IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 1523 of 2019
With
CRIMINAL MISC.APPLICATION (FOR SUSPENSION OF SENTENCE) NO. 1 of 2019
In R/CRIMINAL APPEAL NO. 1523 of 2019

FOR APPROVAL AND SIGNATURE:
HONOURABLE MR. JUSTICE A.S. SUPEHIA **Sd/-**
and
HONOURABLE MR. JUSTICE M. R. MENGDEY **Sd/-**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**YES**
2	To be referred to the Reporter or not ?	**YES**
3	Whether their Lordships wish to see the fair copy of the judgment ?	**NO**
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	**NO**

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BIRJU SALLA @ AMAR SONI S/O KISHOR SALLA
Versus
STATE OF GUJARAT

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Appearance:
MR. YOGESH LAKHANI, SENIOR ADVOCATE with MR. VIKRAM CHAUDHARI, SENIOR ADVOCATE with MR HARDIK P MODH, ADVOCATE (5344), MR. RISHI SEGAL, ADVOCATE, MR. AMIT LADDHA, ADVOCATE AND MS. SHWETA SEGAL, ADVOCATE for the Appellant(s) No. 1

MS. VRUNDA C. SHAH, APP for the Opponent(s) Respondent(s) No. 1

MR DEVANG VYAS, ASG with MR. KSHITIJ AMIN, ADVOCATE for the Opponent(s)/Respondent(s) No. 2

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CORAM: **HONOURABLE MR. JUSTICE A.S. SUPEHIA**
and
HONOURABLE MR. JUSTICE M. R. MENGDEY

Date :08/08/2023
CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE A.S. SUPEHIA)

Since the order dated 15.05.2023, passed by the Supreme Court in Misc. Application No.790 of 2023 for taking and deciding the appeal within a period of two months has been pointed out, we are deciding the main appeal.

(1) The present appeal emanates from the judgement of conviction and order of sentence dated 11.06.2019 passed in NIA Special Case No.1 of 2018 by the Court of City Sessions Court at Ahmedabad. The appellant-accused is convicted for the offences punishable under Sections 3(1), 3(2)(a) and 4(b) of the Anti-Hijacking Act, 2016 (for short "**the Act**") and whereby he has been 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) under Section 4(b) of the Act. Further, from the amount of fine recovered from the accused, the Captain and First Officer of Flight No.9W-339, being Mr.Jay B. Jariwala and Mr.Ashutosh Nevase respectively are awarded amount of Rs.1,00,000/- each, the crew members - Ms.Nitika Joneja and Mr.Mohit Tyagi are ordered to be given an amount of Rs.50,000/- (Rupees Fifty Thousand only) each and all remaining crew members and passengers of the flight are ordered to be given Rs.25,000/-

(Rupees Twenty Five Thousand only) each towards the compensation. Over and above the said sentence, the movable properties of the accused seized by the Investigating Officer are ordered to be confiscated and forfeited under the provisions of Section 19 of the Act.

BRIEF FACTS:

(2) The case of the prosecution in nut-shell is that on 30.10.2017, one Ms.Shivani Malhotra, a cabin crew member in the Delhi bound Jet Airways Flight No.9W-339, which departed from Mumbai at 02:55 a.m., and after its departure at about 03:20 a.m. she found a Note containing threat typed in Urdu and English languages.

(3) As per the case of the prosecution, the said Note was further shown to the pilot and ultimately, he immediately contacted the Air Traffic Control, Ahmedabad for emergency landing and upon receiving appropriate instructions for landing at Ahmedabad Domestic Airport, the aircraft landed at Ahmedabad. The prosecution has alleged that the appellant had written the threat-note, which contained threat credible in nature and accordingly, he committed the act of hijacking, which ultimately forced the aircraft to land in Ahmedabad. An F.I.R. being C.R. No.I-85 of 2017 was registered against the accused at DCB

Police Station, Ahmedabad and statements of the relevant witnesses were recorded and thereafter, the accused was arrested on the same day by DCB Police Station, Ahmedabad i.e. on 30.10.2017.

(4) Initially, the investigation was undertaken by the local Police Station i.e. Gujarat Police and thereafter, the same was transferred to the National Investigation Agency (NIA) vide order dated 07.11.2017 written by the Ministry of Home Affairs, Government of India, which further carried the investigation and it re-registered an F.I.R being RC-16/2017/NIA/DLI on 07.11.2017 (Exh.112), after obtaining sanction from the Central Government under Section 15 of the Act to prosecute the accused in connection with the alleged commission of offence of hijacking of the aircraft. The NIA thereafter examined the evidence both – electronic and oral and, filed charge-sheet (Exh.9) dated 10.07.2018. As per the charge, the aircraft was made to land in emergency considering the credibility of the threat contained in the threat-note. The Court below, after examining the witnesses, 27 in number, as well as the documentary evidence convicted and sentenced the accused as mentioned hereinabove.

SUBMISSIONS ON BEHALF OF THE APPELLANT:

(5) Learned Senior Advocate Mr.Chaudhari appearing on behalf of the appellant - convict has, at the outset, submitted that the language contained in the Note will not *ipso facto* satisfy the provisions of Section 3(2)(a) of the Act. It is submitted that in fact, there was no seizure of the aircraft by the accused since the threat cannot be said to be credible in nature as the accused did not actually make any gesture or conveyed any intention of hijacking the aircraft. He has also referred to the convention of suppression of the unlawful seizure of the aircraft signed at Hague on 16.12.1970 and 2010 Protocol supplementary to the convention also. It is submitted that the trial Court has fallen in error in convicting the accused by considering the aforesaid content of the Note as credible threat, in wake of the fact that ultimately, it turned to be a hoax. He has further submitted that thus, the accused could not have been charged under the Act. Further, he has submitted that the Anti-Hijacking Bill, 2014 was introduced in Rajya Sabha on 17.12.2014 and it was referred to the Preliminary Standing Committee of Transport, Tourism and Culture for examination and in its 270th report on 11.03.2015 the Committee recommended and suggestions with

regard to hoax call. It is submitted that the Committee recommended that new provision made in the bill to cover the hoax calls must commensurate with the punishment. It is further submitted that during deliberation of the Committee with the Ministry of Civil Aviation was asked about punishment for making the hoax calls, the Ministry informed the Committee that the suppression of unlawful acts against the aforesaid Civil Aviation Act, 1982 already covers the instances of hoax calls and the punishment for offender in such case is imprisonment for life and fine. It is thus, submitted that the legislature did not intend to punish the accused, who makes hoax calls by the Hijacking Act of 2016 and offence would fall in the Suppression of Unlawful acts against the Safety of Civil Aviation Act, 1982.

(6) It is contended that in fact, the present case is the case of no evidence since the electronic evidence, which has been examined by the Forensic Science Laboratory (FSL) conclusively does not point out the involvement of the appellant in the offence. It is submitted that though the DNA Profile obtained from the blood samples of the accused matches with the DNA Profile found on the laptop however, it is submitted that the laptop does not show any log with regard to the print out taken from the printer seized from the office

of the accused.

(7) It is pointed out by the learned Senior Advocate Mr.Chaudhari that after the announcement was made by the pilot for emergency landing, no overt act was committed by any person, including the accused in connection with the threat-note and the passengers, including the accused, complied with the instructions of the crew members to have their seat belts fastened without any resistance. It is submitted that the evidence of PW-3 reveals that the accused asked her to let him use the washroom, but he was informed by her that he cannot use the washroom due to security reasons and PW-16, in his deposition has stated that the accused again inquired as to what was going on, to which PW-16 told him to remain seated. It is contended that the accused remained seated with the seat belt fastened and the pilot was able to take decision on his own. It is urged that as per the threat-note, if there were 12 hijackers on board and Bomb in the cargo area of the aircraft was kept, the passengers were kept to wait for 45-50 minutes and thereafter, they were casually asked to de-board from the forward door of the aircraft with their baggages. Thus, it is submitted that the pilot and the crew members of the aircraft were in full control of the aircraft and the accused

was only made to sit on his seat and he has been convicted for the sole reason that he had asked the crew members to use the lavatory. It is submitted that there is all possibilities that the alleged threat-note could have been placed by anyone including the personnel who had cleaned the toilet i.e. PW-5 as well as one Rana Rajindar Singh, and two other passengers, who were sitting in the Business Class. Thus, it is submitted that neither the documentary evidence nor the oral evidence in any manner implicate the accused in the offence hence, his conviction is required to be quashed.

(8) Learned Senior Advocate Mr.Chaudhari has submitted that the prosecution before the trial Court has placed reliance on the judgement rendered in case of Hari Vs. State, 2011 S.C.C. OnLine Delhi 1556, which would not apply in the present case since Delhi High Court had dismissed the appeal in peculiar facts, wherein the threat was found to be credible, however, in the present case, it cannot be said that the threat contained in the Note is credible. Similarly, it is submitted that looking to the peculiar facts of the case, the judgments, on which the trial court has placed reliance, will not apply to the facts of the present case.

(9) Learned Senior Advocate Mr.Lakhani appearing

for the appellant-accused in furtherance of the submissions advanced by learned Senior Advocate Mr.Chaudhari has submitted that the Investigating Officer (PW-22), DCP Dr.Rajdeepsinh Narayansinh Zala (Exh.79) in his deposition has admitted that initially there were 4-5 suspects and the investigation does not reveal that how the accused is connected with the threat-note, which has been found in the lavatory of the aircraft, and no attempts are made to identify the other accused. It is submitted that the entire case of the prosecution is premised on the electronic evidence, which is found from the laptop and DVR seized from the office of the appellant, and there is nothing to connect the appellant with the Note. It is also submitted that the entire investigation does not reveal the motive of committing the alleged offence, which is vital ingredient in the cases premised on circumstantial evidence.

(10) Mr.Lakhani, learned Senior Advocate, has contended that in fact, the accused was arrested on 30.10.2017 at 12:00 hr. at night, and he was taken from Ahmedabad to Mumbai at his office and was asked to prepare a demo on 31.10.2017 in the morning at the office, which ended at 12:15 a.m. It is submitted that the laptop, DVR and a printer were seized from the

office of the appellant on that day, which were sent to the FSLs, Gandhinagar and Mumbai. He has placed reliance on the FSL reports and has submitted that in the Hard Drive of the laptop of the appellant, the fragments of the threat-note were recovered, however, it is submitted that in all probabilities, the fragments of the Note in the laptop can be said to be of demo since neither the FSL report dated 20.01.2018 nor the report dated 16.01.2018 reveal the exact time and date of creation or deletion of the threat-note. In support of his submissions, he has placed reliance in the deposition of PW-13 at Exh.47, Shri Harshad Chimanlal Soni, the Branch Manager of the firm of the accused being Crystal, Gems and Jewelries, who, in his deposition, has admitted that the accused in fact, was brought on 31.10.2017 at his office. It is further submitted that in his cross-examination, it is elicited from him that since their firm was dealing with diamonds and gold, they used to wear gloves in the office.

(11) He has submitted that the case of the prosecution is that the accused typed the threat-note on his laptop and thereafter took out print of the same from his printer of Epson brand installed in his office. It is submitted that in fact, the FSL report as well as evidence of PW-23, Shri Dharmendra Govindlal

Shah at (Exh.102) has in fact, deposed that he had found the text fragments similar to the contents of the threat-note from the recovered folder of the hard disk, Exh.H1 of the laptop. However, he has not mentioned creation or deletion of the fragments of threat-note.

(12) Learned Senior Advocate Mr.Lakhani, while referring to the evidence of the Scientific Officer (PW-25) has submitted that in fact, he has admitted that even if the hard disk is formatted, the deleted files can be retrieved with the help of the forensic tools and the date of creation and deletion of the files can also be retrieved. Thus, it is submitted that in fact, the evidence both - oral as well as FSL reports do not indicate the date and time and creation or deletion of the fragments of the Note similar to the threat-note, further he has submitted that in fact, in the cross-examination, it is elicited from him that printing of the threat-note could have been done on Epson L565 similar type of printer. Thus, it is submitted that for convicting the accused for serious offence and that too which invites grave punishment of life imprisonment till his last breath cannot be premised on such weak evidence.

(13) It is contended that in fact, since no data was

found in the laptop of the accused created on 27.10.2017, the NIA, vide a communication dated 20.11.2017 (Exh.180) sent an additional questionnaire directing the FSL to recover the deleted file and to discover any log regarding command of print or file in the laptop specifically of the date of 28.10.2017. He has asserted that thereafter also the FSL was unable to find any log which connects the laptop to the printer for the dates i.e. from 25.10.2017 to 30.10.2017. Thus, it is submitted that the evidence does not reveal that the accused had taken out the print out of the Note from his Epson printer, after getting it typed in his laptop and hence, the conviction of the accused is required to be quashed.

(14) He has submitted that there is another piece of evidence, which the prosecution has very heavily placed reliance is the DVR (Digital Video Recorder), which has been recovered from the office of the accused. It is submitted that PW-22, DCP, Dr.Rajdeepsinh Narayansinh Zala (Exh.79) had in fact, seized 3 items as per the panchnama, Exh.68, one of which is also a DVR. It is submitted that the said DVR, after it was seized from the office of the accused on 31.10.2017, remained with him till it was sought after by the NIA vide communication dated 17.11.2017 and the same was provided to

the NIA by him on 20.11.2017. It is submitted that in fact, PW-22 has admitted in his deposition that he had opened and seen the same DVR during 31.10.2017 to 20.11.2017. He has further referred to the questionnaire of the NIA dated 12.12.2017, Exh.136 addressed to the DFSL, Mumbai for obtaining the details of the person seen typing on the laptop on 27.10.2017 from 12:07 hrs. to 12:44 hrs. and the details of the text typed on the laptop with date and time was also requested to be provided. While referring to the findings of the FSL, it is submitted that accordingly, the DFSL, after examining the DVR, vide report dated 18.01.2018, Exh.109 as well as dated 19.01.2018, Exh.110 has opined that the accused is seen typing on the laptop and taking out print out on 27.10.2017 from 12:07 hrs. to 12:44 hrs. It is submitted that with regard to specific questionnaire of the NIA relating to the threat-note, it is opined by the DFSL that the pattern, length, width, line, spacing language of the text could not be identified, but the DFSL has opined that the Note in the images of the DVR "is of *similar structure*." Thus, it is submitted that in fact, analysis of the DVR also does not show the actual threat-note and the forensic analysis of the images only shows having similar structure to the threat-note and the contents of the Note are

not visible. It is thus submitted that the evidence of the DVR does not reconcile with the evidence of the laptop which does not indicate of having any evidence of Note created on 27.10.2017 or print out of threat-note taken from the printer.

(15) With regard to seizure of the papers from the office of the appellant, learned Senior Advocate Mr.Lakahani has submitted that the FSL report also does not in any manner reveal that the threat-note, which was found from the lavatory of the aircraft was exactly of the same paper, to those papers which were seized from the office of the accused and hence, such evidence could not have been placed reliance by the trial Court.

(16) While referring to the DFSL report, Gandhinagar at Exh.147, learned Senior Advocate Mr.Lakhani has submitted that the said report reveals traces of the DNA from the laptop which matches with the DNA of the accused since the laptop belongs to the accused however, it is submitted that the report of the DFSL at Exh.147 specifically records that no DNA of the accused has been found on the threat-note. Thus, it is submitted that there is nothing to connect the accused with the threat-note and the entire story has been concocted in order to implicate

the accused in serious crime of hijacking. At this stage, he has invited attention of this Court to the observations recorded by the trial Court and has submitted that the trial Court has in fact, after examining the DVR has recorded that the accused, after taking out the print-out from the printer has kept the threat-note in a plastic pouch however, he has submitted that there is no evidence which shows that the accused had placed the threat-note in a plastic pouch. It is submitted that it is not the case of the prosecution that the accused had worn the gloves in the aircraft also and in order to conceal his DNA he placed a Note in the toilet of the aircraft while wearing gloves after taking out the threat-note from the plastic pouch. Thus, it is submitted that the trial Court on such presumption cannot convict the accused for a serious offence.

(17) With regard to the oral evidence, learned Senior Advocate Mr.Lakhani has placed reliance on the deposition of PW-2, Ms.Shivani Malhotra, who was on duty in the aircraft in the Economy Class. He has submitted that there were three statements recorded of the said witness, (i) on 30.10.2017, (ii) on 03.11.2017 and (iii) on 10.11.2017. He has submitted that the statements, which were recorded on 30.10.2017 and 03.11.2017 were recorded by the Gujarat

Local Police, whereas the statement dated 10.11.2017 was recorded by the NIA. While referring to the testimony of PW-2, he has submitted that in the first two statements, which were recorded by the local police on 30.10.2017 and 03.11.2017, she has not stated about the fact of seeing the accused going to the washroom and for the first time, an improvement is made before the NIA on 10.11.2017 stating such fact. While referring to the deposition of the Investigating Officer, he has submitted that in fact, the entire story about one passenger, who was seated at Seat No.30, who demanded an infant seat has been created so that it can be shown that in fact PW-2 had gone from the Economy Class to the Business Class where the accused was sitting. While referring to the deposition of PW-3, Ms.Nitika Joneja, Exh.25, who was the senior most crew member, it is submitted that in her case also, the statements were recorded on three occasions on the same dates that of PW-2. It is further submitted that in fact, in her two statements recorded by the Gujarat local Police, and she has admitted that the accused i.e. passenger, who had seated at Seat No.1D, has used the washroom while boarding was going on.

(18) While referring to the deposition of PW-16,

Shri Mohit Brijbhushan Tyagi, (Exh.52), who is the cabin crew member, whose statement has been recorded on two occasions i.e. on 03.11.2017 by the Gujarat local Police and on 18.12.2017 by the NIA, learned Senior Advocate Mr.Lakhani has contended that the same contains omissions, since in the cross-examination, it is elicited that in his first statement, recorded on 03.11.2017 by the Gujarat local Police, he did not say about serving welcome drink to the guests or the accused having asked for hot water or for blanket. It is submitted that the entire deposition is tainted with omissions and for the first time before the NIA, after a period of 45 days on 18.12.2017, he has stated that he had seen the accused at Seat No.1D and on the contrary it is elicited in the cross-examination that in the statement dated 18.12.2017, he had not stated that he was occupying the forward crew jump seat from which he could see Seat No.1D and Seat No.1F and he also admitted that he had not stated before the NIA with regard to the request made by the accused to use the washroom, which he did not accede to as the emergency lights and the seat belt signs were on. Thus, it is submitted that the oral evidence of all these three witnesses, who were present in the aircraft cannot be placed reliance as they have made improvement subsequently before the NIA.

(19) Learned Senior Advocate Mr.Lakhani has further submitted that in fact, the trial Court has recorded a finding that no evidence of preparing the threat-note is found on 27.10.2017 and the conviction is only premised on evidence of the DVR by arriving at a finding that since the DVR shows that the accused was using his laptop in his chamber and he is also seen taking out print-out from the printer image of such print-out is similar to the threat-note, the accused is convicted of such serious offence. He has thus, asserted that in fact this is the case of no evidence and even it is believed that the accused is seeing typing in his office on 28.10.2017, the logs of the laptop does not reveal that any print-out is taken out from the printer Epson. It is thus, submitted that merely because the image of print-out has similar structure to that of the threat-note, the accused cannot be convicted in the offence of hijacking.

(20) Learned Senior Advocate Mr.Lakhani, while placing reliance on the provisions of Section 100 of the Criminal Procedure Code has submitted that in fact, one of the panchas (PW-20) Jamilahmed Sirajahmed Saiyed, who was having a criminal background, was accompanying the Investigating Officer (PW—22) to Mumbai.

Learned Senior Advocate Mr.Lakhani, has further submitted that the said panch-witness has deposed that he was arrested on 09.06.2014 under the Arms Act for keeping the weapon without licence and he was in the police custody for two days and the charge-sheet has been filed and the case is pending. It is further submitted by learned Senior Advocate Mr.Lakhani, that upon completion of two days custody, he was again arrested by Karanj Police Station wherein, he remained in custody from 11.06.2014 to 23.06.2014 in that case also the charge-sheet is filed and the matter is pending. The other panch-witness – Imtihaz Khan is also a co-accused in the same case. He has in his deposition admitted that they were personating themselves as DRI Officer before one woman and were charged under Sections 170, 365, 394, 419, 465, 467, 468 and 120B of the Indian Penal Code, (IPC). Thus, it is submitted by the learned Senior Advocate that the evidence of such a panch-witness, who has having criminal background, is hit by the provision of Section 100 of the Cr.P.C., more particularly sub-section (4) thereof.

(21) Learned Senior Advocate Mr.Lakhani, has submitted that the name of the panchas of the discovery panchnama were already written in the letters addressed to the CISF, CSI Airport,

Mumbai (Exh.87 and Exh.89) and 2BCAS SVPI, Airport, Mumbai-88, which suggest that the panchas were informed earlier that they have to go to Mumbai and discover the laptop, which is lying at the office of the accused. It is submitted that the said discovery of the laptop from the office of the accused cannot be said to be discovery under Section 27 of the Evidence Act, but it would be a recovery of the laptop since the laptop was already lying in the office of the appellant. Learned Senior Advocate Mr.Lakhani, has submitted that the trial Court has misdirected itself by treating the recovery of the laptop as a discovery since it cannot be said that as per the provisions of Section 27 of the Evidence Act, the fact of the laptop is discovered since it was already lying at the office of the appellant.

(22) Learned Senior Advocates have placed reliance on the following judgments of the Apex Court and has raised the contentions as under : -

(a) Noor Aga Vs. State of Punjab, (2008) 16 S.C.C. 417:- It is well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. Suspicion can in no circumstances be a substitute for legal

evidence. Initially, the burden is on the prosecution to satisfy all circumstances after which the legal burden of proof shifts and presumption in favour of guilt starts operating.

(b) Mohan Lal Vs. State of Punjab, (2018) 17 S.C.C. 627:- Prosecution must establish a *prima facie* beyond reasonable doubt after investigation, after which the burden of proof shall shift on the accused. The importance of a fair trial is emphasised.

(c) Paramjeet Singh Vs. State of Uttarakhand (2010) 10 S.C.C. 439 :- Where the offence alleged to have been committed is a serious one, the prosecution must provide greater assurance to the Court that the case has been proved beyond reasonable doubt. Material circumstances appearing in evidence against the accused is required to be put before him specifically, distinctly and separately and failure to do so, amounts to serious irregularity, vitiating the trial if it is shown that the accused has been prejudiced.

(d) Shantabai and Ors. vs. State of Maharashtra:- (2008) 16 S.C.C. 354 criminal cases had been registered against the witness, held to be a stock witness. Statement of such witness is not reliable.

(e) Sunil Kumar Sambhudayal Gupta vs. State of Maharashtra, (2010) 13 S.C.C. 657:- Omissions and improvement on material facts do affect the credibility of witness which has to be appreciated by the Court.

(e) Sujit Biswas Vs. State of Assam, (2013) 12 S.C.C. 406:- Suspicion, however grave it may be, cannot take the place of proof, and there is large difference between something that "may be" proved and something that "will be proved."

SUBMISSIONS ON BEHALF OF THE PROSECUTION:

(23) *Per contra*, learned Additional Solicitor General Mr.Devang Vyas with Mr.Kshitij Amin, learned advocate appearing for the respondent-National Investigation Agency (NIA) has submitted that the following facts are admitted by defence in the arguments and in the statement under Section 313 of the Cr.P.C.:

→ The accused was one of the passengers of flight No.9W-339 on 30.10.2017. He was travelling in the business class on seat No.1D.

→ The flight was travelling to Mumbai to Delhi.

→ The threat-note (Exh.27) was found in the washroom of business class.

→ Because of threat-note, flight was diverted to the Ahmedabad and landed at Ahmedabad on 30.10.2017.

→ CISF, Airport authority and all other first responder agency were present on airport at the time of landing and conducted search.

→ Flight took off for Delhi after clearance of authority.

→ The articles seized from the accused at the time of arrest. Further, it is admitted that these articles owned by the accused.

→ Ownership of Sony VAIO laptop and Epson printer, which has been recovered from the office of accused.

(24) It is submitted that Ms.Shivani Malhotra (PW-2) has deposed that there was an issue with the passenger seated at seat no.30 who had requested for infant seat, and she went to PW-3, who was in the Business Class, and while she was discussing the issue, she saw the accused going to the washroom. She has also deposed that after the flight was airborne, she started serving of food and at that time she was sneezing badly and it was not possible for her to use the washroom of Economy Class as there

were two carts in the way and, therefore, she sought permission from Ms.Nitika Joneja (PW-3) and went in the washroom of the Business Class, where she found that the tissue papers from the tissue papers box were not coming out therefore she thought that the tissue papers were over. She reported the fact to Ms.Nitika Joneja (PW-3), who told her to go back on her service and she will change the tissue papers box. It is submitted that Ms.Nitika Joneja (PW-3) stated that when she tried to fill-up the tissue box, she found that there was a white folded paper in the tissue papers box. She took out the paper and read it. It was the threat-note, which had text in Urdu and English. It is submitted that Shri Dayashankar Ramdulare Kahar (PW-5) stated before the trial Court that he had cleaned toilets of the flight scheduled from Mumbai to Delhi and placed new tissue - paper boxes in both the toilets of the Economy Class as well as Business Class. It is further submitted that this evidence established that only the accused had used the washroom before Ms.Shivani Malhotra (PW-2) and the possibility of using of the washroom by any of the passenger of the previous flight is ruled out because Shri Dayashankar Kahar (PW-5) had cleaned and placed new tissue - paper boxes before boarding.

(25) Learned ASG Mr.Vyas has contended that there are three previous statements recorded by the Investigating Officer of each of these witnesses, out of which two statements are recorded by the State Police and last one is recorded by the NIA officer. It is submitted that Section 161 of the Cr.P.C. empowers the Investigating Officer to record the statements of witnesses thus, it is clear that the witness is bound to answer the questions put by the Investigating Officer. It is submitted that it is settled law that omission, contradiction, improvement etc., is always in statement before the Court and previous statements and hence, improvement cannot be interpreted in comparison of statements recorded during the investigation. It is submitted that the statements recorded before the Investigating Officer cannot be compared and, therefore, the arguments of the accused on improvement are totally baseless and against the law. In support of his submissions, he has placed reliance on the judgement of the Apex Court in the case of Tahasildar Singh & Ors. Vs. State of UP, (MANU/SC/0053/1959).

(26) Learned ASG Mr.Vyas has further submitted that this fact is corroborated by Mr.Mohit Brijbhushan Tyagi (PW-16). He stated that after

reading the contents of threat-note, he got scared. It is submitted that regarding this aspect, the key-witness is Pilot, Mr.Jay Bhupendrabhai Jariwala (PW-4), he stated that after reading the threat-note, he also got scared. Further, it is submitted that it must be noted that he was afraid of the safety of the Aircraft, the safety of passengers and crew members. He has submitted that considering safety of the Aircraft and the passengers, he diverted the plane to the Ahmedabad and the act of diversion of flight from its original path itself proves that the Captain has taken the threat as credible threat. He has submitted that it is pertinent to Note that time mentioned in the tape transcript as well as in the Log-Book of the Airport Authority of India are mentioned in Universal Coordinated Time (UTC).

(27) While referring to the provision of Section 8 of the Evidence Act, it is submitted by learned ASG that the conduct of the accused is relevant for proving that he has committed the offence. It is submitted that when the announcement was made that the flight was diverted to Ahmedabad due to security reasons, the accused became restless. He has submitted that this is an important and relevant to the fact in issue

because the anxiety of the accused made him to gather information whether this diversion is due to discovery of the threat-note or otherwise. It is submitted that it is a fact that at that time only the accused was aware that he had placed the threat-note in the washroom and, therefore, he tried to access the washroom and this fact is proved by Ms.Nitika Joneja (PW-3). Hence, he has submitted that this clearly proves that the accused had the knowledge about the threat-note in the washroom of the Business Class and he wanted to check whether emergency landing is in consequence of his act and, therefore, conduct of the accused is proved by prosecution, which is relevant to the fact in issue to prove that the thereat-note was placed by the accused in the washroom.

(28) Learned ASG has further submitted that the prosecution has examined Jamilahmed Sirajahmed Saiyed (PW-20), who is a panch witness of recovery of the laptop at the instance of accused, before whom the accused stated that he had prepared the threat-note on his Sony VAIO laptop, which is kept in his office at Mumbai. It is submitted that after recording the memorandum statement Exh-68, the Police has recovered the laptop from the office of accused. It is submitted that it has brought on

the record by the accused in the evidence of Shri Harshad Chimanlal Soni (PW-13) that at the time of recovery of laptop on 31.10.2017, the accused was typing something on the computer in the presence of then Investigating Officer, Dr.Rajdeepsinh Narayansinh Zala, (PW-22), who has admitted that the accused had shown him demonstration of preparation of the threat-note. It is submitted that as per Section 27 of the Indian Evidence Act, only recovery of object is not important but the knowledge of accused regarding the fact and recovery is also material and demonstration shown by the accused is the exclusive knowledge of the accused regarding preparation of the Note therefore, this is to be considered as discovery under Section 27 of the Indian Evidence Act. In support of his submissions, he has placed reliance on the judgement of Pulukuri Kotayya and Ors. Vs. King Emperor, 1948 ILR 1. It is submitted that it is pertinent to note that the ownership of this Sony VAIO laptop, which is recovered under the panchnama is admitted by the accused and the Forensic Examination Report below Exh.147 established that the Sony VAIO laptop was used by accused.

(29) Learned ASG has in furtherance submitted that the prosecution has examined two expert

witnesses - Shri Dharmendra Govindlal Shah (PW-23) and Shri Ashish Deorao Rathod (PW-25). It is submitted that in the written submission tendered before the learned Special Court, it was stated by the defence that it does not want to make any submission on the evidence of Shri Dharmendra Govindlal Shah (PW-23) therefore, the report of analysis of the laptop is to be considered as an admitted report. For the clarification of the analysis of laptop it is submitted that, Shri Dharmendra Shah (PW-23) has deposed before the trial Court that he did the analysis of data of the hard disk of Sony VAIO laptop (Exh.103), wherein it is clearly mentioned that the file of threat-note was deleted however, the expert has retrieved it by carving the deleted data shows similar contents of threat-note. It is submitted that it is a conclusive proof against the accused that he had prepared the Note on his laptop in both languages and the prosecution has proved that the accused prepared the threat-note on his laptop in two languages English and Urdu. He has further submitted that Exh.104 is the report of EPSON printer, wherein the expert has given opinion that the threat-note was printed using the Inkjet printer for example - EPSON L565. It is submitted that in the document at Exh.103, it is proved by the expert that the

driver of the Epson printer was found installed in the said laptop therefore, inference needs to be drawn that the threat-note was printed on the EPSON printer, which was installed in the office of the accused and hence, this is a conclusive proof against the accused that he had prepared the threat-note and printed the same on his EPSON printer. He has submitted that this fact is corroborated by the analysis of DVR, which has been seized from the office of the accused by the Investigating Officer, Dr.Rajdeepsinh N. Zala (PW-22). It is submitted that the DVR was taken in the custody from Dr. Rajdeepsinh N. Zala (PW-22) by NIA on 20.11.2017 under production-cum-seizure memo below Exh.58. It is submitted that Dr.Rajdeepsinh N. Zala (PW-22) had taken the DVR for the purpose of investigation and it was in his safe custody. It is submitted that there is no reason to disbelieve the version of the Investigating Officer because he had taken the DVR for the purpose of investigation and he did the same while discharging his public duties.

(30) Learned ASG has submitted that Ashish Rathod (PW-25) is the expert, who had analyzed the DVR and has prepared the report, Exh.110. He has submitted that in the evidence, it is not challenged by accused that the person in the

CCTV footage is not him. It is submitted that further in the report, it is seen that accused was typing without gloves and while taking the printout and handling the threat-note he was using the gloves. It is submitted that the accused had taken all precautions to avoid his finger prints on threat-note. It is submitted that in the statement recorded under Section 313 of Cr.P.C., the accused has given the answer to the questions either “Not true” or “it is correct”. It is submitted that in the case based on circumstantial evidence, it is the duty of the accused to supply the missing links however, the accused has not explained any circumstances. It is submitted that the question remains unanswered that why accused was identified as amongst all passengers and crew members. He has submitted that it is not the case of accused that the Gujarat Police has some previous enmity with him and, therefore, the investigation is reliable. He has submitted that a fare chance given by law to him to bring on record how he is falsely implicated, but he had not chosen to explain the circumstances and instead, he tried to put on record that Jet Airways has acrimonious incidences with him however, what were the incidences and the nature of incidences is not brought on record therefore the defence of

false implication is baseless and, therefore, no rebuttal to any evidence has come on record, nor has he laid any evidence as his defence. Learned ASG, at this stage has refereed to the provision of section 16 of the Act, which stipulates the onus of proof on the accused to prove his innocence. It is submitted that the said section stipulates reverse burden, and the accused was required to prove that he has neither has he prepared the threat-note nor he has placed in the lavatory of the aircraft. He has also submitted that the absence of motive is not fatal to the prosecution case is very well enumerated by law and the motive is always locks up in the mind of accused. It is submitted that the failure to discover the motive of an offence does not signify its nonexistence. In support of these submissions, he has placed reliance on the judgement of the Apex Court in the case of Brij Bhushan Sharma Vs. State of UP, (19.12.2000 – ALLHC). Thus, it is submitted that the present appeal may not be entertained.

(31) We have heard the learned advocates for the respective parties at length. The evidence which has been established on record is also threadbare examined by us.

ANALYSIS OF FACTS

(32) The case of the prosecution is premised on circumstantial evidence. The star witnesses of the prosecution are PW-2 (Ms.Shivani Malhotra), PW-3 (Ms.Nitika Joneja), and PW-16 (Mr.Mohit Tyagi were serving as crew member in the Jet Airways, Flight No.9W-339). The prosecution has placed heavy reliance on the electronic evidence, i.e reports of the DFSL, Gandhinagar, Exh.103, 104 and the evidence of its Scientific Officer, PW-23 and Exh.110 (Report of DFSL, Mumbai) and its Scientific Officer, PW-25.

(33) The appellant is convicted for the offence of hijacking of the aircraft on the basis of threat-note. The threat-note contains threat in both Urdu and English language having same meaning. The English paragraph reads as under:

"Flight No 9W 339is 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. dont take it as a joke. Cargo area contains explosive bomb and will blast if you land Delhi."

(34) It is the case of the prosecution that on 30.10.2017 from the lavatory of Jet Airways flight No.9W-339, which was flying from Mumbai to Delhi, the threat-note, was detected by PW-

3, Ms.Nitika Joneja, the Cabin Crew Supervisor from the threaded paper-sheet of tissue papers, which was stuck inside that box. She immediately had shown the same to the captain, pilot and co-pilot of the flight who immediately communicated with the ATC, Ahmedabad and thereafter, upon receiving the instruction from the ATC Ahmedabad, they landed the flight at Ahmedabad Airport in emergency for security reasons.

(35) On 30.10.2017, the F.I.R. being C.R. No.I-85 of 2017 was registered at the DCB Police Station, Ahmedabad for the offence mentioned hereinabove and the accused was arrested. The accused was arrested on the basis of his alleged inculpatory statement made before ACP, Mr.Baldevsinh Chandansinh Solanki (PW-1), who is the complainant, SOG Crime Branch, Ahmedabad. The complaint (Exh.17) reveals that the appellant is arraigned as an accused on the statement made by the crew members PW-2 and PW-3, who have stated that the accused had acted in a suspicious manner since he had time and again asked the crew members to use the washroom and after using the washroom, he did not immediately return to his seat. It is stated in the complaint that on inquiry from the accused, he identified himself and stated that he was having love affair with one Jet

Airways employee namely, Shital Sheth, who is staying at Harinagar, Delhi and since she refused to leave the job and stay with him and despite repeated request made to her, she was not ready and willing to leave her job from the Jet Airways and hence in order to defame the Jet Airways and to get it closed, he printed the Note on 28.10.2017 at his Mumbai office in his Sony Vaio company laptop threatening to hijack the flight No.9W-339. It is further stated in the complaint that the accused had admitted that he had placed the aforesaid threat-note in the washroom in the tissue paper box after he had taken the print-out from his office printer.

(36) Accordingly, the investigation was undertaken by the Gujarat Police initially and thereafter, the charge-sheet was filed by the NIA, Exh.9. The contents of the charge-sheet reveal that it is alleged that on 27.10.2017, the accused reached his office in the morning and in the evening, he typed the threat-note on Sony Vaio laptop by using Google translator for translation of the text into Urdu language. Thus, it is the specific case of the prosecution that the threat-note was prepared by the accused on 27.10.2017 i.e. 2 days before the day of incident in his office located at Mumbai in pre-planned manner and accordingly,

after typing the threat-note on his laptop, he took the print-out from his Epson printer and ultimately planted the same in the washroom of aircraft on 30.10.2017. The prosecution, has primarily placed reliance on the oral evidence of PW-2, 3 and 16 who were the crew members. In order to establish the complicity of the accused in the offence, the prosecution has also placed reliance on the electronic evidence in the form of FSL reports and the opinion of the Scientific Officer.

FACET OF THREAT-NOTE AND SEIZURE OR CONTROL OF AIRCRAFT:

(37) The appellant is convicted for the offence punishable under Sections 3(1), and 3(2)(a) of the Act and sentenced under the provision of section 4(b) of the Act. At this stage, it would be apposite to incorporate the provisions of Section 3 of the Act, which defines hijacking. The accused is punished under Section 4 of the Act for imprisonment of life for remained of his natural life with fine.

"**3. Hijacking.---** (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) organises 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.

4. **Punishment for hijacking.** — Whoever commits the offence of hijacking shall be punished——

(a) with death where such offence results in the death of a hostage or of a security personnel or of any person not involved in the offence, as a direct consequence of the office of hijacking; or

(b) with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life and with fine, and the movable and immovable property of such person shall also be liable to be confiscated."

It is canvassed by the appellant, that since there was no seizure or control of the aircraft after the threat-note was found, hence the rigors of sub-section(1) of Section 3 are not attracted. It is also contended that the threat which emanated from the contents of the threat-

note was not credible as envisaged in section 3(2)(1)(a) since subsequently it turned to be a hoax, as neither any terrorist nor the bomb was found.

(38) The threat which stems out of the threat-note and the effect thereof, is required to be examined in light of the provisions of Section 3. Section 3 of the Act stipulates the offence of hijacking and the circumstances/ conditions are enumerated under which an aircraft can be said to be hijacked. Sub-section (2) creates a deeming fiction of offence of hijacking and Clause (a) to sub-section 2(1) introduces the element of credible threat. Thus, a combined reading of the provision of sub-sections 3(1) and 3(2)(1)(a) suggests that a person who issues a credible threat which results into a seizure or control of aircraft in service commits an offence of hijacking. Clause(a) also specifies the aspect of "circumstances" which would indicate that the threat is credible.

The dictionary meaning of "credible" as understood is something believable or worthy of belief.

The Black's Law Dictionary (Ninth Edition) defines threat as under:

"threat,n (bef.12c)1. A communicated intent to inflict harm or loss on another or on another's property, esp. one that might diminish a

person's freedom to act voluntarily or with lawful consent.

Thus, an intention which is communicated to inflict harm or loss on a person which may diminish his/her freedom to act voluntarily or with lawful consent can be said to be a "threat". It will be a credible threat if such threat is worthy of belief. The credibility of a threat and its effect or impact on human psyche will depend on the given circumstances and the place where such threat is given. A threat which is given at a place where the person who is threatened has some sense of safety, he/she will react to it accordingly, and may not get alarmed or panicked to such an extent which will send him in a shock or trepidation. In the present case, the impact of the threat-note has to be visualised / realised at the moment when it was found and read, and not thereafter when it turned be a hoax. The reaction to the threat on an individual in an air-bound flight at a high altitude will have an alarming and horrifying effect. The aspect of credibility of threat at that moment is impossible to assess. Merely, because a threat is subsequently found to be a hoax, the same cannot wipe out its effect at the time when such threat was issued or as in the present case, the aspect of threat was detected from the Note which was found from the lavatory of

the aircraft. Threat is entirely subjective, metaphysically incongruous and statutorily undefined. The perception of threat will depend on the psyche of each individual and it cannot be compared with one person to another. In the present case, the instantaneous reaction to the threat-note was on the crew members and on the Pilots, who immediately contacted the ATC, Ahmedabad, for emergency landing for security reasons, and untimely the aircraft was made to land at Ahemdabad instead at its final destination at Delhi. The evidence also reveals that all the concerned security agencies were informed who were ready at the ground level. Thus, merely because subsequently it was found that the threat was a hoax, it cannot wipe out the effect or impact of threat-note at given point of time when it was detected, and it cannot be presumed that the threat was not credible. The immediate reaction to the threat-note was on the crew members who found the threat-note and on the pilots, who were compelled to contact ATC for emergency landing. Thus, in the given circumstances which ensued after the detection of the threat-note, it cannot be perceived that the threat contained in the threat-note was “not credible”. Hence, we do find merit in the submissions advanced on behalf of the appellant in this regard.

ASPECT OF HIJACKING:

(39) It is the case of the appellant that it cannot be said that the aircraft was not hijacked, since there was no visible actual overt act committed which resulted in to actual seizure or control of the aircraft. It is contended that the aircraft was in full control with the pilot and co-pilot and its crew members, and hence it can be presumed that the aircraft was not hijacked.

(40) We do not subscribe to the view expressed by the appellant. Section 3 of the Act, explicates the offence of hijacking. The same is reiterated 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."

Section 3 comprises of the following elements:

a) an unlawful and intentional seizure or control of the aircraft in service;

b) by any force or threat or by coercion or by any other form or intimidation or by any technological means

Thus, an aircraft which is in service is sized or controlled by using force, threat, coercion or "by any other form" or intimidation or by any technological means will tantamount to hijacking. For satisfying the aforementioned ingredients of section 3, the seizure or control of an aircraft may not be actual or physical and equally, the threat may not be visible. The expression "any form of intimidation" used in section 3 acquires significance in the present case. In the present case, after the threat-note was detected, the aircraft was compelled to divert from its original route and instead of Delhi it was made to land in Ahmedabad. The pilot had to use the emergency switch/button and, he had also contacted the ATC, Ahemdabad. Thus, the proximate reaction to the threat-note was the diversion of the aircraft and its landing in Ahmedabad. There may not be actual seizure or control of the aircraft by displaying physical means from an individual, but such seizure/control can also be the result of a threat originating in abstract form from any physical entity. The threat emanating from the threat-note gave a knee-jerk reaction which lead to the diversion of the aircraft. The moment the aircraft was diverted from its original route, and was forced to land other than its destination; the same can be termed as

its seizure or control. In the given circumstances of the present case, the aircraft can be said to be hijacked, and it will satisfy the expression "any other form of intimidation". It can be affirmatively held that there was a seizure and control of the aircraft due to threat emanating from the threat-note. Hence, we are not inclined to hold that there was no unlawful seizure or control of the aircraft. We are also not impressed by the objection raised on behalf of the appellant prosecuting him under the provisions of Anti Hijacking Act, 2016 instead of Suppression of Unlawful Acts against the Safety of Civil Aviation Act, 1982. Looking to the facts and the provisions of Anti-Hijacking Act, it cannot be said that its provisions are illegally invoked.

(41) In our considered opinion, there was seizure and control of the aircraft due to "credible threat" arising of the threat-note, however, the case of the prosecution still remains to be tested as to whether it has established the guilt of the accused by leading evidence of sterling quality of beyond reasonable doubt. We shall now make an endevour to examine the evidence which is established on record.

ANALYSIS OF ORAL EVIDENCE:

(42) The appellant who was one of the five passengers traveling in the business class of the aircraft was arrested at 24:00 hours, for using the lavatory and also exhibiting peculiar behavior of asking or requesting the crew members to use the lavatory of the aircraft coupled with the fact that he showed some anxiety and inquired about the diversion of the flight. Emphatically, the appellant remained seated on his seat no.1D of business class with seat belt fastened and he committed no overt act. After his arrest, he was taken to his office in Mumbai on 31.10.2017 by PW-22, Investigating Officer and he was asked to demonstrate of preparing a similar threat-note in English as well as in Urdu language and also to show the procedure of getting the printout from his *EPSON* printer. The Officer of the crime branch also seized the laptop, printer and some papers. The NIA took over the investigation on 07.11.2017 and thereafter, the charge sheet was filed by the NIA. It is the specific case of the prosecution that initially as per the complaint Exh.17 lodged by PW-1, the appellant had admitted that the threat-note was prepared by the accused in his office on 28.10.2017.

(43) We may now deal with the oral evidence of the witnesses. The entire case of the prosecution hinges on the oral evidences of PW-2, PW-3 and PW-16.

(44) PW-2, Ms.Shivani Malhotra, the cabin crew, in her evidence Exh.24 has admitted that initially her statements were recorded by the local police on 30.10.2017 and 03.11.2017, whereas the Investigating Officer of NIA had recorded her statement on 10.11.2017. In her deposition, she has stated that she had seen the accused seated at Seat No.1D who requested for a blanket. She has submitted that she was assigned the duty in the Economic Cabin, however, since on the request of the guests seated on the Economic Seat Nos.29 or 30, who wanted an infant seat for the baby he was carrying, she went to the supervisor in the forward area where Ms.Nitika Joneja (PW-3), who was the supervisor, at that time she saw the accused seated on Seat No.1D and on his request for providing a blanket, she asked him to wait. She has further, in her examination-in-chief, has deposed that while she was informing PW-3, the accused, who was seated on Seat No.1D went inside the washroom. It is further submitted that thereafter, she went with a blanket at Seat No.1D, however, she did not see the accused on his seat.

(45) In her cross-examination, she has admitted that she did not inform the Investigating Officer, who recorded the statement on 30.10.2017 with regard to the guests seated on Seat No.29 or 30 or any demand of the blanket made by the accused. It is elicited that she knew the accused personally as he was Commercially Important Person (CIP) and he had flown on Delhi-Amritsar flight also. She has further stated that she had no further idea as to how many Economic Class passengers or Premier Class passengers have used the washroom while boarding. Thus, in her statement recorded under section 161 of the Code of Criminal Procedure, 1973, it is manifest that she was not aware about how many passengers have used the washroom while boarding and she was not aware that the accused, who was seated on Seat No.1D in the Premium Class, asked her for using washroom. She has also stated that she has no idea as to how many passengers have used the washroom.

(46) PW-3, Ms.Nitika Joneja, who is the senior most cabin crew, her statements are also recorded on three occasions on 30.10.2017 and 03.11.2017 by the local police and 10.11.2017 by the NIA. Her deposition at Exh.25, reveals that she saw the accused coming out of the washroom and returning to his seat. It is further stated by

her that when she removed the tissue box she realized that the tissue box was still full and there was one paper stuck inside the tissue box and when she removed that paper, she saw one more paper written in Urdu and English languages and when she read the Note she got panic and scared and she immediately came outside the washroom and showed that Note to her colleague Mr.Mohit Tyagi, who was serving with her in the Business Class and thereafter, she immediately called the Captain through intercom and asked her permission to go inside the cockpit and she showed the Note to the captain with panic and scared. The captain accordingly informed her that he would inform the same to the ATS and also asked her to follow anti-hijacking procedure. It is further deposed by her that after she made the announcement informing the passengers of diverting the flight to Ahmedabad due to security reasons, the accused, who was seated on Seat No.1D tried to get up to use the washroom and she accordingly had asked him that he cannot get up from his seat due to security reasons. She has accordingly identified the accused and threat-note through video conferencing in the court.

(47) In her cross-examination, it is elicited by her that in her earlier statement recorded on

30.10.2017 and 03.11.2017, she has admitted that she has not stated that she panicked and got scared on seeing the threat-note. Further, it is elicited from her that she told the police in the first statement that the accused used the washroom while boarding was going on. Thus, in her evidence as well as statement taken under section 161 of the Cr.P.C., it is manifest that the accused had used lavatory of the aircraft and requested the witness to use the washroom. It is further elicited that apart from the accused, there were other four passengers in the premium class.

(48) PW-16, Mr.Mohit Tyagi, who was one of the crew members of the Jet Airways, his evidence Exh.53, reveals that there were two statements recorded – one by the Gujarat Police and one by NIA on 03.11.2017 and 18.12.2017 respectively. In his deposition he has admitted that there were total 5 passengers in the Business Class, out of two passengers of Jet Airways and other three passengers Business Class passengers and the accused was one of them who was seated on Seat No.1D and he was Commercially Important Passenger (CIP). It is deposed by him that PW-3, Nikita Joneja was standing with the paper and he also read the paper wherein the threat was written in English and Urdu languages. The supervisor called cockpit via intercom and the

captain allowed him to access in the cockpit. Thereafter, he has narrated the similar version of PW-3 that the flight was diverted to Ahmedabad after announcing and putting on the emergency light. It is further deposed by him in his examination-in-chief that he could see the accused seating at Seat No.1D and he asked him whether he can use the washroom, but is strictly denied to the accused since the emergency lights were was on and thereafter the accused asked for a glass of hot water again. It is further elicited that after the flight landed, almost after 45-50 min. Ms.Nitika Joneja (PW-3) opened the forward door and all the guests de-boarded from the forward door and waited for almost 10 min. for the Jet Airways security to come and at that time that the whole crew was standing and the accused inquired from as to whether the flight will go to Delhi or not. In his cross-examination it is elicited that there were two Jet Airways employees – viz. Mr.Rana Rajendrapal Singh and another Mr.Ravi Arvind Jain, who were also seated in the Business Class and it is not named them in his statement recorded on 03.11.2017 by the Gujarat Police. It is further deposed by him that he has not stated or mentioned in his statement before the Gujarat Police that he was seating on the queue from where he could see seat No.1D and No.1D that at

that time the accused asked him as to what was going on and he informed that due to security reasons, they were diverted and asked him to just be seated. It is further elicited from him that in his statement before the NIA also on, which is recorded on 18.12.2017, he has not stated that he was occupying jump forward seat, from which he could see seat No.1D and NO.1F. Thus, for the first time before the trial Court, this witness has admitted that he was occupying the crew seat from which he could see seat No.1D and No.1F. From the evidence of PW-16, it is established that there were five passengers out of two Jet Airways and one was accused, who was seated on Flight No. The deposition of the present witness suffers from minor omission. The deposition does not reveal that he has actually seen the accused using the washroom.

(49) From the oral evidence of star witnesses of the prosecution PW-2, PW-3 and PW-16 it is established that along with accused, there were 4 other members, who were seated in the business class and accused had used the washroom once while boarding and again during the flight. The Investigating Officer (PW-22), DCP Dr.Rajdeepsinh Narayansinh Zala, has also admitted that initially he had identified 4-5 accused. The investigation is absolutely silent

with regard to the involvement of co-passengers who were accompanying the accused in the business class and the appellant is arraigned as an accused, on the alleged inculpatory statement made by him before the complainant, ACP, Mr.Baldevsinh Chandansinh Solanki (PW-1) admitting that he had prepared the Note in his office and planted it in order to defame the airlines as he was having an affair with one lady Shetal Seth, a Jet airways employee. The investigation officer has not made any endeavor to record her statement, and she is not examined as a witness. Such a statement before the police is hit by the provisions of Sections 25 and 26 of the Evidence Act, 1872 and the Investigating Officer was required to further undertake the necessary investigation for identifying the rest of the accused, which is not done and hence, it is very fatal for the case of the prosecution. The trial Court while placing reliance on the aforesaid evidence has concluded that the appellant's behaviour depicted that he was having the knowledge that he had planted the threat-note in the lavatory of the aircraft. The trial court has also held that since the other co-passengers were the employees of the airlines, their involvement in the offence cannot be believed. In absence of any investigation done in this regard, such a

presumption is impermissible. It cannot be presumed that other persons were absolutely not involved in the offence. If the appellant is convicted in the offence only because he was seen using the lavatory, the same theory can be applied to other co-passengers also, both of economy and business class. Thus, the appellant is convicted on the evidence which is suspicious in nature. In a serious offence like present one, which invites stringent punishment, the evidence which establishes the guilt of the accused has to be of very sterling quality and it has to be proved beyond reasonable doubt pointing out that it is only the accused, who had prepared the threat-note, got it printed and ultimately placed it in the lavatory of the aircraft. The oral evidence of three witnesses does not in any manner reveal that they had actually seen the accused putting the threat-note in the tissue paper box of lavatory of the aircraft hence, the accused cannot be convicted on the evidence of the aforesaid three witnesses.

(50) The evidence, Exh.111 of Investigating Officer of NIA i.e. PW-26 discloses that he has admitted that another person - Rana Rajendra Singh, who was also traveling in the Business Class, had also used the washroom and the same was not revealed during the course of

investigation and examination of the crew members PW-2, PW-3 and PW-16.

(51) The pilot of the aircraft PW-4 on receiving the information of the alleged threat-note discussed the same with co-pilot - Mr.Ashutosh Nevase, who is not examined by the prosecution and accordingly in his deposition, he has stated that on having perused the threat-note, he informed the ATS, Ahmedabad and accordingly, aircraft was landed by an announcement that due to security reason, the plane was diverted to Ahmedabad. Ultimately, it was found that the threat-note was a hoax and all the crew members and pilots thereafter departed to their respective destination and the passengers were also allowed to be de-board. The evidence reveals that four persons have used the washroom i.e. PW-2, PW-3 Rana Rajendrasinh and employees of the Jet Airways and the accused and even economic passengers could have used the washroom as per the evidence of the PW-2, while boarding. There is no eye witness, who has seen the appellant placing the threat-note in the tissue paper box.

ELECTRONIC EVIDENCE

A) LAPTOP and PRINTER

(52) We shall first examine the evidence with regard to the preparation of the threat-note. As per the

contents of the complaint, Exh.17, the appellant has admitted that he had prepared the Note on 28.10.2017 in his office. Thereafter, the prosecution has projected that the threat-note is alleged to have been created on 27.10.2017 by using Google translator. The Laptop and the printer along with some papers were recovered from the office of the accused. The ownership of the laptop and printer is not denied by the appellant. The report dated 20.01.2018, Exh. 103 reveals that the FSL received the parcel of one sealed plastic box of Sony Vaio laptop which contained Hard Disk of 1 TB DFSL, Gandhinagar and after receiving the same a forensic clone of the hard-disk was prepared and the same was analyzed for presence of threat-note. As per the report of the FSL, Gandhinagar dated 20.01.2018, Exh.103, the hard disk does not disclose of preparation of the threat-note on 27.10.2017. A closed reading of the report dated 20.01.2018, Exh. 103 reveals that it is opined by the FSL that "*text fragment similar to the text content of the hard-disk Exh.H1 of the laptop was found. It is also opined that the Hard disk did not contain any evidence regarding using web-page, google translator or any other translator used for translation of text from English to Urdu language on 28.10.2017*." The report also does not indicate any date of the fragments which are found similar to the threat-note.

(53) The PW-23, the Scientific Officer (FSL, Gandhinagar), Shri Dharmendar Govindlal Shah in his evidence at Exh.102 has admitted that he found text fragment similar to the text content of the threat-note from the hard-disk of laptop and it is elicited from his cross-examination that the files created in Microsoft Word, Notepad and Excel, its created date, accessed date and modified date can be retrieved. He has further deposed that there is no way to retrieve the date of deletion apart from the analysis of the properties. He has voluntarily made a statement that no data related to the date on which a given file is deleted, can be retrieved through the analysis of the properties. He has also admitted that if the contents of the particular file are copied identically into another file, the hash value of both the files would remain the same. He has admitted that he had made mirror image/forensic cloning on the one TB hard disk provided by the NIA with the muddamal on 10.11.2017. He has also admitted that there is no date mentioned in his report from page nos.1 to 4 of Exh.103 report.

(54) The PW-25, Scientific officer, FSL, Mumbai, who has prepared the Report of DVR, Exh.110 in his deposition at Exh.108, in his cross-examination 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. It is true that even the date of deletion of a particular deleted file can also be retrieved. It is true that the file created date of deleted file can also be retrieved with the help of forensic tools. It is true that even the file accessed date of deleted file can also be retrieved." He has further admitted that this happens in majority of the cases but not all.

(55) At this stage, it would be apposite to refer that the said report was prepared in view of the questionnaire sent by the NIA vide communication dated 20.11.2017 i.e. additional questionnaire below Exh.118 and Letter dated 12.12.2017, Exh.136. Exh.118 refers to find out the information regarding use of Google translator on 28.10.2017 and printing log of 28.10.2017. Exh.136, Letter dated 12.12.2017 seeks information about the images of DVR of 27.10.2017 relating to the document seen in the Laptop of DVR. In response to the questionnaire, it is deposed by PW-23 that the print of the threat-note “could have happened” on any Epson p L565-All-in-one- printer. He has admitted that there is no reference to any date mentioned in internal page Nos.1 to 4 of Exh.103. The report Exh.103 in paragraph No.9

mentions that the Hard Disk of Laptop did not contained any information regarding assessing/using web-page, Google translator and any other translator used for translation of English Text into Urdu language on 28.10.2017. The evidence of said witness as well as FSL report indubitably mentions that no trace of web-page, google translator or any other translator is used to translate the English text into Urdu language text is used on 28.10.2017. The evidence of the report, Exh.103 as well as PW-23 reveals that no log was found linking the laptop and the printer and hence, the evidence will emphatically establishes that there was no command given from the laptop to the printer for taking out the print-out and hence, in absence of such evidence, it cannot be concluded that the print out of the threat-note was taken from the printer seized from the office of the appellant.

(56) The combined reading of the oral evidence of PW-23, the Scientific Officer, FSL, Gandhinagar and his report Exh.103 and the evidence of PW-25 establishes that no date of creation or deletion of the threat-note or fragments of threat-note is confirmed. There is no evidence found that any print out has been taken from the Epson printer which has been seized from the office of the appellant. The date of

creation or deletion of the file of threat-note or its fragment would be very relevant and a crucial factor to prove the guilt of the accused. In absence of any such data or log having recovered from the Hard Disk of the Laptop, the appellant could not have been convicted.

(57) We shall also refer to the findings of the trial Court about evidence of preparation of threat-note on 28.10.2017. The trial Court has also recorded a finding that the hard-disk of the laptop did not contain any information regarding using or accessing the web-page, Google translator or any other translator on 28.10.2017. The trial Court on the contrary has assumed that since the evidence of DFSL, Mumbai as well as PW-23, Scientific Officer, do not reveal that the laptop was used on 28.10.2017 or print-out was taken on that day however, since the report does not refer to the date 27.10.2017, it cannot be said that the accused had not prepared the threat-note on the same day that is 27.10.2017. Thus, the Trial Court has concluded that the evidence of Laptop or the printer does not reveal that the threat-note was prepared on 28.10.2017, but such evidence is discarded by the trial Court by taking support of the evidence of Exh.110 of DVR which was seized from the office of the

accused on 30.10.2017. By placing reliance on the said evidence, it is recorded that the evidence of DVR definitely reveals and proves the complicity of the accused in the offence since he is seen preparing and taking out the print out of threat-note from his laptop in his office on that day. Thus, after discarding the evidence with regard to laptop and the print-out, the trial Court has convicted the accused on the basis of evidence of the DVR below Exh.110.

(58) The Trial Court and the prosecution has also believed that the appellant had prepared the threat-note in his office, thereafter placed in the plastic pouch, however no plastic pouch was recovered by the prosecution either from the office of the appellant or from the body of the appellant and as noted hereinabove, it is not the case of the prosecution that the appellant while wearing the hand-gloves kept the alleged threat-note in the plastic pouch and placed the same in the washroom of the aircraft.

EVIDENCE OF DVR (Digital Video Recorder)

(59) After examining the electronic evidence of Laptop and Printer, we have examined the evidence of DVR. The Trial Court has convicted the appellant on the evidence of DVR. The DVR

which was seized from the office of the accused was sent for examination to the DFSL, Mumbai. The DFSL, Mumbai vide its report below Exh.110 has sent its report. It would be apposite to incorporate the finding of the DFSL, Mumbai below Exh.110. After undertaking necessary forensic investigation of the videos and images found in the DVR, it is opined that person marked in the reference figures which was sent by the NIA is found similar to the person seen in the DVR. Further it is opined as under:

"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 print-out" were observed on 27.10.2017 from 12:07 hrs to 12:44 hrs related frames as follows"

Further it is recorded as below:

"*Text of laptop screen on of document printed could not be enhanced clearly and hence not identified***".**

With regard to comparison of threat-note, to that one seen on the laptop in the DVR, it is observed thus:

"The pattern, length, width, line spacing, language of text appearing could not be identified, but as observed visually it seems paper has two paragraphs**".**

And

"as shows in above frames similar structure was observed".

(60) The FSL report, Exh.110 dated 19.01.2018 reveals that after the video and image analysis of the CCTV footage of the DVR, the person who was seen was similar to the person i.e. accused and he is seen doing activity of typing on laptop and taking print-put on 27.10.2017 from 12:07 hrs. to 12:44 hrs. In realtion to the threat-note, it is opined that "*similar structure to that of threat-note is observed*". Thus, the FSL report does not in any manner distinctly or unambiguously opine that the image of the threat-note in the CCTV footage obtained from the DVR is of the same threat-note which is recovered from the lavatory of the aircraft. The FSL report does not even reflect the minimum content/text from the image of the Note, and it has only opined that "*similar structure to that of threat-note is found*". Thus, on the presumption of a image which bears similar structure sans contents/texts of Note, it cannot be inferred that the image is of the same Note which was planted in the lavatory.

(61) In support of the FSL report, Exh.110, the prosecution has examined PW-25, Scientific Officer, Shri Ashish Deorao Rathod of DFSL, Mumbai. In his evidence at Exh.108, he has stated that the text on the laptop and on the document i.e. print-out could not be enhanced

properly and hence, the same cannot be identified however, it is further admitted by him that the exported image from the DVR, it appears that two paragraphs and framed similar structure to that of threat-note is observed. He has further admitted that on a careful examination of the exported images, he found that the same pattern, length, width of the text cannot be identified. The trial Court has convicted the accused in a very serious offence and that to inviting serious consequences of life imprisonment till his last breath on such evidence which is of doubtful in character.

(62) It is also not in dispute and is admitted by the Investigating Officer PW-22 that he had kept the DVR in his personal custody for 20 days even though the investigation was taken however, by NIA on 07.11.2017, PW-22 has admitted that he handed over the DVR to the NIA on 20.11.2017 after he received letter from NIA on 17.11.2017 for handover the DVR. It is further admitted by him that he had opened and seen the DVR during 31.10.2017 to 20.11.2017. The Investigating Officer was required to seal the DVR after the same was seized from the office of the accused and should have sent to the FSL or he should have immediately handed over to the NIA in sealed condition for preserving its trustworthiness.

(63) It is also interesting to note that the evidence of PW-25 reveals that he has stated that the questionnaire at Exh.136 was received from the NIA i.e. on 12.12.2017 requesting to provide details of the text typed on the laptop of 27.10.2017 from 12:07 hrs. to 12:44 hrs. The questionnaire at Exh.136 i.e. dated 12.12.2017 written by the NIA to the Scientific Officer, Mumbai specifically narrate in paragraph No.3A that "*on 27.10.2017 from 14:13 to 14:25 hrs., the said person is seemed to be taking out the print-out. The said print-out is seen lying on the printer as well as in the hands of the accused. Please provide text appearing on the said print-out page*." Thus, the questionnaire, Exh.136 written by the NIA refers to the date of 27.10.2017 and the activities done by the accused in his office relating to the typing on his laptop and obtaining print-out from his printer. This evidence of PW-25 read with DFSL report at Exh. 110 dated 19.01.2018 does not in any manner reconcile with the evidence of PW-23 and the report dated 28.01.2018, Exh.103 which says that no log of print-out command or use of any function or trace of web-page, Google translator etc. has been found on 27.10.2017 or on 28.10.2017. The evidence of DVR does not corroborate with the finding or evidence of laptop. The accused is convicted on the basis of the Scientific evidence of fragment of

similar to the threat-note have been found from the laptop of the accused.

(64) It is also interesting to note that the accused was made to perform a demonstration on 31.10.2017, (panchnama - Exh.68) of preparing the threat-note and taking out the print-out at his office by the Investigating Officer, PW-22. He was asked to type the threat-note, translate it and taking out the print, however, there is no evidence in the hard-disk, printer and the DVR which discloses the fact of preparing the threat-note and taking its printout on 31.10.2017. The FSL reports as mentioned hereinabove are blissfully silent with regard to any evidence pointing out demonstration done by the accused on 31.10.2017. In order to ascertain a fair investigation, the forensic evidence indicating the creation and taking out the print out of the threat-note on 31.10.2017 was required to be ascertained more particularly in wake of the fact that the forensic evidence of hard disk of laptop does not reveal the date of creating or deleting the Note. There is no date discovered of the fragments of Note found in the Hard disk.

(65) The PW-13, an employee of the accused has categorically in his evidence stated that he had seen the accused showing something in the

computer and he was typing also when he was taken to his office on 31.10.2017. The evidence of PW-22, DCP Dr.Rajdeepsinh Narayansinh Zala (Exh.79), clearly points out that the accused in presence of panchas had shown demonstration that he had typed the said threat letter in English language and then by opening the google translator application, he had also translated the contents of the threat letter in Urdu language and then he had also demonstrated that it can be saved in both the languages. Thereafter, deposition of PW-22 also reveals that he had shown the procedure of taking its print-out by way of Epson company printer. Thus, in order to convict the accused in such serious offence, which invites serious consequences, the scientific analysis of laptop, printer and DVR should have unambiguously pointed out the complicity of the accused that he is the only person, who had typed the threat-note on his laptop on 28.10.2017, which is the case of prosecution. The FSL report of laptop reveal that no print-out has been taken on 27/28.10.2017 from the Epson printer as logs were missing and the only clinching evidence which prosecution is heavily placing reliance is on the content of the DVR which, as narrated hereinabove, cannot be considered as circumstance beyond doubt to investigate conviction in the offence of

hijacking. Even the electronic evidence of DVR which shows the images of similar structure of threat-note in the laptop are construed as the images of threat-note then the evidence of taking out the print out from the Epson printer was also critical and vital. It was also necessary to prove that the accused had used the Google translator or any other translator to translate the threat-note from English to Urdu. In absence of any evidence suggesting the translating and taking out the print of the threat-note from the printer, it cannot be held that the appellant has in fact prepared the threat-note and placed in the lavatory of the aircraft.

(66) Thus, the examination of the evidence of Laptop, Printer as well the DVR does not pinpoint the date of creation or deletion of the alleged threat-note or fragment of threat-note found in the laptop, and hence on the premise of such delicate evidence, the accused cannot be convicted.

(67) There is yet another aspect which requires to be considered is that the trial Court while convicting the accused, has viewed the contents of the DVR and has formed its opinion that the accused after typing the threat-note has placed it in plastic pouch. The trial Court in

paragraph No.143.4 in its judgement has recorded that "*on perusing the CCTV footages in the DVR produced, it is seen that the accused was wearing the gloves for getting the print of the letter i.e. in the threat-note which is typed in his laptop and thereafter he folded the threat-note in four parts and kept it on his table as the plastic pouch was not available and again he wore the gloves and took plastic pouch and put the threat-note in the said plastic pouch*." The prosecution has not proved that after typing the threat-note, the accused kept the same in the plastic pouch while wearing the gloves and also placed the same in the lavatory of the aircraft. None of the witnesses have deposed that the appellant was wearing gloves in the aircraft.

(68) In the present case, the prosecution has heavily placed reliance on the demonstration panchnama of the accused below Exh.68 and 69 dated 31.10.2017 for establishing the offence to the effect that it was accused, who typed the threat-note on his laptop and taken printout from the printer at his office. One of the panchas of the panchnama, PW-20, Jalil Ahmed Siraj Ahmed, who accompanied the PW-22 DCP, Dr.Rajdeepsinh Narayansinh Zala, from Ahemdabad was having criminal history. His evidence reveals that he was arrested under the Arms Act,

and is charge-sheeted. He has admitted that the other panch witness, Imtiyazkhan Safiqkhan Pathan is also co-accused in the offence registered under sections 170, 365, 394, 419, 465, 467, 468, 120B of the IPC, wherein they had impersonated themselves D.R.I. / Customs officer. He has further admitted that he has stood as a panch witness in the NDPS case. Thus, the witness appears to be stock witness and his evidence has to be discarded as he is not an independent witness. Moreover, even if the demonstration panchnama is accepted at its face value, it amounts to nothing but a confessional statement of the accused, while being in police custody and, therefore, the same is clearly hit by the provisions of Section 26 of the Evidence Act, and hence, inadmissible in evidence.

DNA REPORT:

(69) At this stage, it would be apposite to refer to the DNA report, Exh.147 dated 14.10.2018 of the DFSL, Mumbai. The report Exh.147 indubitably, opines that the DNA profile found from the laptop are common with the blood samples of the accused however, it is also opined that no DNA profile is obtained from the threat-note. Thus, there is nothing to connect the threat-note with the accused as per the DNA report. The evidence of PW-13 also reveals that in fact,

the accused was dealing with the diamonds and gold and hence, he was working while wearing his gloves and hence, it was natural for the accused to wear gloves while in office and it cannot be said that in order to conceal his DNA profile, the accused had planted the threat-note in the lavatory of the aircraft while wearing the gloves. It is also not the case of the prosecution that witnesses PW-2 and PW-3 as well as PW-16 that they had seen the accused at any point of time while he was in the aircraft wearing his gloves. Since no DNA has been found on the threat-note, it does not establish that in fact, the accused had planted the Note in the tissue paper box in the lavatory of the aircraft.

FSL REPORT ON PRINTER PAPERS:

(70) The Trial Court in paragraph No.127.1 has examined the evidence relating to the papers, which were seized from the office of the accused. PW-23, who is the Scientific Officer of the DSFL, Gandhinagar, in his deposition, has admitted that the paper, which were recovered , is easily available in the market and the printout of the threat-note reveals that it could have been printed from a similar printer like *EPSON EcoTank-L-565*. Thus, the evidence does not even remotely connect the

accused to the threat-note or to the papers. The evidence of PW-23 also does not suggest that the same printer and the papers, which were recovered from the office of the accused, has been used to print the threat-note. The Trial Court has very cursorily dealt with the evidence with regard to the papers found from the office of the accused.

STATEMENT UNDER SECTION 313 OF THE CR.P.C.:

(71) The trial Court has also placed reliance on the statements as mentioned hereinabove recorded under Section 313 of the Cr.P.C. A perusal of the statements does not in any manner establish the guilt of the accused. The Apex Court in the case of *Sri. Sujit Biswas Vs. State of Assam*, (2013) 12 S.C.C. 406 has held thus:

> *"13 It is a settled legal proposition that in a criminal trial, the purpose of examining the accused person under Section 313 Cr.P.C., is to meet the requirement of the principles of natural justice, i.e. audi alterum partem. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The circumstances which are not put to the accused in his examination under Section 313 Cr.P.C., cannot be used against him and must be excluded from consideration. The said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act, as the accused cannot be cross-examined with reference to such statement.*

20. The aforesaid circumstances in isolation, point out conclusively, that the appellant has in fact committed the said offence. Furthermore, the most material piece of evidence which could have been used against the appellant was that the blood stains found on his underwear matched the blood group of Sima Khatoon. However, the said circumstance was not put to the appellant while he was being examined under Section 313 Cr.P.C. by the trial court, and in view thereof, the same cannot be taken into consideration. Hence, even by a stretch of the imagination, it cannot be held that the aforementioned circumstances clearly point towards the guilt of the appellant, and in light of such a fact situation, the burden lies not only on the accused to prove his innocence, but also upon the prosecution, to prove its case beyond all reasonable doubt. In a case of circumstantial evidence, the aforementioned burden of proof on the prosecution is much greater."

(72) The Apex Court has held that under Section 313 of the Cr.P.C. cannot be treated as evidence within the meaning of section 3 of the evidence act as accused cannot be cross-examined with regard to such statements and failure to explain established chain of circumstances in the case of circumstantial evidence can benefit the accused. The accused can be asked to furnish some explanation with regard to the incrimination circumstances associated with him. In the present case, the case of the prosecution rests on the circumstantial evidence and it is well settled proposition of law that in the case, which is premised on circumstantial evidence, chain of circumstances and the link is required to be established and

complicity of the accused in the guilt has to be proved beyond reasonable doubt. The incriminating circumstances are missing in the present case, since the prosecution has not proved beyond reasonable doubt such circumstances. As held by the Apex Court in the case of *Sharad Birdhi Chand Sarda Vs. State of Maharashtra*, 1984 4 S.C.C. 116, the circumstance should be of conclusive nature and tendency and facts so established should be consistent with the hypothesis of guilt and the accused, that is to say they should not be explainable or any other hypothesis except that the accused is guilty. The Apex Court has held that graver the crime, greater should be standard of proof and the accused may appear to be guilty on the basis of suspicion but that cannot be amount to legal proof. It is well-settled that where on the evidence two possibilities are available or open one which goes in favour of the prosecution and the other which benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. In case of *M.G.Agarwal Vs. State of Maharashtra*, AIR 1963 SC 200, the Apex Court has held that if the circumstance prove in case are consistent either with innocence of the accused or with his guilt, the accused is entitled to benefit of doubt.

REVERSE BURDEN OF PROOF-SECTION 16 OF THE ACT, 2016:

(73) The presumption of innocence of the accused is one of the fundamental principles of criminal jurisprudence which declares that an accused is presumed to be innocent until proven guilty. This principle is embodied in the maxim *'**semper necessitas probandi incumbit ei qui agit**'* (the necessity of proof always lies with the person who levels the charges). However, the provisions of section 16 of the Act, insist that when a person is prosecuted for commission of the offence specified in the said section, the Court is required to presume that the person has committed the said offence unless the contrary is proved. The presumption, however, cannot be said to be unassailable.

(74) Section 16 of the Act, provides presumption of guilt unless the accused discharges his burden to prove to the contrary. Section 16 of the Act, 2016 reads as under:

"16. 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 has committed such offence."

(75) At this stage, we may refer to the decision of the Apex Court in the case of Noor Aga vs. State of Gujarat, (2008) 16 S.C.C. 417, wherein the Apex Court after considering the provision of Section 102 of the Evidence Act and the provisions of the NDPS Act, more particularly Section 54 thereof, which also contains similar provision of shifting the burden of proof on the accused. The Apex Court has held thus:

"51. The Act specifically provides for the exceptions. It is a trite law that presumption of innocence being a human right cannot be thrown aside, but it has to be applied subject to exceptions.

Burden of proof

56. The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power to the court to impose fine of more than maximum punishment of Rs 2,00,000 as also the presumption of guilt emerging from possession of narcotic drugs and psychotropic substances, the extent of burden to prove the foundational facts on the prosecution i.e. "proof beyond all reasonable doubt" would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance with the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of "wider

civilisation". The court must always remind itself that it is a well-settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. In *State of Punjab* v. *Baldev Singh* [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] it was stated: (SCC p. 199, para 28)

"*28*. … It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed."

(See also *Ritesh Chakarvarti* v. *State of M.P.* [(2006) 12 SCC 321 : (2007) 1 SCC (Cri) 744])

57. It is also necessary to bear in mind that superficially a case may have an ugly look and thereby, prima facie, shaking the conscience of any court but it is well settled that suspicion, however high it may be, can under no circumstances, be held to be a substitute for legal evidence.

58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established."

(76) In case of *Mohan Lal Vs. state of Punjab*, (2018) 7 S.C.C. 627, the Apex Court has reiterated thus:

"13. A fair trial to an accused, a constitutional guarantee under Article 21 of the Constitution, would be a hollow promise if the investigation in a NDPS case were not to be fair or raises serious questions about its fairness apparent on the face of the investigation. In the nature of the reverse burden of proof, the onus will lie on the prosecution to demonstrate on the face of it that the investigation was fair, judicious with no circumstances that may raise doubts about its veracity. The obligation of proof beyond reasonable doubt will take within its ambit a fair investigation, in absence of which there can be no fair trial. If the investigation itself is unfair, to require the accused to demonstrate prejudice will be fraught with danger vesting arbitrary powers in the police which may well lead to false implication also. Investigation in such a case would then become an empty formality and a farce. Such an interpretation therefore naturally has to be avoided.

14. That investigation in a criminal offence must be free from objectionable features or infirmities which may legitimately lead to a grievance on part of the accused was noticed in Babubhai vs. State of Gujarat, (2010) 12 SCC 254 as follows:

32. The investigation into a criminal offence must be free from objectionable features or infirmities which may legitimately lead to a grievance on the part of the accused that investigation was unfair and carried out with an ulterior motive. It is also the duty of the investigating officer to conduct the investigation avoiding any kind of mischief and harassment to any of the accused. The investigating officer should be fair and conscious so as to rule out any possibility of fabrication of evidence and his impartial conduct must dispel any suspicion as to its genuineness. The investigating officer is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction but to bring out the real unvarnished truth.

33. In State of Bihar v. P.P. Sharma this Court has held as under:

> *57. Investigation is a delicate painstaking and dextrous process. Ethical conduct is absolutely essential for investigative professionalism. Therefore, before countenancing such allegations of mala fides or bias it is salutary and an*

*onerous duty and responsibility of the court, not only to insist upon making specific and definite allegations of personal animosity against the investigating officer at the start of the investigation but also must insist to establish and prove them from the facts and circumstances to the satisfaction of the court. * * **

59. Malice in law could be inferred from doing of wrongful act intentionally without any just cause or excuse or without there being reasonable relation to the purpose of the exercise of statutory power.

61. An investigating officer who is not sensitive to the constitutional mandates, may be prone to trample upon the personal liberty of a person when he is actuated by mala fides.

15. The duty of the prosecution under the NDPS Act, considering the reverse burden of proof, was noticed in Noor Aga (supra) observing:

58. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is beyond all reasonable doubt but it is preponderance of probability on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt. Furthermore, the sample not having been deposited in the malkhana, coupled with non-examination of the private witnesses, an adverse inference was drawn therein against the prosecution. This principle has been

reiterated in Bhola Singh vs. State of Punjab, 2011(11) SCC 653."

(77) The Supreme Court in the case of ***Noor Aga (supra***) while considering the stringent punishment prescribed under the NDPS Act has held that the extent of burden to prove the foundational facts on the prosecution i.e. "*proof beyond all reasonable doubt*" would be more onerous. The Apex Court has cautioned that a heightened scrutiny test would be necessary to be invoked because on the one hand, the Court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance with the provisions of the Act for the purpose of upholding the democratic values and the court must always remind itself that it is a well-settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. Section 4(a) of the Act prescribes punishment of death if the offence results death and section 4(b) provides for imprisonment for life till persons natural life

with fine and also confiscation of the immovable property. Section 19 prescribes forfeiture or property. Thus, as per the observations of the Supreme court, the degree of proof required to prove the offence of hijacking has to be very austere.

(78) While considering the doctrine of reverse burden of proof, the Supreme Court has held that the initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift, even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution, whereas the standard of proof required to prove the guilt of the accused on the prosecution is “beyond all reasonable doubt” but it is “preponderance of probability” on the accused. The Apex Court has held that if the prosecution fails to prove the foundational facts, the rigours of reverse burden as stipulated in the statute will not get attracted. Thus, the presumption of the guilt of the accused can only be raised, if the prosecution establishes the foundational facts by strict degree of proof. The Apex Court has also reiterated that it is also necessary to bear in mind that superficially a case may have an ugly look and thereby, *prima facie*, shaking

the conscience of any Court but it is well settled that suspicion, however high it may be, can under no circumstances, be held to be a substitute for legal evidence.

(79) Thus, the observation in the Apex Court in both the aforenoted cases, signifies that in case of reverse burden, the fair trail of the accused i.e. constitutional guarantee under Article 21 of the Constitution of India cannot be compromised. It is further observed that in the nature of reverse burden of proof, the onus will lie on the prosecution to demonstrate on the face of it that the investigation was fair and judicious with no circumstances that may raise doubts about its veracity and obligation of proof beyond reasonable doubt will take within its ambit a fair investigation, in absence of which there can be no fair trial. While referring to the decision of the Supreme Court in the case of *Babubhai Vs. State of Gujarat*, (2010) 12 S.C.C. 254, the Apex Court therein has observed that the investigation in the criminal offence must be free from objectionable features or infirmities which may legitimately lead to a grievance on the part of the accused.

(80) Thus, the provision of Section 16 of the Act which casts reverse burden on the accused, can

only be invoked against the accused, after the prosecution establishes complicity of the accused beyond a reasonable doubt. In the present present case, the evidence as recorded hereinabove does not firmly establish the guilt of the accused in the offence. The conviction in the present case is premised on the basis of suspicion and the same cannot translate into legal proof. Neither the documentary evidence nor the oral evidence establishes the guilt of the accused beyond reasonable doubt. The prosecution is unable to satisfy us that it was only the accused, who had prepared the threat-note in his office. The threat-note, which is found in lavatory of the aircraft is similar/identical i.e. contents therein are found from the laptop of the accused and he is the only one who planted it in the lavatory of the aircraft.

CONDUCT OF ACCUSED-SECTION 8 OF EVIDENCE ACT:

(81) The prosecution has also placed reliance on the provisions of Section 8 of the Evidence Act, which reads as under:

> *"8. Motive, preparation and previous or subsequent conduct.—Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and 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."

It is well established proposition of law that the conduct of accused cannot be solely considered for convicting him for serious offence. In the present case also, the accused had only sought permission for using the lavatory from the crew member and on the declaration of emergency landing, he only inquired whether the flight would go to Delhi or not. Such conduct of the accused cannot explicitly indicate that it was only the appellant, who had planted the threat-note in the lavatory of the aircraft. Such conduct of making inquiry of the accused cannot be used against him and the conviction cannot be solely premised on such evidence for the serious offence of hijacking which invites stringent punishment in absence of corroborative evidence establishing the guilt of accused. The evidence does not indicate that except the accused, no one else has used the lavatory of the aircraft. If the Investigating Officer had initially identified 4-5 accused, then same yard sticks should have been adopted for them also. In the case of Shahaja @ Shahajan Ismail Mohd. Shaikh vs. State of Maharashtra, 2022 (10) Scale 290 has observed thus:

> "Although, the conduct of the accused may be a relevant fact under section 8 of the Act, yet the same, by itself, cannot be ground to convict him that too for a serious offence like murder. Like any other piece of evidence, the conduct of the accused is also one of the circumstances which the Court may take into consideration along with the other evidence on record, direct or indirect. What we are trying to say is that the conduct of the accused alone, though may be relevant under section 8 of the Act, cannot for the basis of conviction."

Hence, the trial court and the prosecution could not have asserted the conduct of the appellant as a circumstance for convicting for a serious offence of hijacking in absence of any other evidence which proves the guilt of the appellant beyond reasonable doubt.

MOTIVE

(82) It is contended by the appellant that the prosecution has failed to establish motive for committing the offence. In order to appreciate such submission, it would be apposite to refer the law in this regard. The Supreme Court in the case of Indrajit Das vs. State Of Tripura, AIR 2023 S.C. 1239, in case of circumstantial evidence while dealing the aspect of motive has reiterated thus:

> ***"15** In a case of circumstantial evidence, motive has an important role to play. Motive may also have a role to play even in a case of direct evidence but it carries much greater importance in a case of circumstantial evidence than a case of direct evidence. It is an*

important link in the chain of circumstances. Reference may be made to the following two judgments on the importance of motive in a case of circumstantial evidence:

(1) Kuna Alias Sanjaya Behera vs. State of Odisha, (2018) 1 SCC 296; and

(2) Ranganayaki vs. State by Inspector of Police, (2004) 12 SCC 521."

In the case of Ranganayaki vs. State By Inspector Of Police, 2004 (12) S.C.C. 521, the Supreme Court has held thus:

***"10** Motive for doing a criminal act is generally a difficult area for prosecution. One cannot normally see into the mind of another. Motive is the emotion which impels a man to do a particular act. Such impelling cause need not necessarily be proportionally grave to do grave crimes. Many a murders have been committed without any known or prominent motive. It is quite possible that the aforesaid impelling factor would remain undiscoverable. Lord Chief Justice Champbell struck a note of caution in Red V/s. Palmer (Shorthand Report at page 308 May, 1856) thus: "But if there be any motive which can be assigned. I am bound to tell you that the adequacy of that motive is of little importance. We know, from experience of criminal courts that atrocious crimes of this sort have been committed from very slight motives; not merely from malice and revenge, but to gain a small pecuniary advantage, and to drive off for a time pressing difficulties". Though, it is a sound presumption that every criminal act is done with a motive, it is unsound to suggest that no such criminal act can be presumed unless motive is proved. After all, motive is a psychological phenomenon. Mere fact that prosecution failed to translate that mental disposition of the accused into evidence does not mean that no such mental condition existed in the mind of the assailants. In Atley V/s. State of Uttar Pradesh, AIR 1955 SC 807, it was held "that is true, and where there is clear proof of motive for the crime, that lends additional support to the finding of the Court that the accused was guilty, but absence of clear proof of motive does not necessarily lead to the contrary conclusion". In some cases it may*

be difficult to establish motive through direct evidence, while in some other cases inferences from circumstances may help in discerning the mental propensity of the person concerned. There may also be cases in which it is not possible to disinter the mental transaction of the accused which would have impelled him to act. No proof can be expected in all cases as to how the mind of the accused worked in a particular situation. Sometimes it may appear that the motive established is a weak one. That by itself is insufficient to lead to an inference adverse to the prosecution. Absence of motive, even if it is accepted, does not come to aid of the accused. These principles have to be tested on the background of factual scenario."

In a recent decision in the case of Prem Singh vs. State Of Nct Of Delhi, 2023 (3) S.C.C. 372, it is held thus:

"15. As regards the relevancy of motive in a case based on circumstantial evidence, the weight of authorities is on principles that if motive is proved, that would supply another link in the chain of circumstantial evidence but, absence of motive cannot be a ground to reject the prosecution case, though such an absence of motive is a factor that weighs in favour of the accused. In ***Anwar Ali and Anr. v. State of Himachal Pradesh: (2020) 10 SCC 166,*** *this Court has referred to and relied upon the principles enunciated in previous decisions and has laid down as under: -*

"24. Now so far as the submission on behalf of the accused that in the present case the prosecution has failed to establish and prove the motive and therefore the accused deserves acquittal is concerned, it is true that the absence of proving the motive cannot be a ground to reject the prosecution case. It is also true and as held by this Court in ***Suresh Chandra Bahri v. State of Bihar, 1995 Supp (1) SCC 80: 1995 SCC (Cri) 60 .*** *that if motive is proved that would supply a link in the chain of circumstantial evidence but the absence thereof cannot be a ground to reject the prosecution case. However, at the same time, as observed by this Court in Babu , absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused. In paras 25 and 26, it is observed and held as under:-*

[6] (2010) 9 SCC 189: (2010) 3 SCC (Cri) 1179.

*"25. In **State of U.P. v. Kishanpal, (2008) 16 SCC 73: (2010) 4 SCC (Cri) 182** ., this Court examined the importance of motive in cases of circumstantial evidence and observed:*

38. the motive is a thing which is primarily known to the accused themselves and it is not possible for the prosecution to explain what actually promoted or excited them to commit the particular crime.

39. The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one...

*26. This Court has also held that the absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused. (Vide **Pannayar v. State of T.N., (2009) 9 SCC 152: (2009) 3 SCC (Civ) 638: (2010) 2 SCC (Cri) 1480** .)."*

Thus, the cumulative reading of the observations of the Apex Court declare that in a case of circumstantial evidence, motive has an important role to play and sometimes it may appear that the motive established is a weak one, but that by itself is insufficient to lead to an inference adverse to the prosecution. It is also observed that absence of motive, even if it is accepted, does not come to aid of the accused, and these principles have to be tested on the background of factual scenario. It is held that the motive is a thing which is primarily known to the accused and it is not possible for the prosecution to explain what actually promoted or excited them to commit the particular crime and the motive may be

considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. However, the is also held that the absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused. In the present case, the prosecution has failed to establish the motive. As per the complaint, Exh.17, wherein the accused of the statement was recorded to the effect that he had committed the offence for defaming the airline due to his estranged relationship with an employee of the Jet Airways. Down the line, and in course of the investigation, such motive has lost its worth. However, as held by the Apex Court motive is one of the link in the chain of circumstances, and the same can be considered for assessing the evidence, and if the evidence is clear and unambiguous, and the circumstances prove the guilt of the accused, the same is not weakened even of the motive is not very strong. The overall appreciation of the evidence reveals that the same does not establish the guilt of the accused beyond reasonable doubt. The evidence does not unequivocally nails the appellant in a serious offence of hijacking.

CONCLUSION:

A) Succinctly stated, the evidence as discussed herein above both oral and documentary does not in any manner establish the guilt of the appellant beyond a reasonable doubt. Initially, the case of case of the prosecution stems out with the allegations that threat-note was created on 28.10.2017 by the appellant, thereafter it is alleged that the same has been created on 27.10.2017. The FSL, Gandhinagar report dated 28.01.2018 at Exh.103 is silent on such preparation of Note on 27.10.2017. The FSL dated 28.01.2018 shows that logs used from the laptop from 28.10.2017 were retrieved from the hard disk of the laptop used by the appellant and text fragments similar to the threat-note were present in the hard disk. The analysis of the network and the registry inter-phase of the hard disk shows that the wireless device 3N6150, has lease obtained dated 28.10.2017 at 10.21.34 hours of the lease is terminated on 31.10.2017 at 10.21.34 hours. The FSL report also indicates that the hard disk of the laptop did not contain any information regarding accessing or using of web-page, Google translator and any other translator used for translating the text from English to Urdu language on 28.10.2017. There is nothing to suggest that any attempts were made to link the

fragment with the threat-note. Such admission is apparent from the deposition of PW-23.

B) The FSL report also does not mention any recovery of the contents of the threat-note for the date 27.10.2017 and it is also established from the report that the laptop does not show any command given to the printer to print the Note. The PW-23 Scientific officer has admitted that the laptop does not show any command was given to the printer to print out the Note. The FSL report dated 16.01.2018 (Exh.104) also creates doubt whether the threat-note after the same having been prepared on the laptop, has been printed out from the printer *EPSON*, which was found from the office of the appellant.

C) The Trial Court has primarily convicted the appellant on the report of DFSL, Mumbai dated 19.01.2018 (Exh.110), which has prepared the report on the video and images analysis of the CCTV footage obtained from the DVR, which was installed in the office of the appellant.

D) As discussed hereinabove, the DFSL, Mumbai has not exclusively opined that the DVR of the CCTV footage shows the same threat-note having similar contents on the screen of the laptop or on the printout, which the appellant is alleged to have been seen from taking out from his

printer. The DFSL, Mumbai in its report has only observed that having similar structures to the threat-note are found.

E) We have also examined the report (Exh.110) and have also carefully observed the images obtained from the CCTV footage. A comparison of threat-note and the images obtained from the CCTV footage do not reveal that the images of threat-note are identical and the content as well as structures is of the threat-note. Thus, on such piece of evidence, which is doubtful in the nature, the appellant cannot be convicted for a serious offence.

F) As discussed hereinabove, the FSL report (Exh.147), which has examined the autosomal DNA profile obtained from the laptop and blood sample of the accused, do show that they were identical; however the autosomal DNA profile could not be obtained from the threat-note.

G) It is very surprising to note that though prosecution has produced the CCTV of the DVR on 27.10.2017, that too for the period from 12.07 hours to 12.40 hours, it is absolutely silent on the footage of 31.10.2017, when the appellant was made to give a demonstration by PW-22 in his office.

H) The PW-22 in his deposition has admitted that during his investigation, he has found that the appellant had drafted threat-note and translated into Urdu by using Google translator and taken the printout by using *EPSON* printer. The evidence of PW-22 is contrary to the opinion of the Scientific Officer (PW-23), who in his cross-examination has admitted that he did not find any logs of caption or in one printer connecting with the hard disk of the laptop. PW-25, Scientific Officer of DFSL, Mumbai has also admitted that the text on the laptop screen and on the document, which is printed, cannot be enhanced to such an accident and cannot be identified. The entire electronic evidence, as mentioned hereinabove, do not refer date and time of creation of the threat-note in the laptop and only the evidence shows that some fragments of threat-note are recovered or retrieved, however the evidence does not reveal that such fragments are papered on a particular date or a particular time, and the print out has been taken from the printer.

I) Such an evidence could have its pristine value, if the scientific analysis could have ingrained the minimum contents and the exact structure of the threat-note either from the laptop or from the DVR or CCTV footage, coupled with the fact

that after such preparation of the threat-note, a printout is taken from the printer of *EPSON* company in the office of the accused. Such evidence was required to be strengthen by placing the contents of the demonstration performed by the appellant on 31.10.2017 at the behest of PW-22, Investigating officer.

J) The appellant cannot be convicted for his demeanor of asking or requesting the crew members for using the lavatory of the aircraft, and also for inquiring as to whether the aircraft will go to Delhi or not. These witnesses have also not denied the using of lavatory by other passengers. They have not seen the accused planting the Note in the lavatory. As per the deposition of PW-22,he had identified 4-5 accused. The crew members have also admitted that there were other passengers in the business class. The prosecution was required to establish the link between the threat-note and the appellant evidence of immaculate character keeping in mind the stringent punishment prescribed for the offence of hijacking under the Act.

K) Thus, the Trial Court has fallen in error and has misdirected itself in appreciating such evidence, which is doubtful in nature in convicting the accused of a serious crime,

having serious consequences of inviting the punishment for imprisonment a life till his last breath forfeiture of property and imposition of fine.

:ORDER:

On the substratum of the overall analysis of facts and circumstances of the case and on examination of the evidence threadbare, we do not subscribe to the view expressed by the trial court convicting and sentencing the appellant for the offence of hijacking on the premise of evidence which is tainted with doubt. Hence, the present appeal stands allowed. The following order is passed:

(A) The impugned judgement and order dated 11/06/2019 passed by the Trail Court in NIA-Spl.Case no.1/2018 convicting and sentencing the appellant is quashed and set aside. The appellant is acquitted from the offence under Section 3(1) and 3(2)(a) of the Anti Hijacking Act, 2016;

(B) As a sequel the sentence under section 4(b) of the Act is set aside;

(C) The order of payment of fine as directed by the Trial Court to the tune of Rs.5,00,00,000/(Five Crores) is also set aside;

(D) The aforesaid fine shall be refunded to the appellant in case it is paid. The crew members are also directed to refund the amount of compensation in case the same is paid as per the directions of the Trial Court. In the alternative, the State is directed to pay the amount which is paid to the crew members, and it will be open for the State to recover such amount from the crew members;

(E) It is further directed that the properties which are seized by the Investigation Officer, and ordered to be confiscated under the provisions of section 19 of the Act, by the Trial Court shall be released forthwith;

(F) The appellant shall be set at liberty immediately, unless his custody is required in any other offence.

The captioned Criminal Misc. Application (for suspension of sentence) stands also disposed of.

Record and proceedings received from the Trial Court, shall be transmitted back to the concerned Court forthwith.

Sd/-
(A. S. SUPEHIA, J)

Sd/-
(M. R. MENGDEY,J)

NVMEWADA-[PS] // Mahesh-[PS]