IN THE SPECIAL COURT FOR NIA CASES, ERNAKULAM, KERALA

Present:-
Shri. P.Krishna Kumar, Judge, Special Court for NIA Cases, Ernakulam
Friday, the 25th day of September, 2020/ 3rd Aswina, 1942.

SESSIONS CASE NO. 2/2017/NIA
(R.C. No. 5/2016/NIA/KOC)

Complainant	:	Union of India represented by National Investigation Agency, Kochi, Ernakulam. By Adv. Arjun Ambalapatta, Senior Public Prosecutor, NIA
Accused	:	Shri. Subahani Haja @ Abu Jasmine, S/o. Haja Moideen, aged 35 yrs, Maliyekkal House, Near Vyapara Bhavan, Market Road, Thodupuzha. Now residing at rental house Door No. 104/132, Taiyaba Manzil, Kader Moideen Pallivasal Street, Kadayanallur, Tirunelveli District, Tamil Nadu. By Adv. V.T.Reghunath
Charges	:	For offences punishable under sections 120B, 122 and 125 of IPC and sections 20, 38 and 39 of the UA(P) Act.
Plea of the accused	:	Not guilty.
Finding of the Judge	:	The accused is found guilty and convicted under section 120B r/w sections 20, 38 and 39 of the UA(P) Act, section 125 of the Indian Penal Code and sections 20, 38 and 39 of the UA(P) Act. The accused is acquitted of the offence punishable under section 122 of the Indian Penal Code.

Sentence or Order : 1) The convict is sentenced to undergo imprisonment for life and to pay a fine of Rs.1,00,000/- with default prison term for one month under sec.20 of the UA(P) Act.

2) He is also sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs.1,00,000/- with default prison term for one month under sec.125 of IPC.

3) He is further sentenced for rigorous imprisonment for five years and to pay a fine of Rs.10,000/- with default prison term for one month under section 120B of the IPC r/w sec. 20, 38 and 39 of the UA(P) Act.

4) The convict is also sentenced to undergo rigorous imprisonment for 7 years each under section 38 and 39 of the UA(P) Act.

5) All the substantive sentences imposed on the convict shall run concurrently.

6) He is entitled to get set off under section 428 of the Cr.PC for the entire period during which he has been detained in this case (From 05.10.2016 till today), if appropriate orders are passed by the competent authority under section 432 or section 433 of the Cr.P.C.

7) MO25 series will be returned to PW34 on filing proper application within a period of 6 months from today. If there is no such application, those material objects shall be disposed of as per rules.

8) All other MOs will be retained with the records of this case, as the investigation against some of the accused persons is pending. The prosecution shall obtain certified copies of the documents in this case within the prescribed time limit for appeal, for future need, if any.

9) The directions made for the disposal of the MOs will come into effect only after the expiry of the appeal period.

DESCRIPTION OF THE ACCUSED

Sl. No	Name of Accused	Father's Name	Occupation	Age	Residence
1.	Subahani Haja @Abu Jasmine	Haja Moideen	Private Employment	35	Maliyekkal House, Near Vyapara Bhavan, Market Road, Thodupuzha. Now residing at rental house Door No.104/132, Taiyaba Manzil, Kader Moideen Pallivasal Street, Kadayanallur, Tirunelveli Dist., Tamil Nadu.

Date of

Occurrence	Complaint	Apprehension	Release on bail	Commitment / Date of filing
01.10.2016	01.10.2016	05.10.2016	Custody	30.03.2017

Commence-ment of trial	Close of trial	Date of Judgment	Sentence /order	Service of copy of judgment for finding on accused	Explan-ation for delay
26.09.2018	23.09.2020	25.09.2020	28.09.2020	28.09.2020	No delay

This case came up on for final hearing before me on 23.09.2020 and upon duly considering the records of evidence and proceeding and after hearing the Public Prosecutor and the Counsel for the accused, I do adjudge and deliver the following :-

INDEX OF JUDGMENT

JUDGMENT

1. The accused stands indicted by the Additional Superintendent of Police, National Investigation Agency (for short 'NIA'), Kochi for offences punishable under sections 120B, 122 and 125 of the Indian Penal Code (for short 'IPC') and sections 20, 38 and 39 of the Unlawful Activities (Prevention) Act (for short 'UA(P) Act'). The prosecution alleges that the accused has joined Islamic State/Islamic State of Iraq and Levant/Islamic State of Iraq and Syria/*Daesh* (for short 'ISIS') for combating war against the Government of Iraq and later returned to India to wage a war against it.

2. Origin of this case has some peculiar features. Shri.Subahani Haja, the lone accused against whom the charge sheet was submitted in this case, had been arraigned as accused No. 11 in RC No. 5/2016/NIA/Kochi. In the said case, which is popularly known as Kanakamala case, NIA submitted charge sheet against 8 accused persons, but Shri.Subahani Haja was not charge sheeted. Instead, the Investigating Officer submitted a separate charge sheet on 29.03.2017 based on an entirely different incident, for which there was no FIR. This case is registered on the basis of the subsequent charge sheet. As per this charge sheet, another accused (the accused No. 12 in Kanakamala case, Shri.Mohammed Kamal) has also complicity in the crime, but he was not charge sheeted since the investigation against him was not concluded. Later, he was granted pardon and examined as a prosecution witness (PW34).

Prosecution Version :

While active surveillance was mounted on the persons accused of in the FIR, credible information was received that Shri.Subahani Haja, the present accused, had been supporting and intending to further the objectives of ISIS in India. Pursuant to a search made in his house on 03.10.2016, it was revealed that the accused had closely interacted with the members of ISIS and he had joined the said terrorist organisation in Iraq in between April and September 2015, as a result of a conspiracy hatched between himself and some other persons. Shri.Subahani Haja got trained by ISIS at Mosul on a combat and was deployed by the terror outfit in the war-front at Iraq to wage war against the Government of Iraq, an Asiatic Power in alliance with or at peace with the Government of India. After being participated in the war, he returned to India in September 2015, and thereafter during May-June 2016, he attempted to procure explosives or precursor chemicals from Sivakasi, while preparing to wage war against Government of India, the prosecution alleges.

3. **Charge:-** After completing the procedural formalities, the court has framed a charge against the accused for offences punishable under sections 120B, 122 and 125 of IPC and sections 20, 38 and 39 of the UA(P) Act. He did not plead guilty and claimed to be tried.

Defence version :

4. The specific explanations offered by the accused, when he was questioned u/s 313(1)(b) of the Code of Criminal Procedure ('Cr.P.C', for short), will be discussed in detail while appreciating the evidence, at the appropriate places. Briefly

put, the accused contended that he is absolutely innocent and he was falsely implicated in this case by NIA. At the early hours of 03.10.2016, NIA officials took him into custody and thereafter fabricated records as his confession statement and based on the same manipulated evidence, including digital and electronic records, suggesting that many objects were seized from his possession. He has no connection with the mobile phones produced by NIA as allegedly seized from him. The officials have implicated him in this case with a view to save PW34, who is an ISIS leader. The accused travelled to Turkey in tourist visa and he lost his passport there and thereafter he returned to India with the assistance of Indian Embassy at Turkey, he asserted.

Points for determination :

5. Heard both sides and perused the records. Shri.Arjun Ambalapatta, the learned Senior Public Prosecutor for NIA, submitted a written argument note. In view of the charges levelled, the evidence adduced by the prosecution and the defence set up by the accused, the following points arise for consideration :

(1) Does the prosecution case suffer from any basic illegality ?

(2) Were MO2, MO2(a), MO6(b), MO9 series, MO14 and MO14(a) seized from the possession of the accused ?

(3) Has the accused got any connection with MO 20 to 23 jackets and sweaters?

(4) Do the Facebook account with user name **subahani.haja** and the Gmail account with user name **usuphalikhan@ gmail.com** belong to the

accused and did their contents extract to MO18 DVD?

(5) Were the mobile phone numbers **8089116051, 9544754503, 7845389463 and 8807966893** used by the accused himself?

(6) Were the conversations in the said **Facebook** and **Gmail** accounts made by the accused himself ?

(7) Did the accused intent to join ISIS in Iraq by reaching Istanbul, Turkey, and to get trained by it ?

(8) Did the accused reach Istanbul, Turkey on 08.04.2015 on a tourist visa for a period of 15 days and return to India only on 21.09.2015 ?

(9) Did he become a member of ISIS, a proscribed terrorist organisation ?

(10) Did the accused associate himself with the ISIS, or support it, with an intention to further its activity ?

(11) Did the accused agree to do any illegal acts with PW34 or any other persons ?

(12) Did the accused prepare to wage war against the Government of India ?

(13) Did the accused wage war or attempt or abet waging of war against the Government of Iraq ?

(14) What, if any, are the offences committed by the accused ?

(15) If yes, what shall be the sentence?

6. **Point No.1 (Illegality, if any, in the prosecution of the case) :-** As stated above, there is no FIR corresponding to the allegations made in the final report in this case. There is also no separate order under section 6 of the

National Investigation Agency Act, 2008 from the Central Government for investigating the offences alleged in this case. Based on these infirmities and challenging non-application of mind in granting sanction, Shri.V.T.Reghunath, the learned counsel for the accused, forcefully submitted that the investigation in this case is invalid and unsustainable in law and consequently, all the subsequent proceedings based on a final report submitted without a lawful substratum, are vitiated. It is also asserted by the learned defence counsel that section 173(2)(i) of the Cr.PC. contemplates only 'a police report' and thus filing of more than one final reports (other than supplementary reports as per section 173(8)) is not permissible in law. PW1, who said to have got secret source information and based on which the FIR was registered, did not put it in writing and hence the present FIR has no legal backing, the learned counsel submitted.

7. As per the prosecution, since the FIR registered on 01.10.2016 included the allegation that a group of about 15 individuals owing to their allegiance or association with ISIS were collecting explosives and other offensive materials for making bomb blast, they proceeded with the investigation into both aspects under a bonafide belief that they were done as part of a common conspiracy, and only at the fag end of the investigation, they were able to extricate the individual facets of both cases separately. It is also contended that the data extracted from the e-mail of the accused revealed his connection with the prime culprit in the other case who is known as '*Omar Al Hindi*' and this fact also misled the Investigating Agency to believe that both criminal acts are the

limbs of a larger plot. When PW45 was challenged in cross examination as to these matters, he explained that by the time it was revealed that the offences committed in both cases are different, the investigation was completed, making registration of a separate FIR a superfluous exercise.

8. It is true that section 173(2)(i) speaks only about '*a*' police report. However, it does not mean that in the course of an ongoing investigation, if the police detects an entirely different offence, in no circumstance they are entitled to submit another final report, without making an FIR. Usually, in such cases the police would register a separate FIR and proceed with the investigation and will submit a separate final report on the basis of that newly registered FIR. In a case where if the Investigating Agency was not able to differentiate two sets of events as totally unconnected owing to the complexity of the facts involved, and if they eventually proceeded to unearth a larger plot behind both the incidents by anticipating that they could find more common features, a precarious situation may result in at the end, if they find only that there is nothing to link those two criminal acts together and by that time, evidence necessary to establish the independent offence is also collected. Then it is only idle to register a fresh FIR and to file a separate final report on its basis.

9. Whatever irregularity occurred in such a course, it does not amount to an illegality vitiating the proceedings of the court, though it was commenced on such a final report. Section 13(2) of the General Clauses Act, 1897 declares that the words in the singular in a statute shall include the plural and vice versa. Thus, in the absence of any specific prohibition in filing a

separate final report on the basis of the same FIR, there is no illegality in making such a report under section 173(2)(i) of the Cr.PC., especially when the accused failed to show that it caused any prejudice to him.

10. Similarly, though it would have been ideal if PW1 had recorded in writing the information he has got, but its absence does not make the present FIR nugatory, particularly when there is no statutory compulsion upon him. PW1 has also given a satisfactory explanation that, it was not the method of working in the intelligence wing where he had been posted at that time, but, had he been in the investigation wing, he would have recorded it.

11. That apart, when the court is empowered to take cognizance upon a police report referring to certain facts, irregularities in filing the police report does not vitiate the proceedings, unlike the case of submitting a police report by an incompetent official, whereas the statute prescribes a police report of a particular officer as a condition precedent for taking cognizance. In such cases, if the court takes cognizance on the basis of a report filed by any other person, it is a matter affecting the jurisdiction of the court and hence it is very significant. In other cases, the purpose of final report is to give foundation for taking cognizance of the facts constituting the offences mentioned therein by the court and then, even if there is any procedural irregularity in submitting the final report, that will not affect the legal proceedings instituted by the court on the basis of such a report. It is relevant to note that either section 460 or 461 of the Cr.PC. does not mention any such eventualities.

12. The question of validity of the sanction granted by the Government of India is also to be answered in favour of the prosecution, as I find no infirmity in Exhibit P7 sanction order. It was elicited by the learned defence counsel from PW9 that he had no direct knowledge about the application of mind by the recommending authority, while passing the sanction order. The law is well settled that the element of application of mind while passing a sanction order has to be satisfied from the recitals of the sanction order itself and not necessarily by examining the authority who was expected to apply his mind while passing the order. On a perusal of Exhibit P7 order it is obvious that the Government has examined all the materials placed before it before passing the said order and hence there is due application of mind. It is held in **Krishnamurthy v. State of Karnataka (2005 (4) SCC 81)** that the question of application of mind by the Sanctioning Authority has to be satisfied from the recitals in the sanction order itself and the prosecution need to adduce only a formal evidence to tender such document in evidence. In **Mohammed Iqbal Ahammed v. State of Andra Pradesh (AIR 1979 SC 677)** the Hon'ble Supreme Court held that the prosecution needs to adduce evidence *aliunde* by examining the sanctioning authority only when the sanction order does not speak for itself.

13. Likewise, when the Central Government has ultimately granted sanction under section 45 of the UA(P) Act, the absence of a specific order of the Central Government authorising the Investigating Officer to conduct investigation of the case in hand, will not affect the validity of the proceedings instituted on the basis of such a final report. It is true that NIA

gets authority to investigate into an offence only when the Central Government makes a direction either under sub section (4) or under sub section (5) of section 6 of the National Investigation Agency Act, 2008. In this case, the investigation was commenced certainly on the basis of an order passed by the Central Government (Ext.P6). Of course, in the said order the Central Government has directed the NIA, Kochi to take up the investigation of the case relating to a module(s) of ISIS consisting of 15 individuals who were working secretly in the southern States of India and were in the process of collecting explosives etc. True, the facts constituting the offences in this case are different from those matters, though they have some broad connections. PW45 clearly narrated in his evidence the circumstances which bonafide misled him to proceed against the present accused believing that he is also part of the other crime. Obviously, he was also included in the array of accused in that case. Thus, I do not find any reason to disbelieve the version of PW45, especially in view of Exhibit P25(a) wherein the accused said to have saved the details of the prime accused in the other case, and also when both of them are allegedly associated with ISIS or suspected to have made attempt to collect explosives.

14. In that circumstance, the only hurdle before this court is that there should be previous sanction of the Central Government, which is the mandate of section 45 of the UA(P) Act, for taking cognizance of the present case. Exhibit P7 (which is proved through PW9, who is the signatory to the order issued on behalf of the President of India) is the sanction order issued by the Government of India on 21.03.2017. On a perusal

of the said order and evidence adduced in the court by PW9, I do not find any difficulty to hold that this court has rightly taken cognizance of the case on 30.03.2017 on the basis of the said final report, which is preceded by a sanction order, as contemplated under section 45 of the UA(P) Act. The evidence of PW9 further makes it clear that the sanction for prosecution was granted within the prescribed time limit. It is evident from the said sanction order that the Central Government has granted sanction under section 188 and 196 of the Cr.P.C. as well, as the offences alleged in the charge sheet include the offences committed outside India and the offences against the State. Hence, there is no illegality in the present proceedings. The sanction order granted by the Central Government pre-supposes that the investigation made by PW5 was with sufficient authority and it has got ex-post facto approval. Hence, it can be concluded that the prosecution against the accused does not suffer from any illegality.

15. **Point No. 2 (Seizure of MO2, MO2(a), MO6(b), MO9 series, MO11, MO14 and MO14(a) from the possession of the accused) :-** The prosecution asserts that PW42, Dy.SP, NIA, Hyderabad had searched and seized MO2 to MO12 from the rented house of the accused at Kadayanellur, Tamil Nadu on 03.10.2016 between 3.00 am to 04.15 a.m., in the presence of PW13 and CW14. Out of those materials, the relationship, if any, of the accused with MO2 YU mobile phone, MO2(a) Docomo SIM card, MO6(b) IDBI/MasterCard international debit card, MO9 series documents issued by the Consular General, Turkey and the Turkey Police, MO14 Blackberry phone and MO14(a) Docomo SIM cards are mainly

relevant in this case. Prosecution relies on MO 11 Super Touch tablet also, as it contain some Internet based materials related to ISIS. The accused disputed his connection with them in cross examination as well as when he has given statement under section 313 of the Cr.P.C. According to him, he was taken into unlawful custody by the NIA officials from the said house at that time, and then they manipulated the records and evidence to show that the said material objects were seized from his rented residence.

16. The evidence in this regard can be considered now. It is proved through PW15 that the accused had been residing in the house at which PW42 said to have conducted search and seizure. PW15 is the landlord of the building, claiming through his father. Exhibit P14 diary is proved through him to denote the quantum of rent paid by the accused, as there is no written rental agreement. Though this witness was challenged during cross examination, nothing was elicited to discredit him. The accused, when examined under section 313 of the Cr.P.C, did not dispute the fact that he had been residing in Tayooba Manzil, Khader Moideen Pallivasal street, Kadayanallur from where seizure was allegedly made, though he challenged the veracity of Exhibit P14. Anyway, besides the evidence of PW15, PW3 to PW5, PW13, PW14, PW19 and several other witnesses deposed that the accused was residing there.

17. PW13, the Revenue Inspector, Collectorate, Thirunelveli deposed that he reached the residence of the accused along with PW42 at about 3.00 a.m on 03.10.2016 and then PW42 conducted search at the bed room of the accused, in his presence. Through this witness Exhibit P10 search list

and MO2 series to MO12 are marked in evidence. PW42 has also narrated the incident with all necessary details and he also identified the material objects said to have seized by him.

18. As per the prosecution case, MO14 was seized by PW45 from the residence of the accused on 07.10.2016, as a result of the disclosure made by the accused himself. This version was strenuously attacked by the learned defence counsel on the ground that, had the residence been properly searched by PW42 on 03.10.2016 itself, it is highly improbable that he could not find out MO14 which was said to have been placed in a medicine box on a table in one of the rooms in that residence. It is elicited from PW42 during cross examination that despite knowing the grave nature of the crime for which the FIR was registered, he did not arrest the accused. Based on these matters, the learned defence counsel forcefully submitted that the search and seizure could not be believed even for a moment, as an officer of the rank of PW42 would not have spared an accused who suspected to have involved in Kanakamala case, if he was actually found there. He also submitted that evidence was fabricated by NIA to show that from the very same house, MO14 was later seized by PW45 from a medicine box kept on the table pursuant to the disclosure made by the accused.

19. No doubt, PW42 had every authority to arrest the accused and normally, no police officer would spare such a person when the officer gets enough materials to suspect his involvement in the case. But PW42 has explained very well the circumstance in which he did not either trace out the mobile phone in the medicine box or arrest the accused. He said, the

instruction received by him was that the accused was only a suspect in the crime. He had got a direction to conduct a search, but not to arrest the accused. While conducting search in the said residence, his attention was to seize materials which would raise his suspicion and not otherwise, he explained.

20. Even if he omitted to search the medicine box which was kept on a table, it cannot be attributed as a serious lapse from the part of PW42, mainly on analysing the explanation offered by him that the phone was kept at a place which might be specifically known to the accused alone, and in particular, he had searched places only which raised his suspicion. When the search was conducted at such an odd hour and it resulted in seizure of nearly 20 objects, there is nothing unusual, if he failed to check one box kept in the table.

21. Besides, the prosecution did not succeed to produce the contents of the said mobile phone, as the Cyber Forensic Expert failed to access its memory. In such a circumstance, I find no force in the defence version that MO14 might have been planted in the residence of the accused by the Investigating Agency and later they staged a recovery in the presence of independent witnesses. When considering the version of PW45 and PW14, the Village Administrative Officer at Kadayanellur village, who was present at the time of the said seizure, there is no reason to disbelieve the prosecution version. PW14 has specifically deposed that he reached along with PW45 at the residence of the accused on 07.10.2016 at 10 am and then the accused pointed out a small medicine box kept in the hall and from that box, PW45 seized MO14 Blackberry mobile phone with MO14(a) SIM card. Through

PW45, the relevant portion of disclosure statement made by the accused (Ext.P11(a)) was also proved. Apart from all these facts, the prosecution has produced certain other evidence to show that the accused was earlier in search of a Blackberry 10 mobile phone and also that, later he used it for making communications. This will be dealt with later.

22. Likewise, it is also very difficult to find fault with the said Police Officer for not arresting the accused. A Police Officer can arrest an accused only when he has reason to believe that the accusation made against him was well founded (Section 167(1) of the Cr.P.C). Further, it is clear from his evidence that he had given notice to the accused to reach the nearby police station immediately after the completion of the search and thereafter to appear at the NIA branch office, Kochi. If the officer decided to arrest the accused only after elaborately questioning him, no lapse can be ascribed to him.

23. The evidence of PW13 also fortifies the finding made above, as he is a person who has no connection whatsoever with NIA and who deposed perfectly in tune with the version of PW42. He meticulously narrated the events occurred when the party reached there. He was also able to identify the materials seized during the said procedure. Nothing was elicited in cross examination to show that he has any reason to state falsehood.

24. It is true that, apart from the accused there might be somebody else in that residence. MO9 series, which are documents pertaining to Emergency Certificate issued by the Consular General, Turkey and the Certificate issued by the Turkish Police for loss of passport, obviously bearing the name

of the accused and thus its connection with him is beyond any dispute. MO6(b) debit card also contains his name in it. As regards to MO2 phone and SIM cards seized from there, there are few other pieces of evidence to connect the accused with those things, which will be discussed in detail later. In view of the above discussion it can be concluded that the prosecution has succeeded in establishing that MO 2 to MO14, especially MO2, MO2(a), MO6 (b), MO9 series, MO11, MO14 and MO14(a), were seized from the possession of the accused.

25. **Point No.3 (the connection of the accused with MO 20 to 23 jackets and sweaters)**: As per the evidence of PW45, on 08.10.2016, the accused had disclosed him while in custody that “two jackets, two warm sweaters purchased from Turkey and bus ticket used to travel in Turkey were kept in an almirah in my house”. Based on the said disclosure statement, PW45 stated that, he recovered MO20 to MO23 jackets and sweaters from an almirah found inside the family residence of the accused at Thodupuzha, as per Exhibit P27 mahazar. PW20, the Village Officer, Maneed Village, has allegedly accompanied PW45, while he seized the said articles.

26. PW20 deposed that on 09.10.2016 at 10.30 a.m., he went to the residence of the accused along with PW45, as lead by the accused and then the accused pointed out a steel almirah in the eastern side of that house. According to him, one leather and one cotton jackets and two other sweaters were then seized from the said almirah as per Exhibit P27 mahazar, to which he subscribed his signature. He also deposed that three of the said wearing apparels were labelled as ‘Made in Turkey’ and on the remaining one, they found a

label named 'Istanbul'. When the said witness was cross examined it was elicited that he did not notice that whether the room from which the recovery was made was kept locked. It was also bought out that he omitted to state to the Investigating Officer that the accused had pointed out the residence or the fact that the witness had noticed the word 'Istanbul' on the label of one of the clothes. But, his evidence remains unshakable.

27. The learned defence counsel forcefully submitted that the prosecuting agency failed to show that the said almirah was in the exclusive custody of the accused, or that the place where they were concealed was not known to anybody else. It is also urged, when it is obvious from the evidence laid by the prosecution itself that the said residence was used by several other person, recovery of the said jackets does not disclose a distinct connection with the accused.

28. It is difficult to accept the contention for more than one reasons. PW20 is an independent witness, who has no connection whatsoever with the prosecution. He is a responsible public servant and has no reason to weave false evidence in tune with the prosecution version. There is also nothing to discredit PW45 in this matter. Hence, the recovery effected by PW45 on the basis of the disclosure statement made by the accused can be believed. The contention that the house at which the jackets were found inside an almirah is occupied by many persons and thus no distinct connection of the accused with the said articles is established, is also unacceptable. PW22 is the brother of the accused, who is residing in the said house. He deposed that NIA had reached

his house along with accused and at that time, he had opened the house for them. Though he denied the prosecution version that MO20 to MO23 were seized from the said house, he conceded that NIA had not taken any materials from that house which belong to PW22 or his father. He also accepted that the accused had stayed in that house, even after he returned from abroad. When the evidence of PW20 and PW45 in this regard is found acceptable, I have no hesitation to hold that PW22 has not deposed true facts and of course, he has sufficient reasons for not doing so, being the elder brother of the accused. The accused also failed to give any plausible explanation in respect of the circumstance in which he happened to disclose about the Turkey made warm clothes, if they were not distinctly connected to him.

29. In short, it is proved that the jackets were kept covered in an almirah in the residence of PW22, where the accused had frequently stayed even after his return journey from abroad, and it was seized on the basis of the disclosure statement made by the accused and further, he also pointed out them in the almirah. In this circumstance, the only possible inference is that the accused had a distinct connection with the warm clothes, which are made in Turkey (where he visited a while back, about which a discussion will be made hereunder). This inference is inescapable especially when the accused made a false explanation for the discovery. The accused did not have a case that MO20 to MO23 were used by anybody else in that house and he was compelled to make such a false disclosure. The existence of those jackets was thus within the exclusive knowledge of the accused and hence, his distinct

connection with them is clearly established.

30. **Point No. 4 (Do the Facebook and Gmail accounts belong to the accused) :-** As per the prosecution case, the accused had communicated with many ISIS persons through a Facebook account with user ID subahani.haja and an e-mail account usuphalikhan@gmail.com and from those conversations his intention to join ISIS is well evident. According to them, the said Facebook and Gmail accounts were opened by the Investigating Officer when the accused disclosed the user ID and password and the contents of the said accounts were extracted to MO18 DVD. In order to verify the genuineness of MO18, the Facebook and Gmail accounts were accessed by this court in open court, by using the passwords produced by PW45 in a sealed cover. The said passwords were said to have been created by PW45 at the time of extraction, by changing the old passwords. On random examination of the contents of the accounts, it was found that the contents of MO18 tallies with the same. Though the extraction proceeding of the said accounts is disputed by the accused, he did not dispute the fact that he had maintained those accounts with the respective user IDs.

31. At any rate, the prosecution has produced PW17 and PW28 apart from the Investigating Officer, to prove that the accused had those accounts and also the fact that the contents were extracted to a DVD. PW17, the Special Village Officer, Kanayannur, deposed that on 10.10.2016, as directed by his superior officer, he reached the NIA office and at that time, PW45 opened the said Facebook and Gmail accounts by using the user IDs and passwords furnished by the accused. He

further stated that when the accounts have been opened, screenshot of each step was taken by PW45 and all those matters were included in Exhibit P25 proceedings, which was attested by the said witness as well. According to him, he attested the DVD also, to which the extracted data were stored (MO18). PW28, an official working in IT Wing of NIA, gave a meticulous description of the extraction process. He also deposed in detail about the contents of those accounts. PW45 also testified in tune with their version. For him, when the accused was interrogated in custody, he made a disclosure statement that he had the said Facebook ID and Gmail ID and that he would help for logging into it, if he was taken to a system and mobile phone with internet connection. As the cross examination of these witnesses was uneventful, I do not find any reason to disbelieve the versions of any of the said witnesses.

32. It is thus obvious that the accused had the knowledge about the user IDs and passwords of the said Facebook and Gmail accounts. Apart from the said evidence which distinctly connects the accused with the contents in the said accounts, there are many other materials in the said accounts themselves to show that they were actually maintained by the accused. First of all, the Facebook account was maintained in the name of the accused himself. A photograph of the accused is seen stored in the said Facebook account (Available in MO18 as D:\ facebook- subahanihaja\ photos\ 372706309467579 \651463681591839. jpg), much before the date of institution of the case. The phone number and e-mail address which are shown in the contact information

of the said Facebook account are '9544754503' and 'usuphalikhan@gmail.com', respectively.

33. Exhibit P16 Visa Ledger of Akbar Travels was marked in evidence through PW16, the Regional Manager of the said company. This ledger was seized by PW45 as per Exhibit P24 mahazar. In page number 170 of the register there is an entry purportedly made when the accused approached Akbar Travels for procuring visa to reach Turkey. The name, date of birth, phone numbers and e-mail ID of the Visa applicant is endorsed in the said page. The above said mobile number (along with the number 8089116051) and the email ID usuphalikhan@gmail.com are written against the name of the visa applicant 'Subahani Haja Moideen', in the said page. PW16 deposed the circumstance in which Exhibit P16 was prepared and the fact that the accused had applied Visa to Turkey through him. Though he was challenged in cross examination, nothing material was elicited to discredit him. That apart, when the contact information of the said email account is accessed, it revealed the undisputed phone numbers of the accused (8089116051) and his brother, PW22. When the accused was questioned under section 313 of the Cr.PC.(Q.No. 60), he did not dispute the genuineness of the entries made in Exhibit P16. He admitted that his phone number and e-mail address were shown in Exhibit P16.

34. In short, it can safely be concluded that the Facebook account with the user ID **subahani.haja** and the Gmail account with user ID **usuphalikhan@gmail.com** belong to the accused and the Investigating Officer has duly extracted the contents of these accounts to MO18 DVD, and the details of

the extraction proceedings with screen shots of the respective pages are shown in Exhibit P25.

35. **Point No. 5 (Were the mobile phone numbers 8089116051, 9544754503, 7845389463 and 8807966893 belong to the accused) :-** As per the prosecution, all the above mobile phone numbers were used by the accused as his phone numbers. It is argued that the numbers 8089116051 and 9544754503 were mentioned by the accused several times in his Facebook chats as his own numbers. The other two numbers were used by the accused after he returned to India from Turkey and by using those numbers, he contacted PW6 and PW7 to procure explosives, the prosecution contended. The Customer Application Forms of these numbers were not traceable as those numbers were subscribed several years back, they submitted.

36. The accused did not dispute that he had the numbers 8089116051 and 9544754503, when he was questioned under section 313 of the Cr.PC. (Q.No. 152 and 60). Besides this, the prosecution has proved these aspects very well by producing Exhibit P50 original account opening form of IDBI Bank and by Exhibit P16 Visa Ledger of Akbar Travels. Exhibit P50 series account opening form dated 04.07.2011 and the copy of the ID card of the accused were marked through PW40, the Branch Manager of IDBI Bank, Thodupuzha. In the said account opening form, the number 8089116051 is shown as the mobile number of the applicant Shri.Subahani.H. The witness was not challenged in cross examination on the said aspect. Exhibit P16 Visa Ledger was also proved by the prosecution through PW16, the Regional Manager of the Akbar

Travels. According to him, as per the page No. 170 of the said Visa Ledger, the accused had furnished the number '9544754503' and '8089116051' as his mobile phone numbers. Though this witness was challenged in cross examination as to the handwriting and proper custody of the document, no materials are forthcoming to disbelieve the witness. Exhibit P16 seems to be a register maintained in the regular course of business, which is so deposed by PW16 as well. There are several entries in the said document prior to the relevant entry and subsequent to it. In view of the evidence of PW16 and from the appearance of Exhibit P16, I find that both those numbers are of the accused, especially when their ownership remains undisputed.

37. This takes us to the question of identity of the remaining two numbers. Mobile No. 7845389463 was subscribed by the customer through Exhibit P31 Customer Application Form. When the prosecution examined PW35, the Nodal Officer of Tata Teleservice, Kerala Circle, he said the phone connection was obtained from the service provider Tata Docomo. He deposed that he produced the said certified copy of Form and the Call Data Records (CDR) pertaining to the said phone number, along with a certificate as per law. As per Exhibit P31, it was subscribed by one Al-Ameen. Prosecution has examined Al-Ameen as PW23. He deposed that he is the nephew of the accused and he also resides in Kadayanellur. He turned hostile to the prosecution and did not accept the prosecution case that the accused had obtained the said phone connection in the name of this witness. He deposed that he did not take any such phone connection. However, he admitted

that the photograph in Exhibit P31 Customer Application Form and the copy of the ID card belong to him.

38. Similarly, Exhibit P31, the Customer Application Form in respect of number 8807966893 also does not bear the name of the accused. It was issued in the name of one Suresh, a native of Tamil Nadu, and he is examined as PW31. He deposed that he never subscribed such a cell phone and the signature in the Customer Application Form was not affixed by him. However, PW31 also admitted that the photograph affixed on the Customer Application Form and the copy of the ID card attached to it are of him. In short, it is proved categorically that both these numbers are not being used by the persons in whose name the respective number is subscribed. It might also not be subscribed by themselves, but both are taken with the ID details and photograph of the respective persons, and one among them is the nephew of the accused.

39. In that circumstance, the next question is that, by whom those numbers were actually used. PW23 deposed that his actual mobile number for the last 8 years is 7418498481. From Exhibit P45 Call Data Records of the number 7845389463, it is clear that these two numbers came into contact with each other several times. 7845389463 was subscribed in the name of the nephew of the accused, yet he admittedly did not use it. Besides, in MO2 itself, the actual number of this nephew (PW23 Al Ameen) is seen saved. As per the version of PW42, the SIM Card of the said mobile number (MO2(a)) was found inserted in MO2 phone, when it was seized from the accused. All these clearly indicate that the said number does not belong to PW23.

40. The said phone was forensically analysed by PW43, the Cyber Expert in C-DAC, Thiruvananthapuram. The Cyber Expert submitted Exhibit P54 report on the basis of Exhibit P53 Forwarding note of this court, dated 07.10.2016. The contents of the data extracted from the said mobile phone was also furnished by the expert as per Exhibit P54(a), in a pen drive. He deposed that the number 7845389463 is saved in MO2 phone as 'My no.'. It is also in the evidence of PW43 that this number was used for WhatsApp, with the name of the user as **'Subahan'.**

41. As the evidence of PW43 has some crucial relevance in this case apart from the said opinion expressed by him, it is beneficial to analyse the same at first. All the digital devices produced in this case were forwarded to C-DAC and inspected by PW43. All those gadgets were forwarded from this court as per Exhibits P53, P56, P58, P60 and P62 forwarding notes. As per the report made by the said witness and the evidence adduced by him in the court, all the said devices reached C-DAC in a tamper proof condition, with seals intact.

42. PW43 was meticulously challenged in cross examination. The witness conceded that he prepared the affidavit filed under section 296 of Cr.P.C. after consulting with the Public Prosecutor of NIA and another NIA official. But he further explained that it was done so to specifically include the matters to which the prosecution is giving emphasis, among various voluminous factors included in his report. When it was asked to the witness that, did he find any editing or manipulation in the data forwarded to the C-DAC for examination, he explained that in every examination of a digital

device, as a first measure, they would verify whether there exists any mismatch, which means the presence of any editing or manipulation after seizing the device. He said, there was no such mismatch in any of the devices he inspected in this case.

43. The matters brought out in cross examination of PW43 does not reveal any materials to disbelieve him. The witness gave firm and acceptable explanation for each and every aspects put to him. PW43 is a scientist possessing M-Tech in Digital Electronics and Communications and he has rich experience in Cyber Forensic matters. He deposed that he had given more than 600 reports in various courts in respect of cyber forensic analysis made by him. Hence, there is no reason to discard his evidence and in particular, in respect of MO2 phone or Exhibit P54 report submitted by him. Thus, it can easily be inferred that as the phone was seized from the accused, he being the person in possession of MO2, he must have saved the said number as 'My No' in MO2, and it was his own number, especially when the WhatsApp name of the number is 'Subahan'.

44. However, Shri.V.T.Raghunath contended that even if MO2 was seized from the residence of the accused, his relationship with the said phone could not be established from it, as there were many other family members in that house. The accused also took a stand when he was questioned under section 313 of the Cr.PC. that he never used WhatsApp.

45. But the prosecution possesses solid digital evidence to conclusively answer the issue. In Exhibit P54(a), PW43 has extracted few WhatsApp chats found in the said phone (available in MO54(a) – D:\CSG No-2016-11A NIA\USBSTORE01\

Evd04\ MobilePhone\ Q1\All_data\ Chinese Android phones_Android MTK\chats\WhatsApp). One of the chats is in respect of a WhatsApp group named '**Gold AIK**' (Chat No.50). The user of the number 7845389463 is also a member of the group. As above said, the name of the user is "**Subahan**". In addition, as per Chat No. 29, a message was seen sent by Subahan as '**I am from gold aik**".

46. Here again, the accused resorted to an outright denial of his relationship with 'Gold AIK', a shop where he was allegedly working at that time. But, from the evidence of PW3 to PW5 it is obvious that the accused had been working in that gold jewellery shop named 'Gold AIK', at Kadayanellur. PW3 is one of the partners of the said jewellery shop. PW4 and PW5 are the accountant cum Sales men of the said shop. All of them clearly deposed that the accused had worked there during 2015-16. Their cross-examination remains uneventful. Even though their connection with the accused or Gold AIK shop is stoutly denied in cross examination, the name and undisputed phone number of PW5, and the number of a person with the name '**Shahul Aik**' (PW4 is Shahul Hameed) are seen saved in MO2 phone, seized from the accused (available in MO54(a)–D:USBSTORE01\ Evd04\ MobilePhone\ Q1\All_data\Chinese Android phones_Android MTK\report.xlsx).

47. In addition, from chat number 50 referred to above, it is further evident that PW4 and PW5 are also members of the Group "Gold AIK", along with Subahan. There are many other witnesses, including the wife and relatives of the accused, who deposed that he had worked in Gold AIK Jewellery. There is also a recovery (hard disk of a computer) from the said shop as per

the disclosure of the accused to PW45, as described in Exhibit P12 mahazar, which is attested by PW14. Therefore, it can easily be concluded that it was nobody else, but the accused himself who had sent the said message from the number 7845389463 and thus it was used by himself.

48. The last number to be resolved is 8807966893. PW43, the Cyber Security Scientist in C-DAC, deposed that the number 8807966893 was also saved in MO2 as “My doco”. It is in evidence that the service provider of this number is Docomo and hence it is obvious that ‘doco’ refers to ‘Docomo’. Thus, there is no difficulty to infer that when the owner of the phone saves a number as 'My Doco', he refers it as his own number.

49. Anyway, there is yet another piece of evidence to hold that the number 8807966893 was used by the accused as his own. As per Exhibit P54(a) report of PW43, a phone number ‘9884956999’ is seen saved as ‘Mohamed’ in MO2 mobile phone. From Exhibit P48 Customer Application form of the said number, which is marked through PW38, it is clear that the subscriber of the said phone is Mohamed Kamal, PW34. NIA seized the mobile phone (MO25) of PW34 and forwarded the same to C-DAC through this court for cyber forensic examination. When the contents of MO25 was extracted, PW43 found that the number ‘8807966893’ was once saved as “Abu Jasmine” and later it was deleted. PW34 deposed in court that it was the accused who contacted him from that number as Abu Jasmine. As PW34 is an approver, his evidence has to be analysed in detail, which will be undertaken hereafter, but, for the present discussion, it can be concluded that the said number was of the accused.

50. In fact, there is a host of evidence to show that the said numbers were used by the accused. As per PW43 and his report Exhibit P54, the IMEI numbers of MO2 phone are 911476057135790, 9114760581357799. PW42 also described the IMEI numbers of the said mobile phone in the search list. From page No. 38 of Exhibit P45 Call Data Record which is proved through PW35, it is clear that the said SIM card has been used for making dozens of calls by inserting it in MO2 phone, during the period 19.09.2016 to 29.09.2016. PW35 also deposed about this fact. That apart, according to PW42 and PW13, the said phone was seized along with a SIM card. The SIM card is marked as MO2(a). Exhibit P10 search list clearly describes that when MO2 mobile phone (YU-5010A) was seized, it contained a Tata Docomo SIM card. After forensically analysing MO2(a) SIM card, PW43 reported the ICCID number of the SIM card in Exhibit P54. The last 10 digits of the Tata Docomo SIM card was found to be 0339621490, as per page No. 9 of Exhibit P54. This number exactly tallies with the last 9 digits of IMSI number shown in Exhibit P31 Customer Application form in the name of PW23, the nephew of the accused. (Though the entire digits are not matching, it is considered as irrelevant, as IMSI number contains different components to denote network code, station code etc., in the initial part of the 15 digit number. Likewise, last digit of ICCID number is also considered as irrelevant). Similarly, the ICCID number detected by PW43 in page No. 4 of Exhibit P55 is correctly matching with the IMSI number found in Exhibit P46 CDR, in respect of the number 8807966893. The said SIM card is MO14(a), which is recovered by PW45 along with MO14

phone, from the residence of the accused, based on his confession. When comparing the IMEI number found in Exhibit P46 CDR of the said number, it is clear that the said SIM card was also used in MO2 mobile phone for making calls during 29.09.2016 to 02.10.2016.

51. Before concluding the point, it may not be inappropriate to consider certain general challenges made by the learned defence counsel, as relates to the investigation. He raised a very spirited contention that there are serious flaws in the investigation right from its inception, and they stain the evidence produced by them, besides making their entire assertions in a thick shadow. He urged, the false story as to the arrest of the accused, manipulation in their evidence as to MO1 and MO14 mobile phones, their failure to seize 6 out of 8 mobile phones seemingly used with SIM card No. 7845389463, lack of documentary evidence to show the employment of the accused in the Gold AIK Jewellery etc., all smack malafide in the prosecution case.

52. Having bestowed the entire evidence adduced by the prosecution, this court does not feel that there is any serious lapse or manipulations in the process of investigation. It is found above that there is nothing unusual in the conduct of PW42 in not arresting the accused from his house at the time when he conducted the search or not seizing MO14 Blackberry mobile phone then. The argument that the seizure of MO1 (another Blackberry phone) itself is a fabricated story and the accused has no connection with it, is also frivolous. As per the prosecution, MO1 was given to PW10 by the accused through PW12, for repairing it. But there is no evidence to connect the

said phone with the Accused, as PW12, a close relative of the accused turned hostile. Notably, the prosecution failed to bring on record the contents of that phone, as C-DAC was not able to access it. Thus, there is no chance that the prosecution has fabricated evidence by the production of MO1.

53. The contention that the prosecution failed to produce any record pertaining to his job in the Gold AIK shop, is also baseless. The evidence discussed above makes it unquestionably clear that the accused had worked there. It is very usual that many shop owners employ low paid workers in their shops without maintaining muster roll or other records. It could not be interpreted to mean that there was no such employment, particularly when there is overwhelming oral evidence to the contrary.

54. It is also not justifiable to find fault with the investigation in their failure to trace out all the mobile phones used with the number 7845389463. When this question was put to PW45, he explained that he failed to find out any other phone. For him, the said SIM cards must have been used in the Blackberry phones as well. But the prosecution failed to detect the IMEI number of the two Blackberry phones, as PW43 reported that C-DAC is not able to access the Blackberry phones. Therefore, it is not clear whether those phones were also used with the said SIM cards. Anyway, MO2 mobile phone seized from the accused and MO19 seized from his father-in-law (which is proved through PW18 and PW19), had been used with the said SIMs. Failure of the prosecution to detect the remaining phones has no significance in this case, as the evidence does not suggest that anybody else other than the

accused had used the said SIM cards to call PW6 and PW7.

55. In view of the above discussion, it can safely be concluded that the mobile phone numbers **8089116051**, **9544754503**, **7845389463** and **8807966893** are used by the accused during the relevant period, as his own.

56. **Point No. 6 (Authorship of the conversations in the said Facebook and Gmail accounts) :-** It is obvious from the discussion made in Point No. 3 that the Facebook account 'subahani.haja' belongs to the accused and the contents of the said account had been correctly extracted by the NIA into MO18 DVD. As it is contended by Shri.V.T.Raghunath that even if the Facebook or Gmail account belongs to the accused, it could not be straight away assumed that those chat conversations were also made by himself, as anything is possible in the virtual world.

57. The Facebook account is a password protected computer application and hence, the person who holds such an account cannot easily shirk his responsibility as regards to the authorship of posts or messages made in it for the account holder. The accused has also not offered any explanation when he was questioned under section 313 of the Cr.P.C., as those accounts were operated by somebody else or the circumstance in which such password protected accounts were accessible to anybody else. Still, this being a criminal trial, and the offences alleged against the accused are being very serious in nature, it is required to be satisfied that it was no one else, but the accused himself had made those chat conversations. Hence, a detailed analysis of the contents of the chats found in MO18 is required, before making any finding on it.

58. As determined above, the phone numbers 8089116051, 9544754503, 7845389463 and 8807966893 were used by the accused during the relevant period as his own. In MO18 DVD, there are Facebook messenger chats between the account holder and a person named Abdul Khader on 08.10.2011 at 1.36 a.m. When Abdul Khader asked the account holder to send his mobile number, the number 8089116051 was given as reply. In a chat conversation between one Jomit.M.J and the account holder on 22.05.2013, at 2.43 p.m., when the phone number of the account holder was asked, he forwarded the numbers 8089116051 and 9544754503. On 07.12.2012, the account holder intimated one Rony Thomas through the Facebook account that 9544754503 is his number. On 29.08.2014, he sent a message to one Saju.K.S. informing that 8089116051 was his number. Apart from this, there is a host of chats wherein the account holder has seen forwarded either of the said phone numbers with his Facebook friends as his own number. For e.g. the chat between the account holder and one Subin (on 20.05.2014 and 22.05.2013), with one Fazal (on 05.04.2014) and with one Mithun (on 05.11.2012).

59. Among the messages transmitted by the account holder with his Facebook friends named Fazal, Abhilash and Abdul Khader, he has expressed his desire to buy a used Blackberry Z10 Model Mobile phone. He enquired with all of them as to the availability of the said type of phone. It is already found that MO14 mobile phone was seized from the accused, on the basis of a disclosure statement made by him. The said phone is a Blackberry mobile phone.

60. The account holder has also made chat conversation with Afsal Rahman on 28.12.2014 and he declared that he was in Kerala, and in particular, from Idukki. Interestingly, the account holder has sent his e-mail ID to a person with display name 'Manu Bhayi' on 20.01.2013 at 8.23 p.m. He sent his e-mail seemingly to persuade the other person to deliver a question paper. The e-mail ID which the account holder had then forwarded is 'usuphalikhan@gmail.com', which is also found to be the mail ID of the accused. From the above said discussion, it can be concluded that the chat conversations in the said Facebook account was made by nobody other than the accused himself.

61. In respect of the identity of the user of gmail account **usuphalikhan@gmail.com**, similar evidence is available from its contents itself. First of all, the account holder has sent a mail on 15.09.2015 at 13.29 hours to 'mohdkamal4u@gmail.com' wherein he attached digital copy of passport of the accused. The account holder stated in the mail that 'Salam, it's my pp copy u may need it'. On 07.09.2015 at 20.19 hours the account holder sent another mail to the same person by which he asked the other person to contact the brother of the account holder from a public booth in a mobile number shown as 9447051638. When PW22, the brother of the accused was examined, he admitted that the said mobile number belongs to him. On 07.09.2015, the account holder forwarded another message to a person named Roshan Ashraf. He referred to in the mail about one Ayesha and asked Roshan Ashraf to tell his mother that Ayesha's phone should be given back, as it would be a great relief to her. PW19

is Ayesha, the wife of the accused. The text of the emails shows that those mails were sent to PW34 and Roshan Ashraf from a Blackberry 10 Smart-phone. No more evidence is thus required to show that it is nobody else but the accused himself had been using that Gmail account during the relevant period.

62. **Point No. 7 (Intention of the accused to join ISIS in Iraq by reaching Istanbul, Turkey and to get trained by it) :-** The prosecution alleges that even during 2014, the accused was determined to become a member of ISIS and to fight against the Government of Iraq and that he had a clear cut plan as to how he should reach Iraq to join ISIS. According to them, it was his plan to first arrive at Istanbul, Turkey as a usual tourist and then to stealthily cross the border to Iraq, with the assistance of members of ISIS. In order to prove this aspect, the prosecution mainly relies on the Facebook chat conversations made by the accused.

63. It is forcefully submitted by Shri.V.T.Raghunath, the learned defence counsel, that all the chat conversations in the Facebook account were made at a point when the organisation ISIS was not included in the schedule of the UA(P) Act and hence no adverse inference could be drawn from such communications made by a person, as it was then perfectly lawful. Motive alone is no offence, the learned counsel added. In reply, Shri.Arjun Ambalapatta submitted that though the said organisation was included in the schedule only on 16.02.2015, it was found a place in the schedule to the United Nations Prevention and Suppression of Terrorism (Implementation of Security Council Resolution) Order, 2007, in 2014 itself, and it is sufficient to attract the penalty envisaged under the UA(P) Act,

since list No. 33 of the first schedule of the UA(P) Act adopts the schedule of the said Order as well in its own fold.

64. When section 35 of the UA(P) Act declares in no uncertain words that an organisation can be included in its first schedule only when the Central Government makes a notification in the official gazette, even if an organisation is enlisted in the said Order, it may not *ipso facto* prohibit the organisation, until a notification is so made. However, whether or not ISIS was included in the schedule of the UA(P) Act or the said Order, the purpose for which the said communications are taking into account, is only to ascertain the motive of the maker of the chats. Of course, it cannot be said that by the said communications, the accused had actually committed any offence (if the organisation was then not scheduled in the UA(P) Act). Anyway, it is pointed out by the prosecution that few of the communications were made by the accused even subsequent to 16.02.2015, the date when ISIS was included in the schedule of the UA(P) Act. When he made chats with Saber Abdulla on 15.03.2015, he asked the exact location of Saber Abdulla in Iraq. Both of them discussed about Dawla, Daesh and Dawlatul Islam (they are the alternate names of ISIS, as per PW34). At any rate, if the accused had actually accomplished his plan by travelling to Istanbul, subsequent to 16.02.2015, the question whether the conversations were made before the inclusion of ISIS into UA(P) Act has little relevance. The said aspect will be discussed in detail in the next point.

65. **Accused planned to join ISIS:** Let us now examine some of the chat conversations made by the accused with his Facebook friends. On 09.04.2014, he asked a person

named as 'Xatab' that whether he was a jihadi, and if so, the accused needed help. On 04.05.2014, he stated to a person having a display name "Await Islam" that he loved Iraq and he wished to get relatives there through marriage. On 25.04.2014, he made a chat with a person having display name "Guns For Sale" wherein he informed the other persons that he needed a "cheytec m200". Same day, he sent a message to Kosari Kurd also referring to 'M200.India'. (CheyTac M200 is an American bolt-action sniper rifle with accuracy ranges upto 2200 meters, as per the Website of the manufacturer. They claim that the rifle is the most advanced long range system today and it is ranked No. 1 in the world).

66. On 04.12.2014, the accused made a chat conversation with a person having display name "Wa alikm alsalam". The accused said *"Ok, I am from India, if u check my wall, u can find where from exactly. I need a help. Hw can I manage to go to iraq from here. I need expert advice. Is there any airline running in Iraq."* Then the other person informed him that there is no airline. The conversation of the accused with a person named Abu Naseeha Al-Maghribi on 08.12.2014 is also very important. To him, the accused unhesitatingly said, he is from 'the bottom of India' and he wanted to know how could he join IS. Then, the other man asked him whether he meant *hijrah*, to which the accused replied affirmatively. But the other person did not budge and said, he could not answer it. Nevertheless, he directed the accused purportedly to an Arabic web page.

67. On 08.12.2014 and 09.12.2014, there are discussions between the accused and a person called 'Rozh DC'

where the accused specifically mentioned about ISIS and asked the other person to join the brotherhood. When Rozh declined his request by saying that Islam is a religion of peace and forgiveness, and hence he could not become a killer, then the accused replied that it is not fair to argue on facts of which one has no idea. Rozh again wrote that the accused could go for jihad only to kill innocent Muslims. In reply, the accused said "*No, InshaAllah He will guide me to kill enemies of Islam*". In a former conversation with Rozh the accused said that he was supporting IS.

68. On 08.12.2014, the accused made another very significant discussion with a person named Aboo Musaddas. The accused said that he wanted to become a *mujahideen* (guerrilla fighter in Islamic countries) by doing *hijra* to D*awlatul al islam*ia (As per PW34, Dawlatul Islamia means ISIS and *hijra* means migration. Accused himself made it clear in his chat with Naseeha Al-Maghribi that by hijra, what he meant was to join ISIS). Then Aboo Musaddas advised him to travel to Turkey (for accomplishing his desire). When the accused again asked about the next step (once he reached Turkey), Aboo Musaddas replied that "someone take you to us" and " then we take you to Al dawlla". When the accused asked him where should he reach in Turkey, the other man said Istanbul. At this point, the accused intimated that he would come to Istanbul in visit visa. He further asked about the contact person when he reached Istanbul. In reply, Aboo Musaddas informed that he should contact him on reaching there. The accused concluded the conversation with a message that "*I will contact u wen I get Istanbul*".

69. Two more chats will make it unquestionably clear that the accused had a definite intention to migrate to ISIS. On 30.12.2014, one Umar Faruq asked him *"are you planning to do hijra???"* Then he replied *"And My Lord's wish"*. On 07.01.2015, the accused informed one Ibn Muhammed Al-Hind that he is from 'Al Hind' (India). Then he asked Muhammed that *"I wanna know weather someone made Hijra before me"*. Apart from the Facebook chats, the prosecution also relies on the fact that there were several ISIS related photos and write ups in MO11 tab recovered from the accused. They also point out, from MO18, it is evident that the accused made online searches on 17.03.2015 and 08.07.2015 about ISIS and its leader Anwar Awlaki. Indeed, as it is pointed out by the learned defence counsel, those materials are accessible to all in the Internet and the searches *per se* does not have any relevance in the present case, especially when one of those matters under search was against ISIS. But, when it is read along with the above matters, it adds some strength to the prosecution case.

70. **Accused aspired to get trained by ISIS :-** The desire of the accused to get trained by ISIS people is also evident from the chat made by him with Kosari Kurdi. On 09.03.2014, the accused started a chat with him and informed that he was from India and he wanted training (at 10:28 a.m). He also informed that he wanted to become "*Jihadi* in India as muslims are suffering a lot". It is on the same day he discussed with Xatab and asked him whether he is a *Jihadi* and if so, the accused needs help from him.

71. The above said chat conversations made by the accused with the respective persons make it unquestionably

clear that it was his well designed plan to migrate to ISIS and to get trained by them. After a long discussion with many of his Facebook contacts, he reached to a conclusion that, as there was no airline service to Iraq, the best way to join ISIS was to reach Istanbul, Turkey in visit visa and then to contact certain persons there, who would be capable of taking him to ISIS by crossing the porous border of Turkey. PW46, a former diplomat in Iraq, gave unimpeachable evidence that it was that exact situation then. The statements made by the accused through his Facebook messages are admissions made by him, which are relevant and admissible in evidence under section 21 of the Indian Evidence Act. Admission is a very valuable piece of evidence and it could safely be acted upon in criminal trial. The point is thus found in the affirmative.

72. **Point No. 8 (The accused visited Istanbul, Turkey on 08.04.2015 on tourist visa for a period of 15 days and returned to India only on 21.09.2015) :-** The accused did not dispute his travel to Istanbul, Turkey and back. According to him, he went there on visit visa as a tourist and lost his passport somewhere there and returned to India with the assistance of Indian Embassy. The prosecution has produced the travel details and visa documents in respect of the journey of the accused to Istanbul, Turkey and back to India. They also produced the transaction particulars of the bank account of the accused from which it is obvious that money was withdrawn by using an international debit card, on various occasions from the account of the accused from Istanbul.

73. Exhibit P52 Passenger Manifesto of Flight No. SV 771/ SV261 of Saudi Arabia Airlines is proved through PW41, the Supervisor (Sales), Saudi Arabia Airlines. As per Exhibit P52, a passenger named Subahani Haja Moideen with ticket No. 0658933730998 had travelled from Chennai to Istanbul via Jeddah in the said flight on 08.04.2015. Exhibit P47 Passenger Manifesto of Turkish Airlines is produced by PW37, the Manager of the said Airlines. As per the said document, on 21.09.2015, a passenger named Subahani Haja Mohide travelled in the said airlines from Istanbul to Mumbai in Flight No. TK 720 of the Turkish airlines. PW37 further explained that MO9(c) is a form issued by the Turkish Police certifying that the passport of the accused was lost somewhere there. He also explained that MO20(a) is a travel pass used in Istanbul. Both these items were seized by NIA from the residence of the accused on 03.10.2016, along with the Emergency Certificate issued from the Indian Consulate, in lieu of passport. The evidence led by the said witnesses as to the journey to and fro by the accused has not been disputed in cross examination.

74. It is also proved through PW16, the Regional Manager of Akbar Travels that the accused had processed visa for 15 days for his journey to Turkey through Akbar Travels. Exhibits P16 to P23 documents are marked through him. Exhibit P16 Visa Ledger contains various entries including the address, date of birth, phone numbers and e-mail ID of the accused. PW16 deposed that the accused had received visa to Turkey from them against an endorsement made in Exhibit P16. Exhibit P17 is the copy of air ticket through Saudi Arabia airlines issued in the name of the accused. Exhibit P19 is the

copy of passport of the accused. Exhibit P20 is an application purportedly signed by the accused, for a tourist visa to Turkey for a period of 05.04.2015 to 20.04.2015. As per Exhibit P20, the applicant requested for issuing a tourist visa, to spend his vacation there during the said period. Exhibit P23 is the copy of hotel booking made by Akbar Travels purportedly on behalf of the accused through Booking.com at Istanbul for a period of 05.04.2015 to 20.04.2015, at Commagane Hotel at Istanbul. PW16 deposed that all the said documents were seized by PW45 from the office of Akbar Travels as per Exhibit P24 mahazar, which was attested by PW16, and the originals were sent to the Consulate, for visa processing. PW27, another attestor of the said mahazar, also testified in this regard.

75. Exhibit P50 series statement of accounts issued by IDBI Bank, Thodupuzha branch in respect of the transaction details of the bank account maintained by the accused in the said bank during the period 07.07.2011 to 29.02.2020, is proved through PW40, the Branch Manager of IDBI Bank. He also produced Exhibit P51 extract of transactions of international debit card issued to the accused in respect of the said account. It is clear from both these documents that the debit card was frequently used at Istanbul during the period 08.04.2015 to 13.04.2015 and then during 07.09.2015 to 21.09.2015. The card was again used at Railway Station, Greater Mumbai on 22.09.2015 and later at Tamil Nadu on 26.09.2015. PW50 identified MO6(b) as the debit card used for the said transactions, which was seized from the residence of the accused on 03.10.2016 by PW42. The debit card number mentioned in Exhibit P20 Visa Application purportedly given by

the accused is identical to the number printed on MO6(b).

76. The evidence of PW16 as to booking of hotel and the documents said to have been furnished by the accused for obtaining visa, is challenged in cross examination. Booking made as per Exhibit P23 was done online and the name of the accused is not mentioned in it, it was brought out. Apart from that, nothing relevant has come out to discredit the witness. In the light of the facts revealed through all the above witnesses, I find no difficulty to uphold that the evidence of PW16 is absolutely believable. What he has deposed, and the documents proved through him, are all about the common course of business transactions and hence their regularity or genuineness can easily be presumed.

77. Hence, it is unquestionably proved that the accused went to Turkey on a tourist visa for a period of 15 days from 05.04.2015 to 20.04.2015, but he returned only on 21.09.2015.

78. **Point No. 9 and 10 (Did the accused join ISIS or did he associate with, or support it) :-** Facts necessary to answer these points are common and hence they can be dealt with together. In order to prove that the accused had joined ISIS and supported it with an intent to further its activity, the prosecution mainly relies on the testimony of PW34 and certain circumstantial evidence. For them, the accused had told PW34 that he had joined ISIS and combated a war on its behalf and that he decided to come back to India since his wife was not well. The prosecution further places strong reliance on the evidence of PW29, a Doctor who had examined the accused while in police custody and to whom the accused said to have made a detailed incriminating statement as to the history of

the injuries found on his body. In addition to it, as per the prosecution, the result of the examination made by PW29 on the body of the accused and the scientific examination made by the FSL on the wearing apparels used by the accused during his days with ISIS, clearly reveal that the accused had actually joined ISIS and had got engaged as a fighter in the war-front of ISIS.

79. However, the evidence led by these witnesses is vehemently attacked by the defence side on various grounds. The learned defence counsel, by relying on the decision in **Shyamal vs. State of West Bengal (AIR 2012 SC 3935)** contended that, in the case of circumstantial evidence the court has to take caution that it does not rely upon conjectures or suspicion and the same should not be permitted to take the place of legal proof and the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of guilt of the accused. As there is no eye witness to prove the pivotal things and none of the digital evidence directly brings out any key incriminating facts, every circumstance relied on by the prosecution in their favour should be fully established, it is emphasised. But, the learned Senior Public Prosecutor submitted that the prosecution is in fact not solely relying on circumstantial evidence to prove the guilt, as the confession of the accused made to PW34 is of a substantive nature and it fully establishes the charges levelled against him.

80. Before appreciating the evidence of PW34, an accomplice, it is beneficial to analyse the remaining evidence

adduced by the prosecution. It will give us a better outlook of the prosecution case. The following facts and circumstances are relied on by the prosecution to independently establish the charge levelled against the accused, which may also eventually corroborative of the version of PW34:- **(1)** The accused had decided to join ISIS in Iraq by visiting Istanbul, Turkey and then to cross the border to Iraq and to get trained by ISIS **(2)** He actually visited Istanbul, Turkey on 05.04.2015 on a tourist visa for 15 days. **(3)** But the accused returned to India only on 21.09.2015, despite the fact that he took visa to visit Turkey only during 05.04.2015 to 20.04.2015 **(4)** The presence of the accused in Iraq in the said period, that he sustained injury during a training session, that his connection with ISIS, and that he was exposed to a blast **(5)** In September 2015, he approached the Consulate of India in Turkey with a false story **(6)** At that period, he was apprehensive that his conversations through electronic media might be intercepted **(7)** The accused was also scared of being caught by Indian police on his return journey **(8)** He went to Turkey without letting to know his kin **(9)** Soon after reaching India, he obtained SIM cards with fake identity **(10)** His subsequent attempt to procure explosives or precursor chemicals in large quantities.

81. Among the matters enumerated above, the first three are hitherto covered in the above discussion. In other words, the prosecution has succeeded in proving that the accused had intended to join ISIS in Iraq and to get trained by them by visiting Turkey and then to cross its border, and that he actually visited Istanbul on 08.04.2015 on a visit visa for 15 days, but he returned to India only on 21.09.2015. In criminal

prosecution, proof of motive has serious relevance. Anything signifies the implementation of that motive places the prosecution in a much better position. Let us now discuss the remaining features to see that, to what extend they have succeeded in this direction.

82. **Presence of the accused in Iraq - his connection with ISIS - during a training session he got injured, and his exposure to an explosion:** The evidence let in by the prosecution to establish this aspect is on four heads i.e., **(i)** the statement allegedly given by the accused to PW29, **(ii)** the presence of basic components of explosives on the jackets of the accused and the inference from the injuries found on his body suggesting that he was in close proximity to an explosion **(iii)** the electronic evidence that his Facebook account was signed in at Iraq on 12.06.2015. **(iv)** Absence of any bank transaction during the relevant time. To evaluate the said contentions, the evidence of PW29 can be considered at first.

83. **Statement given by the accused to PW29:** The prosecution places heavy reliance on the evidence of Dr.B.Krishnan, Assistant Professor in the department of Forensic Medicine, Government Medical College, Alappuzha, as the accused said to have given a detailed statement to this witness. But, referring to a couple of precedents, Shri.V.T.Raghunath stoutly contended that the entire statement is barred by section 26 of the Indian Evidence Act, as the accused was then in police custody.

84. On 21.10.2016, NIA produced the accused in front of PW29 for forensically ascertaining the cause of the injuries

found on his body. PW29 deposed that he had recorded the statement made by the accused in relation to the history of the injuries found on his body, in Exhibit P36, the report prepared in respect of the medical examination. Before recording the history of the injuries found on the body of the accused, PW29 explained that whatever things the accused states to him would be reported to the court and it might be used as evidence against him. He also testified that the information furnished by the accused, in the course of the medical examination of his body, was made by him voluntarily and without the presence of any members of the Investigating Agency.

85. As rightly contented by Shri. V.T. Raghunath, whatever be the precautions taken by PW29, if the information furnished by the accused amounts to a confession, it is undoubtedly barred under section 26 of the Evidence Act. Despite the efforts made by PW29 to seclude the accused from the Investigating Agency, legally he was still then in the police custody. As the accused was not able to freely walk away from the examination room, he was undoubtedly remaining in police custody, and thus the bar under the said provision is very well attracted, so far as it was not given to a magistrate. Section 26 embodies the oft-quoted *Miranda exclusionary rule* that custodial interrogations are inherently coercive and it may take on different forms than what we could imagine.

86. However, there is a crucial distinction, if the statement given by the accused does not amount to *confession*, but still it comes within the fold of *admission*, as section 26 of the Evidence Act bars only *confession* made

during police custody, and not *admission,* which is otherwise relevant under section 21. The law in this regard is well settled in **Kanda Padayachi vs. State of Tamil Nadu (AIR 1972 SC 66).** The ratio of the decision in Kanda Padayachi case is followed in **Chandran vs. State of Kerala** (1987 KHC 124), **State of Kerala vs. Ammini** (1987 KHC 267 (FB)), **Nandan vs. State of Kerala** (1994 KHC 179), **Rajesh vs. State of Kerala** (2007 (4) KHC 277) and **Sivan vs. State of Kerala** (2007 (2) KHC 133).

87. Nevertheless, to precisely identify the mantle of exclusion of the evidence under section 26 of the Evidence Act, it is necessary to understand the exact ambit of the term 'confession'. This question was considered at length in **Aghnoo Nagesia vs. State of Bihar (AIR 1966 SC 119)** by a three Judges Bench of the Hon'ble Supreme Court. The question considered by the court was that whether the exclusion under section 25 of the Evidence Act is limited only to the actual *admission of guilt* or whether the rest of the entire statement is also protected. After observing that the term 'confession' is not defined in the Indian Evidence Act' and thus, for a long time, the courts in India had adopted the definition of 'confession' given in Stephen's Digest of Law of Evidence, where it is said that it is an admission by a person *suggesting the inference* that he committed the crime, the court noted that this definition was discarded by the Privy Council in **Pakala Narayana Swami vs. The King Emperor (AIR 1939 PC 47)**. But the court disagreed with that finding of the Privy Council, and held as follows :-

"13. Now, a confession may consist of several parts and

may reveal not only the actual commission of the crime but also the motive, the preparation, the opportunity, the provocation, the weapons used, the intention, the concealment of the weapon and the subsequent conduct of the accused. If the confession is tainted, the taint attaches to each part of it. It is not permissible in law to separate one part and to admit it in evidence as a non-confessional statement. Each part discloses some incriminating fact, i.e., some fact which by itself or along with other admitted or proved facts suggests the inference that the accused committed the crime, and though each part taken singly may not amount to a confession, each of them being part of a confessional statement partakes of the character of a confession. If a statement contains an admission of an offence, not only that admission but also every other admission of an incriminating fact contained in the statement is part of the confession.

14. If proof of the confession is excluded by any provision of law such as s. 24, s. 25 and s. 26 of the Evidence Act, the entire confessional statement in all its parts including the admissions of minor incriminating facts must also be excluded, unless proof of it is permitted by some other section such as s. 27 of the Evidence Act. Little substance and content would be left in ss. 24, 25 and 26 if proof of admissions of incriminating facts in a confessional statement is permitted.

15. Sometimes, a single sentence in a statement may not amount to a confession at all. Take a case of a person charged under s. 304-A of the Indian Penal Code and a statement made by him to a police officer that "I was drunk; I was driving a car at a speed of 80 miles per hour; I could see A on the road at a distance of 80 yards; I did not blow the horn; I made no attempt to stop the car; the car knocked down A." No single sentence in this statement amounts to a confession, but the statement read as a whole amounts to a confession of an offence under s. 304-A of the Indian Penal Code, and it would not be permissible to admit in evidence each sentence separately as a non-confessional statement. Again, take a case where a single sentence in a statement amounts to an admission of an offence. 'A' states "I struck 'B' with a tangi and hurt him." In consequence of the injury 'B' died. 'A' committed an offence and is chargeable under various sections of the Indian Penal Code. Unless he brings his case within one of the recognised exceptions, his statement amounts to an admission of an offence, but the other parts of the

> statement such as the motive, the preparation, the absence of provocation, concealment of the weapon and the subsequent conduct, all throw light upon the gravity of the offence and the intention and knowledge of the accused, and negatives the right of private defence, accident and other possible defenses. Each and every admission of an incriminating fact contained in the confessional statement is part of the confession."

88. However, in Kanda Padayachi case (supra), a Bench of co-equal strength of the Hon'ble Supreme Court, after referring to the decision in Aghnoo Nagesia case (supra) held that, if the admission falls short of a plenary acknowledgement of guilt, it would not be a confession even though the statement is of gravely incriminating nature, if taken along with other evidence, tends to prove the guilt. The court held assertively that such a statement is only 'admission' and not 'confession'. The court also followed the decision of the Apex Court in **R. vs. Santya Bandu (1958 SCR 94)**. But in Kanda Padayachi case, the whole statement given by the accused to a doctor did not constitute confession, unlike the situation in Aghnoo Nagesia case. In Aghnoo Nagesia, the whole statement amounted to confession and then the court held that the method of severing non-confessional part of the statement and to let in the same as admission is impermissible, if that severed portion is of the nature mentioned in the said decision.

89. In **Nishi Kant Jha vs. State of Kerala (AIR 1969 SC 422)**, a Five Judges Bench of the Hon'ble Supreme Court held that it is permissible to split up or separate confession or admission made by a person, but the rule is only that the whole of the confession or admission should be consider together and then to decide whether it is possible to use one part, by making

sure that the part which is separated does not make the reminder meaningless. In the said case, the Hon'ble Supreme Court held that even the exculpatory part of the confession can be separated and discarded, if from the evidence adduced it appears that the exculpatory part is false, and in that case, the inculpatory part could be acted upon. This decision was followed in **Keshoram Bora v. State of Assam (AIR 1978 SC 1096)**. The full bench of the Hon'ble High Court of Kerala in State of Kerala vs. Ammini (supra) has applied the doctrine of severability as regard to a statement given by the accused while in custody to a doctor, where he said *"these small injuries were caused by biting when I closed Merly's mouth to silence her at 7.30 p.m. on Monday before last."*

90. The legal principle emanates from sections 25 and 26 of the Evidence Act, when the said provisions are understood in the light of the law settled as above, is that the lawmakers do not intent to bring *admissions* within the prohibition of the said provisions, but at the same time, by piecemeal introduction of different parts of a statement, which do not apparently amount to confession, yet if they together constitute what is otherwise prohibited by the provisions, they should also not be admitted.

91. Therefore, it can be summarised that, though the confession made by an accused in custody to any person other than a Magistrate is inadmissible in evidence, when it amounts to admission alone, it is admissible and relevant under section 21 of the Evidence Act (Kanda Padayachi case). However, merely because the parts of the statement, when individually taken, does not amount to confession, but when taken as a

whole constitutes confession, such incriminating part should not be admitted in evidence, even by severing the offensive part. Likewise, if the statement amounts to an admission showing motive, preparation of commission of the offence or the mental state of the accused, then such parts, even if severable, are inadmissible in evidence (Aghnoo Nagasia case). Nevertheless, if any part of the confession is severable and it does not fall within the above said two categories, then the said part of the statement is admissible in evidence, even if it is otherwise incriminating [Nishi Kant Jha case, Kanda Padayachi case and State of Kerala vs. Ammini (supra)].

92. Let us now examine the evidence tendered by the prosecution through PW29. The witness deposed as follows : The accused revealed that he left India in April 2015 from Chennai and reached Istanbul from where he reached Mosul, Iraq. He undertook this trip to join and fight with the ISIS in Syria and Iraq. He stayed for about 6 days in Istanbul and then reached the Syrian border and reached Mosul, Iraq. There he was given 25 days of “religious training” and 21 days of “weapon training”. The weapons training was mainly about dismantling and assembling automatic rifles. All the steps of firearms training, except the actual firing were imparted. As part of the physical training, he was asked to do a sort of kicking exercise. During this exercise, he was supposed to land on his left foot after the completion of the kick with right foot. But when he took the jump and the kick, he failed to land properly on his left foot and he immediately felt an “electric shock like pain” from his left knee and collapsed on to the ground which was a rough cement floor. He was later taken to a

hospital in Mosul for treatment. Later, it was noticed by his trainers that he was not able to stand and perform his activities which included active warfare duty. He was then delegated to guard duty. While on guard duty, a shell exploded near him and that two of his fellow fighters died in that explosion. But he does not exactly remember the details of that incident except that he was not injured in that incident. After this incident, he wanted to return home but then he was detained by the ISIS in a prison for 54 days. After he was released from the jail, he returned to Istanbul from where he returned to India by September 2015.

93. There is no doubt that the said statement allegedly given by the accused, when read as a whole, amounts to a plenary acknowledgement of guilt and thus it is confession. Unlike the facts under consideration in Kanda Padayachi case or in Ammini case, the statement in question here does not stop short of confession. Thus, if the law laid down in Aghnoo Nagasia is applied here, the version that the accused undertook a trip to join and fight with ISIS in Syria and Iraq, that he was given religious training and weapon training by ISIS, that his trainers noted that he was not able to impart warfare duty and thus he was delegated to guard duty, and that while on the said duty, a shell exploded near him causing death of two of his fellow fighters, are matters amounting either to confession of some of the offences alleged in the charge or at least coming within the prohibition explained in paragraph 13 to 15 of the said case.

94. However, the statement said to have been made by the accused to PW29 that he reached Mosul, Iraq from Istanbul

by leaving India on April 2015 from Chennai, that he sustained a serious injury on his left knee while undergoing a training, that he was taken to a hospital in Mosul to treat the injured knee, that after the said incident he wanted to return home, but he was jailed by the ISIS and thereafter he was able to return to Istanbul, are matters which do not amount to a confession or any objectionable aspects as are highlighted in Aghnoo Nagesia case. They, even if taken as a whole, do not constitute a confession. Hence, that part is admissible in evidence and can be acted upon, if PW29 is found believable.

95. PW29 was subjected to lengthy cross examination and it was elicited that even though he had taken all necessary precautions to make sure that the accused was stating the history of injury voluntarily, he could not say whether the accused was actually threatened by the Investigating Agency, but he made those statements in a closed room and in the presence of three doctors and that he was seen comfortable. Injuries old 7 to 10 days were found on the body of the accused. PW29 did not obtain signed permission from the accused to undergo medical examination and there was no difficulty to obtain the same. None of the above materials throw any suspicion on the evidence given by PW29. PW29 is a responsible public servant and a forensic surgeon, coming from a department which has no connection with NIA. When his evidence is considered in its entirety, I find no reason to disbelieve him. Hence, it can be concluded that the accused made an admission to PW29, as to the facts which are found above as admissible. Now, the impact of his evidence on the disputed facts can be looked into.

96. **(i) Evidence showing presence of the accused in Iraq, his connection with ISIS and that he got injured during a training:** In the admissible part of the statement given by the accused to PW29, he said he reached Mosul from Turkey and later, he was taken to a hospital in Mosul, when he sustained a grave knee injury. The accused further revealed to PW29 that when he tried to go home, he was detained by the ISIS. He also said that he got the knee injury while he was undergoing a training. (The statement that he was given weapon training by ISIS is not admissible in evidence and hence it is not being considered). Apart from recording the said statement in Exhibit P36 report, the forensic surgeon, after examining the body of the accused, arrived at a finding that *"The manner of causation and duration of this injury is consistent with the alleged fall on to the left knee on a hard surface. The injury is correlated well with the history of physical training as stated"*. His finding is admissible in evidence as opinion of an expert, and it is also corroborated by the statement given by the accused to PW29. What is proved from these aspects is the presence of the accused in Iraq, his connection with ISIS and that he had undergone a training there.

97. **(ii) the Facebook account of the accused was signed in from Iraq on 12.06.2015:** There is one more piece of evidence to ensure the presence of the accused in Iraq during the period in question. As per page No.35 of Exhibit P25, the Facebook account of the accused had logged in on **12.06.2015** from an IP address **188.164.67.208**. PW28, the officer working in IT department of NIA, deposed that during

the extraction of the Facebook account of the accused, he found that it was logged in from an IP address located at Baghdad, Iraq on 15.06.2015 at 10.58 p.m. and this is evident from Exhibit P25 and MO18. (Though he deposed the date as above, the actual date as per Exhibit P25 is 12.06.2015). As per page No. 10 of Exhibit P63 report proved through PW43, when the contents of Facebook and Google accounts extracted to MO18 DVD was examined by him, he also found that IP address 188.164.67.208 was used for accessing the Facebook account. PW43 deposed that the said IP address is located at Baghdad, Iraq. It is already found that PW43 is a credible witness and he possesses rich experience in the field of cyber forensic analysis.

98. In chief examination, PW43 deposed that as he was not asked to report the location of this IP address, he did not mention the location in the report. But the witness instantaneously provided the location of the IP address after verifying a website (with the permission of the court), which is according to him, considered as genuine by the cyber scientific community across the world. In cross-examination, PW43 affirmed that if anybody knows the log in ID and password of a particular Facebook account, he could log into it from any location. He said, there is a mechanism by which IP address could be spoofed and by using such spoof address, it is possible to make it appear that a person is using internet at a different location than where actually he is. Even though it was suggested to PW43 that by spoofing IP address, it is possible to make it appear that a person is using Internet at a different location though actually he is elsewhere, PW43 assertively answered that well known web sites like Facebook could not be

accessed by a spoofed IP address and no such instance has ever occurred.

99. Interestingly, as per page 34 of Exhibit P25 extraction proceedings, the same Facebook account is seen logged in on 13.04.2015 with an IP address 178.240.6.137. The learned Prosecutor submitted that the said IP address denotes a location in Turkey. PW28 also deposed in his evidence that the said account was logged in at Turkey on 14.09.2015. As it is also found above that the said Facebook account belongs to the accused and the communications available in the said account were made by no one else but by himself, the inexorable inference from all the said facts is that, it was the accused who had accessed his Facebook account from Iraq, on 12.06.2015. The above said inference is perfectly consistent with the admissible part of the statement given by the accused to PW29 that he went to Iraq and was treated at Mosul after April 2015.

100. Above all, it is already found that the accused reached Istanbul on 08.04.2015 and he returned from there only on 21.09.2015. The accused had not offered any explanation when he was questioned under section 313 of the Cr.PC that who else had accessed his Facebook account on the said date by using his password and log in ID. He did not even state that somebody else had done it. He also failed to give a plausible explanation that how he stayed in Turkey, a country sharing the border with Iraq, up to 21.09.2015, despite the fact that his tourist visa was only up to 20.04.2015.

101. It is also evident from the mails he sent on 07.09.2015 to one Roshan Ashraf that he approached the Indian Consulate at Turkey and told them that his passport was

lost somewhere there. But from the mails he had sent to 'mohdkamal4u@gmail.com', it is clear that the accused approached the Consulate with a false story which they declined to buy. This aspect will be dealt with in detail hereunder.

102. **(iii) Absence of bank transactions during the said period:** It is found above that MO6(b) IDBI/Master card international debit card belongs to the accused. It is proved from Exhibit P51 bank statement that the said debit card was frequently used at Istanbul during the period 08.04.2015 to 13.04.2015 and then during 07.09.2015 to 21.09.2015. The card was again used at Railway Station, Greater Mumbai on 22.09.2015 and later at Tamil Nadu on 26.09.2015.

103. It is interesting to note that when the accused was in Istanbul, there were withdrawals from his bank account using MO6(b) debit card, almost on a daily basis. Even prior to that, there were frequent transactions using the very same debit card from some places at Thirunelveli. To be more specific, in between the period of 08.04.2015 to 13.04.2015 and 07.09.2015 to 21.09.2015, there were altogether 15 debit transactions by using the said card. When the accused reached India, the very next day the card was used at CST Railway Station, Mumbai. Again then, the card has been regularly used at Thirunelveli. Significantly, the card has not been used at any time in between 14.04.2015 to 06.09.2015 i.e., for nearly 5 months. The period during which the presence of the accused was found in Iraq as above comes between the said dates. It is very pertinent to note that the accused come up with an explanation that he never used the said MasterCard, when he

was questioned under section 313 of Cr.PC. It is in evidence that the said card belongs to him and it was seized from him by PW42. But he did not explain in what circumstance his own debit card was used by somebody else in Istanbul during the period when he was also there. In this situation, absence of not even a single bank transaction during the period of almost five months, whereas there were transactions on daily basis on all other period, is also a circumstance in favour of the prosecution.

104. It is significant to note that the accused did not offer any explanation for his presence in Iraq during the said period. Instead, he blatantly denied the same and raised a contention that, because of Internet spoofing it might have appeared otherwise. But his presence in Iraq is well established by the above discussion. It is submitted by Shri.Arjun Ambalapatta that there are lot of notifications and official instructions issued by the Government of India, which could be taken judicial notice of, showing that Iraq is not a country accessible by an Indian citizen without a visa. He also contended that, had the accused visited Iraq with a visa, he could have furnished some details about it, as that are within his special knowledge. Thus, he urged, the court should draw an adverse inference against the accused that he transgressed to Iraq by illegally crossing the porous border of Turkey with the assistance of ISIS members, exactly as devised by him well in advance. I find that the said submissions are very sound, in the above said factual settings.

105. **(iv) Accused was exposed to an explosion:** There is one more aspect in the evidence of PW29 which is also

favourable to the prosecution. PW29 deposed that, the multiple scars on the left knee, leg and foot, their physical characteristics and the X-ray appearance, is suggestive of the fact that the accused was in close proximity to an explosion and it further correlates well with the time of occurrence of the explosion injury as provided in the history part i.e., after April 2015. The Doctor further opined that from the radiological appearance and from physical examination of the injury found of the left knee of the accused, he was of the opinion that the manner of causation and duration of the knee injury was consistent with the alleged fall on the left knee on to a hard surface and that the injury correlated well with the history of physical training. As far as the findings arrived at by him after examining the body of the accused, it is certainly admissible as opinion evidence.

106. Though it was contended by the learned defence counsel that generating evidence by the medical examination on the body of an accused is impermissible in law, the said contention cannot be upheld. The examination of the accused by a medical practitioner at the request of a police officer is permissible under section 53 of the Cr.PC., when "there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence." In this case, the conclusions of PW29 are of the said nature and hence, it is perfectly lawful.

107. The prosecution further relies on the evidence of PW24 and PW25, the Assistant Directors in Forensic Science Laboratory, Thiruvanthapuram, who have scientifically examined MO20 to MO23 Jackets allegedly used by the accused

while he was in Iraq. It was found above that the accused has a distinct connection with jackets, which are all made in Turkey, from where the accused has returned to India on 21.09.2015.

108. As per the evidence of PW24, on microscopic examination of MO20 to MO23, she found fibre disturbance in the front left side of their lower region, and such disturbance might be caused due to carrying of any hard surfaced objects like firearms. But it was brought out in the cross examination of said witness that such disturbance could be caused due to any dry frictional force. Hence, it is difficult to infer from the said opinion of PW24 that the person who wore those jackets might have used heavy weapons, though it is also a possibility.

109. However, the evidentiary value of the version of PW25 is different. According to her, when she examined MO20 to MO23, she found the presence of potassium chlorate and potassium nitrate on MO20 and potassium nitrate on MO21 to MO23. To this effect, she submitted Exhibit P33 report. The witness further explained that the said chemical compositions are the essential ingredients of explosives. She further said, they might also be the evidence of gunshot residue resulting in from using firearms, though the use of guns or firearms by the accused could not be inferred. From the said evidence, it is clear that essential components of explosives were found on MO20 to MO23, which are all apparently made in Turkey and recovered at the instance of disclosure made by the accused. Here again, the absence of a reasonable explanation by the accused adds strength to the prosecution contention that the accused was deployed by ISIS in certain areas of Iraq, where insurgence was taken place.

110. But it is forcefully submitted by Shri.V.T.Raghunath that it is impermissible to admit the opinion evidence of either PW29 or PW25, as their opinions are not in a conclusive manner, but they only suggest a probability, and hence it could not be said that there is proof beyond reasonable doubt. It is submitted by the learned counsel that, in a criminal trial, evidence could be acted upon against the accused only if it is of certainty, and if it displays two probabilities, the one which is in favour of the accused alone should be preferred and thus, those opinions could not be accepted. These submissions are to be considered in detail, as the principle they propose has no universal application. First of all, there is a distinction between the nature of evidence adduced by PW24 and PW25. Accepting the contentions of the learned defence counsel, the evidence of PW24 is not taken into account since her opinion gives enough room for inferring alternative possibilities, which are against the proposition made by the prosecution. The fibre disturbances found on the jackets might be either due to the use of firearms or due to its coming into contact with any other rough surface. In such a situation, it cannot be held that the fact sought to be relied on by the prosecution is proved within the meaning of section 3 of the Indian Evidence Act.

111. Nonetheless, when it comes to the question of acceptability of the evidence of PW25 and PW29, a different yardstick has to be taken. Primarily, the evidence of PW25 is of a conclusive nature as to the result of scientific examination she made viz., in the said jackets she found essential ingredients of explosives. It does not reveal any other probability other than the said inference, even after the cross

examination. Of course, she said that the presence of the chemical might be due to various reasons, but then she reiterated that even in that case, the clothes must come into contact with such chemicals. Likewise, the opinion arrived at by PW29 after physically examining the body of the accused that the accused was in a close proximity to an explosion at a period after April 2015, is also very reliable. What is extracted in his cross-examination is only that he was not certain about the exact time at which the metallic particles entered the body. But he was certain about the period during which it happened. He said, it was after April 2015. Moreover, when the said forensic surgeon was confronted with the possibility that the injuries found on the body of the accused could be happened due to many other factors, he convincingly replied that he arrived at the said opinion after ruling out so many other hypothesis and probabilities, and even after considering the explanation offered by the accused that it was caused as a result of a fall into a ditch from his bike. The Doctor further explained that he has ruled out all those probabilities for the reasons specifically noted in Page No. 3 of Exhibit P36. In addition to the assertive nature of his evidence, to a certain extent, the opinion of PW25 corroborates the findings of PW29, on this point, and hence, the said evidence is completely acceptable.

112. Let us now pointedly consider the contention that the circumstantial evidence relied on by the prosecution has not been proved beyond reasonable doubt, and that the evidence of the experts is only of the nature suggesting a probability and not a certainty, which admits in itself a possibility in favour of the innocence of the accused and hence,

out of these two possibilities, the one which favours him should be accepted. It is true that each circumstance against the accused should be clearly and fully proved by the prosecution. The doctrine of 'proof beyond reasonable doubt' as well as 'benefit of doubt' is the bedrock of criminal jurisprudence. But these Common Law principles have to be applied in the process of evaluation of evidence only when the consideration is whether the *proved facts* lead to an *inference of guilt* of the accused or not, and not at the initial stage when a 'basic' or 'primary fact' is considered as *proved.* At that stage, primary fact needs to be proved in the ordinary manner as provided in section 3 of the Evidence Act. This is the law precisely laid down in **M.G.Agarwal v. State of Maharashtra (AIR 1963 SC 200)** by the Constitution Bench of the Hon'ble Supreme Court. The Apex court, speaking through his Lordship Justice Gajendragadkar, declared that *primary or basic facts* in a criminal case has to be judged in the ordinary way, and the doctrine of benefit of doubt comes into fore only when the court considers that whether the proved facts lead to *an inference of guilt of the accused person or not.* In the said case there were only circumstantial evidence against the accused and the trial court acquitted the accused by holding that the prosecution did not establish the case against them beyond a reasonable doubt. Negating the said finding, the Constitution Bench held:

> "If the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt. There is no doubt or dispute about this position. *But in applying this principle, it is necessary to distinguish between facts which may be called primary or basic on the one hand and inference of facts to be drawn from them on the*

> *other*. *In regard to the proof of basic or primary facts, the court has to judge the evidence in the ordinary way, and in the appreciation of evidence in respect of basic or of primary facts there is no scope for the application of the doctrine of benefit of doubt.* The court considers the evidence and decides whether that evidence proves a particular fact or not. When it is held that a certain fact is proved, *the question arises whether that fact leads to an inference of guilt of the accused person or not and in dealing with this aspect of the problem, the doctrine of benefit of doubt would apply* and an inference of guilt can be drawn only if the proved fact is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. It is in the light of this legal position that the evidence in the present case has to be appreciated".
>
> (Emphasis supplied)

113. This view is followed by the Apex court in **G. Parshwanath vs State Of Karnataka (AIR 2010 SC 2914),** while upholding the conviction on the strength of circumstantial evidence. Based on the above said decision, Justice U.L.Bhat, in his celebrated text book on *Relevancy, Proof and Evaluation of Evidence in Criminal Cases (Universal Law Publishing Co., Page Nos. 91 and 202),* commented as follows :

> "The principle of proof beyond reasonable doubt is applicable in the matter of testing the guilt of the accused. It has no operation in the area of proof of '*primary facts*', particularly in cases where the guilt of the accused is sought to be established by circumstantial evidence (page 91)..... The conclusion quoted above of the Constitution Bench deserves serious consideration and appreciation. The above decision is dealt with prosecution based entirely on circumstantial evidence. In such cases, *the circumstantial facts are only facts*, which have been declared relevant under chapter II of the Act. Such facts are referred to in the above decisions as *basic facts or primary facts*. They are governed by the definition of "*proved*" in section 3 of the Act. The court believes in the existence of such facts or accepts such facts as proved by preponderance of probabilities. This

> was what was referred to in M.G.Agarwal's case as judging "*the evidence in the ordinary way*", that is the way mandated by the definition of "*proved* " in section 3 of the Act (page 202)"

114. In short, it is obvious from the Constitution Bench decision that the *basic fats or primary facts,* even in a criminal case, have to be proved in the ordinary way and the question of proof beyond reasonable doubt or benefit of doubt arises only at the stage of evaluation that whether *the proved facts unmistakably lead to an inference of guilt of the accused*. To decide whether a *relevant fact* in question (not the *fact in issue* in a criminal case, which is essentially a matter connected to the guilt of the accused, and hence it has to be analysed in terms of the doctrine of proof beyond reasonable doubt) is proved or not, the court should follow the standard prescribed by section 3 of the Evidence Act as regard to the prudence and practical good sense of an ordinary person, which means in a given case, if the question is whether a particular fact is said to be proved or not, the court should analyse the evidence with the yardstick of a prudent man that whether he would consider the existence of that fact is so probable, under the circumstances of the particular case, to act upon the supposition that it exists. But when it comes to the ultimate evaluation as to proof of fact in issue and the matters from which the inference of guilt of the accused has to be made, the question of proof beyond reasonable doubt comes into play. At that stage, if proved facts admit two possibilities, one which favours the presumption of innocence of the accused should be preferred, by giving the benefit of doubt.

115. In the light of the above legal principles, it can be concluded that the fact proved by PW29 (based on the examination of the body of the accused) that the accused was in a close proximity to an explosion after 2015, and the fact proved by PW25 that MO20 to MO23 jackets (which are distinctly connected to the accused and are made in Turkey) contain essential chemicals used in explosives, are relevant facts complimenting to each other and they are admissible in evidence.

116. **Conclusion:** From all the above circumstances, it can be concluded with certainty that the accused went to Iraq subsequent to April 2015, and he got injured during a training, and he had some kind of connection or interaction with ISIS, and he was in a close proximity to an explosion during that period.

117. **Conduct of the accused revealed through various incidents:-** Conduct of an accused is relevant under section 8 of the Evidence Act, if it is capable of destroying the presumption of innocence. From the evidence adduced by the prosecution, six distinct aspects seem to be pertinent in this regard. Let us discuss each one separately.

118. **(i) The accused told a false story to the Consulate, Turkey, that he lost his passport :** This is revealed through the email sent by the accused to mohdkamal4u @gmail.com and roshanashraf 958@gmail.com. The said emails are available in MO18. The email ID mohdkamal4u@gmail.com is of Shri.Mohammed Kamal, PW34. When the mails sent by the accused to PW34 is read along with his mails forwarded to Roshan Ashraf, it is obvious that he went

to the Indian Consulate in Turkey just before 07.09.2015 with an explanation for his over stay at Turkey for five months. But it was not readily accepted by the Consulate and they quizzed him a lot and asked him to come with more details about the hotel (at which he stayed) and also with a police report (It is apparently about loss of passport. MO9(c) is exactly that report, which was issued on 21.09.2015). If the email communications are closely read, it can easily be concluded that what he had divulged to the Consular officials was not factually correct. On 07.09.2015 at 20:50 hours, the accused told Roshan Ashraf that *"I wend to consulate, they asked me numbers in india. I gave your mom's and uncle's number. If anyone call to that mobile asking about me tel her tel I am turkey I lost my passport. They might ask* ***what I was doing for 5 months, tel them I am with a sufi group that's all I know. U get it."*** On the same day at 21:27 hours, the accused sent another mail to Roshan Ashraf and informed him as follows : *"Tel Maideen mama to come online or Tel him what I have msged you".* On the same day at 20:11 hours, the accused sent a mail to PW34 as follows :- *"They told me to write everything. They* ***cross questioned me a lot,*** *they said it's all true tell them the true, something is missing,* ***my story has loops, I didn't noticed****. They don't believed my story, they give me time reveal anything left* ***but I stick with story****. They told me come with more details* ***about hotel..*** *and* ***a police report****".* At 20:19 hours, he again sent a mail to PW34 stating that *"Send msg as email. Can u call any public booth* ***9447051638*** *and tel on the net. They asked me about numbers in india I gave them my brother num.* ***I need to inform him wat say if they cal.***"

Yes, his story had obvious loopholes, which he did not notice.

119. As discussed above, the phone number which was given by the accused to PW34 was that of PW22 and his name is Moideen. It can be understood from the email sent by the accused to Roshan Ashraf that he was referring to PW22 as 'Maideen mama'. A reading of all the said mail conversations gives only one inference i.e., the accused had told the Consulate persons that he lost his passport somewhere in Turkey and he was in a Soofy group for the past five months. But that story did not work and the Consulate personnel cross questioned him and gave him time to reveal something else, but he stuck to his story and then they asked him to come back with more details like hotel at which he stayed and also a police report, presumably about the loss of passport. MO9(c) Police Clearance Certificate dated 21.09.2015 reveals that the accused had requested the police department in Turkey to issue a clearance certificate showing that he lost his passport and based on which, MO9(a) and (b) letter and Emergency Certificates were issued by the Consulate General of India, Istanbul on 21.09.2015 itself. MO9 series documents were seized from the residence of the accused on 03.10.2016 by PW42.

120. The stiff stand of the Consulate officials compelled the accused to educate his relatives as to how they should react, if the Consulate people cross check the information supplied by him. This prompted him to contact Roshan Ashraf and PW34 and to convey the false version he had presented before the Consulate. It is relevant to note that the accused was careful enough not to communicate the message to his

relatives directly. Instead, he used others to accomplish his purpose. Even when he confide to PW34 all these matters, he was careful enough to instruct PW34 that he should contact PW22 only from a public telephone booth.

121. It is thus convincingly proved that the accused, who had been in Iraq at some point of time in between April 2015 and 06.09.2015, went to the Indian Consulate with a false story and when he felt that they did not believe his story and they might cross check it with his family, he tried to communicate it in advance to his family members through somebody else, rather than directly contacting them. This subsequent conduct of the accused is relevant as it is consistent with the prosecution case, and it punches holes in the presumption of innocence of the accused.

122. **(ii) The apprehension of the accused that he would be caught by the police in his return journey to India :-** MO9(b) emergency certificate issued by the Consulate General of India, Istanbul is a one time travel document having a validity of 3 months and it was issued in suppression of any other accepted travel documents like passport etc. This is well evident from the recitals in MO9(b) itself, which was seized from the possession of the accused by PW42. A person who is returning to India with such a valid travel document need not ordinarily apprehend that he would be caught by the Indian police in the airport. However, the accused entertained such a very serious apprehension and it depicts another relevant subsequent conduct from the accused, the prosecution contended.

123. In one of the email conversations between the accused and the said Roshan Ashraf, the accused clearly entertained a doubt of the above nature. On 07.09.2015, he wrote *"May be they send me back to india, **there is chance I may caught by the indian police** after I get there. Whatever happened this is what our family members need to said. U get na."* The accused again issued a mail to Roshan Ashraf on 21.09.2015 at 14:53 hours informing him that the accused would start his journey back to India on that day and if he could not contact Roshan Ashraf by the afternoon of the next day, he should assume that the accused was captured by Indian police. The message is as follows :- *"Salamu alaikum wrwb. read carefully. InshaAllah I will start today if I didn't contact by tomorrow after noon **consider that I am been captured by ind polc**. Inform everyone else. Dua for me."* Significantly, by the time he sent that email, he had presumably got the Emergency Certificate and journey ticket, yet he was apprehensive of such a casualty.

124. It is thus clearly established by the prosecution that the accused had entertained a very serious doubt that he would be caught by the Indian police at the airport. This conduct of the accused is also a factum against his innocence and relevant in the circumstances of this case.

125. **(iii) The accused entertained a doubt that his conversations would be intercepted:** The email conversations of the accused with PW34 and Roshan Ashraf make it clear that the accused was very cautious while indulging in communications. He advised them even not to use WhatsApp. In the mail sent by the accused to Roshan Ashraf on

03.09.2015, he said “Watsup is not secure anymore send me mails ok.” He also asked PW34 to send messages as emails only. It is also found that he did not even attempt to contact his relatives from Turkey. Instead, he used PW34 and Roshan Ashraf to pass vital messages to them. He even asked PW34 to call his brother only from a public telephone booth. The said subsequent conduct of the accused during the time when he reached back Turkey from Iraq is also very relevant and strengthens the prosecution case.

126. **(iv) He went to Turkey without letting to know his kin :-** To prove this contention, the prosecution relies on the testimony of PW19, the wife of the accused, and PW21 and PW22, his own brothers. PW19 deposed that she never knew that the accused went to Turkey or Iraq, but he left the home by saying that he was going for Umrah and also for Jihad. Her evidence is assailed by the defence on the ground that she separated the marital tie few years back.

127. However, the defence side cannot challenge the version of PW21 and PW22 who said that he told them, he was going to Umrah, which is performed at Saudi Arabia. PW22 further conceded that the accused never went abroad except for doing Umrah.

128. It is pertinent that as per PW22, the accused frequently stayed with him, even after coming back from Umrah and still, PW22 was unaware of his journey to Turkey. True, he is a hostile witness, but it does not make any change, as the same is the version of PW19. Why the accused did not let them know it, is a relevant fact, when it is proved that he actually went to Turkey and then to Iraq and he came into

contact with ISIS. This is also a fact which is consistent with his desire to do *hijrah* to ISIS in Iraq and it is against his defence that he went to Turkey as a bonafide tourist. Interestingly, the prosecution has a firm case that the accused did *hijrah* to ISIS and that is why he severed his ties with his family and even his home land, which is evident by his act of destroying passport, as it is proved through PW34.

129. **(v) The accused obtained fake SIM cards immediately after reaching India :-** As per the prosecution case, the accused obtained two mobile phone connections by using the identification details of PW23 and PW32 immediately after he reached India and he intended to continue his ante-national activities by using these fake SIM cards (MO2(a) and MO14 (a)).

130. From Exhibit P31 Customer Application Form in respect of one of such SIM cards, it is evident that the said mobile phone connection was subscribed on 28.09.2015, i.e., within one week from the date when the accused reached India. From Exhibit P38 Customer Application Form of the other SIM card, it can be seen that it was subscribed on 22.12.2015. From Exhibit P31, Exhibit P38 and the evidence of PW23 and PW32, it is clear that the phone connections were not subscribed by the accused. It is already concluded in point No. 5 that those SIM cards were used by the accused himself and he contacted many persons with those SIM cards.

131. But the act of obtaining fake SIM cards in itself may not be relevant in a criminal case of the present nature. Albeit, it is manifest from the discussion made above that the accused was very keen while making communications and he did not

even attempt to contact his relatives when he was in Turkey and instead, he used PW34 and Roshan Ashraf to pass vital messages. He also advised them not to use WhatsApp or to make phone calls from regular phone connections. Taking into account the said facts, together with the attempt said to have been made by the accused to procure explosives from PW6 and PW7 by contacting them through the said phone numbers (this aspect will be discussed in detail hereunder), the conduct of obtaining fake SIM card is very relevant.

132. **(vi) The accused attempted to procure precursor explosives by using fake identity:-** It is the prosecution case that while the accused was working in Gold AIK jewellery, Kadayanellur, PW6, a person doing wholesale cracker business along with PW7, met him and thereafter the accused contacted both of them and attempted to procure huge quantity of precursor explosives. The prosecution also alleges that the accused contacted them by using MO2(a) and MO14(a) SIM cards obtained by using fake identity. The accused denied even his connection with Gold AIK jewellery and the alleged interactions with PW6 and PW7. However, it was found from the evidence of PW3 to PW5 and various other witnesses (while discussing point No.4) that the accused had worked in Gold AIK jewellery shop.

133. PW6 testified that he was doing wholesale cracker business on commission basis with PW7 and he visited AIK jewellery shop in April 2016 along with his uncle Pothiraj for purchasing gold ornaments. Exhibit P4 invoice issued from the said shop room (in the name of ‘Bodhraj’, instead of ‘Pothiraj’), which was marked through PW3 was also identified by PW6.

PW6 identified the accused as the person who attended them as the salesman of the said jewellery shop on that day. PW6 further deposed that when the accused came to know from him about his cracker business at Sivakasi, the accused obtained his phone number which is 9600257430. The accused introduced himself as 'Rahmath' and he also obtained the phone number of PW7, who is the partner of PW6. PW6 further states that later, PW7 told him that the accused had contacted him and enquired about the possibility of getting materials like chlorate, sulphur and aluminium powder. The admissibility of this statement was challenged during cross-examination on the ground that it is hearsay. But it is settled law that such statements, if it was made soon after the incident, can be admitted in evidence for the limited purpose of section 157 of the Evidence Act. He also deposed that PW8, who is a common friend of PW6 and PW7, advised them not to sell such materials, as it would cause explosion. As the accused identified himself in different names to PW6 and PW7, and also because they got suspicion about his conduct, they decided not to sell the said items to the accused, PW6 deposed.

134. PW7 and PW8 also deposed in tune with the said version. As per the evidence of PW7, a person identified himself as Abdul Rashid from AIK Gold jewellery, Kadayanellur contacted him during May 2016, informing that he got the number of PW7 from PW6. As per PW7, the said 'Abdul Rashid' asked him to arrange 50kg each of chlorate, phosphorous, sulphur and aluminium powder, by intimating that he wanted to start a retail business of crackers and also that it is required to frighten away animals. Later, the said 'Abdul Rashid' called

him again and fixed their meeting at Sivakasi bus stand. PW7 further deposed that they met at the Sivakasi bus stand and as a result, he realised that the accused was the said 'Abdul Rashid'. As PW7 informed him that the said items in large quantities could be procured only with a license. The witness further testified that his mobile number is 8015815604 and accused contacted him over the said phone number on 8 or 9 times. He also deposed that the accused called from a phone number ending with '9463'. PW8, the common friend of PW6 and PW7, and a person holding M.Sc. in Chemistry, deposed that if the materials like phosphorous, aluminium powder, sulphur and chlorate are used at a quantity of 50 Kg each, it could cause explosion ranging 5 Kms. He also deposed that he advised PW6 and P7 not to sell that articles to a person who was from Kadayanellur.

135. All these witnesses were thoroughly cross examined. It was elicited from PW6 that Pothiraj was not his direct uncle and he could not explain the relationship correctly, as he is a distant relative of his father. It was also elicited that the reason for keeping Exhibit P4 invoice by PW7 himself rather than by the said Pothiraj, was only that the price of the gold in the said shop was lesser. It was also brought out in cross examination that he did not state to the police when he was questioned earlier that the accused contacted him on 2 or 3 occasions in the said phone number or that he doubted the identity of the accused, as he gave different identity to them. In cross examination of PW7 it was extracted that when he met the accused at Sivakasi bus stand, they identified each other by making a call to the mobile phone of PW7 at about 3.30 p.m. It

was also brought out that PW6 and PW7 do not have license for cracker business. PW8 conceded in cross-examination that he did not have any direct knowledge about the dealings of PW6 and PW7 with the accused.

136. It is true that PW6 was not able to properly explain why Pothiraj, the person who purchased the gold ornaments, entrusted PW6 the invoice of purchase, rather than keeping the same with himself. The explanation offered by him is very weak viz. it was given to him by Pothiraj by saying that the price in that jewellery shop was lesser. His demeanour, while making the said statement, was also noted down in his deposition, and from which it seems that he was not certain about what he had stated. Shri.V.T.Raghunath, the learned counsel for the accused, forcefully submitted that there occurred a delay of 15 days in between the date of questioning of PW7 and recovering Exhibit P4 and it shows that the same was manipulated. It is also argued by the learned defence counsel that the accused has no connection whatsoever with the said witnesses and the Investigating Agency has manipulated such a case merely on the ground that they could show some telephonic interactions with the mobile numbers of PW6 and PW7 and the numbers said to have been used by the accused.

137. Even when PW6 failed to explain the circumstance in which he happened to possessed the bill, I find no reason to disbelieve the entire story unravelled through these witnesses. It is true that Exhibit P4 was recovered after a delay of 15 days from the date of examination of PW6 by the Investigating Officer. But it is idle to contend that it was the time taken for

fabricating such a document and the entire story related to it is falsehood. It cannot be forgotten that at the time when PW6 was questioned by the Investigating Officer, the Agency was after the said Kanakamala case and their main thrust was on the aspects related to the said case. At that stage, Agency was not able to realise a distinct thread which lead to the present case and hence, they could not be found fault with for not seizing Exhibit P4 then and there.

138. After all, Exhibit P4 plays a very little role in the transactions spoken to by the witnesses. It was indeed seized by Exhibit P5 mahazar, which was attested by PW8 as well. At any rate, Exhibit P4 was identified by PW3, the owner of the jewellery. It is very pertinent that the number '9600257430' is shown in Exhibit P4, against the name of the purchaser of the gold. The accused has no dispute that the said number does not belong to PW6. This fact undeniably establishes the connection of PW6 with the gold purchased, despite the fact that Pothiraj is not his close relative. Even when the accused forcefully denied his connection with Gold AIK jewellery, as per Exhibits P45 and P46, there are dozens of calls to the phone numbers seen printed in Exhibit P4 invoice of Gold AIK jewellery, as its number.

139. The connection of the accused with the said jewellery is clearly established through the said evidence as well as from the call data records pertaining to MO2(a) and MO14(a) SIM cards (Exhibits P45 and P46). There are dozens of calls from the said numbers, which are proved to be of the accused, to the telephone numbers shown in Exhibit P4 as that of the said jewellery. It is also found that the accused himself

sent a WhatsApp message revealing his connection with the said jewellery. From Exhibit P45 it is evident that on 14.06.2016, PW6 received two calls from the accused and they spoke for more than 450 seconds (Calls between 7845389463 and 9600257430 – Page No. 25 of Exhibit P45). There is no dispute as to the phone number of PW7. It is also evident from Exhibit P45 that the accused contacted PW7 on 05.05.2016 twice and they spoke for more than 160 seconds and the accused again contacted him on 31.05.2016 and 01.06.2016. On 14.05.2016 also the accused contacted PW7 (Calls between 7845389463 and 8015815604 – Page No. 18, 19 & 22 of Exhibit P45).

140. When the accused failed to elicit any materials sufficient to discredit these witnesses and when they stood the test of cross examination generally well, I find no reason to discard the prosecution case for the mere reasons suggested by the learned defence counsel. It is relevant to note that the accused raised a false defence as to his connection with AIK jewellery shop, Kadayanellur. But it is proved otherwise with cogent evidence. The accused also denied that connection with the phone number 7845389463, the SIM card of which was seized by PW42 from his possession. It was found used in MO2 mobile phone during the relevant period, which was also seized from the accused. The accused also raised a false defence that PW6 and PW7 are total strangers to him. For all these reasons, it is to be concluded that the accused contacted PW6 and PW7 in a false identity and attempted to procure precursor explosives. This subsequent conduct of the accused is also in complete synchrony with the prosecution case viz., his conduct

was influenced by the motive with which he flew back to India.

Approver's Evidence : Legal principles

141. Let us now consider the evidence of PW34 in the light of the facts stand proved. The prosecution strongly relies on the evidence of PW34 to prove major part of the charges made against the accused. PW34, being an accomplice who is enjoying the benefit of the order of pardon, the reliability of his evidence is assiduously assailed by the defence side, referring to various precedents. In this background, it is necessary to understand the law in this regard at first and then to analyse his evidence accordingly.

142. As a first measure, the dichotomy, if any, in between Section 133 and illustration (b) to Section 114 of the Evidence Act has to be understood carefully. It is no more *res integra* that there is actually no incompatibility between these two provisions. Illustration (b) to Section 114 merely empowers the court to raise a permissive presumption that an accomplice is unworthy of credit, unless he is corroborated in material particulars. But in a case where if the court feels from the circumstances of the case that such a discretionary presumption need not be drawn as per section 114, there is no illegality in proceeding upon the sole uncorroborated testimony of an accomplice even for entering upon a judgment of conviction, in the light of section 133. When these two provisions are understood in the above manner, it is obvious that the court can, as a first step, decide whether it has to raise such a permissive presumption in the given case, depending upon the circumstances in that case. If it decides otherwise, there is absolutely no illegality.

143. However, it has become almost a universal rule of evidence that the court should seek corroboration for the evidence of approver, as his evidence is generally considered as tainted. Taylor in **'A Treatise on the Law of Evidence'**, (Vol. I, Paragraph 967, 1931) opined that *"accomplices who are usually interested and always infamous witnesses, and whose testimony is admitted from necessity, it being often impossible, without having recourse to such evidence, to bring the principal offender to justice". An* accomplice/approver is a person who had participated in the crime and got protection of law by betraying his own confederates and hence he may likely to please the prosecution and even try to weave false details into the evidence. This is why normally the courts insist for corroboration of his evidence for every material aspects spoken to by him.

144. In **Sarwan Singh v. State of Punjab (AIR 1957 SC 637)** it is held that even though an accomplice is a competent witness, the very fact that he has participated in the commission of the crime introduces a serious stain into his evidence and hence the courts would be normally reluctant to receive such tainted evidence unless it is corroborated in material particulars. But the court further held that it is not right to expect that his evidence must be corroborated in major particulars or that the whole story told by him must be covered, as such a view would make the evidence of an accomplice superfluous. In this decision, the Hon'ble Supreme Court laid down a theory named as 'double test' for accepting the evidence of an approver. As the first step, the court has to scrutinize his reliability, which is common to all witnesses and if

the court is satisfied, then as a second step, it must see how far his evidence is corroborated in material particulars. If the accomplice is found unreliable in the first step, there is no question of applying the second test. Further, the evidence of an approver cannot be corroborated by his own previous version, even if it is given under section 164 of Cr.P.C. It is held by Justice Beaumont in **Bhuboni Sahu vs The King (AIR 1949 PC 257)**, *"an accomplice cannot corroborate himself; tainted evidence does not lose its taint by repetition".*

145. Significantly, in **Sitharam Sao v. State of Jharkand (AIR 2008 SC 391)** and **K. Hashim v. State of Tamil Nadu (AIR 2005 SC 128)**, the Hon'ble Supreme Court, after analysing almost all the earlier decisions on the point, held that, when section 114 of the Indian Evidence Act uses the word 'may' instead of 'must', the court is not obliged to hold that the accomplice is not worthy of credit, but it ultimately depends upon the court's view as per the credibility of his evidence.

146. Nevertheless, Shri.V.T.Raghunath raised another contention that the evidence of an approver is of weak nature, as it partakes the character of confession of a co-accused and hence, it could be relied on in evidence only when the prosecution is able to prove its case otherwise, and only as a material corroborating the case of the prosecution. In support of his submissions, he placed reliance on the decision in **Kashmira Singh v. State of M.P. (AIR 1952 SC 159).**

147. It is difficult to accept this contention in its entirety. As discussed above, generally the evidence of an accomplice will be entertained by the court only with great caution and

most often, only when there is corroboration on material particulars. But it does not mean that the evidence of an accomplice is not *substantive* in nature. It is also not at par with the type of evidence dealt under section 30 of the Evidence Act.

148. True, it is held in **Kashmira Singh v. State of M.P.** (supra), that the proper method to analyse the evidence of confession as mentioned in section 30 is to first marshal the evidence against the accused excluding the confession altogether from the consideration and then to see whether if it is believed, a conviction would safely be based on it. The said legal position is unquestionable. But the evidence adduced by an accomplice in the court cannot be equated with the confession of co-accused which is dealt under section 30.

149. First of all, why it is held by the Hon'ble Supreme Court that confession of a co-accused is not 'evidence' in the ordinary sense is that, when the confession of the nature mentioned in section 30 is spoken through a witness, the person who made the confession (the co-accused who is facing trial along with the other accused) cannot be subjected to cross examination and he is not examined as a witness in the court. However, in the case of an accomplice, who was given pardon, the prosecution is bound to examine him as a witness and then he will be subjected to cross examination. It is thus substantive evidence, for all purposes. This is why section 133 of the Evidence Act declares that 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 the accomplice.

150. Seeking corroboration of his version is a rule of prudence, but that does not reduce the evidenciary value of the accomplice to the status of mere corroborative evidence as if the one postulated in section 30, where the person who made the confession is also facing trial, and not examined as a witness. In the Commentary on *Code of Criminal Procedure, 1973 by Sohoni*, (22nd Edition, LexisNexis, Page 4075), the author writes that *"The procedure laid down in section 306 Cr.P.C is an important exception to the general rule that the statement of an offender is not to be taken as evidence against his co-accused unless he incurs the same risk as those jointly accused with him, by inculpating himself. With a view to see that grave offences do not go unpunished, the Legislature has introduced this exception, but confined its operation to cases mentioned in the section"*.

151. After evaluating all the above principles, the law in respect of appreciating the evidence of approver can be summarised as follows: Based on the circumstances prevailing in a given case, if the court feels confidence that no presumption as provided under the second illustration to Section 114 of the Evidence Act has to be drawn against the accomplice, the court may even act upon the uncorroborated testimony of approver. However, as a general rule of caution, the court should apply the 'double test' on his evidence and it should seek corroboration of his evidence as to the material particulars, though the magnitude or nature of corroborative evidence required is totally dependant on the facts and circumstances of the given case. In other words, even if the court feels that he is worthy of credit, the court may seek

corroboration before acting upon his evidence, because he was an accomplice.

152. **Evidence of PW34 :-** Now, the evidence of the approver can be analysed in the light of the above principles. PW34, Shri.Mohamed Kamal, has been doing export business in the name of Euphra Trading Co., since 2011. He had been using 9884956999 as his mobile phone number since very long and he uses the said number for WhatsApp as well. He is using two Facebook IDs as 'Mohamed Kamal' and 'Abu Jamaluddeen'. He had been using KIK, Surespot and Telegram to chat with many people who are related to ISIS, since he become interested in ISIS. From the discussions made with various persons, PW34 came to understand that, if a person wants to join ISIS in Syria or Iraq, he has to first reach Turkey and from there, he would be taken to a safe place by the ISIS people. He also understood that a person who embraces ISIS has to fight with certain opposing Islamic groups in Syria or Iraq or to wage war with the army of those countries, that he could not come back to his mother country, and thus he would destroy his passport once he joined ISIS.

153. He came to know about the accused from a person nick named as '*Umm Hurayra*' who is actually a lady named Fathima from South Africa. At that time, the accused was known as Abu Jasmine, an Indian who was fighting for ISIS in Mosul, Iraq. When PW34 asked Umm Hurayra to share his ID with Abu Jasmine (as PW34 also wanted to join ISIS), Abu Jasmine contacted him in Telegram (an online application used in mobile phones). Then the accused informed PW34 that he was fighting for ISIS in Mosul, that he joined ISIS by obtaining

visa to Turkey through a travel agent in Kerala and that he underwent the *hijrah* to ISIS in that way. When Abu Jasmine understood that PW34 was also a person from Tamil Nadu, he revealed that he was married to a Tamil girl. Both of them shared their WhatsApp number and started to contact each other in WhatsApp. Abu Jasmine told that he was fighting for ISIS in the battle field and hence he would not be available online frequently.

154. PW34 had created a Telegram group consisting of himself, Abu Jasmine and another person named Abu Computer @ Abu Amar, who was also a fighter for ISIS. During the discussion with Abu Jasmine, PW34 understood that Abu Jasmine started to blame himself and he wanted to come back to India as his wife was mentally ill. Then he sought for permission from his Amir, but it was denied and eventually, he was even jailed by ISIS for two weeks when the accused repeatedly insisted, and at last, they left him in a street, from where he crossed the border to Turkey. PW34 understood all these facts through WhatsApp communications, after Abu Jasmine reached Turkey.

155. When PW34 discussed the matter with Umm Hurayra, she advised that Abu Jasmine should approach the Indian Embassy, Turkey, pretending to be a tourist who lost his passport (as Abu Jasmine also destroyed his passport). Later, Abu Jasmine told PW34 that though he went to the Indian Embassy (as per the email, he went to the Consulate, not Embassy), their plan did not work as the Embassy people did not believe the said explanation, as he was not able to produce a return ticket which is invariably be available with all tourists.

At this juncture, Abu Jasmine asked PW34 to arrange money or to procure a return ticket. Abu Jasmine had also sent him a scanned copy of his passport for arranging the ticket, from which PW34 understood the actual identity of Abu Jasmine as the accused. But PW34 did not arrange money or return ticket. (PW34, who was conversant with the colour photo of the accused from his passport, identified the accused during trial). PW34 has also contacted the brother of Abu Jasmine from a public telephone booth in the number given by the accused.

156. Later, the accused informed PW34 that he got money from his brother and thereby he arranged a ticket. During September 2015, PW34 received a WhatsApp call from the accused and then he said that he reached Mumbai and was able to get through the airport security checking without any issues. After two weeks, the accused called him from a land-line number in Tamil Nadu and informed that he reached home and his wife was doing well. In December 2015, he again called PW34 from a mobile phone and told that he got a job in a jewellery shop. The accused further expressed his desire to meet PW34 and asked his number and he also asked for money. At this point, PW34 felt suspicion about his intention and thus he demanded the accused to stop contacting him and thereafter, he deleted all conversations made with him and also the mobile phone number of the accused which was saved in his phone. This is the version of PW34, when he was examined in chief.

157. MO25 mobile phone was seized by NIA from PW34, as per Exhibit P41, along with its SIM card and Memory card. When the cyber forensic report was shown to PW34, he

identified his phone number shown in that report against the name 'Euphra Trading Co.' as well as the number saved against the name 'Abu Jasmine'. He also identified e-mails received from the mail ID of the accused (usuphalikhan@gmail.com), including the one explaining about the incident occurred in the Indian Consulate, Turkey. He also identified e-mail from which he got the number of the brother of the accused. MO18(a), the scanned copy of the passport sent by the accused to PW34 in his e-mail, was also identified by the witness. PW34 had given Exhibit P44 series statement to the Magistrate under section 164 Cr.PC., as well, and it is consistent with the above version.

158. Based on the above evidence, the prosecution contends that the most vital aspect in the charge against the accused is thus proved through P34, as the accused has confessed him that he had migrated to or joined ISIS and was fighting for it in the battle field of Mosul. But it is a seminal principle that confession, even if made to a judicial Magistrate, it requires corroboration when it is retracted, at least in general particulars (**Aloke Nath Dutta and Others v. State of West Bengal: 2007 (12) SCC 230**, paragraph 111) and it must satisfy a 'double test' as to its voluntary nature and also that it is true and trustworthy (**Shankaria vs. State of Rajasthan: AIR 1978 SC 1248**). It is equally settled law that extra judicial confession is an extremely weak piece of evidence and a conviction on its basis alone is rarely recorded (**Ranjit Singh v. State of Punjab: 2011 (15) SCC 285**). This being the legal position, extra judicial confession said to have been made to an approver must be ordinarily a weakest piece of evidence, if not unacceptable. But this may differ if there are undeniable

corroborative evidence of sterling quality.

159. In this circumstance, it is necessary to examine in detail that whether the version of PW34 tallies with the proved circumstances and whether his version gets substantial corroboration from it. Before that, it is required to examine whether PW34 is a reliable witness, which is the first test to be satisfied before accepting the evidence of an approver.

160. The evidence of PW34 was very seriously challenged by the defence side. Shri.V.T.Raghunath, the learned counsel for the accused, mainly attacked his evidence on the following reasons. As the word ‘approver’ is not defined anywhere in the Cr.PC. or in the Evidence Act, it should be understood in the manner in which the legal dictionaries defines the term. In Black’s dictionary, the term ‘approver’ is defined as a ‘companion in guilt’, which means, there must be ‘togetherness’ or 'community of interest' in the acts of the approver and the accused. In the present case, none of the offences allegedly committed by the accused were done by both of them together. In other words, the mere fact that the accused and the approver had allegedly committed the same offence is not sufficient, but they must have done it together by sharing common intention or at least common object and they must be persons who could be jointly tried in a single case. Besides, the culpability of the approver must be lesser than the culpability of the accused, as the prime purpose of giving pardon is to ensure the conviction of an accused whose complicity is higher than the person who was given pardon. This is why it has become the settled law that at the stage of trial the court has to reassess whether the decision granting

pardon was actually necessary. If the person cited as an approver is not qualified as an approver, then that fact itself discredits the entire testimony made by him. As regards to the culpable role of the approver in comparison with the accused in this case, it is much higher, as he had also intended to join ISIS and that he conspired with Abu Amar to recruit people to ISIS for establishing a *vilayath* of ISIS in India and he sent money to many ISIS members for motivating their terrorist acts. NIA has not even verified his passport to know whether he had actually been to ISIS territories abroad. Further, he destroyed evidence by deleting all the conversations with ISIS members from his mobile phone, the learned defence counsel submitted. Reliance was placed on **CBI vs. Ashok Kumar Aggarwal (2013 (15) SCC 222)** in support of the above contentions.

161. I am unable to accept the said contentions for several reasons. If the prosecution allegations are believed for a moment, it cannot be said that the role of the approver is graver than the role of the accused. The allegations made against the accused is that he actually joined ISIS by reaching its territory in Iraq and he fought a war for them against the Government of Iraq and he returned to India with an ingenious motive and even attempted to collect enormous quantity of precursor explosive materials. The offence committed by the approver is not so grave. Moreover, when the evidence is thin and the Investigating Agency has to make a decision as to using one of the culprits as a witness against the other, they can act so only if one among the accused persons is willing to confess his guilt and to cooperate with the investigation. True, it is held in CBI vs. Ashok Kumar Aggarwal (supra) that *to a*

certain extent the Magistrate has to compare the culpability of the person seeking pardon qua the other co accused. But it is so held in a case where one of the accused himself approached the court with a request for granting pardon. Even then the court did not hold that it is an inviolable rule.

162. The contention that there is no unity or 'togetherness' of culpable acts in between the accused and the approver, is also against the facts. It is true that as per the prosecution case, the accused had joined ISIS even before he got acquainted with the approver. But PW34 has created a Telegram group making himself, the accused and another as members to support ISIS (Paragraph 8 and 23 of his evidence). As per his version, the accused as well as the other member of the group was fighting for ISIS at that time. Thus, PW34 has associated with them to further the activity of ISIS, and thereby supported the organisation. The said act would certainly amount to an offence punishable under section 38 and 39 of the UA(P) Act, which are also charged against the accused.

163. The learned Public Prosecutor submitted that PW34 had also abetted the accused in his safe return journey to India without getting caught by the lawful authorities, as he liaised with Umm Hurayra and the accused for misrepresenting the Consulate officials in Turkey. He also aided the accused for procuring a return flight ticket, by passing message to PW22 and that he destroyed the evidence later, the learned Prosecutor submitted. He further contended that the said acts of the approver amounts to screening the offender from legal punishments and causing disappearance of evidence and hence, in that way also PW34 is qualified to be a co-accused in

this case. At any rate, it is clear from the above discussion that there is no impropriety or illegality in examining PW34 as an approver, as his evidence has some crucial relevance against the accused and that he is a person who said to have shared culpability with the accused.

164. Further more, the term employed in section 306 of Cr.P.C is that "***any person*** *supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies*". The extent of the said terms has been considered by various constitutional courts in India. It is now settled that, by employing the term '*any persons...concerned in'*, the legislature has made it pellucid that he need not even be an accomplice. It is held by the Hon'ble High Court of Madras in **Senthamarai vs. S.Krishnaraj (2002 Crl.L.J 2375)** that, the term 'supposed' used in section 306 does not mean that such person should have actually participated in the crime. The very basis of the section is that a person who applies for pardon can be assumed to be directly or indirectly concerned in the offence, it is held. The assumption does not mean that he must actually be a party to the offence. As per the ***Commentary on Code of Criminal Procedure, 1973 by Sohoni*** (22nd Edition, LexisNexis, Page 4088) : *"The basis of granting pardon is not the extent of complicity in the crime. The principle underlying is the prevention of offenders from escaping punishment in grave cases for lack of evidence by grant of pardon to one of them. Pardon may, therefore, be granted to any person "supposed to have been directly or indirectly concerned in or privy to the offence". There is nothing in the section to warrant an inference that the person*

to whom pardon is tendered should be an accused or co-accused in the case in which he is proposed to be examined as a witness."

165. Apart from the said legal objections, the learned defence counsel challenged the reliability of PW34 for the matters bought out in evidence during his cross examination. The following aspects are mainly pressed. He came to know about this case in October 2016 when NIA called him to their office at Chennai. At that time, he was not aware about his status in this case, but he understood that he was in trouble. He did not enquire further with the NIA officials as to the purpose for which he was summoned. Though he had not taken any legal advice when he was directed to appear in front of the NIA officials, later his father consulted a lawyer who is his uncle. The legal advice was that he should disclose everything to the police. He attended the NIA office and was questioned for 12 or 13 days, but he was not taken into custody or that he was detained by them. NIA recorded his statement only three times, despite the fact that he was questioned many times thereafter. When he decided to become an approver, he was not aware that without his disclosure the charge in this case could not be established. His passport was not asked by NIA. It is not correct that the passport was not produced because it would reveal that he had already been to the territories of ISIS. He provided funds to many ISIS members. He did not remember the date on which Umm Hurayra revealed her identity. He was not aware about the connection of the accused with ISIS, until it was disclosed by Umm Hurayra. He was not confronted with a scanned copy of passport by NIA. There is no

Call Data Records in his phone as to the calls allegedly made by the accused. He created several social media groups for supporting ISIS. The name Abu Jasmine is common in social media. When it was suggested to PW34 that MO20 to MO23 jackets belonged to him, he denied it.

166. None of the aspects brought out in the cross examination is capable of challenging the intrinsic worth of the evidence of the witness. When considering the impact of these matters on his version in chief examination, I find no material which is sufficient to discredit the witness. First of all, the witness never deviated from his previous version recorded by the learned Magistrate under section 164 of Cr.PC. He was questioned by the NIA soon after the arrest of the accused and the defence side did not elicit any contradiction in his version. Significantly, most part of the version he has spoken to is supported by electronic evidence or other proved circumstances. However, the evidence available on record which corroborates his version is an aspect which requires detailed narration and hence it will be undertaken hereafter. In short, it can safely be concluded that PW34 is a reliable witness, but as a rule of prudence, it is ideal to seek corroboration of his version, before acting upon it.

Matters corroborating PW34 :

167. **(a) The evidence to show the connection of the accused with PW34 :-** Though it is strenuously contended by the defence side that the accused does not even know PW34 and the case is fabricated by NIA to save PW34, there is clear cut electronic evidence to show that the accused had prior acquaintance with PW34. As per Exhibit P48 Original Customer

Application Form and the copy of ID proof, proved through PW38, the Nodal officer of Idea Limited, mobile No. 9884956999 was subscribed by PW34. The said fact was not challenged in cross examination. PW34 also stated that the said phone belongs to him. It is earlier found that the mobile No. 7845389463 and 8807966893 were used by the accused. As per Exhibits P45 and P46 Call Data Records pertaining to the said numbers, it is obvious that the mobile number of PW34 and the said numbers of the accused were in contact with each other. PW34 accepted this in his evidence.

168. Besides the said evidence, there are many other materials to establish the connection between these two persons. MO2 mobile phone which was seized from the possession of the accused and proved to be used by him for a long period, contains the said mobile number of PW34, as being saved against the name 'Mohamed' (Name of PW34 is Mohamed Kamal). As per Exhibit P42 report and the evidence of PW43, the Scientist in C-DAC, in MO25 mobile phone of PW34, the number 8807966893 (which was proved to be used by the accused), was seen saved against the name 'Abu Jasmine'. The said number is also found deleted from MO25, but it was retrieved forensically by C-DAC.

169. As per the evidence of PW28 and PW45, NIA had extracted the contents of Gmail account of PW34, based on the disclosure made by him as regards to the password and user ID of that account. PW34 also stated about the said fact. As per Exhibit P35, which is the extraction proceedings 'mohdkamal4u@gmail.com' was the email ID of PW34. In MO18 (where the contents of Gmail account of the accused have been

extracted by PW45), there are several email communications between the accused and 'mohdkamal4u@gmail.com', about which a detailed discussion was made above.

170. From MO18 and Exhibit P25, it is evident that in one of the emails sent by the accused to his own email usuphalikhan@gmail.com (on 22.07.2015), there is a note containing names corresponding to certain numbers of few persons. In the said note, he saved the name and phone number of Mohamed Kamal, along with the name and number of Umm Hurayra, Jamaluddeen, 'Computer' etc. PW34 explained that the names and numbers shown in the said note are in respect of the telegram ID of PW34, Umm Hurayra, 'Abu Computer' etc. The said note is specifically marked as Exhibit P25(a) and this also manifests a pre-existing relationship between the accused and PW34.

171. **(b) Other facts corroborating the evidence of PW34** :- Almost all the facts spoken to by PW34 are independantly proved by the prosecution. As most of those matters are already found proved, it can be explained better with the help of a correlation chart.

Deposition of PW34 in court	**Corroborative facts already proved**
When PW34 became interested in ISIS, he started to use social media to get more information about it and accordingly, he came to know about a person nick named as 'Umm Hurayra'	Exhibit P25(a) shows that the accused, PW34 and Umm Hurayra are connected to each other. PW43 has extracted the contents of MO25 phone used by PW34 into Exhibit P59(a), from which it is evident that PW34 had used Facebook, Telegram, WhatsApp etc. in his phone and later he deleted them.

PW34 came to know about the accused from Umm Hurayra with the identity Abu Jasmine and then he contacted the accused.	In MO25 mobile phone of PW34, the phone number of the accused is seen saved as ‘Abu Jasmine’ and later deleted. The connection between them in the said manner is also established by Ext.P25(a).
PW34 and Abu Jasmine contacted each other in Telegram and WhatsApp. PW34 said that he was using the ID ‘Abu Jamaluddeen’ in Telegram. PW34 has created a telegram group of himself, the accused and a person named 'Abu Computer @ Abu Amar'	Exhibit P42 shows that PW34 had used the said applications, though he later deleted it. Albeit the accused urged that he never used WhatsApp, Ext.P54(a) proves otherwise. From Exhibit P25(a), it is evident that the name ‘Jamaluddeen’ with number +13137575593 and the name 'Computer' with a number are saved by the accused on 22.07.2015, when he was in Iraq.
The accused informed PW34 that he reached Mosul, Iraq by obtaining visa to Turkey from a travel agent in Kerala.	As per his Facebook chats, the accused had intended to join ISIS in Iraq in the very same manner. He actually reached Turkey. Visa was arranged through PW16, a Travel Agent in Kerala. Presence of the accused in Iraq during the relevant period is proved through digital evidence and from the statement given by the accused to PW29.
Accused revealed to PW34 that his wife is a Tamil girl and that she was mentally ill.	From the evidence of PW19, the wife of the accused, it is proved that she is a Tamil girl and was mentally not well.
The accused wanted to come back to India. Then he persistently sought permission from his Amir in ISIS, and this caused ISIS to jail him. At last they left him in a street, from where he crossed the border to Turkey.	From the statement given by the accused to PW29, it is proved that when he tried to come back he was jailed by ISIS and later, when he was released from jail, he returned to Istanbul. The mails sent by the accused shows that he reached back Turkey.

When the accused reached Istanbul, PW34 got advice from Umm Hurayra that the accused should approach Indian Embassy, Turkey with a story that he lost his passport. Later the accused told PW34 that though he went to the Embassy, their plan did not work, as Embassy people disbelieved the story when he failed to produce a return ticket.	From the email sent by the accused to PW34, which was extracted into MO18 as per Exhibit P25, it is proved that the accused communicated the said matter to PW34 as well as to Roshan Ashraf. Exhibit P25(a) shows that the accused was also connected to Um Hurraira.
The accused asked PW34 to arrange money or to procure a return ticket for which he sent a scanned copy of his passport to PW34.	The email with digital copy of the passport is retrieved. As per Exhibit P39 Bank statement of the accused, he had only about Rs.10,000/- in his account until Rs.35,000/- was deposited from Thodupuzha, on 18.09.2015. In three days, the accused flew back with air ticket in Turkish Airlines to Mumbai.
The accused asked PW34 to contact his brother.	From the emails sent by the accused to PW34, this fact is clearly proved
When the accused reached Mumbai, he contacted PW34 through a WhatsApp call and informed that he easily surpassed the airport security checking.	From the email sent by the accused to Roshan Ashraf, it is evident that he was scared of being caught by Indian police while reaching the airport
In December 2015, the accused called PW34 in a mobile phone and told that he got a job in a jewellery shop.	Exhibits P45 and P46 Call Data Records show that the accused called PW34 in his mobile phone. It is proved that the accused had been working in Gold AIK jewellery, Kadayanellur at that time

From this chart, it is evident that almost everything deposed by PW34 stands substantially corroborated. The only feature which remains not plainly and directly corroborated in the deposition of PW34 is that the accused had joined ISIS in Iraq and fought a warfare. However, this aspect is very much evident from the following proved circumstances, through which also an approver can be corroborated.

172. **Proved facts - a quick look :** As it was his cherished desire to join ISIS in Iraq, and since there was no airline services to Iraq, the accused had devised a plan to visit Istanbul, Turkey and then to reach Iraq by crossing the border of Turkey, with the help of ISIS emissaries. Afterwards, the accused has carried out his journey to Istanbul, Turkey with a tourist visa for a fortnight, and later he reached Iraq as per his plan. He returned to India only after 5 months. He did not reveal to his near relatives that he was going to Turkey or Iraq and instead, he made them believe that he was going to perform *Umrah* in Saudi Arabia. When it is shown that the accused had aspired to get trained by ISIS mercenaries, it is in evidence that while undergoing a training in Iraq, he has got a serious injury on his left knee. It is also proved that he was in the company of ISIS while he was in Iraq and during that period, he came in a close proximity to an explosion. The wearing apparels, all are made in Turkey, that all recovered on the basis of his disclosure statement, contained prominent chemical compounds of explosives. Later, he approached the Consulate of India in Turkey with a false story that he lost his passport. At that period, he was scared of getting his conversations intercepted. He tried to tutor his relatives to give

an acceptable explanation to the Consular officials in case they cross check why his stay in Turkey was so prolonged. He also suspected that he would be caught by the Indian police on his arrival in India. His subsequent conduct while in India that, by using fake SIM cards he contacted PW6 and PW7 for procuring explosive materials, in the backdrop of his Facebook chat that he wanted to become a '*Jihadi* in India, as muslims are suffering a lot', dispels all misgivings, if any, remaining. To crown it all, the accused has offered false and baseless explanations to all incriminating circumstances put to him.

173. **Inference from the proved facts:-** All the circumstances enumerated above are cogently and firmly established by the prosecution. Those circumstances are of a definite tendency to unerringly pointing towards the fact that the accused had joined ISIS in Iraq and they are completely inconsistent with his plea of innocence. When the circumstances are taken cumulatively, it forms a chain so complete that there is no escape from the inference that the accused had joined ISIS in Iraq.

174. It is a seminal principle of criminal law that a fact could be considered as proved not always on the basis of direct and substantive statements spoken through the witnesses. Quite often, when the circumstances are such that, it is done by drawing inferences from the proved facts. In certain cases, it will be done by raising presumptions under sections 114 of the Indian Evidence Act, regard being had to the common course of natural events and human conduct, in their relation to the facts of each case. It is well settled that presumptive inferences or presumption of facts are not alien to criminal courts, when

foundational facts necessitating such presumptions are established by the prosecution (See **State of W.B. v. Mir Mohammad Omar (2000 (8) SCC 382)**, paragraph 31 to 33).

175. At any rate, in the present case, the prosecution is not completely depending on circumstantial evidence to prove its case. They are able to bring the reliable evidence of PW34, which is precisely consistent with the inference drawn from the said circumstances, and the facts which are otherwise directly proved. Prosecution is in fact depending on those circumstances only to corroborate PW34. Whatever be it, the resultant effect is that, when the core of the charge is convincingly proved by PW34, most of the facts narrated by him are independently corroborated by the other proved circumstances, which are in fact capable of establishing the charge on their own.

176. It cannot be forgotten that necessity to seek corroboration of an approver is only to ensure that the story he told in the court is true. It is thus idle to demand that the entire version of the approver should be corroborated with exactitude, as expecting corroboration of the said extent makes the purpose of examination of the approver a superfluous exercise and hence, it is not the requirement of law. In **Rameshwar Kalyan Singh v. State of Rajastan (AIR 1952 SC 54)**, the Hon'ble Apex Court held that the court has to deal with the nature and extent of the corroboration required for accepting the evidence of the accomplice with the rider that it would be impossible and dangerous to formulate a straight jacket formula as it must necessarily vary with the circumstances of each case. The court referred to the judgment of Lord Reading

in **Rex v. Baskerville (1916 (2) KB 658)** and approved the similar rule laid down therein. In **Piara Singh v. State of Punjab (AIR 1969 SC 961)**, the Hon'ble Supreme Court further held that when seeking corroboration of the version of an approver, the court need not insist for direct evidence, as circumstantial evidence is sufficient for corroboration.

177. In **Sankar v. State of Tamilnadu (1994 (4) SCC 478)**, the Hon'ble Supreme Court held that though ordinarily the approver's statement has to be corroborated in material particulars, the corroboration need not be of a kind which proves the offence against the accused. The court also held that it would be sufficient *if it connects or tends to connect* the accused with the crime and what is required is only that there should be sufficient corroborative evidence to ensure that the approver is speaking the truth with regard to the accused whom he seeks to implicate, and it is not necessary that there should be independent corroboration on every material circumstance. It is also held that it need not consist of evidence which is standing alone would be sufficient to justify the conviction.

178. In **A. Deivendran v. State of Tamil Nadu (AIR 1998 SC 2821)**, it is held by the Hon'ble Apex Court that all that is required to act upon the evidence of approver is that there must be some additional evidence rendering it probable that the story of the accomplice is true, and it could be both by direct or circumstantial evidence. The Apex court in **Sarwan Singh v. State of Punjab** (supra) held that it is not right to expect that the whole story told by him must be covered, because, such a view would make the evidence of an

accomplice redundant. While holding that as a rule of prudence the court should seek corroboration of the evidence of approver, the larger Bench of the Hon'ble Supreme Court in Ram Narain case (supra) also made it further clear that the evidence of corroboration needs only to *'connect or tend to connect the accused with the crime charged'*. Thus, the law does not insist for concrete or absolute proof in the matter of corroboration, but the corroborating circumstance must have a tendency or trend to connect the accused.

179. As contended by Shri.V.T. Raghunath, the trail court has to consider the actual role of an approver to make sure that he is not a planted witness. But in this case, there is unchallengeable evidence that he was in privy to certain offences charged against the accused. His complicity in rigging a neat passage to the accused back to India is also well demonstrated by the digital and parol evidence.

180. **Conclusion:** It is observed above that the proved circumstances themselves are sufficient to establish the charge to a greater extent. When the prosecution stands in this vantage point, PW34 gives them all that is required to literally prove the case beyond reasonable doubt. To sum up, the facts stand proved as above, when read together with the version of PW34, make the assertions of the prosecution impenetrable, as they complement each other in perfect unison. Thus, the inescapable conclusion is that, the accused had joined ISIS in Iraq after reaching Istanbul on 08.04.2015, by crossing the border of Turkey. The said act, together with his role as a member in the Telegram group created by PW34 to support

ISIS, proves that the accused had supported, and associated with, ISIS.

181. **Point No. 11 (Did the accused agree to do any illegal acts with PW34 or any other persons) :-** As per the prosecution case, the accused had conspired with many persons to join ISIS. They also contend that PW34 got connected to the accused pursuant to a conspiracy hatched between himself, a person named Umm Hurayra and the accused, and as a result, they supported ISIS. Nevertheless, it is forcefully submitted by Shri.V.T.Raghunath that in order to establish the offence of conspiracy, the prosecution has to prove that there was an agreement between two or more persons for the commission of an offence and in proof of such an agreement, mere suspicions, surmises or inferences which are unsupported by cogent evidence, are not sufficient. He also contended that the conspiracy has to be put into action and in the absence of such actions, mere thoughts or intention shared by two persons are not enough. The learned counsel also adverted to the decision in **P.K.Narayanan vs. State of Kerala (1995 (1) SCC 142 and Shyamal Ghosh vs. State of W.B (2012 (7) SCC 646).**

182. There is no dispute in the proposition that even for proving the existence of an agreement to do an illegal act by the parties to a criminal conspiracy, the prosecution should establish sufficient materials which compel the court to draw an inference that such an agreement was in existence. Conspiracy to commit an offence is usually hatched in secrecy and thus it is extremely difficult to get direct evidence, but it is not an excuse to act upon mere suspicion, surmises or inferences

without the support of convincing evidence. At the same time, it is equally settled law that the offence of criminal conspiracy can be proved largely by drawing inference from the acts committed by the conspirators in pursuance of a common desire (**Mohammad Yusuf vs. State of Maharashtra: AIR 1971 SC 885, V.C. Shukla vs. State: 1980 (2) SCC 665 and State of Tamil Nadu v. Nalini (1999 (5) SCC 253)**). In the decision in P.K.Narayanan vs. State of Kerala (supra), the Hon'ble Supreme Court has cautioned only that, inference should not be drawn, unsupported by reliable evidence.

183. In the present case, the situation is entirely different. It is proved beyond any doubt that the accused interacted with several persons abroad through his Facebook account and he finally chalked out a plan to visit Turkey to join ISIS at Iraq. While discussing the previous points, it was observed that the accused had made a conversation with one Aboo Musaddas on 08.12.2014. When the accused informed his desire to join ISIS to Aboo Musaddas, he agreed to make all necessary arrangements and asked the accused to reach Istanbul. He said, the accused should contact him once he reached Istanbul and then someone would take him to 'Al Dawlla'. Of course, it is pointed out by the learned defence counsel that ISIS was not enlisted in the first schedule of the UA(P) Act on the date on which the accused made the above said conversation. But at the time when he actually undertook the journey, ISIS was clearly proscribed by the Government of India and its name was included in the first schedule as Item No. 38. The accused commenced his journey on 08.04.2015, which is nearly two months after the date of such inclusion of ISIS into the

schedule. It is already proved that he crossed the border of Turkey to Iraq and joined ISIS and then he flew back to India by misrepresenting the Consulate personnel to obtain MO9(b) Emergency Certificate issued by the Consul General. From the facts and circumstances proved in this case, it is clearly inferable that the accused joined ISIS as a result of an agreement with many other persons, including the said Aboo Musaddas. It can easily be inferred from the proved circumstances that the accused crossed the border of Iraq without any travel authority and pursuant to the agreement he made with such persons. It is settled law that even if the agreed act is not illegal, but it was agreed to do by illegal means and some act has been done in pursuance of such an agreement, then it amounts to a criminal conspiracy.

184. Further, it is proved that PW34 has created a Telegram group to support ISIS and the accused and another person were members of that group. It is clear from the evidence of PW34 that he got acquaintance with the accused only through a person named Umm Hurayra. The details of the said lady as well as PW34 are seen saved by the accused in Exhibit P25(a). All these acts clearly reveal the existence of an agreement to commit many illegal acts. The inference drawn above is not mere speculation or surmise, but it is the sole factual inference which could be drawn from the proved facts. All the above said acts had been occurred subsequent to the inclusion of ISIS in the first schedule of UA(P) Act and hence, there is no excuse for doing anyone of such acts.

185. On the top of it, in furtherance of his discussion with Umm Hurayra, PW34 asked the accused to approach the Indian

Embassy/Consulate in Turkey and to present a false story, to enable him to avert the legal consequences of joining ISIS. The accused and PW34 had reached to an agreement to make an easy passage to the accused back to India, and as a result, PW34 communicated certain messages to the brother of the accused, and ultimately the accused obtained money in his bank account, with which he obtained a return ticket and safely landed in Mumbai. All these acts clearly reveal an agreement to do illegal acts. Hence, the point is found in the affirmative.

186. **Point No. 12 (Did the accused prepare to wage war against Government of India) :-** It is forcefully submitted by Shri.Arjun Ambalapatta that the evidence adduced by the prosecution is enough to prove that the accused had prepared to wage war against the Government of India. It is also pointed out that the accused came back to India with a definite intention to execute the plans of ISIS in India. The moment when the accused landed India, he contacted PW34, a person known to the accused as an activist of ISIS in India, and it depicts the purpose for which he came back, it is urged. The accused has arranged two fake SIM cards soon thereafter and by using the same, he attempted to procure explosives and this also unmistakably demonstrates that the accused had prepared to wage war against Government of India by lone wolf attack or otherwise, as he certainly longed to become a *mujahideen*, the learned Senior Public Prosecutor submitted.

187. It is also argued by the prosecution that the quantity of explosives which the accused attempted to obtain was enough to cause an explosion for a radius of 5 Km. The accused

has offered a completely false explanation when he was questioned by this court and then he took a stand that he had no connection with Gold AIK Jewellery or PW6 and PW7 and that he has no connection whatsoever with MO2(a) and MO14(a) fake SIM cards, and when all these facts are proved otherwise, the said false stand also supplies a link in favour of the prosecution evidence, it is contended. He placed reliance on the decision in **Hardik Patel vs. State of Gujarat (MANU/GJ/ 0877/2015).**

188. The said contentions are fervently assailed by Shri.V.T.Raghunath. For him, waging war against Government of India is a very serious act and thus the preparation for waging such a war means some acts which are of extensive magnitude to match the ultimate object and none of the prerequisites of the statutory provision is attracted in this case.

189. It is indeed proved that the accused has attempted to purchase chlorate, sulphur, Aluminium powder and phosphorous from PW7. It is also proved that those materials can cause large scale explosions. It is also in evidence that the accused procured fake SIM cards and with which he contacted PW6 and PW7 for getting the explosive chemical materials. But at the same time, none of the said acts is sufficient to constitute "preparation to wage war against the Government of India", which is the essential ingredient of the offence under section 122 of IPC, in the context of this case. The evidence available shows only that the accused herein had, at the best, *prepared* to obtain explosives, and he had obtained two fake SIM cards, might be for the purpose.

190. In **State v. Navjot Sandhu (AIR 2005 SC 3820)**,

the Hon’ble Supreme Court considered the meaning of the term 'waging war' and held as follows :

> “S.121 and 121A occur in the chapter "Offences against the State". The public peace is disturbed and the normal channels of the Government are disrupted by such offences which are aimed at subverting the authority of the Government or paralysing the constitutional machinery. The expression "war" preceded by the verb "wages" admits of many shades of meaning and defies a definition with exactitude though it appeared to be an unambiguous phraseology to the Indian Law Commissioners who examined the draft Penal Code in 1847. The Law Commissioners observed: "We conceive the term 'wages war against the Government' naturally to import a person arraying himself in defiance of the Government in like manner and by like means as a foreign enemy would do, and it seems to us, we presume it did to the authors of the Code that any definition of the term so unambiguous would be superfluous."

The Hon’ble Supreme Court in **Ajmal Kasab v. State of Maharashtra (2012 (9) SCC 1)** also held that though a terrorist act and an act of waging war against Government of India may have some overlapping features, a terrorist act may not always be an act of waging war against Government of India, and vice-versa. In **State v. Navjot Sandhu (Supra),** the Apex Court further held that the degree of animus or intent and the magnitude of the acts done or attempted to be done would assume some relevance in order to consider whether the terrorist acts give rise to a state of war.

191. This being the legal requirements to attract the offence under section 122 IPC, the above said acts of the accused would not invite punishment under section 122 of IPC. It is in fact difficult to hold that his acts would, in the strict legal sense, amount even to an *attempt* to procure *explosives*. He

asked PW7 to arrange the precursor chemicals, but PW7 decided not to do it. There was no exchange of price or further action from the part of the accused, other than making few phone calls. Anyway, his *preparation* is limited only to collect some components of explosives. There is no evidence to assert that the fake SIM cards were collected for the exact purpose alleged in the charge. Hence, none of his moves gets translated to an act constituting *preparation* of waging war against India.

192. Had he actually collected explosives of enormous quantity with an intention to cause wide-ranging destruction in any part of India, the argument advanced by the prosecution could have been entertained to a certain extent, as the accused wanted to become a *mujahideen* or a *'jihadi'* as a way out to eradicate the perceived sufferings of a section of people in India. In the absence of such supervening acts, the mere readiness of the accused to get chemical compounds of explosives, or his act of obtaining fake SIM cards, will not constitute the offence of preparation to wage war against the Government of India. The point is found in the negative.

193. **Point No. 13 (Did the accused abet waging of war against Iraq) :-** As per the prosecution, the accused has become a member of ISIS in Iraq and waged war against the Government of Iraq, along with ISIS. In order to prove the said allegation, the prosecution mainly relies on the conversations made by the accused in his Facebook account and also the facts proved through PW34 and PW46, a former Diplomat in the Indian Embassy, Baghdad (whose identity is protected from publication, as per an order in Crl.M.P. 155/2020). They argue

further, the medical examination on the body of the accused and the scientific examination on his wearing apparels clearly reveal that what PW34 deposed (the confession of the accused that he was engaged in the battle field of ISIS) is absolutely true.

194. Nevertheless, it is submitted by Shri.V.T.Raghunath that a criminal charge could not be treated as proved by mere assumptions and hence, even when the prosecution succeeds to prove that the accused joined ISIS in Iraq, it is not enough to conclude that he had waged a war against the Government of Iraq. Unless the prosecution convincingly proves that the accused had used arms or ammunitions and waged a warfare against the Government machineries in Iraq, the said charge could not be established, he persuasively contended. It is also urged that there is absolutely no evidence as to the offensive acts, if any, done by the accused in Iraq and hence, no finding is possible against him for an offence punishable under section 125 of the IPC.

195. It is quite evident from the messages sent by the accused in his Facebook that he wished to join ISIS with a definite intention to further its activities and even to "kill enemies of Islam" (Chat with Rozh DC, 08.12.2014). He also declared that (Chat with Aboo Musaddas on 08.12.2014) *"I want to be mujahideen*". The term 'mujahideen' means *'Islamic guerilla fighters especially in the Middle East' -* (*Merriam-Webster Dictionary).* It is already found that the accused had joined ISIS with the intention to further its activity in Iraq, someday after 8th April 2015 and he returned at some day in September 2015.

196. To prove the activities of ISIS in Iraq and the situation prevailing there during the time the accused had reached Iraq, the prosecution examined PW46, an Indian Foreign Service officer, who worked as a First Secretary in the Indian Embassy in Baghdad, Iraq, during April 2015 to February 2017. For him, Iraq is an Asian country having friendly relationship with India in all fields for a long time and it is a country at peace with Government of India. It is proved through this witness that from 2014 onwards and until he returned from Baghdad, the situation in Iraq was war like and during that period, almost one third of Iraq was captured by ISIS by using huge amount of weaponry. Mosul, one of the major cities of Iraq, was completely under the control of ISIS and the Government officials of Iraq could not even access the said city, as it was sealed by ISIS. PW46 further said, he worked very near to the border of Mosul as part of his mission to rescue 39 Indians, who were missing in the ISIS occupied Iraq, but at that time, he was not able to go ISIS occupied area, because there was bombing, shelling and firing etc. ISIS had reached very near to Baghdad in their attempt to capture it, but it was defended by the Government of Iraq and all its allies. He also deposed that the main object of ISIS in Iraq was to establish a caliphate by overthrowing the existing Government and for that purpose, they made extensive propagation through social media and recruited thousands of persons across the globe. He also deposed that Exhibits P75 to P81 documents are part of United Nation’s report regarding the situation of Iraq pertaining to ISIS, and it corroborates his account.

197. Though it was extracted in the cross-examination that there was no document in the Indian Embassy pertaining to the cases registered by the Iraq police against ISIS aggression, there is nothing on record to dispel the credit of PW46. It is thus fairly established by the prosecution that ISIS had seceded a large part of Iraq during 2014 and it was waging a war against the Government of Iraq for seizing the remaining area as well. It is also in evidence that ISIS was inviting support of youthful persons from different parts of the globe and as a result, thousands of persons like the accused had reached Mosul, the virtual capital of the territory of Iraq under the occupation of ISIS insurgents.

198. The offence defined under section 125 of the Indian Penal Code comprises not only waging war against any Asiatic Power in alliance or at peace with India, but it includes abetment of waging such a war. Hence, in this case, it is in fact enough for the prosecution to show that the accused had abetted a combat against Government of Iraq, to establish his complicity under section 125 of IPC. The term 'abetment' is defined in section 107 of IPC. As per the definition, if a person *intentionally aids* the doing of a thing, he abets it. It means, if the accused had intentionally aided ISIS in its war against the Government of Iraq, it is sufficient to attract section 125.

199. As rightly pointed out by Shri.Arjun Ambalapatta, the illustration to section 121 of IPC adumbrates that, if a person joins an insurrection against the Government of a country, it amounts to waging war. Thus, use of weapon or ammunitions is immaterial and what is crucial is his participation in the war or insurrection against the Government established by law. As

contended by the prosecution, the result of medical examination on the body of the accused and the scientific examination on the warm clothes connected to him gives credence to the version of PW34 that the accused was deployed by ISIS in its war-front.

200. When the prosecution has proved the situation prevailing in Iraq during the time when the accused had joined ISIS, it may not be fair to compel the prosecution to bring further evidence in this regard, in addition to the above facts, especially when the accused has thoroughly failed to make a reasonable explanation as to his presence in Iraq and his company with ISIS. In fact, he made an explanation, but it is proved as false. Taking into account all these facts, this court cannot forget the resounding words of the Hon'ble Supreme Court in **State of W.B. v. Mir Mohammad Omar (2000 (8) SCC 382) that:**

> "The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage the offenders in serious offences would be the major beneficiaries, and the society would be the casualty...Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reach a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is

> incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened."

201. War is an aggressive movement comprising ever so many minute and major actions resulting in a violent upraising or mutiny against the ruling authority. Every person who joins in any of the department of such a movement with the intention to strengthen it, is certainly taking part in the combat against the authority in power. Hence, it is immaterial that whether he used any arms or not, or even whether the war was asymmetrical or conventional.

202. The term *'Asiatic Power in alliance or at peace with*' is not defined in IPC. Reference made to law books and websites makes it appear that it has become an archaic term. Even PW46, a senior Diplomat of India, is not familiar with that usage. Thus, it should be given a pragmatic meaning, being thoughtful of the purpose for which it is still retained in IPC, in spite of several amendments made to it. From section 125, the term 'Queen' was replaced with 'the Government of India', in 1950, and it clearly indicates the intention of the lawmaker to retain the penal provision, with all its vigor. It is thus logical to understand that 'Asiatic power' now denotes any Asian country. *Dr. Harisingh Gour, in his commentary on Indian Penal Code* (Law Publishers (India), 11th Edition, page 1265), writes that this section was clause 114 in the Original Bill and it was intended to protect friendly Asiatic powers from the ravages of Indian citizens who may make excursion to their territory, and then run back to the security of their home. When it is proved through PW46 that the Government of Iraq, being an Asian

country, is at peace with the Government of India for a very long period, waging war against it by a citizen of India must be an offence attracting the consequence provided in section 125 IPC.

203. To sum up, from all the proved circumstances, the only possible inference is that at the moment when the accused had transgressed to the soil of the ISIS occupied Iraq with his proved motive to join ISIS, he had actually started to abet the ongoing war lead by ISIS against the Government of Iraq, an Asiatic Power at peace with the Government of India. The evidence of PW34, which is substantially corroborated by digital, scientific and oral evidence, lends support to ultimately find that the accused had fought a battle for ISIS against the Government of Iraq.

204. **Point No. 14 (What, if any, are the offences committed by the accused) :-** It is found above that the accused had, along with some other persons, agreed to do certain illegal acts, including to join ISIS and to support and associate with it. The said act amounts to an offence punishable under section 120B of IPC r/w sections 20, 38 and 39 of the UA(P) Act. It is clear from section 40 of the IPC that the term ‘offence’ used under Chapter VA of the IPC denotes a thing punishable not only under the IPC, but also under other special or local law.

205. It is also found that the accused had joined ISIS, a proscribed terrorist organisation. Becoming a member in a terrorist organisation, which is involved in terrorist act, is the offence made punishable under section 20 of the UA(P) Act. Membership in a terror outfit has to be understood in the

practical sense of physical joining in a group by sharing the community of interest and acting as one among them for achieving their prime objects. We are familiar with the situation in which a person is said to be a *member* of an unlawful assembly within the meaning of sections 141 and 149 of the IPC. Here, the accused has actually joined the terrorist group in Iraq by crossing the border of Turkey, and got trained by ISIS. His unequivocal motive to do hijra to ISIS in Iraq and 'to become a *mujahideen*', a guerrilla fighter, is visible from his previous messages. The evidence shows that it is nothing short of migration to ISIS by severing his tie up with his homeland. Thus, he has certainly become a *member* of that group. This inference is completely supported by the evidence of PW34 and other proved circumstances.

206. To attract section 20 of the UA(P) Act, it should also be proved that the terrorist organisation in which the accused has become a member, is *involved in terrorist act*. Section 35(2) of the UA(P) Act provides that the Central Government can proscribe an organisation only if it believes that the organisation is involved in terrorism. ISIS is obviously included in the first schedule by the Government of India, presumably after arriving at a satisfaction that it is an organisation involved in terrorism. It is proved by PW46 that ISIS had been indulged in waging war by using bombs and explosives and it even captured a part of Iraq by waging a war against it. Thus, when the accused became a member of ISIS, he has inevitably committed the offence under section 20 of the UA(P) Act.

207. The aforesaid acts of the accused certainly amount to the offences of associating oneself with a terrorist

organisation with intent to further its activity which is punishable under section 38 of the UA(P) Act. Likewise, the proved acts of the accused extent to 'the support given to a terrorist organisation' with intent to further its activities, and thus it is an offence punishable under section 39 of the UA(P) Act. It is also evident that the accused had committed the offence of abetting to wage a war against the Government of Iraq, an Asiatic Power at peace with the Government of India, which is also an offence, punishable under section 125 of the IPC. But, even though the accused, while in India, had declared that he wanted to become a *'jihadi'* in India, and that he was ready to collect precursor explosives or most advanced sniper rifle, the offence of preparation to wage war against the Government of India, which is punishable under section 122 IPC, is not got attracted.

208. The discussion made above clearly establishes that the prosecution has proved beyond any doubt that the accused has committed all the offences charged against him, except the offence punishable under section 122 of the IPC.

209. Before parting with the case, I must place on record that Shri. Arjun Ambalapatta, the learned Senior Public Prosecutor of NIA, has taken earnest efforts to assist the court whenever it was required. By aptly resorting to the plenary provisions of procedural law, he exemplified the ideal role of a prosecutor when something more is required during trial, than what is brought on record by the Investigator. Shri.V.T.Raghunath, the learned defence counsel, has also helped the court very well with his vast experience in criminal trial. Shri. A.P.Shoukkath Ali, the Investigating Officer, deserves

special appreciation, as he has taken painstaking efforts to bring on record all important materials, despite the offence was being committed abroad. This case illustrates that the criminal investigation, as also its prosecution or defence, is a relentless pursuit of perfection and devotion.

210. Therefore, the accused is found guilty and convicted under section 120B r/w sections 20, 38 and 39 of the UA(P) Act, section 125 of the Indian Penal Code and sections 20, 38 and 39 of the UA(P) Act. The accused is acquitted of the offence punishable under section 122 of the Indian Penal Code.

Dictated to the Confidential Asst., transcribed and typewritten by her, corrected and pronounced by me in open court, this the 25th day of September, 2020.

Sd/-
P. Krishna Kumar
Judge

211. **Point No. 15 (Sentence) :-** Heard the convict on question of sentence. The convict submits, he is neither an extremist nor a terrorist, and he knows that peace only begets peace, not violence. He said, he did not commit any offence against this country or its people, or even against any other country. He further states, while accepting the judgment of this court, he leaves it to the revision of the ultimate court, *the Almighty*. He said, there is no God but Allah, and Mohamed is his messenger, and thus truth would prevail. He submits, he expects that this court will take into account his young age, good conduct and his duty to look after his parents, while fixing the punishment.

212. It is argued by the learned Public Prosecutor that the convict is a person who declared that he wanted to become a 'jihadi' in India for the perceived reason that his brothers are suffering here. He is the person who tried to buy a lethal sniper, even while in India, and he is the man who declared that he likes to become a guerrilla fighter for killing the enemies of ISIS, the learned Public Prosecutor submitted. Soon after reaching back India, he tried to collect 50Kg each of chlorate, phosphorous, sulphur and aluminium powder, which could destruct an area up to 5Km radius, he recapitulated. It is also urged that, being a person who got radicalised by ISIS and also got trained by them, the convict should not be left to the free society after a brief stint in the prison, and thus, nothing short of life sentence would satiate the legislative intent.

213. Learned counsel for the convict fervently submitted that there is no proof that the convict has committed any offence in his homeland. He is also acquitted of the charge for the offence of preparation to wage war against the Government of India, he pointed out. Though Section 20 of the UA (P) Act provides life imprisonment as punishment, the Parliament has left unbridled discretion to the court by using the term 'which **may extent to** imprisonment for life' and thus any shorter sentence is also permissible especially when no minimum sentence is prescribed, the learned counsel urged.

214. It is also highlighted that sections 38 and 39 are enacted with a cap on maximum punishment viz. 10 years, even when the provisions are meant to deal with persons who have associated with or supported a terror outfit, with certain

specified objects. However, to attract section 20 of the UA(P) Act, one need not do any such positive act, as his mere membership is sufficient, and hence, the said sealing on punishment is virtually ingrained even in section 20, in cases where there is no positive proof that the convict has committed any terrorist act, than being a mere member in a terrorist organisation, the learned counsel contented. Section 125 IPC consists of three modes of punishments (life imprisonment, imprisonment up to 7 years and fine only), each of them suits only to the corresponding offensive act (waging war, attempts to wage war and abets to wage war), and since there is no positive proof of waging of war by the convict, the punishment must be limited to the second or third component, it is submitted.

215. The argument of Shri.V.T.Raghunath is attractive on its first sight, but it is proved that the convict has physically joined the terror outfit and waged a war, than being its remote indolent partner. Even then, I am tempted to show leniency to the convict for his younger age, and also his impressive conduct during the entire trial. But it is the arduous duty of every trial court to balance between the larger societal interest and the individual plight of the convict. In **Ravi v. State of Maharashtra (MANU/SC /1368/2019),** the Hon'ble Supreme Court has held that the civic society has a ‘fundamental’ and ‘human’ right to live free from any kind of psycho fear, threat, danger or insecurity at the hands of criminals, and that the society legitimately expects that the court would apply the doctrine of proportionality, by imposing suitable and deterrent punishments which commensurate with the gravity of the

offence, without being influenced by the personal predilictions of the Judge.

216. As rightly pointed out by the learned Public Prosecutor, the convict has declared in no uncertain words that he wanted to be a ***'Jihadi'*** **in India**, for certain reasons perceived by him. His attempt to procure precursor explosives in huge quantities, soon after reaching back from Iraq, is also a very disturbing fact, especially when a witness having scientific background opined that the said quantity was enough to devastate a large area. How easily he deceived the Consul General in Turkey, his dexterity to keep the journey of no return (as he believed then) a secret from all his kin and his foresightedness to use a mobile phone of a particular brand presumably for all his vital communications (till date, the Cyber Division of NIA or the well trained Cyber Scientist of C-DAC is unable to access any information from it, except that it was used to make communications with certain persons), demonstrate that normal methods of reformation will be ineffective for him. When these facts are considered together with his effort to buy Online a most advanced American sniper rifle while he is in India, which is lethal even at the range of 2.2Kms (Cheytac 200), the question of leniency in sentence has become absolutely foreclosed. For those reasons, it is difficult to discard the contention of the prosecution that the convict is a person who is not only radicalised by ISIS, but as well trained by their specialised mercenaries, and thus he could execute any evil schemes here, if he is set at large in a short span.

217. The insolent boldness shown by the convict to plan meticulously his journey to ISIS and to execute it with perfection, his temerity to come back to India without being caught by any authorities and his commitment to pursue the offensive objects he cherished, make this court very cautions and to be society centric, while fixing the quantum of punishment. It being the sovereign function, rather the solemn duty, of a criminal court to adequately insulate the society from the menace of terrorism and the aggravated forms of crimes, individual interest of the convict cannot be given undue privilege. Thus, a message of deterrence, as well as a solid measure for the safety of the society, has to be infused into the sentence.

218. The act of the convict is a blot on the cultural conscience of this State. It is also a blow to its pride as one of the most progressive societies in the nation. It is a painful realisation that youthful people are indoctrinated by such extremist ideologies and they are even prepared to renounce the eternal tie with their mother country, seemingly on their wishful thought that they could embrace their own paradise in that attempt. Let us hope that Shri.Subahani Haja, once duly reformed, will tell them that the best rule of paradise must be the rule of law preserved by the Constitution of India.

In the result,

(1) The convict is sentenced to undergo imprisonment for life and to pay a fine of Rs.1,00,000/- with default prison term for one month under section 20 of the UA(P) Act.

(2) He is also sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs.1,00,000/- with default prison term for one month under section 125 of IPC.

(3) He is further sentenced for rigorous imprisonment for five years and to pay a fine of Rs.10,000/- with default prison term for one month under section 120B of the IPC r/w sections 20, 38 and 39 of the UA(P) Act.

(4) The convict is also sentenced to undergo rigorous imprisonment for 7 years each under section 38 and 39 of the UA(P) Act.

(5) All the substantive sentences imposed on the convict shall run concurrently.

(6) He is entitled to get set off under section 428 of the Cr.PC for the entire period during which he has been detained in this case (From 05.10.2016 till today), if appropriate orders are passed by the competent authority under section 432 or section 433 of the Cr.P.C.

(7) MO25 series will be returned to PW34 on filing proper application within a period of 6 months from today. If there is no such application, those material objects shall be disposed of as per rules.

(8) All other MOs will be retained with the records of this case, as the investigation against some of the accused persons is pending. The prosecution shall obtain certified copies of the documents in this case within the prescribed time limit for appeal, for future need, if any.

(9) The directions made for the disposal of the MOs will come into effect only after the expiry of the appeal period.

Dictated to the Confidential Asst., transcribed and typewritten by her, corrected and pronounced by me in open court, this the 28th day of September, 2020.

Sd/-
P. Krishna Kumar
Judge

APPENDIX

Prosecution Exhibits :-

P1	01-10-2016	Certified copy of complaint filed by PW1
P2	05-10-2016	Arrest memo of Subahani Haja
P3	05-10-2016	Personal search memo of Subahani Haja
P4	30-4-2016	Estimate memo(Bill) of AIK Jewellary
P5	21-01-17	Seizure Mahazar of Estimate Memo No.C1229
P6	01-10-2016	Certified true copy of Order No11011/29/2016-IS-IV issue by under secretary to Govt. of India
P7	21-03-2017	Sanction order No11011/29/2016-IS-IV issue by under secretary to Govt. of India
P8	03-10-2016	Seizure Mahazar for the seizure of Mobile phone(Blackberry from PW10 Sadhique
P9 series	11-10-2016	Portion of 161 statement of PW12
P10	03-10-2016	Search list.
P11	07-10-2016	Seizure Mahazar for the seizure of Medicine packer and Blackberry Mobile phone.
P11(a)	06-10-2016	Disclosure statement of Subahani Haja

P12	07-10-2016	Seizure Mahazar relating to the recovery of Hard disc from Gold AIK Jewellers.
P12(a)	06-10-2016	Disclosure statement of Subahani Haja.
P13	04-01-2017	Seizure Mahazar for the seizure of Diary and Inland letter
P14		Blue colour diary for the year 2016 (crompton)
P15	07-10-2016	Seizure Mahazar for the seizure of Diary (crompton)
P16		Visa Register (ledger)
P16(a)	17-10-2016	Kychit for the Visa Register
P17	02-04-2015	Copy of flight ticket (Saudi Arabian Airlines) document No89337309984.
P18	14-03-2015	Photocopy of confirmation letter given to the Visa officer, Consulate General of the Republic of Turkey, Mumbai by Haja Moideen, father of Subahani Haja.
P19		Photo copy of Passport No.G.4216884 of Subahani Haja.
P20	03-03-2015	Copy of letter given to the Visa officer, Consulate General of the Republic of Turkey, Mumbai by Subahani Haja.
P21	05-03-2015	Photocopy of License to conduct Industries, Factories and other business issued from Thodupuzha Municipality (In English)
P21(a)	05-03-2015	Photocopy of License to conduct Industries, Factories and other business issued from Thodupuzha Municipality (In Malayalam)
P22		Photocopy of Account statement of Subahani Haja Account No.1028104000010089.
P23		Photocopy of Hotel Booking details “ Booking Com.” Commagene Hotel
P24	17-10-2016	Seizure Mahazar for the Seizure of Visa Register and other connected documents.
P25	10-10-2016	Extraction Proceedings for the extraction of G mail and Face Book account of Subahani Haja.

P25(a)		Screen shot of page of P 25 extraction proceedings which shows the phone No., virtual telegram No of PW34 along with the details of Hurayara and her Number.
P25(b)		Disclosure statement in Ext.P25 Extraction Proceedings of Subahani Haja.
P26	18-10-2016	Seizure Mahazar for the Seizure of CELKON Mobile phone
P27	09-10-2016	Seizure mahazar for the seizure of leather jacket,sweaters, blue card etc.
P27(a)	08-10-2016	Voluntary Disclosure statement of Subahani Haja
P28	30-01-2017	Portion of 161 statement of PW21 Peer Mohamed
P28(a)	30-01-2017	Portion of 161 statement of PW21 Peer Mohamed
P28(b)	30-01-2017	Portion of 161 statement of PW21 Peer Mohamed
P29	30-01-2017	Portion of 161 statement of PW22 Moitheen Shah
P29(a)	30-01-2017	Portion of 161 statement of PW22 Moitheen Shah
P29(b)	30-01-2017	Portion of 161 statement of PW22 Moitheen Shah
P30	22-03-2017	Portion of 161 statement of PW23 Al-Ameen
P31	28-09-2015	Photocopy of Customer application form in relation to the Mob. No.7845389463 (Tata Docomo) in the name of Al-Ameen.
P31(a)		Photocopy of Election ID card of Al-Ameen
P32	21-02-2017	Report No. B1-1234/FSL/17 of Dr.Simi, Asst. Director (Ballistic) FSL., Thiruvananthapuram.
P32(a)		Work sheet contain the details of examination carried out by PW24
P33	25-02-2017	Report No. B1-1234/FSL/17 of Smt. Molly George, Asst. Director(Explosives) FSL., Thiruvananthapuram.

P34	07-11-16	Forwarding note and Authorisation letter dated 1.2.2017 for the MOs sent to FSL., Thiruvananthapuram.
P35	02-03-2017	Extraction proceedings of E. mail and Social media account of Mohammed Kamal
P36	21-10-2016	Report No. ML/137/OE/FMA/16 of the examination conducted by Specialist Medical officers, Department of Forensic Medicine, Govt. TD Medical College, Alappuzha in respect of Subahani Haja
P37		X-Ray Film of Left leg of Subahani Haja taken at Govt. Medical College, Alappuzha (No.0482/0/21-Oct-2016/Tibia Fabula)
37(a)		MRI Scan Film of Subahani Haja taken at Hindlabs 1.5 Telsa MRI Scan Centre, Govt. Medical college, Alappuzha.
37(b)		MRI Scan Film of Subahani Haja taken at Hindlabs 1.5 Telsa MRI Scan Centre, Govt. Medical college, Alappuzha.
37(c)		MRI Scan Film of Subahani Haja taken at Hindlabs 1.5 Telsa MRI Scan Centre, Govt. Medical college, Alappuzha.
P38 (STP)	22-12-15	Certified copy of Customer application Form of Mob No.8807966893 of Shri. Suresh.
P38(a)		Photo copy ID proof of Suresh attached to the CAF
P39		Print out of Bank account statement of Subahani Haja A/c No.1028104000010089 from 07-07-2011 to 15-10-2016
P40	04-07-2011	Scanned copy of Application Form and KYC document of Subahani Haja along with 65B certificate.
P40(a)		Photo copy of ID proof of Subahani Haja attached to the account opening Application.
P41	20-10-2016	Mahazaor dated for the seizure of Samsung mobile phone, vodafone SIM card, Samsung memory card, Apple I pad and Jio SIM card of Mohammed Kamal.

P42	12-10-2018	Pen drive contains the analysis report No CDAC/CSG/2016-15c NIA/AR/OCT/2018 of the data extracted from the MO 25 mobile phone.
P43 (STP)		Photocopy of CAF of of Vodafon mobile Connection 9884956999
P43(a) STP		I.D proof (copy of Passport) of Mohammed Kamal
P44 series	07-12-2016	Relevant Portion of 164 statement of Mohamed Kamal (PW34)
P45		CDR of Mobile No.7845389463 along with 65B certificate produced by Nodal officer, Tata tele services.
P46		CDR of Mobile No.8807966893 along with 65B certificate produced by Nodal officer , Tata tele services.
P47	21-09-2015	Passenger Manifesto of Turkish Airlines TK720 from Istanbul to Mumbai along with 65B certificate.
P48	10-08-2011	Original Customer Application Form with ID proof submitted by customer Mohammed Kamal of Mob No.9884956999.
P48(a)		Copy of ID Proof of Mohammed Kamal.
P49	31-05-2007	Passport Application Down loaded from the server of Subahani Haja Moideen accompanied with copy of Police enquiry report, ID proof and related records along with 65B certificate.
P49(a)		Copy of Police enquiry report of Subhahani Haja
P49(b)		Copy of ID Proof of Subhahani Haja
P49(c)		Copy of SSLC Book Subhahani Haja
P49(d)		Copy Letter sent by Hansal travels (P)Ltd Cochin to the Regional Passport Officer.
P49(e)		Copy Authorisation letter given by Subahani Haja to Hansal travels
P49(f)		Copy Declaration form submitted by the travel agent

P49(g)		65B certificate submitted by Regional Passport officer
P50	04-07-2011	Account opening Form of Subahani Haja with IDBI bank Thodupuzha branch. (KYC Form)
P50(a)	06-07-2011	Account opening check list of IDBI bank in respect of Subahani Haja.
P50(b)	04-07-2011	Form No 60 submitted by Subahani Haja.
P50(c)	06-10-2010	Copy of Election ID card of Subahani Haja.
P50(d)		Statement of Accounts of A/c No.10281040000010089 of Subhani Haja for the period 07-07-2011 to 24-02-2020
P50(e)	25-02-2020	Section 65B certificate issued by Branch head IDBI Thodupuzha Branch.
P51		Extract of transaction of International Debit card having No.5105579901045209 of Subahani Haja
P52		Passenger Manifesto of Flight No SV771/SV261 of Saudi Arabian Airlines from Chennai to Istanbul via Jiddah on 8-4-2015.
P53	07-10-2016	Forwarding note issued by this court for forwarding MOs to C-DAC
P54	28-03-2017	Cyber Forensic Analysis Report No. CDAC/ CSG/2016-11C NIA/AR/MAR/2017
P54(a)		Pen drive contains the data extracted from the digital devices.
P55	28-03-2017	Cyber Forensic Analysis Report No. CDAC/ CSG/2016-11A NIA/AR/MAR/2017
P55(a)		Pen drive contains the Data extracted from the mobile phone
P55(b)		Pen drive contains the data extracted from the Hard disc.
P56	18-10-2016	Forwarding note issued by this court for forwarding MOs to C-DAC
P57	12-10-2018	Cyber Forensic Analysis Report No. CDAC/ CSG/2016-12A NIA/AR/OCT/2018 Disclosure statement of Subahani Haja

P58	24-10-2016	Forwarding note issued by this court for forwarding MOs to C-DAC
P59	12-10-2018	Cyber Forensic Analysis Report No.CDAC/CSG/2016-15C NIA/AR/OCT/2018
P60	24-10-2016	Forwarding note issued by this court for forwarding MOs to CDAC
P61	28-03-2017	Cyber Forensic Analysis Report No.CDAC/CSG/2016-15 NIA/AR/MAR/2017
P61(a)		DVD contains the data extracted from the digital device.
P62	17-08-2017	Forwarding note issued by this court for forwarding MOs to CDAC
P63	12-10-2018	Cyber Forensic Analysis Report No. CDAC/ CSG/2016-13B NIA/AR/OCT/2018
P63(a)		Pen drive contains the data extracted from the digital devices
P64	1-10-2016	Certified copy of FIR No.5 in SC 2/2017/NIA
P65	02-10-2016	Advance search intimation
P66		Report submitted by chief Investigating officer to incorporate name and address of Subahani Haja
P67	03-11-2016	Seizure Mahazar for the seizure of Bank account statement and details of VISA international Debit Card of Subhahani Haja.
P68	11-11-2016	Report submitted by Chief Investigating Officer to incorporate Mohammed Kamal into the array as A12.
P69	21-03-2017	Ownership certificate issued by Commissioner Kadayanelloor Municipality
P70	15-11-2016	Ownership certificate issued by the Secretary, Thodupuzha Municipality pertaining to the house of the accused.
P70(a)	15-11-2016	Ownership certificate issued by the Secretary, Thodupuzha Municipality pertaining to the shop room used by the accused
P71	04-10-2016	List of articles pertaining to memory card, SIM card, mobile phone etc.

P71(a)	04-11-2016	List of documents pertaining to search list dated 03.10.2016
P71(b)	13-10-2016	List of articles pertaining to medicine cover etc.
P71(c)	09-10-2016	List of documents pertaining to seizure mahazar dated 07.10.16 & 09.10.16.
P71(d)	13-10-2016	List of documents pertaining to extraction of emails/social media accounts of Subahani Haja etc.
P71(e)	18-10-2016	List of documents pertaining to seizure mahazar dated 08.10.16 etc.
P71(f)	21-10-2016	List of articles pertaining to Samsung mobile phone etc.
P71(g)	21-10-2016	List of documents pertaining to mahazar proceedings of V.Senthil Kumar, Inspector, NIA.
P71(h)	04-11-2016	List of documents pertaining to seizure mahazar dated 03.11.2016
P71(i)	16-11-2016	List of documents pertaining to scanned copy of application form and KYC etc.
P71(j)	06-01-2017	List of articles pertaining to a blue gray coloured diary etc.
P71(k)	06-01-2017	List of documents pertaining to search warrant dated 03.01.2017 etc.
P71(l)	23-01-2017	List of articles pertaining to one estimated memo of Gold AIK
P71(m)	23-01-2017	List of documents pertaining to seizure mahazar dated 21.01.2017
P71(n)	03-03-2017	List of articles pertaining to DVDs containing Gmail and Facebook accounts
P71(o)	03-03-2017	List of documents pertaining to extraction proceedings of email and social media accounts
P72		CDR of Mob No8015815604(Vodafone) in the name of Vino Karthik from 29-03-2016 to 02-10-2016.
P72(a)	17-02-2015	Customer Application Form of Mobile No.8015815604(vodafone) of Vino Karthik.

P73	03-08-2020	Cyber Forensics Analysis Report from CDAC
P74		Print out from the Embassy of India(Baghdad, Iraq) regarding India- Iraq Bilateral brief.
P75		Print out from the United Nations General Assembly website dated 21/05/2015 regarding sixty ninth sessions- Culture of Peace.
P76		Print out from the United Nations Security Council Resolution 2169(2014) dated 30/07/2014
P77		Printout from the Human Rights Council Websites dated 15/06/2016 on 32nd session- They came to destroy ISIS crimes against the Yazidis's.
P78		Print out from the United Nations Security Council Websites dated 18/08/2016 on conclusions on children and armed conflict in IRAQ
P79		Printout from the Security Council Report Website of November 2015 Monthly Forecast- Middle East- Iraq (UNAMI)
P80		Printout from the Security Counseil Report Website of May 2015 Monthly Forecast - Middle East Iraq
P81		Printout from the Security Council Report Website of JULY2015 Monthly Forecast- Middle East- Iraq(UNAMI)

Defence Exhibits :-

D1	03-10-2016	Portion of 161 Statement PW10 Sadhique

Prosecution Witnesses :-

PW1	26-09-2018	Yaspal Singh Thakur.
PW2	25-10-2018	Arjun Krishnan
PW3	08-11-2018	K.Naina Mohamed
PW4	08-11-2018	Shahul Hameed.M

PW5	08-11-2018	J.Mohamed Ashik Ali
PW6	11-12-2018	S.Kannan
PW7	11-12-2018	P.Vino Karthik
PW8	11-12-2018	Saravana Kumar.R
PW9	10-01-2019	N.S.Bisht
PW10	29-07-2019	Sadhique K.S.
PW11	14-08-2019	Rajan O.N
PW12	14-08-2019	Salman M.P
PW13	14-08-2019	M.Sankar
PW14	14-08-2019	Mariappan
PW15	14-08-2019	Shajahan
PW16	06-09-2019	Lal P.K.
PW17	06-09-2019	George .C.Valooran
PW18	22-10-2019	A.Syed Masood
PW19	22-10-2019	Ayesha Beevi
PW20	06-12-2019	Sajeevan M.K
PW21	06-12-2019	H.Peer Mohamed
PW22	06-12-2019	Moitheen Shah
PW23	06-12-2019	M.Al-Ameen
PW24	03-01-2020	Dr.Simi S. Asst. Director (Ballistic), FSL Thiruvananthapuram
PW25	03-01-2020	Smt.Molly George, Asst. Director (Explosives), FSL Thiruvananthapuram.
PW26	03-01-2020	K.Vijayakumar, Inspector, NIA, Kochi.
PW27	06-01-2020	Rajeevan.P, CPO., Kovallur.P.S
PW28	06-01-2020	Binoy Joseph, NIA, Kochi
PW29	07-01-2020	Dr.Krishnan.B., Forensic Surgeon, TD Medical College, Alappuzha.
PW30	07-01-2020	Salma Maha Jabeen.T.M, Asst Professor (Tamil), Govt.Victoria College , Palakkad.
PW31	07-01-2020	S.Suresh

PW32	07-01-2020	R.B Saravanan
PW33	21-01-2020	A.Sylviya Jasmine
PW34	21-01-2020	J.S.Mohamed Kamal
PW35	04-02-2020	Marshal D' Cunha, Nodal Officer , Tatatele services
PW36	04-02-2020	Ebison Franco, Inspector NIA Kochi.
PW37	10-02-2020	Ibrahim Hakki Guntay, Manager, Turkish Airlines, Mumbai.
PW38	27-02-2020	Shahin Komath, Nodal officer, Vodafone.
PW39	27-02-2020	Shibu John, Regional Passport Officer, Kochi.
PW40	27-02-2020	Manesh Mani, Branch Manger, IDBI Bank, Thodupuzha.
PW41	27-02-2020	Siddharth Bhatt, Supervisor, Saudi Arabian Airlines, Kochi.
PW42	27-02-2020	B. Mukherjee, Dy.SP, NIA, Hyderabad.
PW43	22-05-2020	Nabeel Koya.A, Scientist, Examiner C-DAC.
PW44		P.Sajimon, Dy.SP, NIA
PW45	26-06-2020 02-07-2020 18-09-2020	A.P.Shoukkathali, Investigating Officer, NIA Kochi.
PW46	18-09-2020	Regional Passport Officer, Bangalore (Protected Witness)

Defence Witness - Nil

Material Objects

MO1	Black Berry Mobile phone(Black colour) IMEI No.357351060049505/14
MO2	Mobile Phone ' YU' with SIM card
MO2(a)	SIM card (Tata docomo) inside the mobile phone MO2
MO3	Sand Disk memory Card 32 GB

MO4	Vodafone SIM card
MO5	Adhaar Card No.364122648952 of Subahani Haja.
MO5(a)	Driving License No.38/824/2004 dated 16-05-2013 of Subahani Haja
MO5(b)	Election ID Card No.FBR/1667005 of Subahani Haja
MO6	Citibank ATM Card ending with No.1406 of Subahani Haja
MO6(a)	Union Bank ATM Card ending with No.4237
MO6(b)	IDBI Bank ATM Card ending with No.5209 of Subahani Haja
MO7	Malalyalam Text Book " Noorabni 'Q'AIDA
MO8	Telephone Card No.4441444 of Turk Telecom
MO9	Receipt No.23354 dated 15-09-2015 issued at Consulate General of India, Istanbul
MO9(a)	Letter dated 21-09-2019 issued from Consulate General of India
MO9(b)	Emergency Certificate No.953133 issued at Consulate General of India, Istanbul.
MO9(c)	Police Clearance Certificate
MO10	Dongles (Airway)
MO10(a)	Dongle (Reliance)
MO11	Tablet (Super touch)
MO12	Railway Ticket No. 88096944
MO13	Medicine Cover packet(Carton) "Zincofer"
MO14	Black berry mobile phone
MO14(a)	Tata Docomo SIM cards
MO 14(b)	Memory Card
MO15	Hard Disc 'WD Blue' Sr.No.wcc2eh760085 (Desktop Hardware)
MO16	Pale Blue colour Diary of year 2009
MO16(a)	Page of MO16 diary of 25th November (Wednesday) of the year 2009.
MO17	Inland letter (light blue colour)
MO17(a)	Translated copy of MO17(Inland letter) submitted by Salma Maha Jabeen, Asst. Professor (Tamil) Govt. Victoria College Palakkad.
MO18	DVD of Extraction of Gmail and Facebook Account of Subahani Haja.

MO18(a)	Scanned copy of Passport of accused Subahani Haja received from his E-mail ID by Mohammed Kamal (in MO18 DVD)
MO19	CELKON Mobile phone with out battery Model C-770i IMEI No. Ending with 8743 and 8750 with Samsung 2GB Memory card.
MO20	Leather Jacket
MO20(a)	Blue colour Travel card
MO20(b)	Slip(Label) affixed on the sealed packet of MO's by NIA
MO21	Cotton Jacket
MO22	Ash colour sweater
MO23	Blue colour Sweater
MO24	DVD containing Extraction proceedings of E. mail and Social media account of Mohammed Kamal
MO25	Samsung Mobile phone (IMEI No.355306/06/675063/1)
MO25(a)	Vodafone SIM card.
MO25(b)	Samsung memory card.
MO25(c)	Apple I-Pad (CEO682
MO25(d)	SIM card (Jio)
MO26	Cheque Book of IDBI Bank , Thodupuzha Branch of Subahani Haja.
MO26(a)	Cheque Book of IDBI Bank , Thodupuzha Branch of Subahani Haja.

Sd/-
Judge
(By Order)

//True Copy//

Sheristadar

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