

**IN THE CITY SESSIONS COURT AT AHMEDABAD****NIA SPECIAL CASE NO.1 OF 2018****Complainant :**

1. STATE OF GUJARAT (N.I.A.)

**VERSUS****Accused :**

1. Birju Salla @ Amar Soni, s/o. Kishor Salla, aged 37 years, resident of Flat No.1502, 15<sup>th</sup> Floor, Shripati Arcade, Nana Chowk, Grant Road, Mumbai.

**Appearance:**

Learned Addl.Public Prosecutor Ms.Geeta Godambe and learned Special Public Prosecutor Shri M.G.Kapadia for the State. Learned advocates SHRI R.S.VERMA with SHRI B.P.JHALA, SHRI R.D.KINARIWALA, SHRI J.M.BULA, SHRI K.K.PATEL, SHRI ALAY A. DAVE, Ms.FORAM U.TRIVEDI, SHRI YASH K.DAVE & Ms.TULSI R.SHAH for the accused.

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**JUDGMENT**

1) The accused herein stands charged with having committed an offence punishable under Sections 3(1), 3(2)(a) and 4(b) of the Anti-Hijacking Act, 2016 (*to be referred to herein after as 'the Act' for the sake of convenience*), and the accused is alleged to have been involved in such offence for having placed a threat note in the tissue paper box in the toilet of Jet Airways Flight No.9W-339 going from Mumbai to Delhi.

2) The brief facts as made out in the Prosecution case and which are required to be narrated, are as herein after follows.

3) It is the case of the Prosecution that on 30/10/2017, one Ms.Shivani Malhotra, a cabin crew member in the Delhi bound Jet Airways Flight No.9W-

339 from Mumbai, soon after its departure from Mumbai at 02:55 a.m. and approximately at about 03:20 a.m., observed that the tissue papers placed in the tissue-paper box in the toilet near the Business Class seats of the aircraft, were not coming out. It is the case of the Prosecution that therefore, upon the said issue being brought to the notice of Ms.Nitika Joneja, Cabin Crew Supervisor on the Flight, by the said Ms.Malhotra, said Ms.Joneha went to the toilet and attempted to replenish the tissue-paper box, and that during such time, said Ms.Joneja noticed that a folded white paper sheet was stuck inside the tissue paper box, which was taken out by her. It is the further case of the Prosecution, that upon the said folded paper being opened by said Ms.Nitika Joneja, it was noticed that a note was typed on the paper in Urdu as well as in English, the English portion whereof is reproduced herein below:-

***“Flight No. 9W 339 is covered by Hijackers and aircraft should not be land and flown straight to POK. 12 people on board. If you put landing gear you will hear the noise of people dying. Don't take it as a joke. Cargo area contains explosive bomb and will blast if you land Delhi. Allah is Great.”***

4) Further as per the case of the Prosecution, the paper also contained a type written text in Urdu language, above the text in English, which revealed a threat regarding hijackers on board and explosive bomb in the cargo area of the aircraft. As per the case of the Prosecution, such discovery was communicated by the Captain/Pilot and Co-Pilot of the aircraft immediately to the Air Traffic Control,

Ahmedabad, and upon receiving appropriate instructions, they landed the aircraft at the Ahmedabad Domestic Airport.

5) Thereafter, as per the Prosecution case, upon being informed by the Airport Manager, Ahmedabad Domestic Airport, with regard to the emergency landing of the Flight on account of threat of hijacking and planting of bomb, the officials from the Ahmedabad Crime Branch reached the Ahmedabad Domestic Airport, and to them, during the course of inquiries, the present accused who was also a passenger travelling in the Business Class of the aircraft, admitted to have placed the above referred 'threat note' in between the tissue papers in the tissue-paper box in the toilet of the aircraft.

6) It is the case of the Prosecution that it is on the basis of such admission on the part of the accused, that an offence punishable under Sections 3(1), 3(2)(a) and 4(b) of the Act, came to be registered against the accused in the shape of FIR No.I-85/2017 at the DCB Police Station, Ahmedabad, and the statements of relevant witnesses were recorded and since the identity of the accused was not at all in doubt, accused came to be arrested on the same day by the DCB, Ahmedabad, i.e. on 30/10/2017 itself.

7) Next as per the case of the Prosecution, considering the gravity and seriousness of the offence, the investigation into the present offence, upon being handed over to the National Investigation Agency by virtue of Order dated 7<sup>th</sup> November, 2017 of the Ministry of Home Affairs, Govt. of India, the N.I.A. took over the reigns of

investigation from the previous investigating agency, on 07/11/2017, whereby the present offence came to be re-registered vide RC-16/2017/NIA/DLI, and upon the NIA having obtained sanction from the Central Government under Sec.15 of the Act to prosecute the accused in connection with alleged commission of above referred offences, the present offence thus came to be investigated by the N.I.A. The relevant evidence was in the course of the investigation, forwarded to the F.S.L. for analysis and tests thereupon, and was made part of the investigation records by the concerned I.O. who on receipt of the relevant reports of the analysis and tests from the F.S.L., included such reports in the records of the investigation material.

8) It is the case of the Prosecution that on completion of the investigation and finding material against the accused, a chargesheet came to be filed against the accused.

9) The chargesheet so filed by the investigating agency NIA, has eventually culminated into the present proceedings in the shape of NIA Special Case No.1 of 2018 and the proceedings were thereafter, placed for trial before this Special Designated Court, which proceeded to frame the charge against the accused on 10/07/2018 vide Exh.9. The said charge was read over and explained to the accused, who pleaded not guilty to the charge framed and claimed to be tried. Even in the course of the further statement of the accused recorded under the provisions contained in Sec.313 of the Cr.P.C., the accused maintained that he was falsely implicated in the present offence and sought a clear acquittal. It is required to be noted that all throughout, the

accused has been in judicial custody and he has been constantly denied bail.

10) It is in the background of such facts and circumstances that the following points have arisen for determination by this Court:-

(1) Does the Prosecution prove beyond reasonable doubt that by preparing and placing the threat note in the tissue-paper box of the toilet in the Jet Airways Flight No.9W-339 on its way from Mumbai to Delhi, the accused tried to unlawfully and intentionally seize control of/hijack the said Flight, and has thereby committed an offence punishable under Sections 3(1), 3(2)(a) and 4(b) of the Anti-Hijacking Act, 2016?

(2) What order? What judgment?

11) My findings on each of the above points for determination are as follows:-

- 1) In the affirmative.
- 2) As per final order and judgment.

12) Before ascribing my reasons for arriving at the findings stated above, it would be necessary at the outset to state that in an effort to prove the charges against the accused, the Prosecution has relied upon both - oral and documentary evidence which is required to be elaborated and is hereby done so as herein after follows.

13) The oral evidence comprises of the testimonies of no less than 27 witnesses as per the following details:-

PW No.	Name & description of the witness	Exhibit No.
1	Shri Baldevsinh Chandansinh Solanki, Complainant	15
2	Ms.Shivani Malhotra	24
3	Ms.Nitika Joneja	25
4	Shri Jay Bhupendrabhai Jariwala	29
5	Shri Dayashanker Ramdulare Kahar	30
6	Shri Sushant Raosaheb Salve	31
7	Shri Moinuddin K.Shaikh	33
8	Shri Bharatkumar Devdanbhai Maru	35
9	Shri Mahesh Ranchhodbhai Desai	36
10	Shri Suryanarayan Pichumani	39
11	Shri Surendrasing Harichand Khatri	44
12	Shri Prashant Bajirao Jagdale	45
13	Shri Harshad Chimanlal Soni	47
14	Shri Rakesh Ashok Gupta	50
15	Shri Giridhar Gopal Bhargav	51
16	Shri Mohit Brijbhushan Tyagi	52
17	Shri Bharat Manubhai Kanakiya	55
18	Shri Mahesh Shantilal Chauhan	57
19	Shri Amit Vinod Thakkar	63
20	Shri Jamilahmed Sirajahmed Saiyed	67
21	Shri Bhagwanbhai Mohanji Vanjara	73
22	Dr.Rajdeepsinh Narayansinh Zala	79
23	Shri Dharmendra Govindlal Shah	102

PW No.	Name & description of the witness	Exhibit No.
24	Shri Satish Chander	106
25	Shri Ashish Deorao Rathod	108
26	Shri Vikram Khalate	111
27	Shri Kameshwar Mishra	153

14) In addition thereto, the documentary evidence relied upon by the Prosecution, consists of the following documents:-

Sr. No.	Description of document	Exh. No.
1	FIR of DCB, Ahmedabad, registered vide I-85/2017 on 30/10/2017	
2	FIR of NIA re-registered vide RC/16/2017/NIA/DLI on 07/11/2017	112
3	Station Diary Entry No.5/2017 dated 30/10/2017 regarding registration of FIR of DCB, Ahmedabad.	16
4	Complaint of Shri B.C.Solanki, ACP, SOG, Crime Branch, Ahmedabad.	17
5	Aircraft Cabin appearance release form dated 30/10/2017	26
6	Threat note	27
7	Jet Airways ticket of accused	34
8	AAI Logbook	37
9	Production cum seizure memo dated 11/11/2017	40
10	AAI Logbook	41
11	Tape Transcript - SVPI Airport, Ah'd	42
12	Contingency Plan for handling hijack situation etc. of AAI, Ahmedabad.	43
13	Boarding Pass of PW-12 Mr.Prashant Jagdale	46
14	Service Contract of CCTV system installed in the office of accused	56
15	Production cum seizure memo dated 20/11/2017 regarding production of DVR	58

Sr. No.	Description of document	Exh. No.
16	Tax invoice issued to M/s.Krish Gems & Jewellers - dated 25/09/2017	64
17	Invoice dated 01/10/2016 issued to M/s.Krishna Gems & Jewellery	65
18	Registration Certification - Form - D of Shivam Computers	66
19	Panchnama dated 31/10/2017	68 & 69
20	Panchnama of the state of body of the accused dated 30/10/2017 Arrest Panchnama	74
21	Signatures of Panchas	75
22	Letter requesting to make entry of seized muddamal in muddamal register	80
23	Muddamal slip dated 30/10/2017 regarding deposit of threat note in Urdu and English text	81
24	Passengers' list of Jet Airways Flight No.9W-339 containing name of the passengers	82
25	Intimation letter to the family members of the accused about his arrest	83
26	Letter dated 30/10/2017 regarding arrest entry in station diary and to record it in muddamal slip alongwith muddamal slips	84
27	Station diary entry dated 30/10/2017 of the incident reported	85
28	A letter having outward No.ACP/Crime/1364/17 marked to Police Commissioner, Ahmedabad city regarding sanction of advance amount for investigation of the case	86
29	Letter No.923/2017 marked to Officer In Charge, CISF, CSI Airport, Mumbai regarding providing protection and assistance to Gujarat Police team	87
30	Letter No.924/2017 marked to Assitt. Director, BCAS, SVPI Airport, Mumbai, regarding providing and assistance to Gujarat Police team	88
31	Letter No.926/2017 marked to Officer In Charge, CISF, CSI Airport, Mumbai	89



Sr. No.	Description of document	Exh. No.
	regarding providing protection and assistance to Gujarat Police team	
32	A permission letter marked to the Regional Deputy Director, Bureau of Civil Aviation Security, Ahmedabad, for carrying prisoner with them for investigation purpose	90
33	Permit order 23/2017 from Shri Deepak Bhardwaj, ASO, Regional Deputy Director, Bureau of Civil Aviation Security, SVP International Airport, Ahmedabad "Three copies"	91
34	A letter dated 31/10/2017 marked to Police Inspector of LT Marg Police Station, Mumbai regarding seized article in muddamal slip	92
35	Copy of a letter dated 31/10/2017 marked to PI of LT Marg Police Station, Mumbai regarding keeping the accused in the lock-up.	93
36	Letter dated 31/10/2017 31/10/2017 marked to PI of LT Marg Police Station, Mumbai regarding handing over custody of the accused from the lock-up.	94
37	A letter dated 31/10/2017 marked to PI of LT Marg Police Station, Mumbai regarding providing police assistance	95
38	Certified copy of relevant pages of station diary dated 31/10/2017 of LT Marg Police Station	96
39	Original landline bill of MTNL, Mumbai in the name of accused Birju Kishor Salla and having stamping date 25/10/2017 and original light bill of residential flat of accused for the month of October, 2017	97
40	A letter marked to incharge of muddamal section for making the entry in muddamal slip and muddamal slip dated 01/11/2017 of Laptop and other articles	98
41	Letter No.Addl.DCP/Crime/1380/2017 dated 02/11/2017 marked to Y.S.Bhinder, Manager Security, regarding preservation of digital	99

Sr. No.	Description of document	Exh. No.
	evidence	
42	Letter No.Addl.DCP/Crime/1390/2017 dated 04/11/2017 to SVPI Airport for preserving digital evidence and provide certificate under Sec.65-B of Evidence Act	100
43	Letter No.Addl.DCP/Crime/1391/2017 dated 04/11/2017 to A.S.Hadhiwala, SVPI Airport, Ahmedabad for providing CISF logbook for the day dated 30/10/2017	101
44	Part examination report vide case No.DFS/EE/2017/CF/639 dated 20/01/2018 received from DFS, Gandhinagar, Gujarat regarding examination of Sony Viao Laptop and 65-B IEA certificate alongwith Annexure-A1	103
45	Letter dated 16/01/2018 received from DFS, Gandhinagar, along with examination report dated 16/01/2018 regarding examination of Epson printer and printing papers	104
46	Order dated 17/01/2018 of Under Secretary to the Govt. of India, Ministry of Civil Aviation	107
47	Examination report dated 18/01/2018 of DFSL, Mumbai	109
48	Examination report dated 19/01/2018 of DFSL, Mumbai	110
49	Confidential letter dated 10/11/2017 written by NIA, Mumbai, marked to Director, FSL, Gandhinagar	113
50	Letter dated 10/11/2017 of DFSL, Gandhinagar, addressed to SP, NIA, Mumbai	114
51	Letter dated 12/11/2017 to SP, NIA, Mumbai, from Y.S.Bhinder, Manager Security, Ahmedabad.	115
52	Letter dated 17/11/2017 of NIA, Mumbai marked to Rajdeep Jhala, Addl. DCP, Ahmedabad.	116
53	Letter dated 17/11/2017 of NIA, Mumbai marked to DFSL, Gandhinagar,	117

Sr. No.	Description of document	Exh. No.
54	Letter dated 20/11/2017 of NIA, Mumbai marked to DFSL, Gandhinagar,	118
55	House search panchnama dated 21/11/2017	119
56	VIP Entry pass for Rajya Sabha	120
57	Acknowledgment of I.T. Return for A.Y.2017-2018 of accused	121
58	Audit report dated 21/09/2017 in Form No.3CB issued by the auditor of the accused	122
59	Letter dated 04/11/2017 addressed to the accused by Kotak Mahindra Prime, Mumbai	123
60	Letter dated 22/11/2017 of NIA, Mumbai marked to DFSL, Mumbai.	124
61	Letter dated 22/11/2017 from DFSL, Mumbai, addressed to SP, NIA, Mumbai	125
62	Letter dated 22/11/2017 of NIA, Mumbai marked to DFSL, Gandhinagar	126
63	Letter dated 23/11/2017 of DFSL, Gandhinagar to SP, NIA, Mumbai	127
64	Letter dated 23/11/2017 of NIA, Mumbai marked to DFSL, Mumbai	128
65	Letter dated 23/11/2017 of DFSL, Mumbai to SP, NIA, Mumbai	129
66	Letter dated 26/11/2017 of NIA, Mumbai marked to Asstt. Director, DNA Division, DFSL, Gandhinagar	130
67	Letter dated 28/11/2017 of DFSL, Gandhinagar, addressed to SP, NIA, Mumbai	131
68	Letter dated 28/11/2017 of NIA, Mumbai, marked to the Home Secretary, Chairman of the Aerodrome Committee, Secretariat, Gandhinagar.	132
69	Confidential Letter dated 18/12/2017 of Under Secretary (L&O), Home Department, Govt. of Gujarat, Gandhinagar, marked to SP, NIA, Mumbai	133
70	Letter dated 30/11/2017 of SP, NIA, Mumbai addressed to Dr.Mohammad Shahid Abdul Wahid, Head of Urdu Department, University of Mumbai	134

Sr. No.	Description of document	Exh. No.
71	Letter dated 04/12/2017 of Dr.Mohammad Shahid Abdul Wahid, Head of Arabic Department, University of Mumbai, addressed to SP, NIA, Mumbai	135
72	Letter dated 12/12/2017 of SP, NIA, Mumbai, addressed to DFSL, Mumbai	136
73	Arrival/Departure Aircraft Checksheet dated 29/10/2017 and 30/10/2017 respectively, of Jet Airways Flight	137
74	Letter dated 19/12/2017 of SP, NIA, Mumbai addressed DFSL, Gandhinagar	138
75	Letter dated 26/12/2017 of NIA, Mumbai to DFSL, Gandhinagar	139
76	Letter dated 27/12/2017 of DFSL, Gandhinagar, addressed to SP, NIA, Mumbai	140
77	Letter dated 16/01/2018 of PI, NIA, Mumbai, addressed to the Chief Airport Security Officer, Ahmedabad Domestic Airport, Ahmedabad	141
78	Letter dated 18/01/2018 of CASO/Commandant, CISF, SVPI, Ahmedabad, addressed to PI of NIA, Mumbai.	142
79	Gemera Diary of CISF Unit, SVPI Airport, Ahmedabad	143
80	Standard Operating Procedures for Handling Hijack Situation at SVPI Airport, Ahmedabad.	144
81	Bomb Threat Contingency Plan for Ahmedabad Airport	145
82	Copy of agreement dated 08/09/2004 between Jet Airways and M/s.Soft Touch Aviation, Mumbai	146
83	Forensic Examination Report dated 14/02/2018 issued by DFSL, Gandhinagar	147
84	Certificate dated 10/11/2017 issued AAI, Ahmedabad	148

15) This in a nutshell, is the evidence required to be considered by this Court to decide as to whether the Prosecution has indeed established and

proved beyond reasonable doubt the charges against the accused.

### **REASONS**

#### **Points No.1 and 2 for determination**

16) Since the evidence is common and germane to both the points for determination, the same are discussed and decided simultaneously for the sake of convenience.

17) At the very outset, it is, at the cost of repetition, required to be noted that the Prosecution has examined in all 27 witnesses to prove its case against the accused. The relevant excerpts from the deposition of material witnesses, are produced herein below for the sake of convenience.

PW-1 Shri Baldevsinh Chandansinh Solanki  
(Complainant)- Exh.15

18) The Prosecution has firstly examined Shri Baldevsinh C. Solanki as PW-1 vide Exh.15, who is the complainant in connection with the present offence. In his examination-in-chief, he has deposed that he is serving as Assistant Commissioner of Police, SOG, Crime Branch, Ahmedabad, and on 30/10/2017, a message was received from the PSO, DCB Crime Branch, Ahmedabad, that they have received a message from the Ahmedabad Control Room at 04:14 Hrs. from Mr.R.N.Desai, Airport Manager, Ahmedabad, that Jet Airways Flight No.9W-339 is made to go for emergency landing on account of hijacking and bomb threat, and on receiving such message, the witness immediately rushed to the Ahmedabad Airport.

19) It is further deposed that the said Flight of the Jet Airways was kept in the isolated zone of the Airport, and the passengers were safely evacuated from the Flight and were taken to the Ceremonial Hall of the Airport. It is further deposed that at the said point of time, the passengers and the Airport Staff members who were present, were very much scared. It is testified by the witness further that the passengers and their baggage was frisked and checked by the BDDS and the dog squad, and the Flight was also checked. It is further deposed that a telephonic entry in this connection with the PSO of DCB Police Station was registered, which was further registered as 'Janva Jog' entry No.2/17 with the DCB Police Station, and the investigation in this regard was entrusted to ACP Shri C.N.Rajput, SOG, Crime Branch, who upon reaching the Airport, commenced with his investigation process. It is further deposed that the statements of the crew of the Flight being Ms.Shivani Malhotra, Ms.Nitika Joneja and the Pilot of the Flight Mr.Jay Bhupendrabhai Jariwala, were recorded. It is further deposed that the papers of such investigation upon being handed over to this witness, he thoroughly examined the same including the statements of Ms.Malhotra and Ms.Joneja, and such fact is also referred to in the complaint filed by the witness. It is further deposed that thereafter, the accused was interrogated by the witness, and the facts narrated by him, were incorporated in the complaint by the witness.

20) The witness further deposes that in light of the preliminary inquiry conducted by the witness, upon finding sufficient evidence against the accused, the complaint was filed by the witness against the accused for commission of an offence

punishable under the provisions contained in Secs.3(1), 3(2)(a) and 4(b) of the Anti-Hijacking Act, 2016, and the same was forwarded to the DCB Police Station for due registration. The witness upon being shown the yaadi at mark 14/3 and subsequently exhibited vide Exh.16, identifies his signature thereupon, and states that the same is the Yaadi forwarded by the witness to the PSO of DCB Crime Police Station on 30/10/2017 for registering the complaint. The witness further on being shown the original complaint produced vide mark 14/4 and subsequently exhibited vide Exh.17, identifies his signature thereupon and admits the contents thereof to be true.

21) In the cross examination, the witness states that he reached the Ahmedabad Airport at around 04:45 a.m. i.e. about 20 minutes after receiving the message, and the Janvajog entry was made at around 06:15 a.m. The witness further admits that in the said Janvajog entry, he has not mentioned that the passengers and the other staff members of the Airport who were present at the Airport, were very much scared, and that other passengers present at the Airport too were very much terrified. The witness has also further admitted that it is also not mentioned in the said Janvajog entry that the Officials from other agencies viz. CISF, Airlines Staff, State IB, Central IB, local Police, Bomb Disposal Squad were present. The witness has denied having wrongly registered the complaint on account of he not being competent to register such complaint as per the provisions of Anti-Hijacking Act, 2016.

PW-2 Ms.Shivani Malhotra, Cabin Crew, Jet Airways - Exh.24

22) The Prosecution has examined Ms.Shivani Malhotra, Cabin Crew Member serving with Jet Airways, vide Exh.24 as PW-2.

23) This witness has deposed in her examination-in-chief that she is working with Jet Airways, and her duty is to provide services like serving food, blankets etc. to the passengers and also to ensure safety of passengers. She has further testified that on 30/10/2017, she was on duty on Jet Airways Flight No.9W-339 going from Mumbai to Delhi. The witness further deposes that while she was approaching her Supervisor Ms.Nitika Joneja to inform her about the issue related to the guest occupying the seat No.30 in Economy Class, the guest seated on seat No.1D i.e. the accused herein, requested the witness for a blanket, pursuant to which, the witness told the said guest i.e. the accused to wait, and the witness proceeded towards the forward area. It is further deposed by the witness that while she was informing her Supervisor Ms.Nitika Joneja about the issue of the guest on Seat No.30 of Economy Class, the witness saw the accused Mr.Birju Salla who was occupying seat No.1D, going inside the washroom. It is further deposed by the witness that thereafter, upon she being told by her Supervisor Ms.Joneja to resume her services, she went back in the Economy Cabin, and contacted her senior Mr.Pankaj Chaudhary and informed him about the issue related to the guest on Seat No.30. It is further deposed that after few minutes thereafter, the witness recollected that the guest on Seat No.1D i.e. Mr.Birju Salla, had asked her for a blanket, and therefore, the witness went



into the Forward Section again, took out a blanket from the said area where blankets are usually kept in the divider between the Premier Class and Economy Class, went to the seat No.1D of the accused, and kept the blanket on his seat. It is deposed by the witness that at the said point of time, the accused was not there on his seat. The witness has deposed that she thereafter returned to the Economy Section to resume her services.

24) Further according to the deposition of PW-2, during the course of performing the safety demo at the 10<sup>th</sup> row near the divider between Premier Class and Economy class, the witness thought of informing the accused after conclusion of the safety demo, about the blanket. According to the witness, she therefore, went to his seat and found the accused seated there at that time. It is deposed that the witness informed the accused to have kept the blanket on his seat, to which the accused accepted to have got the same, and thereafter, the witness went behind the Economy Cabin.

25) It is further deposed by the witness that thereafter during the course of her duty, after completing her services of serving food to passengers on the 11<sup>th</sup> row, as she was sneezing badly, she thought of using the nearby washroom of the Premier Class as the washroom of Economy Class was a little far from the witness. It is further testified that therefore, with the permission from her Supervisor Ms.Nitika Joneja, the witness used the washroom of Premier Class, and in the course, took out two to three tissue papers, but the third one was struck inside the tissue paper box. It is further deposed by the witness that she told the same thing to her

Supervisor Ms.Joneja immediately that the tissue papers were over, and as her Supervisor was standing free, she told the witness to resume her services and in the meanwhile, she (the Supervisor) would change the tissue paper box.

26) It is further deposed by the witness that thereafter, when she was again busy serving the food in the Economy Class and was on the 17<sup>th</sup> row, her Supervisor Ms.Joneha came over to her and at the same time the witness also heard the announcement from the Captain of the Flight to the effect that they were landing at Ahmedabad on account of security reasons, which fact Ms.Joneja also conveyed to the present witness. It is further deposed by the witness that her Supervisor Ms.Joneja told the witness to clear all the trash and make everyone sit on their seats, and within 20 minutes thereafter, the Flight landed in Ahmedabad. It is further deposed by the witness that once the guests disembarked from the aircraft, her Supervisor Ms.Nitika Joneja informed her about she having found a letter suggesting that there were hijackers or hijacking on board. It is deposed further by the witness that thereafter, the Cabin crew also deplaned with their bags, and went through the security check.

27) It is further deposed by the witness PW-2 that some time thereafter, when she reached the ATC Office at the Ahmedabad Airport upon being called upon, she found lots of management members seated in the said room, who asked the witness as to whether she had used the washroom or not, to which the witness replied in the affirmative. It is deposed further by the witness that thereafter, she was asked as to whether she had seen any guest using the

washroom, whereupon she informed about the accused Mr. Birju Salla having used the washroom in front of her. It is further deposed by the witness that thereafter, their statements were recorded by the ATC people, and thereupon, she and her Supervisor Ms. Nitika Joneja were again taken to the Aircraft after some time and were asked to enact the incident, which they did. According to this witness, her statement was recorded on the same day i.e. on 30/10/2017 by the Gujarat Police and the NIA, and thereafter, they were sent back to Delhi.

28) In her cross examination, this witness PW-2 has admitted that in her first statement recorded on 30/10/2017, the facts in connection with the issue relating to the passenger on Seat No.30, were not disclosed by her, and that she is unable to say as to whether in the subsequent statement recorded by the Gujarat Police, such facts regarding passenger on Seat No.30 are stated or not.

PW-3 Ms. Nitika Joneja, Cabin Supervisor, Jet Airways  
- Exh.25

29) The Prosecution has thereafter, examined Ms. Nitika Joneja at Exh.25 as PW-3, who in her examination-in-chief, testifies that she is working with Jet Airways as Cabin Crew Supervisor, and that she is senior most amongst the cabin crew and is in charge of all the Cabins, and that after the Captain, she is responsible for the safety of the aircraft.

30) The witness further deposes to the effect that the incident in question happened on 30/10/2017, and that she had boarded the Flight

No.9W-339 of Jet Airways going from Mumbai to Delhi. It is further deposed by the witness that few minutes after the boarding started, Ms.Shivani Malhotra (PW-2) came in the galley, informing to the present witness about the seat issue related to a passenger in the Economy Class, and the present witness told her to wait as the boarding was in progress, and that she (present witness) would inform the ground staff. It is further deposed by this witness that at that time, when PW-2 Ms.Shivani Malhotra was informing the present witness that the guest Mr.Salla (accused) was a very finicky guest, during that time Mr.Salla went to use the washroom. It is further deposed by the witness that thereafter, Ms.Shivani Malhotra went away and after some time, Mr.Salla came outside the washroom and went back to his seat.

31) It is further deposed by the witness that after take off, she upon being asked by Ms.Shivani Malhotra, permitted her to use the lavatory as she was sneezing badly, and thereafter, upon coming out from the lavatory/washroom, Ms.Shivani Malhotra informed the present witness that the tissue papers in the box had exhausted. It is further deposed that the witness told Ms.Shivani Malhotra to continue with her services in the Economy Class, and that she herself would replenish the tissue paper box, and thereafter, the present witness went inside the lavatory with a fresh tissue paper box and after opening the storage compartment meant for storing tissues, removed the previous tissue box. It is then deposed that the witness upon having removed the tissue box, realized that the same was still full and there was one paper tucked inside the tissue box. It is further deposed by the witness that she removed the said paper and came to know that

there was one note written in Urdu language and English language, and upon reading the note written in English, the witness panicked and got scared, as the said note stated that *"Flight No. 9W 339 is covered by Hijackers on board and do not land into Delhi and take the aircraft to POK. Twelve persons on board. If landing gear come down you will see people dying in the cabin. There is a bomb in cargo if the landing gears come down to land into Delhi. The bomb will explode. Do not take it as a joke. Allah is Great."*

32) The witness further deposes that thereafter she immediately approached the Captain in the Cockpit and showed him the note, and the Captain also panicked and got scared, and informed the witness that he would inform the ATC, and told the witness to follow anti-hijack procedures. The witness has further deposed that thereafter she came out of the cockpit and the Captain informed her through inter-phone and also made an announcement informing the passengers that they were diverting to Ahmedabad due to security reasons. The witness has further testified that she informed her crew of Economy class about immediate landing and also told that there should not be any guests movement, and that she also made an announcement to the effect that they were diverting towards Ahmedabad on account of security reasons. It is also further deposed by the witness that at that time, the guest on Seat No.1D i.e. the accused herein, tried to get up from his seat to use the washroom, and was told by the witness that he cannot get up from his seat due to security reasons. It is then deposed that thereafter, they landed at Ahmedabad.

33) It is then deposed by the witness that thereafter they waited at the remote bay, and witness was told by the Captain that the passengers should deboard only from the forward exit through step ladder, and therefore, the step ladder was aligned and Jet security personnel came and told the witness to make the passengers deboard with handbags, pursuant to which, the witness made an announcement informing the passengers to deplane with their handbags.

34) In her cross examination by the learned Advocate for the defence, the witness PW-3 has admitted to have not mentioned in her earlier statements recorded on 30/10/2017 and 03/11/2017 that on seeing the threat note, she panicked and got scared. She has however, denied to have not informed about the place from where the threat note was found, in her earlier two statements. It is admitted by the witness that in her first statement recorded on 30/10/2017, the fact of the accused having tried to use the toilet prior to landing at Ahmedabad and the witness not allowing him to do so, is not disclosed. The witness also admits that in none of her statements, it has been referred that the Captain panicked and got scared. The present witness in her cross examination, also states that she was not aware of the fact that the passenger of Seat No.1D i.e. the accused, had a history with the Jet Airlines.

PW-4 Shri Jay Bhupendrabhai Jariwala, Pilot, Jet Airways - Exh.29

35) The Prosecution has thereafter, examined the Captain of Jet Airways Flight No.9W-339, i.e. Shri Jay Bhupendrabhai Jariwala as PW-4 vide

Exh.29. In his examination-in-chief, the witness testifies to be on duty on the said Flight from Mumbai to Delhi, on 30/10/2017. It is further testified by the witness that he upon reading the threat note shown by the witness PW-3, got scared and was afraid of the safety of the aircraft, the passengers and the crew, and that at that time, multiple thoughts went through his mind. It is testified further by the witness that he was in a shock and could get himself composed after about a minute.

36) This witness has further testified that while landing at Ahmedabad, he put the landing gear of the aircraft a little late, so as to get less time to respond to the passengers, and thereafter, the aircraft taxied to the isolation bay, and after landing, the witness observed the movements of the Security Forces, Fire Brigade and Airport Emergency Services.

37) The witness has further deposed that at the ATC office, he was asked by the Committee there, to show the threat note, pursuant to which, the witness showed the said note to them, and thereafter, on being asked, he informed the Committee about the entire incident. It is also further deposed that thereafter the witness went to Delhi as a passenger in the aircraft as he was not in a position to operate the Flight.

38) In his cross examination, the witness denies of having not informed either the Gujarat Police or the NIA that PW-3 Ms.Nitika Joneja appeared frightened when she entered into the cockpit, and that he had not stated before the Gujarat Police in

his earlier two statements recorded by the Gujarat Police that he was scared, and was afraid about the safety of the aircraft, passengers, and that multiple thoughts having gone through his mind etc.

PW-12 Mr.Prashant Bajirao Jagdale, Passenger in Flight No.9W-339 of Jet Airways, at Exh.45

39) The Prosecution has also examined as PW-12 Mr.Prashant Jagdale vide Exh.45, who was also one of the passengers on Flight No.9W-339 of Jet Airways and was going from Mumbai to Delhi on 30/10/2017.

40) The present witness PW-12 has, in his examination-in-chief, deposed that the Flight No.9W-339 had departed from Mumbai on time, and that after about 30 to 45 minutes from departure, an announcement was made in the Flight that no services will be provided on account of emergency, and that the Pilot also announced that the Flight has been diverted to Ahmedabad owing to emergency reasons, and that after sometime thereafter, the Flight had landed at Ahmedabad and the aircraft was taken to a corner. The witness has further deposed that the upon looking from the window of the aircraft, it was found that there were vehicles with red and yellow lights, stationed near the Airport, and the passengers could not make out as to why these vehicles were stationed there, and hence, all the passengers were scared. It is further deposed by the witness that he too was very much scared his boss Mr.Mehul Malani was also scared. The witness further deposes that as his boss Mr.Mehul Malani had twice suffered heart attacks, he was concerned about his boss.



PW-13 Mr.Harshad Chimanlal Soni, staff member working in the office of the accused, at Exh.47

41) The Prosecution has next examined Mr.Harshad C.Soni as PW-13 vide Exh.47, who works as a Branch Manager in Krish Gems & Jewellers owned by the accused Mr.Birju Salla. In his examination-in-chief, this witness has deposed that the office of Krish Gems & Jewellers is situated on the 2<sup>nd</sup> floor in Giriraj Building in Zaveri Bazar, Mumbai, and the said office is owned by the accused herein.

42) It is further deposed by the witness that on 30/10/2017 at 10:00 a.m., the witness was in the said office, and four persons from the Crime Branch had come the office and the present witness introduced himself as well as two peons to the persons from the Crime Branch, on being asked to do so, and thereafter they instructed the witness to switch off his cell phone and to keep the same aside, and they also instructed the Peons to go inside the kitchen. It is deposed further by the witness that thereafter, the said persons from the Crime Branch had started checking the office, and when the witness asked them as to why they were doing so, they replied that the witness would be informed in that regard once their Senior arrives in the morning. It is also deposed that the witness was informed by them that they will have to stay overnight in the office as their Senior was to arrive in the morning, and therefore, all of them including the witness had stayed in the office during the night.

43) The witness has further testified that at around 11:30 p.m., one Mr.Goswami had come from

Ahmedabad and he had also carried out the checking in the office of the accused, and he had also informed that their Senior who would be coming in the morning, would inform them regarding the checking of the office of the accused.

44) The witness then deposes that at about 07:30 a.m., around seven to eight Officers of the Ahmedabad Crime Branch, bringing along the accused with them, had come to the office, and they went into the cabin of the accused taking along with them the accused, and thereafter had shut the door of the cabin from inside. It is further deposed by the witness that when he went into the office of the accused along with the tray of snacks, he saw that the computer lying on the desk of the accused, was on, and the accused was showing and typing something on the said computer, and when the witness came out of the office, at that time two officers had also come out along with him. It is deposed that this process continued for about four to five hours.

45) The witness further deposes that the Officers from the Crime Branch who had come, had taken the Laptop, papers for printing, other papers lying beside, and also perhaps the DVR, along with them, and that they also informed the witness to accompany them to the L.T. Marg Police Station where they were going, and at that time, they also took the accused with them.

46) In the cross examination, this witness has admitted that any trader before observing or examining any object of gold or diamond by holding the same in his hand, puts on hand gloves, and the reason for putting on the hand gloves, is to ensure

that no damage is caused to the object. The witness has also further admitted that his boss Mr. Birju Salla has checked such gold and diamond objects on many occasions by putting on hand gloves, and that when the witness happens to visit other traders for official purposes, these traders also check the gold and diamond objects after putting on the hand gloves.

47) It is further stated by the witness that on 30/10/2017 when the four Police personnel had come to the office of the accused, they had not shown any search warrant to the witness, for the purpose of carrying out the search of the office, and one of the said four persons, had introduced himself as Mr. Sachin Mane, Officer with the Crime Branch Unit-II. It is further deposed that Mr. Goswami had come at 11:00 p.m., and he had neither informed the witness as to the Police Station from where he had come nor had he shown any search warrant to the witness. It is further testified by the witness that the Police personnel before leaving the office of the accused, had not given any acknowledgment receipt to the witness with regard to the articles seized or taken away by the Police personnel from the office. The witness admits that no signature of the witness was obtained by them.

48) It is further admitted by the witness that in the course of his duty, he has seen his boss i.e. the accused herein, operating his computer and typing on the computer with his hand gloves on.

PW-16 Mr.Mohit Tyagi, Cabin Crew Member, Jet Airways, at Exh.52

49) The Prosecution has also examined Mr.Mohit Tyagi as PW-16 vide Exh.52, who was one of the Crew Members on the Jet Airways Flight No.9W-339. The witness testifies to be on duty on the said Flight on 30/10/2017.

50) The witness further in the course of his examination-in-chief, has deposed that after the Flight took off and while he was doing his duty, his colleague Ms.Shivani Malhotra came into the Premier Class and asked the Supervisor Ms.Nitika Joneja for permission to use the washroom as she was sneezing badly, and that it was almost impossible for her to reach the Economy Class washroom as there were two meal carts in between. It is further deposed by this witness that when he came back to the alley after serving meals to the passengers, Ms.Shivani Malhotra was informing Ms.Nitika Joneja that there were no tissue papers left in the washroom, and therefore, after instructing Ms.Shivani Malhotra to continue with her work, Ms.Joneja had decided to change the tissue paper box. It is further deposed that thereafter the witness continued with his work and thereafter when he again came back in the galley, he saw Ms.Nitika Joneja standing with a paper, and she confirmed the Flight number with this witness, and thereafter, as further deposed by the witness, he also started reading the said paper, wherein the above referred threat was written in English and Urdu languages. It is also further deposed by the witness that upon reading the threat note, the witness as well as the Supervisor Ms.Joneja, both got scared.

51) As further deposed by the witness, thereafter, upon obtaining access to the Cockpit, Ms.Joneja contacted the Captain, and after returning from the Cockpit, she made that announcement requesting all passengers to remain in their seats and to fasten their seat belts. It is further deposed that thereafter she also called up the Crew of the Economy Class via interphone and instructed them to immediately prevent any passenger movement in the Cabin, and further told the Crew to wind up their work as soon as possible, and to just dump everything in the carts. It is also deposed that she also instructed to keep an eye in the cabin and ensure that no passenger gets up.

52) It is further deposed by the witness, that thereafter the aircraft landed at Ahmedabad, and at that time the accused Mr.Birju Salla was sitting in Seat No.1D and the witness himself was sitting on the forward crew-jump seat, from where he could see Seat Nos.1D and 1F, and at that time, the accused Mr.Birju Salla asked the witness as to what was going on, to which the witness replied that they had diverted owing to security reasons and therefore, the accused should remain seated. It has been further deposed by the witness, that thereafter upon again being asked by the accused as to what was going on, the witness instructed him in an assertive mode to remain seated, and even thereafter, when the accused asked the witness for permission to use the washroom, the witness strictly denied such request of the accused as the seat belts were on and the emergency lights were also on. It is further deposed by the witness that thereafter, when the aircraft landed at Ahmedabad and the passengers and the Crew had deplaned, the accused against asked the witness as to

whether the Flight will go to Delhi or not, and thereafter, the CISF staff present at the Airport, was informed by the witness to take the accused away.

53) In the cross examination, the witness has admitted that he had not stated before the Gujarat Police in his statement recorded on 03/11/2017 that he was sitting on the crew jump seat from where he could see seats Nos.1D and 1F, and that at that time, the accused had asked the witness as to what was going on, and that the witness had replied to the accused that on account of security reasons, they had diverted and that he (accused) should remain seated, and that thereafter again upon being asked by the accused, the witness had instructed him in an assertive mode to be seated, and that thereafter on being asked by the accused for permission to use the washroom, the witness had strictly denied as the seat belts and emergency lights were on, and that the accused was feeling uneasy and had asked for a glass of hot water again.

54) The witness has also further admitted regarding there being no reference in his statement recorded on 1812/2017 before the NIA, about the request made by the accused to use the washroom which was not acceded to by the witness as the emergency lights and seat belts were on.

PW-18 Mr.Mahesh Shantilal Chauhan at Exh.57

55) The Prosecution has also examined one Mr.Mahesh S.Chauhan as PW-18 vide Exh.57, who works at the Fire Office, Airports Authority of India, Ahmedabad. This witness has deposed that a phone call was received at the Control Officer of the Fire

Division, whereby the witness upon being informed, met Shri Rajdeepsinh Jhala in his office at Gaekwad Haveli, who introduced the witness to Mr. Pradip Bhale, an official from NIA who was also present there. It is further deposed by the witness that thereat, Shri Rajdeepsinh Jhala handed over a black coloured DVR of Hickvision Company to said Mr. Pradip Bhale, who packed the said DVR in a green cover and sealed the same by applying brass seal of NIA, and thereafter, the present witness, one other Panch Mr. Alpesh Mehta as also both the officers i.e. Shri Pradip Bhale and Shri Rajdeepsinh Jhala, all put their signatures on the said cover. It is further deposed by the witness that along with the green cover containing the DVR, an Adaptor was also placed in sealed condition. The witness on being shown the document Exh.58, has identified the signatures thereupon as those of his, of the other Panch Mr. Alpesh Mehta, as also of Mr. Rajdeepsinh Jhala and of Mr. Pradip Bhale, and the witness further admits the writing contained in the said document Exh.58 to have been done by Mr. Pradip Bhale in his presence at the relevant point of time.

56) In his cross examination, the witness has identified the above referred DVR and Adaptor, which was handed over in his presence by Mr. Rajdeepsinh Jhala to Mr. Pradip Bhale.

PW-20 Mr. Jamil Ahmed Siraj Ahmed Saiyed, Panch Witness at Exh.67

57) The Prosecution has examined as PW-20 vide Exh.67 one Jamil Ahmed S. Saiyed, who is one of the Panch witnesses herein.

58) It is deposed by the present witness in his examination-in-chief that he was telephonically informed from Gaekwad Haveli Crime Branch on 30/10/2017 at around 01:15 a.m. past midnight i.e. on 31/10/2017, to come along with a friend of his, as both were required to act as Panchas, and therefore, the present witness along his friend Imtiyazkhan Safiqkhan Pathan, had gone to Gaekwad Haveli Crime Branch at around 01:45 a.m. in the night. The witness further deposes that he went to the Crime Branch Office in the upper portion, where a person nabbed by the Police, upon being asked about his name in presence of the witness, had informed that his name is Birju Salla. The witness deposes further that the said Birju Salla further informed that he intends to show at his office situated at Mumbai the Laptop which he had used, and therefore, the Police had prepared a writing to such effect and the witness and his friend Imtiyaz had signed the same.

59) It is then deposed by the witness that thereafter, they both i.e. the witness and his friend Imtiyaz, along with the accused, one PSI, one Constable etc. were all flown to Mumbai from Ahmedabad, and after reaching Mumbai, they all were taken to the office of the accused in Government vehicles. It is further deposed by the witness that they all went to the cabin of the accused which was situated inside his office, whereat the Laptop which was lying down, was placed by the accused on a table, and the accused thereafter upon opening the Laptop, showed an application of Google Translation, through translation could be done from English into Urdu.

60) The witness further deposes that a printer was lying in another room situated within the



office of the accused, and one paper was in the said printer, which was seized together with twenty to twenty five other papers from amongst the papers lying on the cupboard, by the Police in presence of the witness. The witness further deposes that the entire seized material was separately packed and sealed by the Police and the signatures of the witness and his friend were obtained. The witness on being shown the said Laptop, has identified the same as the one seized by the Police as aforesaid, and has also identified the signatures.

61) In the cross examination, the witness admits to have not received any telephone call from the Crime Branch, Gaekwad Haveli, prior to receiving the telephone call at around 01:15 a.m. in the night of 30/10/2017. The witness further admits that the other Panch being Mr.Imtiyaz had not accompanied him during his ten to twelve visits to the office of the Crime Branch.

62) The witness admits that he was arrested on 09/06/2014 by the Crime Branch in connection with an offence under Arms Act, and that he was charged with having possessed a weapon without license, remained in custody for two days consequent to his arrest, and that the said case against him is still pending. It is further admitted by the witness that he and his friend Imtiyazkhan were also the Panchas in another offence under the NDPS Act investigated by the Crime Branch, on 09/06/2017 i.e. four months prior to being called as Panchas in connection with the present offence. It is also further admitted by the witness that when they went to Mumbai, on that day Mr.S.L.Chaudhary was also with them, who was also connected with the investigation in NDPS case, and in

the said NDPS Case, Mr.J.M.Patel was the complainant, who was also with the Panch witnesses when they went to Mumbai. It is further admitted by the witness that Mr.S.L.Chaudhary and Mr.Jhala are both Facebook friends of the witness.

63) The witness further states in his cross examination that one more Police Officer from Ahmedabad being one Mr.Jitendra Goswami who was not known to the present witness before he was called in connection with the Panchnama in the present case, was also present at the office of the accused in Mumbai apart from other Officers from Ahmedabad and the Manager of the accused.

PW-21 Mr.Bhagwanbhai Mohanji Vanjara, Panch Witness, at Exh.73

64) The Prosecution has also examined as PW-21 vide Exh.73 one Bhagwanbhai M.Vanzara, who is also one of the Panch witnesses herein.

65) It is deposed by the present witness in his examination-in-chief that he went to the Gaekwad Haveli Crime Branch on 30/10/2017 along with his friend Mr.Mahendra Iswarbhai Vanzara, on being telephonically called upon. It is deposed that the witness met Shri Rajdeepsinh Jhala, and upon being asked by him to act as a Panch witness, the witness replied in affirmation, and his friend Mr.Mahendra Iswarbhai Vanzara also showed his readiness to act as a Panch witness.

66) This witness upon being shown the Panchnama Exh.74, identifies the signatures therein of the concerned signatories. The witness also

further, upon being shown, has identified the currency notes of different denominations amounting to Rs.4,02,700/-, and the witness states the same to be the very currency notes which were seized by the Police from the bag of the accused.

PW-22 Dr.Rajdeepsinh Narayansinh Jhala, DCP, Cyber Crime, Ahmedabad, at Exh.79

67) The Prosecution has examined as PW-22 vide Exh.79 Shri Rajdeepsinh Jhala, who initially led the investigation process in connection with the present offence.

68) The witness in his examination-in-chief, has testified that on 30/10/2017 upon being informed by his PSO regarding the receipt of threat letter of hijacking, from the Ahmedabad Airport Authority, the witness reached the Ahmedabad Airport and was present there to assist the SOG, and thereafter returned to his office at around 11:30 a.m.

69) The witness further testifies that on the same night i.e. at 10:15 p.m., his PSO had informed that a complaint in connection with the present offence, has been registered by the ACP, SOG on behalf of the Government, and that the same has been forwarded to the present witness for being investigated upon for the commission of an offence under Secs.3(1), 3(2)(a) and 4(b) of the Anti-Hijacking Act, 2016. It is further deposed by the witness that all the relevant material in connection with the investigation into the present offence viz. Report of the PSO, copy of the FIR, seizure Panchnama of the threat letter, Janvajog Entry No.2/17,

statements of Shivani Malhotra, Nitika Joneja, Jay Jariwala, Birju Salla - all recorded by ACP Shri B.C.Solanki together with the passenger chart, two DVDs etc. and other material, was handed over to the present witness. It is then deposed by the witness that thereupon after completing all other necessary formalities required for investigation, the accused Mr.Birju Salla was arrested at 24:00 Hrs. after drawing the Panchnama regarding the physical condition of the accused in presence of Panchas Mahendra Vanzara and Bhagwan Vanzara.

70) The witness further testifies that thereafter, the further statement of the accused was recorded in presence of the witness. It is thereafter deposed by the witness that during the course of his investigation, it was revealed that the accused had drafted the threat letter in his Sony Vaio Laptop at his office situated at Mumbai, and the said threat letter was translated in Urdu through Google Translator in the very same Laptop, and a print-out thereof was taken from the printer lying in the office of the accused which was of Epson Company. It is further deposed by the witness that it was also revealed during investigation that the said threat letter was placed by the accused in the tissue paper box in the toilet situated in the front portion of Jet Airways Flight No.9W-339, and therefore, a preliminary Panchnama was drawn with respect to recovery of Laptop, printer in presence of two Panchas being Jamil Saiyed and Imtiyaz Pathan, which lasted from 02:00 a.m. to 02:30 a.m., and thereafter, the witness along with two Panchas, the accused, PI Mr.Shanker Chaudhary, PSI Shri J.M.Patel, Head Constable Mr.Mehboobkhan etc. left for Mumbai by Air

India Flight No.AI-30 from Ahmedabad Domesti Airport at around 04:30 a.m.

71) It is thereafter deposed further by the witness that upon reaching Mumbai Airport at 05:45 a.m., they all along with the local Police personnel from Mumbai, went to the office of the accused in Police vehicles, and thereat, upon entering into the office of the accused, the accused in presence of the Panchas, pulled out one white Laptop of Sony Vaio Company and one charger from the lower drawer of his table, placed the same atop the table, and activated the same in presence of the Panchas, and then demonstrated as to how he had drafted the threat letter in English, and thereafter, it was also demonstrated by the accused in presence of the Panchas as to how the translation could be done by opening the Google Translator, how the same could be saved in both languages after being copying the same, and thereafter, the accused also informed about the procedure to take print-outs from the Epson printer lying in the adjacent chamber of his employee Mr.Harshad Soni.

72) Further in the course of his testimony, the present witness testifies that he had seized the DVR from the Mumbai office of the accused Birju Salla, which the witness had kept in his personal custody, and thereafter, the investigation in connection with the present offence upon being transferred to the N.I.A., the present witness had handed over the custody of the said DVR to the officer of the N.I.A. The witness has identified the contents of the production-cum-seizure memo Exh.58, including his own signature thereupon.

73) In his cross examination, the witness has admitted that he had not received any orders from the Government of India either for investigating into the offence under the Anti-Hijacking Act, or for assisting in such investigation or for arresting the accused for the offence under the Anti-Hijacking Act. He has further admitted that he had also not passed any order for seizure of the muddamal under Sec.18 of the Anti-Hijacking Act. The witness on verifying the record, further states that he has seen the statements recorded by Shri B.C.Solanki at the relevant point of time. It is also further admitted by the witness that it is not noted or mentioned in the statement Exh.83 that the relatives of the accused upon being telephonically contacted, had not received the calls, and therefore, they were approached on the landline connection and were asked to receive the calls. It is also further admitted by the witness that on 30/10/2017 when he was present at the Ahmedabad Airport till 11:30 a.m., he neither had any occasion to interrogate the passengers of the Jet Airways Flight No.9W-339 nor had any occasion to talk to the Crew Members of the said Flight, and that he had only assisted in the bandobast, and apart from that, he had not undertaken any procedure in connection with the offence in question.

74) The witness further admits that in the letter Exh.86 seeking permission from the Commissioner of Police to go to Mumbai, it has been mentioned that upon examination of the investigation papers by the witness in connection with Janvajog Entry No.2/2017, four to five persons seemed to be suspects. The witness has denied having been entrusted the investigation at around 10:15 a.m. on 30/10/2017, in connection with offence registered

vide I-C.R.No.85/2017 with DCB Police Station, but has however admitted that it was decided on 30/10/2017 itself as to which of the Police Officers and Panchas would be going to Mumbai, including the Flights to and fro Mumbai for the purpose of transit of all concerned.

75) The witness has further admitted that he had not issued any written orders to PSI Shri Goswami for going to Mumbai. The witness denies having any knowledge with regard to the time as to when PSI Shri Goswami was sent to Mumbai as he had been sent to Mumbai in connection with Janvajog Entry No.2/2017.

76) The witness further goes on to admit that when he reached the Crime Branch at Gaekwad Haveli at around 11:30 a.m., the accused was present thereat since then till his arrest. The witness further admits that it is not mentioned in the letter Exh.92 regarding the articles viz. two to three Hard Discs, two to three pen drives, one webcam, light bill, telephone bill, wifi router of office, DVR of Hickvision Company and printer of Epson Company having been seized in terms of the Panchnama Exh.68, and such reference is also not in the letter Exh.98 written to the Charge Officer of Crime Branch, Ahmedabad, for issuing the muddamal Pavti. The witness denies that in the Panchnama Exh.68, it is not mentioned the accused had demonstrated the preparation of the threat letter, and admits that the words *"on the accused being made to activate the Laptop"* are not mentioned in the Panchnama Exh.68.

77) It is further admitted by the witness that since returning from Mumbai on 31/10/2017 till

20/11/2017, the custody of the DVR of Hickvision Company, was with the witness, and that the NIA vide its letter dated 17/11/2017, sought from the witness the said DVR of Hickvision Company, and that from 07/11/2017 to 17/11/2017 the witness had not informed the NIA through letter regarding he having the custody of the said DVR with him. It is also admitted by the witness that from 31/10/2017 to 20/11/2017, he had an occasion to open and examine the said DVR. It is also further admitted by the witness that neither the accused nor his Manager Mr.Harshad Soni were issued any receipt acknowledging the seizure of other muddamal from the office of the accused, apart from the muddamal referred to in the Panchnama Exh.68.

78) It is also further admitted by the witness that during the course of his investigation, he came to know of the fact that the accused had had scuffles on trivial matters with the staff members of Jet Airways.

PW-24 Mr.Satish Chander, Under Secretary, Ministry of Civil Aviation, GOI, at Exh.106

79) The Prosecution has also examined Mr.Satish Chander as PW-24 vide Exh.106, who is working as Under Secretary, Ministry of Civil Aviation, Govt. of India, and who had issued the sanction to prosecute the present accused. The witness in his examination-in-chief, testifies that the document Exh.107 is the order issued by him sanctioning the prosecution of the accused. In his cross examination, the witness admits that from 12/01/2018 to 17/01/2018, the file in which the sanction is required to be obtained, was not on his desk.



PW-25 Mr.Ashish Deorao Rathod at Exh.108

80) The Prosecution has examined as PW-25 Mr.Ashish Deorao Rathod at Exh.108, who was working in the office of the DFSL at Mumbai from 03/11/2014 to 03/09/2018 as a Scientific Officer. It is deposed by the witness in his examination-in-chief that his duty as a Scientific Officer, was to do analytical work of digital cyber forensics and to give report of such analysis to his Assistant Director for verification.

81) It is further testified by the witness that on 23/11/2017, while on duty, he received from his Assistant Director/HOD one sealed envelope vide case file No.Cy-1277/17 for analysis, containing one DVR machine along with hard disk with adaptor, which was analyzed by the witness by using forensic tools according to the case file instructions, and a mirror image of the hard disk of the said DVR was prepared by the witness in one new blank hard disk, which along with the DVR machine with adaptor (without original hard disk) was handed over to the NIA official by hand on the same day i.e. on 23/11/2017 for investigation purpose, and the original hard disk was removed from the DVR machine and the case file was deposited in safe custody of the Assistant Director.

82) It is further deposed by the witness that on analysis in connection with another file bearing No.Cy-1365/17 received on 05/01/2018 by the witness, with exhibits and questionnaire provided by the NIA, the witness had exported the videos of particular date from the hard disk and checked the

exported videos using forensic tools, and on examining and comparing the exported images, the witness found that the person in the reference photograph provided by the NIA was similar person in the said exported images, and that further, on the video analysis of the questioned video (CCTV footage), it was revealed that gestures related to activity of typing on laptop and taking printout were observed. It is further deposed by the witness that upon his examining the exported images in connection with the query of the NIA as to whether the text typed on the laptop matched with the questioned document, its identical in respect to pattern, length, width, line-spacing, language of the text appearing in Urdu and English, it was found by the witness that the said pattern, length, width, line-spacing, language of the text could not be identified, but as observed visually, it seemed that the paper had two paragraphs and visually framed similar structure was observed.

83) In his cross examination, the witness has admitted that even if a particular Hard Disk is formatted, deleted files can be retrieved with the help of forensic tools on examination of such Hard Disk and that even the date of deletion of a particular deleted file can also be retrieved. It is further deposed that the questionnaire received from the NIA, made a reference to specific dates and specific times. The witness has denied having been forwarded a copy of FIR along with the questionnaire. It is also further admitted by the witness that he has not issued a separate certificate under Sec.659b) of the Indian Evidence Act, 1872.

PW-26 Mr.Mr.Vikram Mukundrao Khalate, SP, NIA, Mumbai (IO) at Exh.111

84) The Prosecution has examined the IO of the NIA Mr.Vikram Khalate as PW-26 vide Exh.111, who investigated into the present offence, after the NIA took over the investigation from the Gujarat Police.

85) The witness has deposed in his cross examination that he had seen the mirror image of the Hard Disk of DVR which was provided by the FSL, Mumbai, and on perusal of the same, it was found that on 27/10/2017, while sitting in his office in front of his Sony Vaio laptop, the accused Mr.Salla started printing at 1227 Hrs., and thereafter tried to put on hand gloves at around 1236 Hrs. It is further deposed by the witness that it was also found on the perusal of the mirror image that the accused could not succeed in putting on the hand gloves as someone had entered, and thereafter again at around 1419 Hrs., the accused printed the paper by putting on hand gloves.

86) In the cross examination, this witness admits that till the time he made a written communication with ACP Shri Jhala, with regard to the DVR, there was no written communication made from Mr.Jhala's end. It is also further admitted by the witness that he had an occasion to examine few of the other passengers of the Flight No.9W-339 travelling in Business Class, apart from Mr.Prashant Jagdale who was travelling in Economy Class on the same Flight, and that upon such examination of the passengers, his investigation revealed that a passenger named Rana Rajinderpal Singh had accessed the washroom of the Business Class of Flight 9W-339, and that such factum

was not revealed during the course of investigation and examination of the crew members of Jet Airways i.e. Ms.Nitika Joneja, Ms.Shivani Malhotra and Mr.Mohit Tyagi. The witness further admits of having not further examined these Crew Members after he examined the passenger Rana Rajinderpal Singh.

87) The witness in his cross examination, volunteers to state that Mr.Bhinder was asked as to whether any cockpit footage is recorded or not, to which said Mr.Bhinder had replied in the negative, and that no documentary evidence is given by said Mr.Bhinder to show that no cockpit footage was recorded. The witness further volunteers to state that nothing was inquired in writing and therefore, nothing was supplied in writing.

88) The witness has further admitted that during his investigation, it was revealed that during the period from 30/10/2017 to 31/10/2017, apart from Manager Mr.Harshad Soni, one Peon and one another office staff of the accused, were present at the office of the accused. It is further stated by the witness that he is unable to say anything as to whether any of the witnesses had expressed a feeling of fear or intimidation in their previous examination done by the earlier investigating agency. The witness admits to have got an occasion to go through the statements of the witnesses, recorded by the previous investigating agency.

89) It is further admitted by the witness that after having received the report Exh.103 from the FSL, Gandhinagar, the witness did not seek any clarification on any count with regard to the said

report. It is admitted by the witness that he had an occasion to go through the said report Exh.103.

90) The witness has further admitted in his cross examination, that his investigation revealed that the accused had an acrimonious past with Jet Airways. It is also admitted that as per the Anti-Hijacking Act, only the NIA is the Agency for arrest and investigation purposes.

PW-27 Mr.Kameshwar Mishra, Under Secretary, Ministry of Civil Aviation, GOI, at Exh.153

91) The Prosecution has also examined Mr.Kameshwar Mishra as PW-27 vide Exh.153, who is working as Under Secretary, Ministry of Civil Aviation, Govt. of India, and who had put his signature on the file regarding prosecution sanction in respect of the accused. The witness in his examination-in-chief, testifies that on 15/01/2018, Mr.Satish Chander, Under Secretary in the Ministry of Civil Aviation was on leave, and the witness was his Link Officer, and on that day, the witness had received the case file of the accused. It is further deposed that the said file contained the reports of NIA received through the Ministry of Home Affairs, regarding investigation of the case against the accused. It is further deposed by the witness that he went through the file, the report and the examination done by the Section of the report submitted by the NIA and after satisfying himself that there was sufficient evidence for issuing of prosecution sanction against the accused as per the Anti-Hijacking Act, 2016, the witness put his signature on the file as a mark of endorsement and further submitted the file to his senior i.e. Director in

Ministry of Civil Aviation, who in turn submitted the file to the Joint Director, Ministry of Civil Aviation, and subsequently the file went to the Minister of Civil Aviation who is the competent authority to issue prosecution sanction.

92) In the cross examination, the witness admits that he had no occasion to read any of the papers related to the present case, prior to 15/01/2018, and that after receipt of the file from the Minister, he had no occasion to go through the said file.

#### **SUBMISSIONS OF THE PARTIES & FINDINGS OF THIS COURT**

93) At the outset, it is required to be noted that the learned Spl.P.P. and the learned Advocate appearing on behalf of the accused, have advanced oral arguments in the matter, and have also in turn furnished their respective written arguments which have been taken on the record, and a submission has been made *inter alia* to the effect by both the learned Advocates that the written submissions may also be treated as a part of the oral arguments. It is in such circumstances that this Court would arrive at its findings herein, based on the evidence that has unfolded before this Court as also taking into consideration the respective submissions advanced by the learned Advocates for the parties herein.

94) On careful consideration of the oral submissions together with a perusal of the written arguments made on behalf of the NIA, it can be seen that the substance of submissions advanced by the learned Spl.P.P. Ms.Geeta Godambe, is *inter alia* to the effect that the accused who is charged with

having committed an offence under Secs.3(1), 3(2) (a) and 4(b) of the Anti-Hijacking Act, 2016, is established beyond reasonable doubt by the Prosecution to have committed such offence, through the oral and documentary evidence of forensic experts and eye witnesses, together with the panchnamas establishing recovery of the relevant muddamal articles.

95) As against that, the learned Advocate Shri R.S.Verma appearing on behalf of the accused, has argued that a cumulative consideration of the arguments advanced on behalf of the accused - both oral as well as written - lead to the only conclusion that the Prosecution has miserably failed to prove the case beyond reasonable doubt against the accused and hence, the accused is required to be acquitted of all the charges that he stands charged with vide Exh.9, and it is also further argued that the present case being that of circumstantial evidence, the Prosecution has failed to complete the entire chain of circumstances against the accused, and thus, at the cost of repetition, the Prosecution having miserably failed to prove its case against the accused, the accused is entitled for a clean acquittal.

96) The defence has cited and relied upon the following authorities in support of the arguments advanced on behalf of the accused.

Sr. No.	Names of parties	Citation
1	Gopal Krishnaji v. Mohd.Haji Latif	AIR-1968-SC-1413
2	Musauddin Ahmed v. State of Assam	2010(1)-SCC(Cri)-1445
3	State of UP v. Jaggo	AIR-1971-SC-1586

4	State of Maharashtra v. Wasudeo R.Kaidalwar	(1981) 3-SCC-199
5	Tomaso bruno v. State of UP	(2015) 7-SCC-178
6	Sukhvinder Singh v. State of Pubjab	(1994) 5-SCC-152
7	Mukhtiar Ahmed Ansari v. State (NCT of Delhi)	(2005) 5-SCC-258
8	Raja Ram v. State of Rajasthan	(2005) 5-SCC-272
9	Anvar P.V. v. P.K.Basheer	(2014) 10-SCC-473
10	Adambhai Ajmeri v. State of Gujarat	(2014) 7-SCC-716
11	Sujit Biswas v. State of Assam	(2014) 1-SCC (Cri) -677
12	Navaneethakrishnan v. State	AIR-2018-SC-2027
13	Suresh and Ors. v. State of Haryana	AIR-2018-SC-4045
14	Digamber Vaishnav v. State of Chhattisgarh	Criminal Appeal No.428-430 of 2019 (March 5, 2019)

97) The Prosecution has also cited and relied upon the following authorities in support of the arguments advanced on behalf of the accused.

Sr. No.	Names of parties	Citation
1	Pulukari Kotayya and Ors. V. King Emperor	(1948) ILR-1
2	State (NCT of Delhi) v. Navjot Sandhu and Ors.	(2005) 11-SCC-600
3	Jamuna Singh and Ors. v. Bhadai Shah	AIR-1964-SC-1541
4	Arjunlal M.Upadhyaya v. Stte of Gujarat	2010 (3) -GLR-2469
5	State through Inspector of Police, A.P. v. N.Narasimhachary	(2005) 8-SCC-364



6	P.L.Tatwal v. State of M.P.	AIR-2014-SC-2369
7	A.N.Venkatesh and ors. v. State of Karnataka	AIR-2005-SC-3809
8	Ganesh Lal v. State of Rajasthan	2002-Cr.L.J.-1967
9	Jagroop Singh v. State of Punjab	AIR-2012-SC-2600
10	Brij Bhushan Sharma v. State of U.P.	2001-Cr.L.J.-1384
11	Sucha Singh and Ors. v. State of Punjab	AIR-2003-SC-3617
12	R.Shaji v. State of Kerala	Criminal Appeal No.1774 of 2010
13	Tahsildar Singh and ors. v. State of U.P.	AIR-1959-SC-1012.

98) Now this Court intends to proceed to deal with each of the material arguments as particularized herein below, from amongst those advanced by the parties hereto, followed by the findings arrived at by this Court with regard to such arguments as herein after follows.

#### **FINDINGS**

99) Before dealing with the evidence, it is required to be noted that the prosecution in the present case has examined in all 27 witnesses. The following aspects are not in dispute in the present case:

- a. ***The accused was one of the passengers of flight 9W 339 on 30.10.2017 and was travelling in the business/premiere class and was allotted Seat 1D.***

- b. *The said flight was travelling from Mumbai and its original destination was Delhi.*
- c. *That a threat note (Exh. 27) was found from the wash-room of the business class.*
- d. *The said flight therefore had to be diverted to Ahmedabad and the flight subsequently landed in Ahmedabad in the early hours of the morning of 30.10.2017.*
- e. *The concerned authorities viz. CISF, Airport Authority and all other agencies did conduct a thorough search of the flight upon its landing at Ahmedabad.*
- f. *The flight did finally take off for Delhi after the authorities gave a clearance at Ahmedabad Airport.*
- g. *At the time of affecting the arrest of the accused (which arrest per se is challenged) certain articles seized viz. cash, credit-debit cards, phones, laptop etc belonged to the accused himself.*
- h. *Even though the recovery of the Sony VAIO laptop and Epson printer from the office of the accused is shrouded with mystery, ownership with*

***regards to the Sony VAI0 laptop and Epson printer is also not disputed.***

99.1) Since the aforesaid aspects are not disputed, no arguments are being advanced with regards to witnesses P.W. No.5, P.W. No.6, P.W. No.7, P.W. No.8, P.W. No.9, P.W. No.10, P.W. No.11, P.W. No.14, P.W. No.15, P.W. No.17, P.W. No.19 and P.W. No.23 and documents, if any, produced by these witnesses.

100) When the Court discusses the evidences on the record in a criminal matter, the Court should also consider the settled principles of Criminal law. The following principles of criminal law are required to be considered considering the evidence on record.

- A) It is the character of the evidence that has to be appreciated and not gravity of the crime committed.
- B) Conviction or guilt of an accused has to be adjudicated on the touchstone principles of appreciation of evidence and nothing else.
- C) Even in a criminal trial under a presumptive Act [like the Anti-Hijacking Act], the burden of proving relevant facts lies squarely on the Prosecution, and it is only after the Prosecution discharges its initial burden of proving the case beyond reasonable doubt, that any presumption can be drawn against an accused.
- D) In a case where the evidence is circumstantial in nature, the following is a necessity:

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) The circumstances should be of a conclusive nature and tendency.

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

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

(E) Suspicion however grave, it cannot take the place of proof.

101) The learned Advocate Mr. R.S.Verma has advanced his arguments on the following points :-

**A. TESTING THE EVIDENCE OF WITNESSES & DOCUMENTS RELIED BY THE PROSECUTION.**

- B. LAW ON APPRECIATION OF EVIDENCE, BURDEN OF PROOF & ADVERSE INFERENCE
- C. LAW ON CIRCUMSTANTIAL EVIDENCE & SIGNIFICANCE OF MOTIVE
- D. ILLEGAL INVESTIGATION AND ITS EFFECT ON THE ARREST & RECOVERIES MADE DURING SUCH ILLEGAL INVESTIGATION
- E. JUSTIFICATION OF INVOCATION OF THE ANTI-HIJACKING ACT, 2016.
- A. TESTING THE EVIDENCE OF MATERIAL WITNESSES & DOCUMENTS RELIED BY THE PROSECUTION.

102) It is submitted by the learned advocate Mr. Verma for the accused that in the present case, amongst other issues, it is incumbent on the prosecution to prove beyond reasonable doubt the following:

I : *Whether the threat note (Exh. 27) found in the washroom of the flight 9W 339 was indeed prepared by the accused?? If yes, then "when, where, how and and why was such threat note prepared"??*

II : *Whether it was the accused who placed the threat note (Exh. 27) in the tissue paper box of the washroom of flight 9W 339??*

102.1) The Prosecution has also admitted that the following facts are required to be proved by the

Prosecution to prove its case against the accused, which are as under:-

- (a) **Accused placed threat note.**
- (b) **Accused intentionally prepared threat note.**
- (c) **Accused had authorship of threat note.**
- (d) **The threat was credible threat.**

102.2) The learned advocate Mr. Verma has advanced his argument with respect to the second issue before advancing to the first issue :

**II : *Whether it was the accused who placed the threat note (Exh. 27) in the tissue paper box of the washroom of flight 9W 339??***

**USE OF WASHROOM BY THE ACCUSED :**

103) It is an admitted fact on the part of the Prosecution that apart from the accused, one Crew Member namely Ms. Shivani Malhotra being PW-2 herein as well as Ms. Nitika Joneja being PW-3 herein, had used the washroom. Not only that, but from the evidence of PW-26, it can be said that one other passenger travelling in the Business/Premier Class, had an access to the washroom i.e. Rana Rajendrapal Singh. It is also an admitted fact that the said Jet Airways employee Rana Rajendrapal Singh has not been examined by the Prosecution. In such circumstances, the argument of learned P.P. Ms. Godambe, cannot be accepted that the accused was the only person having accessed the washroom.

104) To prove the fact that the accused used the washroom during the Flight, the Prosecution has

examined three material witnesses viz. PW-2 Ms.Shivani Malhotra, PW-3 Ms.Nitika Joneja and PW-16 Mr.Mohit Tyagi. All these three witnesses were the crew members on the said Flight No.9W-339. The PW-3 Ms.Nitika Joneja and PW-16 Mr.Mohit Tyagi were performing their duty in the Business Class and PW-2 Ms.Shivani Malhotra was performing her duty in the Economy Class.

104.1) Now if the deposition of PW-2 Ms.Shivani Malhotra at Exh.24 is perused, it transpires that on 30/10/2017, she was on duty on Flight No.9W-339 going to Delhi from Mumbai, which is also an admitted fact on the part of the defence. The said witness has also stated that she was having her duty in the Economy Class, but simultaneously she has also stated that due to the issue of the guest occupying seats No.29 and 30, she reported such issue to her Cabin Crew Supervisor Ms.Nitika Joneja being the PW-3 herein, and for that, she came in the Business Class. It is also stated by the said witness, that while going towards PW-3 Ms.Nitika Joneja, the guest occupying seat No.1D requested her i.e. PW-2 Ms.Shivani Malhotra for one blanket. It is also stated by the witness that when she was discussing the issue of guest on seats No.29 and 30 with PW-3, the guest of seat No.1D went to the washroom of the Business Class. It is also stated that when she (PW-2) went to seat No.1D for giving the blanket, nobody was found on the said seat and therefore, she kept the blanket on the seat.

104.2) From the deposition of PW-3 Ms.Nitika Joneja, it transpires that when she was talking with PW-2 Ms.Shivani Malhotra with regard to the issue of the guest on seats No.29 and 30, the PW-2 also

informed her that the guest Mr.Salla was a very finicky guest and during that time, Mr.Salla went to use the washroom.

104.3) Both these witnesses were cross examined by the defence in order to place on record the *inter-se* contradictions emerging from the oral evidence of these two witnesses. However, on the basis of the contradictions emerging from the testimonies of these two witnesses, the same cannot be said that the evidence of PW-2 Ms.Shivani Malhotra and PW-3 Ms.Nitika Joneja would not be enough to arrive at a positive conclusion that the accused indeed used the washroom of the Flight.

105) The learned Advocate Shri Verma has pointed out that the three statements of PWs 2 and 3 came to be recorded during the course of the investigation and two statements of PW-16 came to be recorded and in their statements, recorded on different dates, material improvements have been made by these witnesses. It is submitted that even in their respective substantive evidence before the Court too, all the three witnesses have made material improvements, and all such material improvements, omissions and contradictions have been duly proved by confronting these witnesses with their previous statements and no satisfactory reasons have been assigned by these witnesses for making material improvements and omissions and thus, the evidence of these witnesses is wholly unreliable on this very count.

105.1) In this regard, if the depositions of PW-2 and PW-3 is again perused, it becomes crystal clear that they have categorically mentioned that the



accused Birju Salla had accessed the washroom during the Flight and the said fact has been stated by the witnesses before the Police when their first statement was recorded. There was no improvement in their statement as to the use of the washroom by the accused, in their subsequent statement recorded by the NIA. From the deposition of these two witnesses, the Court can come to the conclusion that the accused Birju Salla though denied by him, had used the washroom of the Flight.

105.2) It is also required to be noted that in the case of **Uday Chakraborty vs. State of West Bengal (2010) 7 SCC 518**, the Hon'ble Supreme Court has observed that Investigating Officer though investigation at subsequent stage upon transfer of the investigation, examining witnesses afresh is permissible and it cannot be said that prejudice caused to accused.

105.3) It is also required to be noted that on the case of **Harpal Singh vs. Devinder Singh (1997) 6 SCC 660**, the Hon'ble Supreme Court has observed that if the Investigating Officer elicited more details from the same person during any subsequent interrogation his evidence does not become suspect.

105.4) In view of the above settled legal position, if Investigating Officer elicited more details from the same person i.e. PW-2 Ms. Shivani Malhotra and PW-3 Ms. Nitika Joneja in the present matter, the evidence of these two witnesses does not become suspect.

106) The learned Advocate Shri Verma has also submitted that though the PW-2 Ms. Shivani Malhotra

and PW-3 Ms.Nitika Joneja have stated in their substantive evidence that they saw the accused using the washroom of the Business Class, the PW-16 who all throughout was present in the Business Class, is conspicuously silent on this aspect, and that on the contrary, the PW-16 states that he only saw PW-2 use the washroom of the Business Class. It is also submitted that it is highly unlikely that a witness like PW-16 Mr. Mohit Tyagi whose duty was to serve the passengers of Business/Premier Class, did not see the accused using the washroom, thereby creating doubts on the contrary versions of PW-2 Ms.Shivani Malhotra and PW-3 Ms.Nitika Joneja.

106.1) Of course, on perusing the deposition of PW-16, it can be said that the witness has not deposed that the accused had used the washroom of Business Class, but mere silence of the witness before the Court as to the use of washroom by the accused, does not make the witness 'conspicuously silent' on this aspect. It cannot create any doubt as to the use of the washroom by the accused if the said witness remains silent on the aspect of use of washroom by the accused, and as stated by him, he saw only PW-2 using the washroom of the Business Class. Not only that, his silence on the point of use of washroom by accused Birju Salla creates the credibility of his deposition. Had he intended to involve the accused Birju Salla falsely, he would have deposed that he had seen the accused Birju Salla using the washroom.

107) The learned Advocate Shri Verma has also pointed out that the PW-2 Ms.Shivani Malhotra, PW-3 Ms.Nitika Joneja and PW-16 Mr. Mohit Tyagi are conspicuously silent with regard to the use of the

washroom by one other Business Class passenger namely Rana Rajendrapal Singh, which also creates doubt on the deposition of these witnesses.

107.1) Of course, during the course of recording of the evidence of these three witnesses, it is not disclosed by any of them as to the use of the washroom by one other Business Class passenger namely Rana Rajendrapal Singh, but however, it is the usual practice during the recording of evidence that whatever the questions are asked by the learned P.P. in examination-in-chief and by the defence Advocate in the cross examination, are replied by the witness. In such circumstances, these witnesses have deposed on the questions asked by the learned P.P. Of course, these witnesses were silent on other points also, but they are not silent even when the specific question as to the use of washroom by any other person, is asked to them and, therefore, it cannot be said that the PWs 2, 3 and 16 are conspicuously silent with regard to the aspect of use of washroom by one other passenger of Business Class Rana Rajendrapal Singh.

108) The learned Advocate Shri Verma has also pointed out that the PW-3 initially denied the suggestion, but when confronted, she has admitted that in all her previous statements, she has stated different times with regard to the accused having alleged used the washroom.

108.1) Considering such submission, in the opinion of this Court, merely because the timing of the usage of washroom is stated differently, it cannot be said that the accused had not used the washroom while travelling in the Flight, and no

benefit should be given to the accused considering the entire set of evidence on the record.

109) The learned Advocate Shri Verma has also pointed out that the Jet Airways employee Rana Rajendrapal Singh accessed the washroom, and even though he was not examined by the Prosecution, and in such circumstances, adverse inference is required to be drawn against the Prosecution.

109.1) From the evidence on the record, the Court has come to the conclusion that the Prosecution has beyond reasonable doubt proved that the threat note was found from the box of the tissue paper in the washroom of the Premium class of Flight No. 9W-339 of Jet Airways. Not only that, PW-5 Shri Dayashanker Ramdulare Kahar deposed before the Court that he had cleaned the toilets of the Flight scheduled from Mumbai to Delhi. He had placed new tissue paper box in both the toilets Economy class as well as Business class. Moreover, PW-6 Shri Sushant Raosaheb Salve confirmed that PW-5 Shri Dayashanker Ramdulare Kahar was assigned duty of cleaning the toilets of Flight No. 9W-339. The PW-14 Shri Rakesh Ashok Gupta deposed that he had checked Jet Airways Flight No. 9W-339 which was scheduled from Mumbai to Delhi and he has taken the signature of the Cabin Crew Supervisor. This fact was corroborated by PW-3 Ms.Nitika Joneja. All these oral evidences clearly prove that there were new tissue paper boxes on the Flight.

109.2) When the Court comes to the conclusion that the threat note was found from the tissue paper box from the Premium class washroom and when it has come on the record that only four persons had accessed the

washroom of Premium class and out of these four persons, three persons were crew members of the Jet Airways and one is the accused, the Court has to consider the conduct of these persons at the time when the threat note was found. After reading the threat note PW-3 Ms. Nitika Joneja got panicked and scared. Similarly, if we see the deposition of the PW-2 Ms. Shivani Malhotra who had also accessed the wash room, it appears that nothing suspicious is found during his conduct after hearing the announcement from the Captain stating that they were landing in Ahmedabad due to security reasons.

109.3) Of course, Mr. Rana Rajendrapal Singh who is an employee of the Jet Airways is not examined nor his conduct has been brought on the record by the Prosecution, but the conduct of the present accused is brought on the record in the deposition of the crew members of the Jet Airways Flight No. 9W-339 which clearly suggests that the accused became impatient after the hearing of announcement informing passengers that they were diverting the Flight to Ahmedabad due to security reasons. Not only that, he tried to get up from the seat to use the washroom as well as after the passengers and the crew members deplaned, the accused again asked the witness whether the Flight will go to Delhi or not.

109.4) As per section 8 of the Indian Evidence Act, the conduct of the accused is relevant. The section clearly explains that the conduct of any person, an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto. In the case of **A.N.Venkatesh and Ors. Vs.**

**State of Karnataka** reported in **2005(3) ACR 2518 (SC) and AIR 2005 SC 3809**, the Hon'ble Supreme Court has observed that under section 8 of the Indian Evidence Act, the conduct of the accused is relevant if influences or is influenced by any fact in issue or relevant fact. Moreover, the fact can be proved by the conduct of a party and surrounding circumstances.

109.5) If we peruse section 8 of the Indian Evidence Act, it is also relevant. Considering the evidence on record, under the head subsequent conduct, the conduct as to fear, trembling, etc., physical symptoms indicating fear, paleness, trembling, fainting, weeping, sweating, sighing, hesitation, fluttering of the voice, etc. would be material.

109.6) In light of this, the evidence on record is evaluated, it can be said that when announcement was made that the flight was diverted to Ahmedabad due to security reasons accused became restless. This is important and relevant to the fact in issue because the anxiety of accused made him to gather information whether this diversion is due to discovery of threat note or otherwise. It is the fact that at that time only accused was aware that he had placed the threat note in the washroom and therefore he tried to access the washroom. This fact is proved by PW-3 Ms.Nitika Joneja, she stated that **"Then he immediately made an announcement informing passengers that we are diverting to Ahmedabad due to security reasons. I informed my crew of economy class about immediate landing and told that there should not be any guests movement. Even I made an announcement that we are diverting to Ahmedabad due to security reasons. The guest on 1D seat Mr. Salla tried to get up from his**

seat to use washroom. I told him that he cannot get up from his seat due to security reasons”.

109.7) This fact is corroborated by PW-16 Mr.Mohit Tyagi, he stated that **“After that the Aircraft landed at Ahmedabad, and the Captain took the Aircraft in the isolation bay. At that time Mr. Birju Salla was seating in the seat No. 1D. I was on seating on the forward crew jump seat from there i.e., my seat, I could see seat No.1D and 1F. At that time, Mr. Birju Salla asked me as to what was going on. I informed him that due to security reasons, we have diverted, so just be seated. After few minutes, he again asked as to what was going on. In assertive mode I told him to be seated. After that he asked whether he can use washroom, but I strictly denied as the emergency light were also on. He was feeling very uneasy and asked for glass of hot water again”.**

109.8) This clearly proves that accused had knowledge that he had placed threat note in the washroom of business class and he wanted to check whether emergency landing is in consequence of his act.

109.9) The accused was so restless and upset even after deplaning, he kept asking to PW-16 Mr.Mohit Tyagi and wanted to ascertain the reason for diverting flight. Regarding this PW-16 Mr.Mohit Tyagi stated that **“At that time was also Mr. Birju Salla asked me as to whether this flight will go to Delhi or not”.** Therefore, conduct of accused is proved by prosecution which is relevant to the fact in issue that a threat note was found in the washroom and conduct of accused proved that he had placed the

threat note in the washroom. The conduct of accused is conclusive proof against the accused.

110) The learned Advocate Shri Verma has also pointed out that PW-2 Ms.Shivani Malhotra has admitted regarding the history the accused had with Jet Airways. It is also submitted that PWs 22 and 26 have admitted in their cross examination that during the course of their respective investigation, it was revealed that the accused had an acrimonious history with Jet Airways. It is submitted that thus, the possibility of false implication by foisting "the theory of usage of washroom by the accused" cannot be ruled out.

110.1) Of course, on perusal of the evidence on record, it can be said that it has come on record that the accused had an acrimonious history with Jet Airways, but what kind of acrimonious history the accused had with Jet Airways, is not brought on record. Not only that, due to threat note found on board, the crew members were also scared and got panicked. Moreover, the conduct of the accused during the flight and thereafter is also to be considered. In such circumstances, considering the previous as well as subsequent conduct of the accused it is not possible to accept that due to acrimonious history with Jet Airways, there is a possibility of false implication by foisting 'the theory of usage of washroom by the accused'.

111) From the above discussion, with regard to the evidence on record, it cannot be said that the evidence that has been led by the Prosecution, it would not only be adverse but also fallacious to arrive at an irresistible conclusion that the



Prosecution has succeeded in proving beyond reasonable doubt that the accused had indeed used the washroom. In the above circumstances, this Court comes to the conclusion that during the course of the Flight, the accused who was occupying the seat No.1D in the Business/Premier Class of the Flight, had used the washroom of the Premier Class.

112) The learned Advocate Shri Verma has also submitted that it is the alleged case of the Prosecution that the accused wore hand gloves and kept the alleged threat note in a small plastic pouch. It is pointed out that no such alleged pouch is recovered by the Prosecution either from the office of the accused or from the body of the accused, and therefore, the absence of such recovery of plastic pouch falsifies the entire case of the Prosecution that the accused had placed the threat note in the tissue paper box of the washroom of the said Flight.

112.1) In this regard, it is required to be noted that mere non-recovery or non-discovery of the gloves or plastic pouch cannot give any benefit of doubt to the accused and it also cannot be said that the chain of circumstances to prove the guilt of the accused is not proved. There was ample opportunity with the accused to wash away the plastic pouch in which the threat note was placed as well as the gloves which were worn for placing the threat note.

112.1.1) Moreover, any mistake done by the IO cannot always be fatal for the Prosecution to prove its case. In the case of **Karnel Singh vs. State of Madhya Pradesh 1995 Cri.Law Journal 4173**, the Hon'ble Supreme Court has observed that in case of defective

investigation, the Court has to be circumspect in evaluating the evidence, but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the Investigating Officer if the investigation is designedly defective. In the circumstances, on the basis of non-recovery of the plastic pouch either from the office of the accused or from the body of the accused, benefit of doubt cannot be given to the accused.

113) The learned Advocate Shri Verma has also argued on the following aspect:-

**I : Whether the threat note (Exh. 27) found in the washroom of the flight 9W 339 was indeed prepared by the accused?? If yes, then "when, where, how and and why was such threat note prepared"?**

113.1) The learned Advocate Shri Verma has also further submitted that it is the alleged case of the Prosecution that the threat note **(Exh.27)** found in the Flight was prepared by the accused on 27.10.2017 at his office between the period 12.00 Hrs. to 16.00 Hrs. by allegedly using his Sony VAIO laptop and Epson printer. It is further submitted that in the complaint and in the chargesheet, there was also an alleged specific motive attributed against the accused.

113.2) It is submitted that in order to prove the aforesaid aspects, the Prosecution has examined various witnesses including PWs 13, 20, 22, 23, 25 and 26 amongst others, and further documentary evidence has also been placed on record and relied

upon by the Prosecution. It is submitted that however, none of the witnesses examined and the documentary evidence produced before the Court go on to help the Prosecution, and on the contrary some of the evidence led by the Prosecution on their own volition completely destroys their alleged case against the accused.

114) It is submitted that the Prosecution has failed to prove/establish as to how did the accused come to know on 27.10.2017 itself that he would be flying in Flight number 9W-339 on 30.10.2017.

114.1) If anybody wants to fly after a week, the ticket can be purchased easily by him before one week from the authorized agent of the Airlines or from the Airlines itself. In such circumstances, on 27/10/2017 the accused might have the knowledge as to which Flight would be going to Delhi from Mumbai, and therefore, the number of Flight can be easily written in the threat note. In such circumstances, it cannot be said that it is not proved as to how the accused came to know about the exact number of the Flight he was supposed to travel in.

**DISCOVERY OF SONY VAIO LAPTOP AND EPSON PRINTER :**

115) It is next submitted on behalf of the defence, that as far as the other alleged case of the Prosecution is concerned, though the ownership of the Sony VAIO laptop and Epson Printer is not doubted, the recovery of the said articles is shrouded with mystery, on the following counts:-

(1) PW-20 Jameel Ahmed Siraj Ahmed Saiyed and the other panch witness

Imtiyazkhan can easily be termed as “police stock witnesses” in view of the fact that PW-20 has admitted to having been a panch witness in another NDPS case investigated by the Crime Branch itself in the month of June, 2017. He has also admitted that the said seizure under the NDPS Act was affected in the presence of one SL Chaudhary who had accompanied this witness in the present case. He has also admitted that the complainant in the NDPS Act case was also one of the officers who had accompanied him in the present case.

(2) PW-20 has also admitted his close proximity with one of the officers accompanying the Crime Branch team viz. SL Chaudhary. His being friends with the said officer & PW-22 on his FACEBOOK account makes his credibility and integrity doubtful and thus PW-20 destroys the entire recovery proceedings drawn vide **Exh. 68** panchnama. In no terms can PW-20 be termed as an independent witness.

(3) PW-20 himself has a criminal past including facing trials under the Arms Act and for offences related to kidnapping etc. This fact has been admitted by him in the cross-examination. He has also admitted that even the pair panch of the panchnama **Exh. 68** was one of the co-accused in the kidnapping case along with him.

(4) Further PW-20 has come up with a case that it was on 31.10.2017 at around

01.15 am he received a call from Crime Branch Office and it was only when he reached Crime Branch office alongwith the pair panch that he realised that he had to travel to Mumbai in the early hours of 31.10.2017. However letters at **Exhs.87, 88, 89 and 90** which are all dated 30.10.2017 makes references of not only PW-20 but also that of the other panch Imtiyazkhan, thereby giving a clear impression that it was pre-decided to take PW-20 and the other panch witness Imtiyazkhan to the office of the accused on 31.10.2017. PW-22 has admitted this aspect in his cross examination.

115.1) Now, from the documents produced on the record at Exh.87 i.e. letter marked to the CISF, CSI Airport, Mumbai, Exh.88 i.e. letter marked to BCAS, SVPI Airport, Mumbai, Exh.89 i.e. CISF, CSI Airport, Mumbai and Exh.90 i.e. letter marked to Bureau of Civil Aviation Security, Ahmedabad, it becomes crystal clear that these documents were written by the I.O. prior to asking the Panch witnesses i.e. PWs 20 and 21 as to their willingness to act as Panchas during the course of investigation in the matter. Therefore, it can be said that the deposition of PW-20 is quite unbelievable when he deposes that on 31/10/2017 at about 01:15 a.m. he received a call from the Crime Branch office and it was only when he reached the Crime Branch office along with the pair panch that he realized that he had to travel to Mumbai in the early hours of 31/10/2017. From these documents, it can be said that the Panchas were informed early to act as Panchas in the investigation and they were also informed early to the effect that they have to travel to Mumbai in the early hours of

31/10/2017. In such circumstances, surely it creates a doubt that the Panchas were called upon at 01:15 a.m. on 31/10/2017 and before whom the accused disclosed the fact that the threat note was prepared on his SONY VAIO Laptop and he was ready and willing to show the said Laptop.

115.2) Moreover, it is also required to be noted that if the FIR Exh.112 is perused, it also discloses that the accused prepared the threat note on his SONY VAIO Laptop in his office at Mumbai, in English and thereafter with the help of Google translator, translated the same into Urdu language, and thereafter took out a print of the said threat note from his Epson make printer lying in his office. In such circumstances, it is very difficult to accept that the fact was discovered for the first time in the presence of the Panchas and thereafter the I.O. as well as the Panchas along with the accused, went to Mumbai and recovered the Laptop as well as the Epson printer.

115.3) From the cross examination of the PW-20 Jameel Ahmed, it can be seen that he has close proximity with one of the officers who accompanied the Crime Branch team, namely Mr.S.L.Chaudhary. However, it is very difficult to accept that merely the friendship of PW-20 with the said officer and PW-22 on his Facebook account, makes his credibility and integrity doubtful and thus PW-20 destroys the entire recovery proceedings done vide Exh.68 Panchnama, specifically when it is an admitted fact that the accused Birju Salla is the owner of SONY VAIO Laptop and Epson printer.

115.4) The mere fact of PW-20 and the pair Panch of Exh.68 Panchnama being co-accused in a kidnapping case, cannot make the whole proceedings illegal. Of course, the evidence brought on record by the Prosecution should be scrutinized thoroughly and if any doubt is created, the evidence of the said witness should be thrown out.

116) The learned Spl.P.P. Ms.Godambe has submitted that as per Sec.27 of the Indian Evidence Act, only recovery of the object is not important, but the knowledge of the accused regarding the fact and recovery is also material. It is submitted that the demonstration shown by the accused is the exclusive knowledge of the accused regarding preparation of the threat note and therefore, this is to be considered as discovery under Sec.27 of the Indian Evidence Act, and for that, the Prosecution relies upon the judgment delivered in the case of **Pulokuri Kotayya and others v. King Emperor (1948-ILR-1)**.

116.1) Now if the said judgment is gone through, it is held therein as under:-

*"It is fallacious to treat that "fact discovered" within section 27 as equivalent to the physical object produced; the fact discovered embraces the place from which the object is produced and the knowledge of accused as to this, and the information given must relate distinctly to this fact.*

*Clearly the extent of the information admissible must depend on the exact nature of the fact discovered and the*

*information must relates distinctly to that object can be proved.*

*Clearly the extent or the information admissible must depend on the exact nature of the fact discovered and the information must distinctly relate to that fact. We have emphasized the word 'normally' because the illustrations given by the learned judge are not exhaustive".*

116.2) The Prosecution has also relied upon the judgment delivered in the case of **Navjot Sandhu @ Afsan Guru v. State of NCT of Delhi (AIR-2005-SC-3820**, wherein it has been held as under:-

*"It is explicitly clarified in the section that there is no taboo against receiving such information in evidence nearly because it amounts to confession.*

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

*There is one more point which we would like to discuss i.e. whether pointing out a material object by the accused furnishing information is a necessary concomitant of section 27 we think that the answer should*



***be negative. It is not essential that there should be such pointing out in order to make the information admissible under section 27."***

116.3) Relying on the principle laid down in the above referred two judgments, the learned Spl.P.P. Ms.Godambe has argued that it is the exclusive knowledge of the accused that he had prepared the threat note on SONY VAIO Laptop which was recovered and further the process he had adopted to prepare the threat note, is also covered in the knowledge. It is also submitted that admittedly the accused used to use more than one Laptop and therefore, this particular Laptop which he had shown in the discovery is a new fact for the IO and therefore, this is the evidence required to be considered under Sec.27 of the Evidence Act, and therefore, it is argued that the argument of the defence that it is the recovery Panchnama and not the discovery Panchnama, is baseless and contrary to law.

116.4) As against that, the learned Advocate Shri R.S.Verma appearing for the accused, has relied upon the judgment delivered in the case of **Sukhvinder Singh v. State of Punjab [(1994)5-SCC-152]**, and it is submitted that the disclosure statement made first in point of time, is alone admissible in evidence.

116.5) Now if the judgment in the case of Sukhvinder Singh (Supra) is carefully perused, it transpires that the Hon'ble Supreme Court has observed that *"Once the fact has been discovered, Sec.27 of the Evidence Act cannot again be made use of to "rediscover" the discovered fact. It would be a*

*total misuse, even abuse of the provisions of Sec.27 of the Indian Evidence Act.”*

116.6) In the present case on hand, perusing the FIR, it is found categorically mentioned that “the SONY VAIO Laptop and the Epson make printer on which the accused prepared the threat note, were lying in the office of the accused, which shows that the place from where the article has been recovered, is disclosed. Not only that, as discussed above, the names of the Panchas of the discovery Panchnama were already written in the letters written to (i) CISF, CSI Airport, Mumbai [Exhs.87 and 89] and (ii) BCAS, SVPI Airport, Mumbai [Exh.88], which suggests that the Panchas were informed earlier that they have to go to Mumbai, which also further suggests that the discovery of Laptop is to be done from Mumbai. Therefore, it can be said that the fact was not disclosed for the first time before the Panchas by the accused as to the use of Laptop, as to where it was lying and that he was ready to show the said article to the I.O. In such circumstances, it is very difficult to accept that Exh.68 Panchnama is the discovery Panchnama and as per the instructions of the accused, the recovery was made.

116.7) Further, it cannot be accepted that the accused used to utilize more than one Laptop and therefore, the particular Laptop which he had shown in discovery, is the new fact for the IO and the evidence is admissible under Sec.27 of the Indian Evidence Act. Moreover, it is also difficult to accept that as per the deposition of PW-22 Shri Jhala, the accused had shown him demonstration of preparation of the threat note so it is the fact discovered as it was in the exclusive knowledge of

the accused, and it is admissible under Sec.27 of the Indian Evidence Act.

**SEIZURE OF DVR :**

117) The learned Advocate Shri Verma has emphasized that the DVR was also seized from the office of the accused on 31/12/2017, but however, there is no contemporaneous record of such seizure, and admittedly the Panchnama Exh.68 makes no reference of seizure of DVR and none of the documents produced vide Exhs.96 and 98 make a reference of such seizure of DVR. It is also further submitted that not only that, till the time the request was made by the NIA on 17/11/2017, no attempts were made by PW-22 to produce the so-called seized DVR on his own motion. It is also submitted that no valid explanation has been offered with regards to the aforesaid leading to the only inference that there was something which PW-22 intended to hide from this Hon'ble Court, and therefore, an adverse inference is required to be drawn against the Prosecution on this aspect too. It is also submitted that furthermore tampering of the DVR cannot be ruled out more particularly in view of the evidence of PW-13 Mr.Harshad Soni.

117.1) It is an admitted fact on the part of the Prosecution that there is no contemporaneous record of the seizure of the DVR from the office of the accused on 31/10/2017, and the Panchnama Exh.68 makes no reference of the seizure of the DVR and in turn, Exhs.96 and 98 also do not make any reference of seizure of DVR. It is also admitted on the part of the Prosecution that on request being made by the NIA, the DVR was handed over to the NIA by PW-22 Dr.Rajdeepsinh Jhala vide seizure Panchnama Exh.58 dated 20/11/2017 and no attempts were made by PW-22

to produce the so-called DVR on his own motion. However, it cannot be accepted that no valid explanation has been offered with regard to the aforesaid, leading to the only inference that there was something which PW-22 Mr. Zala intended to hide from this Court. If the muddamal article No.36 is perused, one black colour DVR of HICKVISION Digital Video Recorder, Model: DS-7208HFI-SHE, SN: 438180028 & Adaptor, which was seized from the office of the accused Birju Salla, located at Giriraj Building, Krish Gems & Jewellery, Office No.202, Zaveri Bazar, above ICICI Bank, Mumbai, by DCB, Ahmedabad on 31/10/2017, which was sent for the cyber forensic analysis by NIA on 12/12/2017, which was received by Directorate of FSL, State of Maharashtra, Home Department, Vidyanagari, Kalina, Santa Cruz (East), Mumbai on 13/12/2017, and after cyber forensic analysis of HD EXH.1 Digital Video Recorder (DVR) along with Adaptor, Model No.DS-7208HFI-SHE, report has been submitted on 19/01/2018. If the same is perused, it is clearly mentioned therein at Sr.Nos.3 to 6 as under:-

***“3. After video and image analysis of the recorded questioned video (CCTV footage) marked Ex-1 of M.L.case No.Cy-1277/17 revealed that the person present in Ex-1 of M.L. Case No.Cy-1277/17 is found similar to the person marked in reference photograph Ex-3 of M.L.Case no.Cy-1365/17.***

***4. The video analysis of the recorded questioned video (CCTV footage) marked Ex-1 of M.L. case No.Cy-1277/17 revealed that, gestures related to***

*'activity of typing on Laptop and taking printout' were observed on dated 27/10/2017 from 1207 hrs. to 1244 hrs. Related frames are as follows ....*

- 5. Text on laptop screen and on of document printed could not enhanced clearly and hence not identified.*
- 6. The pattern, length, width, line spacing, language of text appearing could not be identified, but as observed visually it seems paper has two paragraphs.*

117.2) From the said report, it can be said that mark E-1 of ML Case No.Cy-1277/17 reveals that gestures related to activity of typing on Laptop and taking printout were observed on 27/10/2017 from 12:07 Hrs. to 12:40 Hrs. and related frames are also produced. This suggests that though there was no mentioning of seizure of the DVR in the Panchnama drawn by the IO on 31/10/2017, and it was not informed to the NIA by the earlier IO and the same was kept with him till 20/11/2017, it cannot be said that (i) the DVR was manipulated by the earlier IO Shri Jhala, and (ii) that tampering with the DVR cannot be ruled out more particularly in view of the evidence of PW-13 Mr.Harshad Chimanlal Soni.

117.3) The images obtained by the Scientific Officer on 27/10/2017 from 12:00 Hrs. to 16:00 Hrs. which show the present accused typing on Laptop and taking printout, cannot be manipulated by the IO in the DVR though it was in his possession. Not only that, when the Scientific Officer has made the

analysis of Hard Disk and if any tampering is found, he would have suggested in his report accordingly. Not only that, any question was also not asked to the Scientific Officer Mr.Ashish Deorao Rathod examined vide Exh.108 as PW-25 by the defence, as to the tampering of the DVR and in such circumstances, it is very difficult to accept that tampering of the DVR cannot be ruled out more particularly in view of the evidence of PW-13 Mr.Harshad C. Soni, though it was in the possession of the PW-22 till 20/11/2017 and non-mentioning of the seizure in any document.

**Demolishing of prosecution case by report Ex.103 itself :**

118) The learned Advocate Shri Verma has also submitted that it is the alleged case of the Prosecution that the accused is supposed to have (i) typed out the threat note on his laptop (ii) using the facility of Google translator, got the English version translated into Urdu and (iii) thereafter gave an appropriate command to the printer from his laptop to get the print-out in question. It is submitted that the FSL report at **Exh.103** at page Nos.661 to 681 and more particularly at page No.665 states as under:

**"(8) Hard disk Exh - H1 of the laptop Exh. - 1 did not contained any log of EPSON make all in one printer Exh. - 3 (DFS - EE-2017-674) and Wi-Fi.**

**(9) Hard disk Exh. - H1 of the laptop Exh. - 1 did not contained any information regarding accessing/using web page, google translator and any**

***other translator used for translation of English text into Urdu, language on Dt. 28/10/2017."***

118.1) It is further submitted by Shri Verma that it is pertinent to note that it is the alleged case of the prosecution that the alleged threat note **(Exh.27)** was made by the accused on 27/10/2017, and no event log and/or print command log was thus found by the FSL in the media hard disk on 27/10/2017 or any other date. It is submitted that the aforesaid clear cut finding completely demolishes the alleged case of the Prosecution that Epson all-in-one printer was allegedly used for the printing of the alleged threat note (Exh.27).

118.2) Now if we peruse Exh.103, it is the report pertaining to SONY VAIO make Laptop having Model No.PCG-61A12L and bearing Sr.No.275450243023454. The report was given for the queries raised by the NIA, which were replied by the Scientific Officer Shri D.G.Shah on 20/11/2018, and he categorically stated that Hard Disk Exh.H1 of the Laptop Exh.1 did not contain any log of Epson make all-in-one printer Exh.4 and Wi-fi.

118.3) Moreover, for another query of the NIA, the Scientific Officer has replied that the Hard Disk Exh-H1 of the Laptop Exh-1 did not contain any information regarding accessing/using web page, google translator and any other translator used for translation of English text into Urdu language on date 28/10/2017.

118.4) Thus on perusing the analysis pertaining to query No.9, it transpires that the Hard Disk Exh.H1 of the Laptop Exh.1 did not contain any

information regarding accessing/using web page, google translator and any other translator used for translation of English text into Urdu language on 28/10/2017, but no report has been submitted that on 27/10/2017, there was no use of web page, google translator and any other translator for translation of English Text into Urdu language. In such circumstances, the non-use of web page, google translator, other translator etc. on 28/10/2017 is not helpful to the accused as it was the case of the Prosecution that the accused had got the threat note typed on 27/10/2017, and the report produced vide Exh.110 as to DVR along with Adaptor seized from the office of the accused on 30/10/2017, suggests that the accused had typed on 27/10/2017 between 12:07 Hrs. to 12:44 Hrs. and paper structure frame on visual observation, it is noted that frames found in the DVR are of similar structure with that of the threat note.

119) It is also submitted by Shri Verma that it is again pertinent to note that it is not the case of the Prosecution that the accused knows to read or write Urdu Language, and furthermore no Urdu language Application was downloaded or installed on the laptop. It is submitted that no Google translator or any other translator was downloaded or installed on the laptop. It is submitted that the FSL Report at **Exh.103** proves that there was no access or use of any web page, Google translator or any other translator for translation of English text to Urdu language on 28-10-2017. It is submitted that it is practically impossible for any person to type in Urdu language without knowing to read and/or write Urdu language. It is further submitted that the alleged threat note (**Exh.27**) is in two parts viz. the first is in Urdu



and the second is in English, and the FSL report at **Exh.103** does not support or prove the case of the Prosecution that a new document was created on the laptop by editing, copying and pasting text in Urdu and English language.

119.1) As discussed above, the report of the Scientific Officer produced vide Exh.103 on the query of the IO as to whether there was any access or use of web page, google translator or any other translator for translation of English text into Urdu, states that there was no access or use of any webpage, google translator or any other translator for translation of English text to Urdu Language on 28/10/2017.

119.2) Moreover, it is an admitted fact that the **Sony Vaio Laptop** bearing **Sr. No.275450243023454** is of the ownership of the accused and on scientific analysis of the said Laptop, the contents of the threat note were also found. Not only that the report of DVR which was recovered from the office of the accused by Investigating Officer Shri Rajdeepsinh N.Zala on 31.10.2017 reveals the suspicious conduct of the accused.

119.3) Moreover, in section 8 of the Evidence Act, 2016, the piece of conduct of the accused can be held to be incriminatory which has no reasonable explanation except on the hypothesis that he is guilty. In light of this settled proposition of law on evaluating the evidence on record this Court can surely come to the conclusion that the gloves may be worn by the accused for the purpose of his work but the wearing of the gloves on 27/10/2017 between 12 hours and 16 hours, seen in the hard disk of the DVD

was worn for specific purpose to avoid the finger prints on the paper which accused got printed i.e. threat note.

119.4) In such circumstances, it cannot be said that the FSL report Exh.103 does not support or prove the case of the Prosecution that a new document was created on the Laptop by editing, copying and pasting text in English and Urdu language.

120) It is next submitted by Shri Verma that the Report at **Exh.103** also does not help the case of the Prosecution in conclusively establishing the involvement of the accused. It is submitted that the said report was prepared by PW-23 Mr.D.G.Shah who has contradicted PW-25 Mr.A.D.Rathod on material aspects of computer forensics. It is submitted that while PW-23 Mr.D.G.Shah has denied that data related to deleted files can be retrieved, the PW-25 Mr.A.D.Rathod has replied to the contrary in this regard. It is, therefore, submitted that which of the two Prosecution expert witnesses, is to be believed, is anybody's guess given the contradictory answers given by each of them.

120.1) Of course, on perusing the deposition of PW-23 Mr.D.G.Shah and PW-25 Mr.A.D.Rathod, it can be said that both the witnesses have replied to the contrary on the point of retrieval of data related to deleted files, but it cannot be said that the deposition of PW-25 is gospel truth and the data cannot be retrieved from the deleted file. Moreover, the report Exh.103 also discloses that the computer storage media hard disk Exh-H1 was forensically analyzed using the authorized forensic software EnCase V.6.19.7.2 & V.7.10, IEF V.6.7.4.0771 and

hardware as per the cardinal rules of Computer Forensics.

121) It is submitted by the learned Advocate Shri Verma that though the letter **Exh.126** makes a reference of the threat note being forwarded to FSL Gandhinagar, PW-23 Mr.D.G.Shah, in his cross-examination, has denied that the NIA had provided him the threat note, and such denial of PW-23 is in complete variance to the letter **Exh.126**, and hence, according to the learned Advocate Shri Verma, the possibility of the results of the report **Exh.103** having been pre-decided by PW-23 Mr.D.G.Shah cannot be ruled out.

121.1) Mere denial by the PW-23 Mr.D.G.Shah as to sending of the threat note by NIA, cannot give any benefit to the accused, considering the evidence on record. The Scientific Officer has analyzed forensically the Hard Disk Exh.H1 and has given a detailed report, and if Annexure A-1 is perused, it cannot be said that the result of report Exh.103 has been pre-decided by PW-23 Mr.D.G.Shah.

122) The learned Advocate Shri Verma has submitted that though the contents of pages No.1, 2 and 4 of Annexure A-1 of the report Exh.103 are different, ironically PW-23 Mr.D.G.Shah found the Hash Value of all the three pages as being the same. It is submitted that this aspect assumes importance because PW-23 Mr.D.G.Shah has admitted in the cross examination that any minor change made while copying a particular file would change the Hash value of the subsequent copied file, which is not the case with the report Exh.103 despite the fact that the contents of all the 3 pages are different from each other.

122.1) It is submitted further that even the logical size as well as the physical size of pages No.1, 2 and 4 of Annexure A-1 of the report Exh.103 are the same despite there being a difference in the contents of the said 3 pages.

122.2) If we peruse the pages No. 1, 2 and 4 or Annexure A-1 of Exh.103, contents thereof are different on pages, but if we peruse the report, it is very much clear that the logical size, physical size and Hash value of the exhibited file, which is analyzed by the Scientific Officer and the contents shown on pages No. 1, 2 and 4 are the contents of the full path shown on the respective pages and all the paths are different from each other. Moreover, it is also required to be noted that these three documents show three different views of the contents. Page No. 1 of Annexure A-1 (Page 671) shows tax view, Page No. 2 of Annexure A-1 (Page 673) shows Hex view and Page No. 4 of Annexure A-1 (Page 677) shows key word search view.

123) The learned Advocate Shri Verma has also submitted that the report **Exh.103** does not even remotely suggest that a deleted file having the exact contents of the threat note was ever recovered from the Laptop of the accused. It is submitted that on the contrary, the report **Exh.103** merely opines that "text fragment similar to the text content of the threat note Exh.1 were found present at following path in the hard disk Exh.H1". It is submitted that thus what gets culled out from the report **Exh.103** is that only similar text fragments were found and not the entire threat note from the Laptop. It is submitted that this Court at this stage is required

to consider the aforesaid aspect after taking into consideration the evidence of PW-13 wherein he has categorically stated that the accused was made to type on the laptop on 31.10.2017 at his office.

123.1) Now if we peruse the report Exh.103, it discloses that the contents of the threat note were found at the path in the Hard Disk Exh.H1, which is produced herein below for ready reference:-

**“Results of Examinations:**

(1) .....

(2) *Text fragment similar to the text content of the threat note Exh-1 were found present at following path in the hard disk Exh-H1.*

a. *E\Recovered*

*Folders\WINDOWS\WinSxS/ wow64\_ microsoft-windows-upnpcontrolpoint\_31bf3856ad364e35\_10.0.14393.)\_none \_6a9884117bd49874\upnp.dll.WofCompressedData*

b. *E\Recovered*

*Folders\WINDOWS\WinSxS/wow64\_microsoft-windows-upnpcontrolpoint\_31bf3856ad364e35\_10.0.14393.)\_none \_6a9884117bd49874\upnp.dll.WofCompressedData*

c. *E\Recovered*

*Folders\amd64\_0734805d268f8e96f53ea781392e30a4\_b)3f5f7f11d50a3a\_4.0.14305.105\_none\_546f94749b81330a.manifest*

d. *E\Recovered*

*Folders\WINDOWS\WinSxS/wow64\_microsoft-windows-upnpcontrolpoint\_31bf3856ad364e35\_10.0.14393.)\_none \_6a9884117bd49874\upnp.dll.WofCompressedData”*

123.2) The details of each path is shown along with the Annexure A-1 of Exh.103. If we see the full path on page Nos.1 to 3 of Annexure A-1 (Page-671 to 675), it can be seen that the contents of the threat note are practically found on the said track. If we similarly peruse the full path on page No.4 of

Annexure A-1 (Page-677), it can also be seen that the contents in English are translated into Urdu language also, and this document can prove that the contents of the threat note are found on this full path. In such circumstances, it cannot be said that what gets culled out from the report Exh.103, is that only similar text fragments were found and not the entire threat note from the Laptop.

124) The learned Advocate Shri Verma has also submitted that despite having been admitted by PW-23 Mr.D.G.Shah that dates relating to files created, accessed and modified can be retrieved, ironically none of the three files allegedly retrieved make a reference of such dates, and thus the report Exh.103 does not take the Prosecution case further in conclusively establishing the complicity of the accused in the present case.

124.1) Now if we peruse the report Exh.103, definitely it does not disclose the dates and as per the admission by PW-23 Mr.D.G.Shah, the dates relating to the files created, accessed and modified can be retrieved ironically and none of the three files allegedly retrieved make a reference of such dates. However, the Court should also see the report produced vide Exh.109 after analysis of the DVR along with the adaptor, which discloses that on 27/10/2017, the CCTV footage shows that the accused was typing on his Laptop. Moreover, it is also required to be noted that the Hard Disk along with DVR is also produced on record of the case and this Court had an opportunity to see the recording of the DVR. Nothing is found with regard to the date 30/10/2017 to the effect that the accused was compelled to type on his SONY VAIO Laptop. In such circumstances, reading conjointly

**Ex.103** report of SONY VAIO Laptop and **Ex.110** report of DVR as well as the conduct of the accused, it can be said that, merely because the date relating to files created, accessed and modified, is not mentioned in the report Exh.103, it cannot give any benefit to the accused.

125) The learned Advocate Shri Verma has also pointed out that the results at Serial Nos.8 and 9 of the Report Exh.103 completely rule out the involvement of the accused in the creation of the threat note on his Laptop, and on the contrary, the results at Serial Nos.8 and 9 suggest the possibility of "plantation" with an ulterior motive of creating false evidence against the accused.

125.1) The serial number 8 discloses that the Hard Disk Exh.H1 of the Laptop Exh.1 did not contain any log of Epson make all-in-one printer Exh.4 and Wifi. In such circumstances, of course the Prosecution is unable to prove that the Hard Disk Exh.H1 of the Laptop Exh.1 contained any log of Epson make all-in-one printer Exh.4 and Wifi, but if we peruse the recording of DVR which is available on the record, one can easily say that on 27/10/2017, at about 1207 Hrs. to 1244 Hrs., the accused had typed on his SONY VAIO Laptop and after wearing gloves, he tried to get the print from the printer lying in the chamber. Not only that during the course of typing and getting the print out due to intercom he vacated the chamber without getting print of the document and thereafter, he again came to the office and got the print of the typed contents on his laptop and during his act of typing the contents on the laptop as well as getting the print and placing in the pouch, the conduct of the accused is absolutely suspicious. If

the conduct of the accused in the footage of the DVR, is observed, one can easily say that there is some malafide intention of the accused and when the report Exh.103 of the SONY VAIO Laptop shows the contents of the threat note and the accused was also found accessing the washroom in the Flight, not only that the conduct of the accused during the flight and thereafter surely suggests that the accused got the threat note printed. Moreover, it is also required to be noted that commands are given in ques, then it shows login and if only one command is given it does not show login, and therefore, merely because the report Exh.103 discloses that the Hard Disk Exh.H1 of Laptop Exh.1 did not contain any log of Epson all-on-one printer Exh.4 and Wifi, it cannot give any benefit to the accused.

125.2) Now if we see the result at serial number 9, it discloses that Hard Disk Exh.H1 of Laptop Exh.1 did not contain any information regarding access to webpage, google translator or any other translator used for translation of English Text into Urdu language on 28/10/2017. Therefore, it can be said that the result was given for the date 28/10/2017 and not for the date 27/10/2017 and as per the case of the Prosecution, the google translator was used on 27/10/2017 and when the contents of the threat note in English as well as in Urdu language is found on 27/10/2017 in the Laptop Exh.1, it is very difficult to accept that the results of Sr. Nos. 8 and 9 of the report Exh.103 completely rule out the involvement of the accused in preparation of the threat note on his Laptop.



**SEIZURE OF WRONG LAPTOP :**

126) The learned Advocate Shri Verma has also pointed out that the serial number of the Sony VAIO laptop mentioned in the Report Exh.103 is quite different than the one mentioned in the forwarding letters Exhs.113 and 118 written by PW-26. It is submitted that such discrepancy in the serial number which emerges on record, is as follows:

Serial Number mentioned in <b>Exh. 103</b>	Serial Number mentioned in <b>Exhs.113 &amp; 118</b>
<b>275450243023454</b>	<b>2745502950243023454</b>

126.1) It is also submitted that the PW-26 Mr.Vikram Khalate upon being confronted in this regard, has admitted that he did not seek any clarification from the FSL after having received the Report Exh.103. It is submitted that even otherwise the Serial Number mentioned in the Report **Exh.103** also does not mention with the Serial Number mentioned in the panchnama **Exh.68** and documents at **Exhs.96 and 98**, which discrepancy in the serial number emerges as thus:

Serial Number mentioned in <b>Exh.103</b>	Serial Number mentioned in <b>Exhs.96 &amp; 98</b>
<b>275450243023454</b>	<b>274550243023454</b>

126.2) It is submitted that no explanation is coming forth on behalf of the Prosecution with regard to the aforesaid discrepancy, and therefore, in the submission of the defence, no reliance can be placed on the Report **Exh.103** on this count too.

126.3) On perusal of Exhs.113 and 118, the serial numbers of the SONY VAIO Laptop is found to be

**2745502950243023454.** Similarly in the Panchnama Exh.68 and the documents Exhs.96 and 98, the serial number is found to be **274550243023454**, whereas in the report Exh.103 the serial number is found to be **275450243023454.**

126.4) From the report Exh.103, it can be said that the Scientific Officer of the FSL has analyzed the SONY VAIO Laptop having Sr.No.275450243023454 and the report has been submitted with regard to SONY VAIO Laptop having Sr.No.275450243023454. The muddamal SONY VAIO Laptop is also produced on record as muddamal article No.18, and on examining the said Laptop, it is crystal clear that the Sr.No. 275450243023454 is written on the body of the Laptop. Therefore, from the record, it can be said that the SONY VAIO Laptop which is on the record of the Court, has been examined by the Scientific Officer of the FSL and the report has been submitted.

126.5) Now if Exhs.68, 96 and 98 are perused, it can be only found that the digits '5' and '4' in the serial number, are juggled. When the accused has admitted that the muddamal produced vide article No.18 is of his ownership and when the same is analyzed by the Scientific Officer of the FSL and when the report is submitted after analysis of the said SONY VAIO Laptop and when such report discloses that on the path mentioned in the report discloses the contents of the threat note, the Court is required to come to the conclusion that only by mistake, the false number has been written in the Panchnama and subsequently on the documents created on the basis of the Panchnama. In such circumstances, the accused is not entitled to get any benefit of

mention of wrong serial number in Exhs.68, 96 and 98 as well as Exhs.113 and 118.

**"NO EXPERT OPINION REPORT" EXH.104 AS TO PLAIN PAPER:**

127) The learned Advocate Shri Verma has also pointed out that the report at **Exh.104** can be termed as "no expert opinion related report" in view of the admission made by PW-23 Mr.D.G.Shah in his cross-examination in paragraph No.13.

127.1) Of course, the PW-23 Mr.D.G.Shah has admitted that the paper similar to the size and thickness of the paper mentioned in his report produced vide Exh.104 are easily available in the market. However, in the opinion of this Court, that does not mean that the paper which is used to prepare the threat note, is not used from the paper available in the office of the accused. Of course, the paper similar to the size and thickness of the paper used for the threat note, is easily available in the market, but when this Court has come to the conclusion that the Laptop which is seized from the office of the accused, is used for typing the threat note, and the accused is found in suspicious condition during typing of the threat note as well as getting the print of the threat note and when the recording of the CCTV footage also discloses the use of the paper lying in the office of the accused, it cannot be said that the report Exh.104 can be termed as "*no expert opinion related report*".

**ABSENCE OF CERTIFICATE U/S.65(B) OF THE EVIDENCE ACT:-**

128) The learned Advocate Shri Verma has also submitted that the Report at **Exh.110** has to be excluded from consideration in its entirety since there is no separate mandated certificate issued under Sec.65B of the Indian Evidence Act alongwith the said report, and a mere one-liner on the footer stating that ***"this report is issued under section 65(B) of the Indian Evidence Act"*** cannot be termed as compliance to the mandatory provisions of Sec.65B. It is submitted that the compliance to the provisions of Sec.65B of the Indian Evidence Act are mandatory in nature as has been held by the Hon'ble Supreme Court reported in **2014 (10) SCC 473**. It is submitted that thus the report at **Exh.110** is required to be excluded from consideration in its totality.

128.1) Whereas the learned A.P.P. Ms. Godambe vehemently submitted that the report contained the certificate renewed under section 65-B of the Evidence Act. It is submitted that it is mentioned in the report that the report was issued under section 65-B of the Evidence Act. It is also submitted that the SONY VAIO Laptop as well as DVR also are on record and ownership of these two Muddamal articles is also admitted by the accused.

128.2) Now if the document Exh.110 is perused, it is the examination report of the DVR along with the Adaptor which is also produced on the record of the proceedings as muddamal article No.36. The report also contends that the report is issued under Sec.65B of the Indian Evidence Act, 1872, but the detailed certificate which is required to be issued by the

Scientific Officer, is not attached along with the examination report. Therefore, the objection has been raised by the learned Advocate for the accused. Shri Verma has relied upon the judgment in the case of **Anvar P.V. v. P.K.Basheer (Supra)**. If the said judgment is gone through, it has been observed by the Hon'ble Supreme Court in paragraphs Nos.14 to 18 and 22, which are reproduced hereunder.

*"14. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in accordance with the procedure prescribed under Section 65-B. Section 65-B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document i.e. electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65-B(2). Following are the specified conditions under Section 65-B(2) of the Evidence Act:*

(i) *The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;*

(ii) *The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;*

(iii) *During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and*

(iv) *The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.*

15. *Under Section 65-B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:'*

(a) *There must be a certificate which identifies the electronic record containing the statement;*

(b) *The certificate must describe the manner in which the electronic record was produced;*

(c) *The certificate must furnish the particulars of the device involved in the production of that record;*

(d) *The certificate must deal with the applicable conditions mentioned under Section 65\_b(2) of the Evidence Act; and*

(e) *The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.*

16. *It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to*

*tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.*

*17. Only if the electronic record is duly produced in terms of Section 65-B of the Evidence Act, would the question arise as to the genuineness thereof and in that situation, resort can be made to Section 45-A - Opinion of Examiner of Electronic Evidence.*

*18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65-B of the Evidence Act are not complied with, as the law now stands in India.*

*19. ....*

*20. ....*

*21. ....*

*22. The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by*



*Sections 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case, does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible."*

128.3) The observation of the Hon'ble Supreme Court in the above mentioned paragraphs, is on the point of secondary electronic evidence, and it is observed that in the case of CD, VCD, chip etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which the secondary evidence pertaining to that electronic record is inadmissible.

128.4) In the instant proceedings, of course, in the certificate which is required with all contents enumerated in Section 65-B is not issued by the concerned Scientific Officer, but it is mentioned that the certificate is issued under Section 65(B) of the Indian Evidence Act. Moreover, while dealing with the issue regarding admissibility of the electronic records, the Court should also consider the principle laid down in the case of **Shafi Mohammad v. State of Himachal Pradesh (AIR-2018-SC-714)**. In the said case,

the Hon'ble Supreme Court has observed in paragraphs No.14 and 15 as under:

*"14. The applicability of procedural requirement under Section 65B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said Sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in absence of certificate under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65B(4) is not always mandatory.*

*15. Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section 65B(4) of the Evidence Act. The*

*applicability of requirement of certificate being procedural can be relaxed by Court wherever interest of justice so justifies."*

128.5) In view of the above position of law, the furnishing of certificate under Section 65B(4) is not mandatory when electronic evidence is produced by the party who is not in possession of the device from which such evidence is produced.

128.6) Moreover, here it is also required to be noted that in the judgment on which the learned Advocate for the defence, has relied i.e. **Anvar P.V. (Supra)**, the Hon'ble Supreme Court has observed in paragraph No.24 as under:-

*"24. The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65-B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in*

*the preceding paragraphs on the secondary evidence of electronic record with reference to Sections 59, 65-A and 65-B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance with the conditions in Section 65-B of the Evidence Act."*

128.7) In view of the above observation of the Hon'ble Supreme Court, when the DVD itself is produced on record and the Court has an opportunity to see the CCTV footage recorded in the DVD, it can be said that the primary evidence is produced on the record and if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance of the condition in Section 65B of the Evidence Act. In such circumstances, the argument of Shri Verma that the report Exh.110 has no evidentiary value in absence of the certificate issued under Sec.65B of the Evidence Act, is not acceptable, even the request is made by the PW-26 for issuance of the certificate under Sec.65B of the Evidence Act by his letter Exh.136 dated 12/12/2017.

**EVIDENTIARY VALUE OF Exh.110 - REPORT OF EXPERT ON DVR:**

129) It is further submitted by Shri Verma that letter **Exh.136** if read in its entirety already had answers to some of the questions formulated in the questionnaire and hence, nothing incriminating gets culled out from the report **Exh.110**. It is submitted that admittedly a photograph of the accused

as also the threat note was forwarded to PW-25 Mr.Ashish D.Rathod and thus he had a clear idea about the contents of the threat note before the examination of the DVR. It is thus submitted that in view of this also the report **Exh.110** is required to be excluded from consideration.

129.1) In the opinion of this Court, it cannot be said that nothing incriminating gets culled out from the report Exh.110. If we peruse Exh.110, it reveals that the accused is typing something and getting copy of the letter after wearing gloves. Of course, text on the Laptop screen and on the document printed, could not enhance clearly and hence, not identified. Similarly, the pattern, length, width, line spacing, language of the text appearing could not be identified, but the Scientific Officer was able to observe visually and as per his opinion, the paper has two paragraphs. Not only that, the Scientific Officer has also opined that the structure of the text appearing on the screen and paper was observed similar to the threat note, and merely the photographs of the accused as well as the copy of the threat note is given to the Scientific Officer by the IO, it cannot be the ground for excluding the report Exh.110 from consideration.

129.2) Moreover, it also cannot be said that the reports Exhs.103, 104, 110 and 147 fail to establish the involvement of the accused beyond reasonable doubt, as argued by the learned Advocate Shri Verma.

**IILEGAL AND VOID AB-INITIO INVESTIGATION:-**

130) The learned Advocate Shri Verma has also submitted that under the Anti-Hijacking Act, 2016, no

investigating agency except the NIA has been duly empowered to investigate a case registered under the Act, and the language of the Act itself is very clear and unambiguous requiring no further special interpretation.

130.1) It is submitted by Shri Verma that despite this, the initial investigation after the registration of the FIR on 30.10.2017 to 7.11.2017 was conducted by the Crime Branch, Ahmedabad. It is submitted that PW-22 Dr.Rajdeepsinh N.Jhala has categorically admitted that he had an occasion to read the Anti-Hijacking Act, and that he received no orders from the Central Government at any point of time for the purpose of investigation of the offence under the Act. It is submitted that the PW-22 has further admitted that he did not at any point of time receive any order from the Central Government for the purpose of either assisting or affecting the arrest of the accused.

130.2) It is submitted further by Shri Verma that in view of the above the entire initial investigation till the time it was subsequently transferred to NIA can be termed as **"illegal and void ab initio"** and the consequence thereof would be that the entire investigation during the period 30.10.2017 to 7.11.2017 shall have to be eschewed from judicial consideration. It is also submitted that all the alleged recoveries during such period too shall have to be excluded from final adjudication.

130.3) It is submitted by Shri Verma that given the stringent provisions of the Act including the nature of punishment prescribed, no deviation on flimsy grounds is permissible. It is further

submitted that when the Act empowers only the NIA to investigate offences punishable under the Act, no other agency including the Crime Branch had any authority to investigate the case by itself.

130.4) It is further submitted by Shri Verma the reliance of the Prosecution on Sec.6 of the Anti-Hijacking Act is entirely misplaced and misconceived in view of the unambiguous definition of "Agency" in Sec.2(a) of the Act as also the statements of objects and reasons for the introduction of the Act of 2016.

130.5) Whereas, the learned Spl.P.P.Ms.Godambe has argued that Section 6(1) of Anti-Hijacking Act, reads that for the purposes of this act the Central Government may by notification confer on any officer of Central Government or any officer of Agency, powers of arrest, investigation and prosecution. While reading this section the word "may" is very important. It is not mandatory that always there is a special officer for investigation of the cases under this act.

Section 9(d) of the Act reads as under;

***" the Designated Court may, upon perusal of the report filed by the Agency or a complaint made by an officer of the Central Government, or the State Government as the case may be, authorized on this behalf, take cognizance of the offence without the accused being committed to it for trial".***

130.6) It is submitted that though FIR is filed by Gujarat Police the investigation is carried

out by the National Investigation Agency and chargesheet is filed and this Hon'ble Court has taken the cognizance.

130.7) For better understanding we should discuss what is institution of prosecution? It is submitted that the filing of FIR is not institution of prosecution. In *Jamuna Singh and Others v/s Bhadai Sah* (AIR 1964 SC 1541) Supreme Court held that **"The court does not contain any definition of words institution of case. It is clear however and indeed not disputed that case can be said to be instituted in a court when the court taken cognizance of the offence alleged therein"**.

130.8) In light of this it is submitted that the investigation against the accused is valid and according to the law.

130.9) From the record, it can be said that the earlier investigation was carried out by the PW-22 Dr.Rajdeepsinh N. Jhala, and after Notification issued by the Central Government, the investigation was handed over to the NIA. In such circumstances, this is required to consider as to whether the investigation carried out by the Gujarat Crime Branch is illegal as per the Anti-Hijacking Act, 2016. To decide this issue, the provisions contained in Sec.6 of the Anti-Hijacking Act, 2016, are required to be gone into, which are reproduced hereunder:-

***"6. Conferment of powers of investigations etc.-***

***(1) For the purposes of this Act, the Central Government may, notwithstanding anything contained in the Code of Criminal***



*Procedure, 1973 (2 of 1974), by notification, confer on any officer of the Central Government or any officer of the Agency, powers of arrest, investigation and prosecution exercisable by a police officer under the said Code.*

*(2) All officers of police and all officers of Government are hereby required and empowered to assist the officer of the Central Government referred to in sub-section (1) in the execution of the provisions of this Act."*

130.10) On bare reading of Sec.6 of Anti-Hijacking Act, 2016, it can be said that for the offences under the Anti-Hijacking Act, 2016, the Central Government may, by notification, confer on any officer of the Central Government or any officer of the Agency, the power of arrest, investigation and prosecution exercisable by a police officer under the said Act. In such circumstances, the Sec.6 empowers the Central Government for conferring the powers of investigation etc., but nowhere it has been mentioned in the Act that the offence alleged under the Anti-Hijacking Act, 2016 can be investigated only by the agency or any officer who is conferred power by the Central Government.

130.11) Moreover, in such circumstances, Sec.6 of the Anti-Hijacking Act, 2016 is read along with sub-section (7) of Sec.6 of the The National Investigation Agency Act, 2008, it can be said that whatever the investigation has been carried out by the PW-22 Dr.Rajdeepsinh N.Jhala i.e. the officer of the Crime Branch, Gujarat State, is protected by law.

For ready reference and for the sake of convenience, the said provision is reproduced herein below:

**“6. Investigation of Scheduled Offences.-**

(1) xxxxxxx

(2) xxxxxxx

(3) xxxxxxx

(4) xxxxxxx

(5) xxxxxxx

(6) xxxxxxx

(7) ***For the removal of doubts, it is hereby declared that till the Agency takes up the investigation in the case, it shall be the duty of the officer-in-charge of the police station to continue the investigation.***”

130.12) On perusing the sub-section (d) of Section 9 of the Anti-Hijacking Act, 2016, the designated Court has power to take cognizance upon perusal of the report filed by the Agency i.e. NIA, and in the present proceedings, the Designated Court has taken the cognizance on the report filed by the Agency i.e. NIA which is empowered by the Central Government.

130.13) In the case of **Jamuna Singh & Ors. V/s. Bhadai Sah** the Hon'ble Supreme Court has observed that the Code does not contain any definition of the words “institution of a case”. It is clear however and indeed not disputed, that a case can be said to be instituted in a Court only when the Court takes cognizance of the offence alleged therein.

130.14) In view of the above legal position of law, it cannot be said that the investigation carried

out by Mr.Jhala, PW-22, is illegal and required to be eschewed from judicial consideration.

### **ILLEGAL DETENTION OF THE ACCUSED**

131) The learned Advocate Shri Verma has also submitted that further though the document **Exh.37** clearly mentions 07:15 a.m. as the time when the accused was taken under custody by the Crime Branch, the PW-22 Dr.Rajdeepsinh N.Jhala states that he arrested the accused at 24:00 Hrs. on 30/10/2017. It is submitted that however PW-22 Dr.Rajdeepsinh N.Jhala has also admitted that from the time he reached the Crime Branch office at 11:30 a.m. on 30/10/2017 the accused was already there at the Crime Branch office till the time of his arrest at 24:00 Hrs. It is submitted that the time gap in the document at **Exh.37** and the arrest memo **Exh.83** is more than 16 hours suggesting illegal detention of the accused during such period.

131.1) Now if the document Exh.37 is carefully perused, it is the self-attested copy of the logbook pages produced by Mr.M.R.Desai, Manager of the Ahmedabad Airport regarding emergency landing message received from ATC, wherein the first entry is registered at time 0348 Hrs. to the effect that *"ATC intimated that Jet Airways Flight No.9W-339 (Bombay to Delhi) diverted to Ahmedabad due to hijacking threat and explosive threat."* It further discloses that at 07:15 a.m., the passenger named Birju Salla of Seat No.1D of Flight No.9W-339 is taken under custody by the Crime Branch Team and deplaned (offloaded). The document Exh.37 does not disclose that the accused was taken in the custody by the Crime Branch. Of course, he was taken for further

investigation by the team of the Crime Branch after being deplaned, but in fact the accused was taken into custody at 24:00 Hrs. on 30/10/2017. Of course, it can be said that the accused was with the team of Crime Branch since early morning at 07:15 a.m. till his arrest, but it cannot be said that the accused was illegally detained for more than 16 hours. In such circumstances, there is no substance in the argument of Mr.Verma that the accused was taken into custody in the early morning at 07:15 a.m. and was illegally detained for 16 hours.

**JUSTIFICATION OF INVOCATION OF THE ANTI-HIJACKING ACT, 2016 :**

132) It is further submitted by Shri Verma with regard to justification of invocation of the Anti-Hijacking Act, 2016 by the Prosecution in the present case, that admittedly the entire theory of **"fear and intimidation"** has been subsequently introduced by witnesses **PWs 2, 3, 4, 12 and 16** to justify the invocation of the Anti-Hijacking Act. It is submitted that except PW-12, the other witnesses were already examined by the Crime Branch before the investigation stood transferred to the NIA on 07.11.2017, and despite this, none of the witnesses stated that they felt intimidated and/or feared for their life in their respective previous statements recorded by the local police.

132.1) It is further submitted by Shri Verma that the introduction of such "intimidation and/or fear" happened only after the NIA took over the investigation and when the NIA realized that the prosecution against the accused under the Act shall not be possible.

132.2) It is submitted that it was only thereafter that all the witnesses introduced this belated theory of "fear and/or intimidation" and such attempt on the part of the witnesses can be clearly seen as a **"material improvement"** from their earlier respective version.

132.3) It is submitted that there is cardinal difference between the terms "omissions" and "improvements", and in the present case, given the fact that the aforesaid witnesses have made material improvements from their earlier statements, the only inference that can be drawn is that the entire theory of "fear and/or intimidation" has been subsequently introduced by the aforesaid witnesses at the instance of the NIA with a view to justify the invocation of the Anti-Hijacking Act.

132.4) It is further submitted that the Anti-Hijacking Act is a special Act enacted for preventing a particular class of offences, and given the stringent provisions of the Act coupled with the facts of the present case, a pertinent question that arises for adjudication is "Whether the invocation of the act at the threshold itself was justified?". It is submitted that on the contrary if the statement of objects and reasons of the Act are to be read in its entirety, the invocation of the Anti-Hijacking Act in the facts of the present case would be found to be wholly unjustified.

132.5) It is submitted that even otherwise there is nothing to suggest that the accused unlawfully and intentionally seized or exercised the control of the Flight being 9W-339 which is *sine qua*

*non* for invoking the provisions of Anti-Hijacking Act, 2016.

132.6) It is further submitted that there is nothing on record to suggest that the behaviour and conduct of the accused whilst on the Flight satisfied the aforesaid mandatory requirement of law u/s 3(1) of the Anti-Hijacking Act. It is pointed out that on the contrary the evidence that has come on record suggests that at no point of time did the accused seek unlawful and intentional seizure or control of the Flight.

132.7) It is further submitted that even with regard to Sec.3(2)(a) of the Act, the same has to be read and interpreted in a manner that the ultimate act of seizing or exercising control of the flight is required to be established. It is submitted that in other words, Sec.3(2) has to be read conjointly with Sec.3(1) of the Act and any attempt of reading it in isolation would be a futile exercise as also not permissible in the eyes of law.

132.8) As against that, it has been argued on behalf of the Prosecution by learned Spl.P.P. Ms.Godambe that the Prosecution has examined the witnesses namely Nitika Joneja (PW-3), Jay Jariwala (PW-4), Bharatkumat Maru (PW-8), M. R. Desai (PW-9), Suryanarayan Pichumani (PW-10), Surendrasingh Khatri (PW-11), Giridhar Bhargav (PW-15), Mohit Tyagi (PW-16) to prove that the threat was credible threat.

132.9) It is next submitted that Sec.3 of the Act categorically explains that, a person who received the threat which clearly indicates that the

threat is credible and the action taken on reception of threat is because the threat is credible.

132.10) It is further submitted at the cost of repetition in this regard that Nitika Joneja (PW-3) stated that Shivani Malhotra (PW-2) reported her that tissue papers from the tissue paper box in the business class washroom were not coming out and might be finished. It is submitted that she told Shivani Malhotra (PW-2) to carry on services and she herself went into the washroom to change the tissue papers box, and that while replacing tissue papers box, she found that the tissue box was filled with tissue papers and there was one white folded paper inside. It is submitted that she took out the paper, the paper had two paragraphs - one in Urdu and second in English. It is submitted that she on having read over the English part, panicked and got scared. It is submitted that therefore, she immediately came out from washroom and showed it to her colleague Mohit Tyagi (PW-16) and she showed the same to the Captain Jay Jariwala (PW-4), who after reading the same, also got panicked and scared. It is submitted that they started following SOP of hijacking & bomb threat and accordingly, Captain informed the same to ATC, Ahmedabad, and thereafter, the Captain did emergency landing at Ahmedabad.

132.11) It is submitted on behalf of the Prosecution that this fact is corroborated by Mohit Tyagi (PW-16), who has stated in his deposition that after reading the contents of threat note he get scared. Regarding this aspect, it is submitted that the key witness is Jay Jariwala (PW-4) who states in his deposition that after reading the threat note he get scared.

132.12) It is submitted further that it must be noted that the PW-4 Captain was afraid of the safety of the Aircraft, the safety of passengers and crew members, and therefore, considering safety of Aircraft and passengers he diverted the plane to the Ahmedabad. It is submitted that this act of diversion of flight from its original path itself proves that the Captain has taken the threat as credible threat.

132.13) It is further submitted that Bharatkumar Maru (PW-8), M.R.Desai (PW-9), Suryanarayan Pichumani (PW-10), Surendhrasingh Khatri (PW-11), Giridhar Bhargav (PW-15) have all supported the fact that the threat was credible and they responded to the information received from Jay Jariwala (PW-4), which shows that not only Captain of the flight but the other agencies like ATC, CISF, BDDS, Fire services, Airport Authorities had considered the threat as credible threat.

132.14) It is submitted that Mr.M.R. Desai (PW-9) has exhibited the certified copy of Log Book of Airport Authority of India, Ahmedabad (Exh-47), which proves that the Airport Authority has taken the threat as credible and informed the other agencies for immediate action. It is submitted that Mr.Surynarayan Pichumani (PW-10) has submitted the tape transcript of conversation between Captain of the Flight and ATC (Exh-42), which proves that the Captain and ATC had taken the threat as credible and accordingly they acted upon it.

132.15) It is further submitted that it would be pertinent to note that the time mentioned in tape transcript as well in Log Book of Airport Authority



of India are mentioned in UTC, it means 'Universal Co-ordinated Time'. It is further submitted that in India we have to add 05.30 hours in the time mentioned, for getting real time, which is admissible u/s.57(9) of Indian Evidence Act.

132.16) It is also further submitted by the Prosecution that the fact the Flight 9W-339 was landed in emergency at Ahmedabad is not disputed, and therefore, it is submitted that the Prosecution has proved that the threat was credible and therefore, Captain diverted the Flight to Ahmedabad from its original path. It is submitted that the Prosecution has proved that by placing threat note accused had seized the control of flight in service and committed offence of hijacking.

133) Having considered the above referred rival submissions together with the material available on record, at the outset, it would be necessary to reproduce the relevant provisions of Sec.3 of the Anti Hijacking Act, 2016 for the sake of convenience, which are as under:-

***"3. (1) Whoever unlawfully and intentionally seizes or exercises control of an aircraft in service by force or threat thereof, or by coercion, or by any other form of intimidation, or by any technological means, commits the offence of hijacking.***

***(2) A person shall also be deemed to have committed the offence of hijacking specified in sub-section (1), if such person-***

(a) makes a threat to commit such offence or unlawfully and intentionally causes any person to receive such threat under circumstances which indicate that the threat is credible; or

(b) attempts to commit or abets the commission of such offence; or

(c) organizes or directs others to commit such offence or the offence specified in clause (a) or clause (b) above;

(d) participates as an accomplice in such offence or the offence specified in clause (a) or clause (b) above;

(e) unlawfully and intentionally assists another person to evade investigation, prosecution or punishment, knowing that such person has committed any such offence or the offence specified in clause (a) or clause (b) or clause (c) or clause (d) above, or that such person is wanted for criminal prosecution by law enforcement authorities for such an offence or has been sentenced for such an offence.

(3) A person also commits the offence of hijacking, when committed intentionally, whether or not any of the offences specified in sub-section (1) or in clause (a) of sub-section (2) is actually committed or attempted, either or both of the following:

(a) agreeing with one or more other persons to commit an offence specified in sub-section (1) or in clause (a) of sub-

*section (2), involving an act undertaken by one of the participants in furtherance of the agreement; or*

*(b) contributing in any manner to the commission of an offence specified in sub-section (1) or in clause (a) of sub-section (2) by a group of persons acting with a common purpose and such contribution shall either-*

*(i) be made with the aim of furthering the general criminal activity or purpose of the group, where such activity or purpose involves the commission of such an offence; or*

*(ii) be made in the knowledge of the intention of the group to commit such offence.*

*(4) For the purposes of this Act, an aircraft shall be considered to be "in service" from the beginning of the pre-flight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty four hours after any landing and in the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board."*

133.1) On plain reading of the provisions contained in Sec.3, sub-section (1) as well as sub-section (2) (a), it becomes crystal clear that when any person unlawfully and intentionally seizes or exercises control of an aircraft in service by force or threat thereof, or by coercion, or by any other form of intimidation, commits the offence of hijacking. Moreover, as per Sec.3, sub-section (2), a

person shall also be deemed to have committed the offence of hijacking specified in sub-section (1) if such person makes a threat to commit such offence or unlawfully and intentionally causes any person to receive such threat under circumstances which indicate that the threat is credible. In such circumstances, considering the facts of the case on hand, when it has been alleged against the present accused that he prepared the threat note and placed the same in the tissue paper box in the toilet of the aircraft, it can be said that if the allegation is proved against the accused, he has committed the offence under Sec.3(1) and 3(2)(a) of the Act. In such circumstances, there is no substance in the argument of learned Advocate Shri Verma that no offence has been committed by the present accused in terms of the provisions of Sec.3 of the Act.

133.2) Moreover, the Anti-Hijacking Act, 2016 repeals the Act of 1982. Its objectives are in tune with the Hague Convention of December, 1970 for the suppression of the unlawful seizure of the Aircraft. The Act further incorporated in September, 2010 the protocol, supplementary to the Hague Convention, which specifically dealt with "unlawful acts against civil aviation by new types of threats". The Act highlighted the Governments concerned for expedient measures to be taken during hostile acts of seizure or exercise of the control of Aircraft which jeopardized the safety of persons and property.

133.3) The new law revamped Sec.3 of the 1982 legislation to expand the definition of hijacking to seizure or taking over of an aircraft using "any technology means". It has taken into consideration the possibility that a hijacker need not be

physically present inside the aircraft to take control of it. According to the Act, even a credible threat to hijack an aircraft amounts to hijacking. The definition of 'hijacking' also includes "an attempt to commit the crime, abetting, organizing, participating in it as an accomplice and unlawfully and intentionally assisting a person involved in the hijacking to evade investigation or prosecution or punishment". Here a person who does not actually participate in the hijacking, but "directs" someone else to do it is equally liable.

133.4) Further, the Court is of the firm opinion that the interpretation of the provisions of the said Act with regard to the credibility of the threat given, by Shri Verma, is not correct, as the usage of words like 'POK' (Pakistan Occupied Kashmir) and use of Urdu language in the threat note, is clearly established, and there being twelve persons indicated to be involved, would naturally in the opinion of the Court, caused panic in the minds of the cabin crew. The threat emanating from the said chit, was taken seriously enough that the Pilot decided to divert the flight from its original path and landed the flight under emergency circumstances at the nearest Airport which was incidentally Ahmedabad.

133.5) Furthermore, in such circumstances, the Court is of the clear opinion that therefore, that chit emanated a credible threat which resulted in an indirect control exercised by the accused in diverting the flight from its original path. The Court, therefore, finds itself in agreement with the submissions of Ms. Godambe that taking out of landing gear is required to be interpreted in the manner

sought to be done so by the N.I.A., and therefore, in the opinion of the Court, a credible threat has emerged.

134) Section 16 of the Anti-Hijacking Act, 2016 also gives the power to the Court for presumption as to offence under section 3 and 5 which reads as under:-

**"16. Presumption as to offences under sections 3 and 5:- In a prosecution for an offence under section 3 or section 5, if it is proved that-**

**(a) the arms, ammunitions or explosives were recovered from the possession of the accused and there is reason to believe that such arms, ammunitions or explosives of similar nature were used in the commission of such offence; or**

**(b) there is evidence of use of force, threat of force or any other form of intimidation caused to the crew or passengers in connection with the commission of such offence,**

**the Designated Court shall presume, unless the contrary is proved, that the accused had committed such offence."**

134.1) On perusing sub-section (b) of section 16, the Designated Court shall presume, unless the contrary is proved, that the accused had committed such offence, if there is evidence of use of force, threat of force or any other form of intimidation caused to the crew or passengers in connection with the commission of such offence. In the present matter the note was found by one of the crew members, which

contains the threat, and due to the threat note, the path of the Flight was diverted. In such circumstances, the Court can also presume that the offence under Section 3 of the Act has been committed by the accused.

#### **ABSENCE OF MOTIVE**

135) The learned Advocate Shri Verma has further relying on the judgment in the case of **Tomaso Bruno (Supra)**, submitted that where the case is based on circumstantial evidence, proof of motive will be an important corroborative piece of evidence. It is also submitted that in absence of the motive, the case cannot be proved by the Prosecution when it rests on circumstantial evidence.

135.1) It is also submitted that as far as motive is concerned, the Prosecution has failed on this count too by not leading any evidence, and that despite attributing a specific motive against the accused, the Prosecution has chosen not to lead any evidence. It is submitted that no witness has been examined to prove the alleged motive against the accused, and thus, in absence of proof of motive, the Prosecution case against the accused gets further weakened.

135.2) The absence of motive is not fatal to the prosecution case is very well enumerated by law. The motive is always locks up in the mind of accused. The failure to discover the motive of an offence does not signify its nonexistence. The prosecution is relying on the judgement **Brij Bhushan Sharma vs. State of U.P. (19.12.2000 - ALLHC) : MANU/UP/0875/2000.**

135.3) According to this Court, of course, on perusal of the evidence on record, it can be said that the evidence as to motive for committing the offence by the accused, is not brought on record. The Court shall also refer the provisions contained in Section 8 of the Indian Evidence Act. Section 8 of the Evidence Act deals with motive, preparation and previous or the subsequent conduct, which mainly deals with three aspects:

- (i) A fact which shows or constitutes a motive for any fact in issue or relevant fact.
- (ii) The acts constituting preparation for any fact in issue or relevant fact.
- (iii) The conduct of the person either previous or subsequent to the offence.

135.4) Under this section, the motive which induces a party to do an act, or the preparation which he makes for its commission, will be taken into account. The motive to commit an offence is the hidden innerspring of human action which cannot always be known to the Prosecution. The Prosecution can only be expected to place before the Court the previous background as known to it. Proof of presence of motive, preparation, opportunity or the previous attempts would be relevant as they go to show not only the *mens rea* in committing a crime but also provide sufficient information in establishing the commission of the offence.

135.5) In the case of **Bhim Singh v. State of Uttarakhand (2015-Cr.L.J.-1428)**, the Hon'ble Supreme



Court has observed that absence of the motive does not break the link in the chain of circumstances connecting the accused with the crime. In the case of **Sardul Singh v. State of Haryana (AIR-2002-SC-3462)**, the Hon'ble Supreme Court has observed that absence of motive does not *ipso facto* warrant an acquittal. In the case of **Manikumar Thapa v. State of Sikkim (AIR-2002-SC-2920)**, the Hon'ble Apex Court has also observed that even where the Prosecution is able to establish beyond reasonable doubt from other circumstantial evidence that it was the accused alone who could have committed the crime, the absence of motive will not hamper a safe conviction. In the case of **Nachhitar Singh v. State of Punjab (AIR-1975-SC-118)**, the Hon'ble Supreme Court has observed that when the Prosecution fails to prove motive, it cannot be a ground to throw the Prosecution case overboard if other evidence proves the guilt of the accused beyond all reasonable doubt. It is also well settled that failure to prove motive is not fatal to prove the Prosecution case as it is not a decisive test to determine criminal character of human acts.

135.6) In view of the evidence on record, this Court is of the view that even though the motive is not proved by Prosecution, the case of Prosecution is not fatal.

### **SANCTION**

136) The learned Advocate Shri Verma has also pointed out that even the sanctioning authority has shown complete non-application of mind while according sanction vide **Exh.107**. It is further submitted that the file notings being not a part of the record of this Hon'ble Court, mere evidence of

PW-24 Mr.Satish Chander and PW-27 Mr.Kameshwar Mishra would not be sufficient to come to a conclusion that the sanction **Exh.107** was accorded after proper application of mind.

136.1) It is submitted that on the contrary the evidence of PW-24 Mr.Satish Chander and PW-27 Mr.Kameshwar Mishra goes on to suggest that the sanction was accorded in a very casual manner, and exactly what papers of investigation were sent to the sanctioning authority has not been established by the Prosecution.

136.2) It is submitted by Shri Verma that in light of the decision of the Hon'ble Supreme Court reported in **(2014) 7-SCC-716** as also considering the evidence of PWs 24 and 27, the sanction **Exh.107** accorded in the present case demonstrates complete non-application of mind on the part of the sanctioning authority.

136.3) As against the above submission, the learned Spl.P.P. Ms.Godambe has submitted on behalf of the Prosecution, that the Prosecution has examined two witnesses to prove the sanction, being Mr.Satish Chander (PW-24) and Mr.Kameshwar Mishra (PW-27). It is submitted that Mr.Satish Chander (PW-24) had proved and exhibited sanction (Exh-107). It is submitted that he has deposed that on the date of receiving the file for sanction of prosecution he was on leave, and his link officer was Kameshwar Mishra (PW-27). It is submitted that said Mr.Kameshwar Mishra (PW-27) deposed before court that after perusal of file there was sufficient evidence for issuing of prosecution sanction against the accused as per the Act and, therefore, he had put his

signature as mark of endorsement. It is submitted that the sanction is accorded by Hon'ble Minister of Civil Aviation.

136.4) It is submitted that the contents of sanction order are not challenged by accused. It is further submitted that there is no cross examination in this regard. It is submitted that in **Arunlal M. Updhyay v/s State of Gujarat [2010 Law Suit (Guj)-905]** it is decided by Hon'ble Gujarat High Court that **"If during discharged official duty of public servant if any record or any document is prepared by a public servant then it is relevant fact and it can be considered as proved document"**. It is submitted that in paragraph 12 of this judgment it is clearly mentioned that **if accused has not tried to disprove the contents, the sanction order is legal, valid and issued after due application of mind.** It is thus submitted that the Prosecution has proved sanction against the accused accorded by the Central Government, in the present case.

136.5) Now, if the judgment in the case of **Adambhai Ajmeri v. State of Gujarat (Supra)** is gone through, it transpires from the said case that the sanction was given on the approval of the Home Minister of the State of Gujarat to prosecute the accused, and it was held that the relevant documents required for granting sanction shall be presented before the sanctioning authority so that the sanction can be granted on the basis of the relevant material information and documents collected from the course of the investigation with respect to the crime, and after discussing the principle as to giving sanction for the prosecution, the Court has come to the conclusion that the sanctioning authority had not

applied its mind to the satisfaction as to whether the said case required granting of sanction.

136.6) Whereas in the instant proceedings, the Prosecution has examined PWs 24 and 27. The PW-27 Mr.Kamleshwar Mishra at Exh.153, has deposed as thus:-

*"1) Since the year 2016, I am working as Under Secretary in the Ministry of Civil Aviation. On 15/01/2018 Mr.Satishchander, Under Secretary in the Ministry of Civil Aviation was on leave. I was his link officer. On that day, I had received the case file of Mr.Birju Salla. The file contained the reports of NIA received through Ministry of Home Affairs. The said report was regarding investigation of the case against Mr.Birju Salla. I went through the file, the report, and the examination done by the Section of the report submitted by NIA and after satisfying myself that there was sufficient evidence for issuing of prosecution sanction against Shri Birju Salla as per the Anti-Hijacking Act, 2016, then I put my signature on the file as a mark of endorsement and further submitted it to my senior Mr.Suyash Narain, Director in Ministry of Civil Aviation. He further submitted the file to Joint Secretary Ms.Usha Padhee, Ministry of Civil Aviation. Subsequently the file went to the Minister of Civil Aviation, who is the competent authority to issue prosecution sanction."*

136.7) Similarly the PW-24 Mr.Satish Chander who is examined at Exh.106, has deposed as thus:

**"2).....The request was deliberated at the level of Section and thereafter, the facts were submitted to Sanctioning Authority i.e. Hon'ble Minister of Civil Aviation through various channels....."**

136.8) It is also further deposed by PW-24 as under:-

**"3) On receipt of the approval, I conveyed his decision for prosecution of sanction on 17/01/2018. The original order of sanction is attached along with the chargesheet. The said order is shown to me, and it is the same which was issued by me after obtaining the approval of Hon'ble Minister for Civil Aviation to prosecute Mr.Salla. The same is exhibited at Exh.107."**

136.9) On perusing the evidence of these two witnesses, it is proved beyond reasonable doubt on record that defence has never made any attempt to put any question to the witness just to disapprove the contents of the sanctioned letters. Moreover, it is also required to be noted that if during discharge of official duty of a public servant, if any record or any document is prepared by a public servant then it is a relevant fact and it can be considered as a proved document. Moreover, here also it is required to be noted that as per the section 114(e) of the Indian Evidence Act the Court can presume that judicial and official acts have been regularly performed. In such circumstances also, the Court can presume that the sanction issued by the concerned

department is after following due procedure and after application of the mind on the evidence produced before him. Moreover, in the case of **P.L.Tatwal Vs. State of Madhya Pradesh** reported in **AIR 2014 SC 2369**, the Hon'ble Supreme Court has also observed that grant of sanction is only an administrative function.

136.10) In view of the above circumstances, especially the oral evidence of the witnesses in the present case, it can be said that the sanctioning authority has applied its mind before granting the sanction for prosecution against the accused herein under the Anti-Hijacking Act, 2016.

**ADVERSE INFERENCE :**

137) The learned Advocate Shri Verma has also submitted that the non-examination of the material witnesses in the present case, should neither restrain this Court from drawing adverse inference against the Prosecution nor should the Prosecution be permitted from praying immunity from drawing of such adverse inference.

137.1) It is further submitted that though the cockpit footage was sought to be recovered, no such footage forms a part of the record. It is submitted that PW-22 in his evidence categorically stated that on 02.11.2017 he wrote a letter to the Security Manager of Jet Airways vide **Exh.99**. It is submitted that in the cross-examination, he has stated that he did not receive such footage till the time the investigation was being carried out by him. It is submitted that PW-26 in his cross-examination has voluntarily deposed that he was told that no cockpit footage is recorded. It is further submitted that

upon being confronted as to whether he was given any documentary evidence in this regard, PW-26 has stated in the negative.

137.2) It is submitted that the attempt on the part of the Prosecution to suggest that no cockpit footage has been produced because there existed none, is yet another attempt of not producing the best evidence before this Court, and therefore, adverse inference is required to be drawn in this regard too.

137.3) Shri Verma has further relied on the judgment in the case of **Tomaso Bruno (Supra)**, and has submitted that CCTV footage is not produced by the Prosecution as well as Prosecution has not examined Rana Rajendrapal Singh and therefore, they have concealed the material evidence, which should be considered adverse to the Prosecution case.

137.4) Now if the judgment in the case of Tomaso Bruno (Supra) is carefully perused, the Hon'ble Supreme Court has observed in para-28 of the judgment as under:-

***"28. The High Court held that even though the appellants alleged that the footage of CCTV is being concealed by the prosecution for the reasons best known to the prosecution, the accused did not invoke Section 233 CrPC and they did not make any application for production of CCTV camera footage. The High Court further observed that the accused were not able to discredit the testimony of PW 1, PW 12 and PW 13 qua there being no relevant material in the CCTV camera footage. Notwithstanding the***

***fact that the burden lies upon the accused to establish the defence plea of alibi in the facts and circumstances of the case, in our view, the prosecution in possession of the best evidence, CCTV footage ought to have produced the same. In our considered view, it is a fit case to draw an adverse inference against the prosecution under Section 114 Illustration (g) of the Evidence Act that the prosecution withheld the same as it would be unfavourable to them had it been produced."***

137.5) As against such submission, the learned P.P. Ms.Godambe, has argued that indeed there is a facility of video camera inside the aircraft, but there is no facility of recording and in such circumstances, the Investigating Agency is unable to produce the footages from the video camera.

137.6) Of course, in the present proceedings, the cockpit footage was sought by the IO from the concerned authority, but it is not produced on record. The PW-22 Dr.Rajdeepsingh N.Jhala has explained that till he was in charge of the investigation in the present case, he had not received any cockpit footage from the concerned authority, but the PW-26 Mr.Vikram Khalate in his cross examination, has clarified that no cockpit footage is recorded. Moreover, in my opinion, when nothing is on record to show that though there is a facility of recording of events taking place in the aircraft, through CCTV, the footage is not produced on record. In such circumstances, when in the investigation it was found that no cockpit footage was recorded, the expectation of the learned Advocate



for the defence that such footage should be brought on record, is exaggerating and is therefore, required to be discarded.

137.7) In the case of **Harpal Singh (Supra)**, the Hon'ble Supreme Court has also observed that section 114(g) presumption under, is optional. It is a permissible and not a necessary inference. Hence Court should not mechanically draw an adverse inference merely on ground of non-examination of a witness even if the witness is a material witness.

137.8) Further in the judgment in the case of Tomaso Bruno (Supra), in para-27, the Hon'ble Supreme Court has observed as under:

***"27. ....Drawing of presumption under Section 114 Illustration (g) of the Evidence Act depends upon the nature of fact required to be proved and its importance in the controversy, the usual mode of proving it; the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned, all of which have to be taken into account. It is only when all these matters are duly considered that an adverse inference can be drawn against the party."***

137.9) Considering the facts of the instant case, as discussed above, the cockpit footage was not recorded and in such circumstances, it cannot be brought on record. Hence, no adverse inference can be drawn as per Sec.114, illustration (g) of the Evidence Act.

138) The learned Advocate Shri Verma has also submitted that the Prosecution has argued that the accused was found to be allegedly involved by the Aerodrome Committee, but no person from the Aerodrome Committee is examined by the Prosecution and hence, adverse inference is required to be drawn on that count too.

138.1) Of course, none of the members of the Aerodrome Committee is examined by the Prosecution though the accused was brought before such Committee on 30/10/2017 in the morning, but such non-examination of any member of the Aerodrome Committee cannot give any benefit to the accused. Of course, if any member of the Aerodrome Committee would have been examined by the Prosecution, it would have been one more link in the chain of circumstantial evidence.

138.2) The learned Advocate Shri Verma has relied upon the cases of **Gopal Krishnaji (Supra)**, **Masauddin Ahmed (Supra)** and **State of U.P. v. Jaggo (Supra)**, on the point of adverse inference to be drawn if the material evidence is not brought on record.

138.3) Of course, the principles laid down in the said judgments are binding principles to this Court, but however, as discussed herein above, non-examination of the witnesses by the Prosecution, as alleged by the defence, cannot be considered a material flaw and it cannot be said that the witnesses whose evidence is essential to the unfolding of the narrative, are not examined.

**BURDEN OF PROOF :**

139) The learned Advocate Shri Verma has also relied upon the judgment of **State of Maharashtra v. Wasudeo R.Kaidalwar (Supra)**, and has submitted that the accused is not bound to prove his innocence beyond all reasonable doubt. It is submitted that all that he needs to do is to bring about preponderance of probabilities.

139.1) Of course, it is well settled principle that the accused is not bound to prove his innocence beyond all reasonable doubts, and it is for the Prosecution to prove the charges leveled against the accused beyond reasonable doubt. Moreover, it is the case based on circumstantial evidence, and therefore, the Prosecution has to prove the link of chain of all circumstances.

139.2) The learned Advocate Shri Verma has also relied on the judgment in the case of **Sujit Biswas (Supra)** and submitted that suspicion however grave, it may not take the place of proof. Reliance is placed on para-18 of the judgment:

***"18. ....In a case of circumstantial evidence, the judgment remains essentially inferential. Inferences are drawn from established facts, as the circumstances lead to particular inferences. The court must draw an inference with respect to whether the chain of circumstances is complete, and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion, that the accused alone is the perpetrator of the crime in***

**question. All the circumstances so established must be of a conclusive nature, and consistent only with the hypothesis of the guilt of the accused."**

140) The learned Advocate Shri Verma has placed reliance on para-25 of the said judgment, which reads as thus:

**"25. An adverse inference can be drawn against the accused only and only if the incriminating material stands fully established, and the accused is not able to furnish any explanation for the same. However, the accused has the right to remain silent, as he cannot be forced to become a witness against himself."**

141) The learned Advocate Shri Verma has also pressed into reliance the judgment in the cases of **Navneethakrishnan (Supra) and Suresh & Ors. (Supra)**, and it is submitted that the Court must satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. Shri Verma has particularly relied on the observation made in para-23 in the case of Navneethakrishnan (Supra), which reads as under:-

**"23. The law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis**

*against the guilt is possible. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The Court must satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances gets snapped and the other circumstances cannot, in any manner, establish the guilt of the accused beyond all reasonable doubt. The court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes, unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between 'may be true' and 'must be true' and the same divides conjectures from sure conclusions. The Court is mindful of caution by the settled principles of law and the decisions rendered by this Court that in a given case like this, where the prosecution rests on the circumstantial evidence, the prosecution must place and prove all the necessary circumstances, which would constitute a complete chain without a snap and pointing to the hypothesis that except the accused, no one had committed the offence, which in the present case, the prosecution has failed to prove."*

142) The learned Advocate Shri Verma has also relied upon the judgment in the case of **Digamber**

**Vaishnav (Supra)**, and has emphasized on paras 15 to 19 of the judgment, which are reproduced hereunder:

*"15. One of the fundamental principles of criminal jurisprudence is undeniably that the burden of proof squarely rests on the prosecution and that the general burden never shifts. There can be no conviction on the basis of surmises and conjectures or suspicion howsoever grave it may be. Strong suspicion, strong coincidences and grave doubt cannot take the place of legal proof. The onus of the prosecution cannot be discharged by referring to very strong suspicion and existence of highly suspicious factors to inculcate the accused nor falsity of defence could take the place of proof which the prosecution has to establish in order to succeed, though a false plea by the defence at best, be considered as an additional circumstance, if other circumstances unflinching point to the guilt.*

*16. This Court in Jaharlal Das v. State of Orissa, (1991) 3 SCC 27, has held that even if the offence is a shocking one, the gravity of offence cannot by itself overweigh as far as legal proof is concerned. In cases depending highly upon the circumstantial evidence, there is always a danger that the conjecture or suspicion may take the place of legal proof. The court has to be watchful and ensure that the conjecture and suspicion do not take the place of legal proof. The court must satisfy*

*itself that various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. In order to sustain the conviction on the basis of circumstantial evidence, the following three conditions must be satisfied:*

*i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*

*ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and*

*iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused.*

*17. In Varkey Joseph v. State of Kerala, 1993 Suppl (3) SCC 745, this Court has held that suspicion is not the substitute for proof. There is a long distance between 'may be true' and 'must be true' and the prosecution has to travel all the way to prove its case beyond reasonable doubt.*

*18. In Sujit Biswas v. State of Assam, (2013) 12 SCC 406, this Court, while*

*examining the distinction between 'proof beyond reasonable doubt' and 'suspicion' has held as under:*

*'13. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved, and something that "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between "may be" true and "must be" true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so*



*demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense.'*

19. *It is also well-settled principle that in criminal cases, if two views are possible on evidence adduced in the case, one binding to the guilt of the accused and the other is to his innocence, the view which is favourable to the accused, should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence [See Kali Ram v. State of Himachal Pradesh, (1973) 2 SCC 808]."*

143) The learned Advocate Mr. Verma on relying on the above judgments has submitted that the PW-13 Shri Harshad Chimanlal Soni, staff member working in the office of the accused has at Exh. 47 categorically stated that when he went into the office of the accused alongwith the tray of snacks, he saw the computer on and lying on the desk of the table of the accused, as the accused was showing and typing something on the said computer. The case of the defence is that the Investigating Officer Mr. Zala compelled the accused to type the threat note on the computer lying in the office of the accused. In such circumstances, as well as the data deleted from the computer were not retrieved by the Scientific Expert, it can be said that there is reasonable doubt as to the commission of the offence by the accused and as per the settled principle of law, the accused

always be given the benefit of doubt when the Prosecution has failed to prove its case beyond reasonable doubt.

143.1) The learned advocate Mr. Verma has pointed out the judgment in the case of **Mukhtiar Ahmed Ansari (Supra) and Raja Ram (Supra)**. Shri Verma has submitted that when the PW-13 Shri Harshad Chimanlal Soni, is not declared hostile, his evidence supported the defence and accused can therefore, rely on the said evidence and in such circumstances, the case of the Prosecution that the IO compelled the accused to type on his Laptop when they visited the office of the accused on 30.10.2017, should be accepted by the Court.

143.2) It is thus, submitted by Shri Verma that a cumulative reading of the aforesaid points dealt with in the arguments herein above, lead to the only conclusion that the Prosecution has miserably failed to prove the case beyond reasonable doubt against the accused and hence, the accused is required to be acquitted of all the charges he has been charged with vide Charge **Exh. 9**. It is submitted that further the case being that of circumstantial evidence, the Prosecution has failed to complete the entire chain of circumstances against the accused.

143.3) The learned Advocate Mr. Verma has cited the Judgments on the point of burden of proof, adverse inference, completion of the chain, when the matter rests on the substantial evidence, etc. If we peruse the said Judgments and consider the principles laid down in the said Judgments, the Court can say that the principles laid down in the said Judgment are well settled principles of criminal law and while

deciding any criminal matter by the Court, the basic principle of Criminology should be considered by the Court and if when the matter rests on the circumstantial evidence, the chain of each and every circumstances is proved and the circumstances from which an inference of the guilt sought to be drawn must be cogently and firmly established. Moreover, the circumstances, taken cumulatively, should form a chain to complete that there is no scope from the conclusion that within all human probability the crime was committed by the accused and none also, it should also be not of explanation on any other hypothesis than that of the guilt of the accused.

143.4) On perusing the CCTV footages in the DVR produced vide Muddamal Article No.36 at 12:35 p.m., the accused was wearing the gloves for getting the print of the letter i.e. threat note which is typed in his laptop but at that time due to interphone he was unable to take the print of the letter and he vacated the chamber. Thereafter, again at about 14:16 p.m. the accused came in the chamber where the printer was installed and directed the Peon to close the door and thereafter he wore the gloves and he took the print of the threat note. Thereafter, he folded the threat note in four parts and kept it on his table as the plastic pouch was not available at that time in that chamber. Thereafter, he again took that threat note with the help of the gloves. At that time, he used the gloves as clothes and put the threat note between the flap of the Laptop and thereafter he went to his own office where he again wore the gloves and took the plastic pouch and put the threat note in the said plastic pouch. Thereafter, on completion of the work, the gloves

were put off and placed it in the drawer. The conduct of the accused to get the threat note typed, printed and placed in the plastic pouch is absolutely suspicious and no explanation has been given by the accused for what reason he wore the gloves for of getting the letter from the printer, as well as placing the letter in plastic pouch. Moreover, why he directed the office boy to close the door while getting the copy of the letter from the printer.

143.5) If we see the further statement given by the accused, he has not given any explanation on the evidence brought on the record by the prosecution as to the conduct of the accused that is previous as well as the subsequent. In such circumstances and in view of the principles laid down in the case of **Ganesh Lal Vs. State of Rajasthan** reported in **2002 Cri.L.J. 967**, the Hon'ble Supreme Court has observed that the fact remains that the accused failed to offer any explanation of such circumstances and, therefore, they can be used as inculpatory circumstances against him and the necessary inferences flowing therefrom used as links in chain of incriminating circumstantial evidence fastening guilt on him.

143.6) The incriminating circumstances enumerated above inevitably lead to the guilt of the accused and nothing has been highlighted or brought on record to make the facts prove or the circumstances established to be in any manner in consonance with the innocence act of the accused. The circumstances regarding the previous as well as subsequent conduct of the accused were personally and exclusively within the knowledge of the accused and only he can explain the same and as such he proves

misleading for completing the chain of incriminating circumstances necessary to connect the accused with the crime committed. It is also well settled that in the case of the circumstantial evidence false explanation of the accused offers additional link in chain of circumstances. In the case of **Jagroop Singh Vs. State of Punjab** reported in **AIR 2012 SC 2600** the Hon'ble Supreme Court as also considering the principle laid down in the case of **Sucha Singh & Anr. Vs. State of Punjab** observed that Prosecution was not required to meet any and every hypothesis put forward by accused. A reasonable doubt was not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. Present case was one where there was no trace of doubt that, all circumstances completed the chain and singularly lead to guilt of accused persons.

143.7) When the question as to reasonable doubt is under consideration, the Court should also consider the Judgement of **Jayantilal Kuberdas Sharma v. State of Gujarat [2007(1)-GLR-99]**, in which the Hon'ble High Court of Gujarat has, in para-32, observed as under:-

*"32. Thus, uninformed legitimisation of trivialities would make a mockery of the administration of criminal justice while protecting the accused by criminal process. The proof beyond reasonable doubt is mere guideline and not fetish. Likewise, in the matter of Sucha Singh v. State of Punjab, as reported in 2003(7) SCC 643, the Supreme Court held that reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common*

*sense. In Para 20, the Apex Court observed as under:*

*'20. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion, and thereby, destroy social science. Justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent. Letting the guilty escape is not doing justice according to law. (See Gurbachan Singh v. Satpal Singh). A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some inevitable flaws because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hyper-sensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. [See Inder Singh v. State (Delhi Admn.)]. Vague hunches cannot take the place of judicial evaluation.*

*"A Judge does not preside over a criminal trial, merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties." (Per Viscount Simon in Stirland v. Director of Public Prosecution quoted in*

***State of U.P. v. Anil Singh (SCC 692, Para 17).***

144) The case of the Prosecution may rest on the number of the circumstances, and each and every circumstance is not required to be proved by the Prosecution, but only the chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. In the present matter, as discussed above, it can be held that that Prosecution succeeds in proving the chain of evidences which shows that in all human probability the act must have been done by the accused.

145) In view of the above discussion, the Court comes to the conclusion that the Prosecution succeeds to prove beyond reasonable doubt that the accused Birju Salla prepared the 'threat note' on 27/10/2017, to days before the day of incident, in his office located at Mumbai in a pre-planned manner. This is established from the oral evidences of the witnesses examined during the course of trial as well as from the forensic evidences adduced from the Laptop and the printing papers (recovered under Sec.27 of the Indian Evidence act) for the preparation of the 'threat note'. Forensic Examination Report with regard to the laptop indicating presence of soft copy of 'threat note' in the hard disk of the laptop besides the Forensic Examination Report with regard to blank printing papers seized from the office of the accused Birju Salla in Mumbai conclusively establish the authorship of the 'threat note' by the accused Birju Salla.

Authorship of the 'threat note' by the accused Birju Salla on 27/10/2017 is further corroborated from the evidences adduced from the DVR (Digital Video Recorder) recordings of the CCTV camera installed in the office of the accused Birju Salla at Mumbai.

145.1) The accused Birju Salla intentionally placed the 'threat note' in the tissue paper box of the toilet near to the Business Class of the Jet Airways Flight No.9W-339 on 30/10/2017. This is established from the oral evidences of the witnesses recorded during the course of trial as well as from the circumstantial evidences. Documentary evidences produced and proved during the trial clearly establish that the accused Birju Salla was travelling in the Business Class of the Jet Airways flight No.9W-339 on 30/10/2017, seated on seat No.1D, which is also an admitted fact and was having access to the toilet of the plane near to the Business Class from where the 'threat note' was recovered.

145.2) Planting of the 'threat note' in the toilet of the plane by the accused Birju Salla amounted to a 'credible threat' to commit the offence of hijacking as defined in section 3 of the Anti-Hijacking Act, 2016. This is established from the language and content of the 'threat note' itself - use of Urdu language in addition to English, threat of cargo area containing explosives, 12 terrorists being present on board, etc. makes the 'threat note' a credible one. Concealing of the 'threat note' by the accused Birju Salla in the plane in a place where one would not find it easily besides the events following discovery of the 'threat note' in the plane - reaction of the Pilot of the plane, emergency landing of the plane in Ahmedabad, etc. further



established that planting of the 'threat note' in the toilet of the plane amounted to a 'credible threat' about hijacking of the plane as contemplated in sections 3(1) and 3(2)(a) of the Anti-Hijacking Act, 2016.

145.3) Evidences, oral as well as documentary, produced on record as discussed above, thus reveal that the accused Birju Salla prepared the 'threat note' in a pre-planned manner, and intentionally placed the same in the tissue paper box of the toilet near to the Business Class of the Jet Airways Flight No.9W-339 on 30/10/2017. The accused Birju Salla thus has committed the offence as defined in Sections 3(1), 3(2)(a) of the Anti-Hijacking Act, 2016 which is punishable under Sec.4(b) of the Anti-Hijacking Act, 2016.

146) This Court has considered the number of authorities submitted herein on behalf of the defence. However, the same do not appeal to this Court in the least. No doubt, these judgments are of the Hon'ble Supreme Court and the Hon'ble High Courts, but none of them apply squarely to the facts and circumstances herein and in the opinion of this Court, while these judgments no doubt lay down a ratio which is binding to the trial Courts, the facts and circumstances herein and more particularly what has been discussed herein before, makes this Court come to the conclusion that these judgments cannot come to the aid of the accused in any manner whatsoever.

147) In view of the foregoing discussion, in my opinion, the involvement and guilt of the accused in the commission of the offences he stands

charged with vide Exh.9, is proved beyond reasonable doubt. In my opinion, therefore, the point No.1 is required to be answered in affirmative and in favour of the Prosecution.

**Point No.2 for determination**

148) It is in such circumstances and having decided point No.1 in favour of the Prosecution, that this Court holds that the Prosecution has successfully established that by intentionally placing the 'threat note' in the tissue paper box of the toilet of the Business Class of the Jet Airways Flight No.9W-339 on 30/10/2017, which has been established to be a credible one beyond all reasonable doubts, the accused has committed an offence punishable under Sections 3(1), 3(2)(a) and 4(b) of the Anti-Hijacking Act, 2016. In the circumstances, the following final order is delivered:-

**Order**

The Prosecution succeeds.

The accused Birju Salla @ Amar Soni, son of Kishor Salla is hereby convicted under Sec.235(2) of the Criminal Procedure Code, in connection with the charges framed against him at Exh.9 for having committed offence punishable under Secs.3(1), 3(2)(a) and 4(b) of the Anti-Hijacking Act, 2016.

The accused to be heard on the quantum of punishment.

Dictated and pronounced in open Court on this 11<sup>th</sup> day of June, 2019.

City Sessions Court,  
Ahmedabad.  
Date: 11/06/2019

(Mukesh Kantilal Dave)  
Special Judge (NIA)  
Unique I.D. Code No.GJ00100

Further order

Heard the learned Advocate Shri R.S.Verma on behalf of the accused and learned Spl.P.P. Ms.Geeta Godambe appearing for the Prosecution, on the quantum of sentence.

It is submitted by the learned Spl.P.P. Ms.Geeta Godambe appearing for the Prosecution, that considering the gravity of the offence in question, adequate punishment as prescribed under the Anti-Hijacking Act, 2016 be awarded to the present accused. It is also emphasized that all movable and immovable properties of the accused be also ordered to be confiscated as prescribed under the Act and heaviest fine be also imposed on the accused.

As against that, the learned Advocate Shri Verma concedes that the punishment for the offence in question, is prescribed under the Act, and insofar as imposition of fine is concerned, the said aspect is left to the discretion of this Court.

I have considered the rival submissions on the aspect of quantum of punishment.

The Sec.4(b) of the Anti-Hijacking Act, 2016, reads *"imprisonment for life which shall mean imprisonment for the remainder of the person's natural life and with fine, and the movable and immovable property of such person **shall** also be liable to be confiscated."* Now insofar as punishment in terms of imprisonment is concerned, in the opinion of this Court, considering the nature and gravity of the offence in question, the accused is liable for imprisonment for life which shall mean imprisonment for the remainder of his life, which is the only punishment for the imprisonment for offence of present nature.

However, insofar as confiscation of movable and immovable property of the accused is concerned, no doubt, the word "*shall*" is used in Sec.4 of the Act, but this Court is also required to consider that when there is also the provision for imposing "*fine*" in clause (b) of Sec.4 of the Act, the word "*shall*" can be construed or treated as "*may*" as per the settled law. Moreover, it is also required to be noted that it is not binding to the Court to forfeit the entire movable and immovable property of the accused.

In such circumstances, this Court is of the opinion and comes to the conclusion that confiscation of all the movable and immovable property of the accused is not required, more so, when the fine is adequately imposed. In the event, it would be just and proper if only movable property of the accused seized by the Investigating Officer during the course of investigation, is ordered to be confiscated.

In such circumstances, when the Court has come to the conclusion that the present accused has committed the offence under Secs.3(1), 3(2)(a) and 4(b) of the Anti-Hijacking Act, 2016, at the cost of repetition, the movable and immovable properties of the accused are not required to be confiscated, and instead only the movable property of the accused which are seized by the Investigation Officer during the course of investigation, are ordered to be confiscated on account of the fact that the fine to be imposed by the Court, is appropriately determined, and out of the said fine, the victims of the offence i.e. the crew members as well as the passengers of the Flight No.9W-339 from Mumbai to Delhi, are required to be suitably compensated considering the severe mental stress and trauma they might have undergone immediately on discovery of the threat note, as well as on announcement of the diversion of the Flight due to security reasons and thereafter, having faced the consequent inquiry. Moreover, the crew

members namely Ms.Nitika Joneja, Mr.Mohit Tyagi, and the Captain and First Officer being Mr.Jay B.Jariwala and Mr.Ashutosh Navase respectively, read the threat note and therefore, they had the knowledge that the plane has been hijacked, with bomb and explosives planted on board, and in such grave situation, the Captain and First Officer considering the fact that the fate of the Flight including the crew members and other passengers, would have been unimaginable, putting their lives at stake for no fault on their part, might have undergone severe mental stress and trauma as compared to the other crew members and passengers, and therefore, in the opinion of this Court, it would be just and proper if the Captain and First Officer are compensated to the tune of Rs.1,00,000/- each, and two crew members being Ms.Nitika Joneja and Mr.Mohit Tyagi are awarded compensation to the tune of Rs.50,000/- each, and the remaining crew members and passengers are compensated to the tune of Rs.25,000/- each, would in the opinion of this Court, meet the ends of justice.

Before finally parting, this Court cannot restrain itself from taking the note of the fact that the learned Advocates appearing on behalf of the Prosecution and defence, have extended their whole-hearted support and cooperation, which has led to a smooth and uninterrupted trial in the present proceedings. The learned Advocate Shri Verma has put his defence in utmost extra-ordinary preparedness, without interrupting the smooth progress of the trial in any manner whatsoever, which also is hereby duly appreciated.

In view of the foregoing discussion, I hereby deliver the following final order:-

Order

The accused Birju Salla is thereby sentenced to undergo imprisonment for life which shall mean imprisonment for the remainder of his natural life, and is also further ordered to pay fine to the tune of

Rs.5,00,00,000/- (Rupees Five Crores only), for having committed offence punishable under Secs.3(1), 3(2)(a) and 4(b) of the Anti-Hijacking Act, 2016.

From the amount of fine recovered from the accused, the Captain and First Officer of the Flight No.9W-339 being Mr.Jay B.Jariwala and Mr.Ashutosh Nevase respectively be each awarded an amount of Rs.1,00,000/- (Rupees One Lakh only), the crew members being Ms.Nitika Joneja and Mr.Mohit Tyagi be each given an amount of Rs.50,000/- (Rupees Fifty Thousand only) and all the remaining crew members and passengers of the Flight, be each given an amount of Rs.25,000/- (Rupees Twenty Five Thousand only) towards compensation.

The movable properties of the accused seized by the Investigation Officer and produced before the Court, be confiscated and forfeited under the provisions contained in Section 19 of the Anti-Hijacking Act, 2016.

The remaining muddamal articles be appropriately disposed of after the expiry of appeal period.

A certified copy of this order and judgment be provided to the accused free of cost.

A copy of this order and judgment be also forwarded to the District Magistrate, Ahmedabad, under Sec.365 of the Cr.P.C.

Dictated and pronounced in open Court on this 11<sup>th</sup> day of June, 2019.

City Sessions Court,  
Ahmedabad.  
Date: 11/06/2019

(Mukesh Kantilal Dave)  
Special Judge (NIA)  
Unique I.D. Code No.GJ00100