

CASE NO.:
Appeal (crl.) 628 of 1998

PETITIONER:
STATE OF MAHARASHTRA

Vs.

RESPONDENT:
BHARAT CHAGANLAL RAGHANI & ORS.

DATE OF JUDGMENT: 11/07/2001

BENCH:
K.T.Thomas, R.P.Sethi

JUDGMENT:

SETHI, J.

Under the heaps of voluminous record in the form of various paper books spread over thousands of pages, lies the hidden story relating to the new 'merchants of death and destruction'. Upon dissection, when peeped into, it reflects the woeful situation prevalent in the society where writs of the organised criminal gangs run which affect the peaceful and innocent citizens of the country. This world of gangsters, popularly known as the 'underworld', comprises of various gangs headed by notorious dons for whom, the only valuable thing in the life is 'wealth' and the useless thing, the 'life' of others. Deaths are sold by these dons at their asking price and purchased by those who resort to have immediate results for their enrichment with the deflation of their otherwise inflated money bags. To this underworld, the unemployed, thoughtless and dejected youths are attracted and the bosses of the gangsters leave no stone unturned to utilize the services of such frustrated and misled youth for the commission of crimes, to further their evil designs. Contract killings by employing mercenary killers, after receipt of consideration known as 'supari' are the orders of the day, particularly in commercial cities of the country where the race for getting enriched overnight is going on at jet speed.

Mumbai, (with its erstwhile name Bombay) known as the commercial capital of the country, is at the top where such crimes are committed every now and then. Piling of the cases in the courts of law without their disposal particularly with respect to disputes relating to property is reported to have created settle centres of unusual trade where private courts are held by the gangsters and disputes are solved according to the will of those who can pay as per demand of the criminal dons. It is said that the unaccounted accumulation of black money in the hands of a few have encouraged the gangsters to widen the scope of their activities. Because of the money and muscle power, they are in a position of procuring highly sophisticated weapons. Such gangs collect money from various businessmen, land developers, persons carrying on the illegal activities in gambling dens, drug traffickers, etc. Such collected money is termed as "protection money" which in Marathi referred to as "Khandani" (Khandani is a Marathi word which

relates to long past history where the rulers used to collect Khandani from their subjects). A feeling is prevalent in the city that it is not the State alone which can protect the life and property of the rich and influential, but it is the criminals who render protection to such people for the consideration of the "protection money" received by them.

Such on going activities of the underworld are problems faced not only in Mumbai and this country but all over the globe. Generally known abroad as 'organised crime' has been found to be a subject of fascination in popular culture and a major criminal justice concern in the Western World. Such organised crimes pose various problems to the world community concerned to combat and fight it out.

In Europe, the terms 'organised crime' and 'professional crime' are largely interchangeable. As compared to American standards, the European criminal organisations are small-scale and short-lived. Such crimes are defined as; involving a system of specifically defined relationships with mutual obligation and privileges and association of a small group of criminals for the execution of the intended crime. The eruption of organised crime in India is of recent origin and is at the initial stage. It is the need of the hour to control such criminal activities which tempt the persons involved to amass huge profit. Such crimes have not only a legal facet but has a social and economic aspect which is required to be felt and dealt with by all concerned including the judiciary, the executive, the politicians, the social reformers, intelligentsia and the law enforcing agency.

This appeal relates to a case of one such mercenary killing by hired goons at the behest of criminal dons operating from abroad but rendering their services of criminal actions in this country on payment of huge amounts.

In this case the respondents herein were charged of having committed offences punishable under Sections 302, 307 read with Sections 120B, 23, 114 of the Indian Penal Code (hereinafter referred to as "the IPC"), Section 3 read with Sections 25(1-B)(a), Section 5 read with Section 27 of the Arms Act, Sections 3(2)(I), 3(2)(ii), 3(3), 3(5), 5 and 6 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as "the TADA Act") for having committed the murder of one Pradeep Jain, a young businessman, on 7.3.1995 in the commercial capital of India, i.e., Mumbai at about 7.30-8.00 p.m. and also attempting to murder the other brother, Sunil Jain. The deceased was murdered and his brother injured in furtherance of the conspiracy hatched by the respondents with other absconding accused. The crime was committed in the office of the company of the Jain Brothers, known as "Kamla Constructions". The accused persons, namely, Salim Abdul Salim (A8), Abu Salem (A9), Rajesh Igwe (A10), Sunil Nair (A11), Udai Pawar (A12) and Sanjay Kadam (A13) were declared absconders and have not faced the trial yet.

Bharat Chaganlal Raghani Respondent No.1 (A1) is a Solicitor, Rajan Robert Fernandes, respondent No.2 (A2) and Shaukatali Jamal Mistry @ Chauhan, respondent No.4 (A4) are the brokers, Subbedarsingh Ramdas Singh Yadav, respondent No.3 (A3), is the alleged purchaser and ultimate beneficiary of the intended sale of property.

The mercenary killers are stated to be belonging to the gang of a notorious gangster by name Dawood Ibrahim. It may be noticed, at this stage, that A4 who faced the trial had since died in a police encounter. Similarly A8, A10, A12 and A13 are stated to have been killed in the encounters with the police during the years 1995-96. A7, A9 and A11 are still absconding. In the commission of the crime the respondents are alleged to have used sophisticated weapons such as AK rifles, revolvers and pistols. Seventeen bullets are stated to have been pumped into the body of Pradeep Jain, the deceased.

Pradeep Jain was eliminated by the hired gangsters and Sunil Jain

attempted to be killed for their fault of not succumbing to the pressure of parting with their landed property, situated at Koldongir in Andheri (East), Mumbai of which they were owners in possession. This property originally belonged to one Matabadal Yadav who had four sons, namely, Garib, Kallu, Ballu, Jayanand. Fekuram was the grandson of Munnar. Jagannath, Dudhnath, Baijnath and Lal Chand were the sons of Kallu. Ramadhar, Ramnan and Ramkewal were the sons of Ballu. Mulai, Bhola and Laltaprasad were the sons of Jayanandan. The said landed property comprised of three categories shown as A, B & C in the sketch plan (Exhibit 49 at page 380, Vol.II of the paperbook). The property (A) measured 5000 sq.yards was purchased by Kamla Constructions, the company of the deceased Pradeep Jain, from the successors and heirs of Matabadal Yadav vide Agreement of Sale dated 21st December, 1979 where they had constructed two multi-storeyed buildings. The Property (B) is the land which the Kamla Constructions had procured from all the 13 Yadavs vide Agreements executed between the years 1981-82. Such Agreements of Sale have been proved by the prosecution and exhibited at the trial as Exhibits 50A, 52A, 54A, 56A, 58A, 60A, 62A, 64A and 66A. Separate agreements were executed by Ramroop, Lal Chand, Baijnath and Dudhnath on 18.2.1986 for which they received the earnest money vide receipt Exhibit 68A. Property (C) is the subject matter of an Agreement to Sell executed by Fekuram Yadav in favour of Kamla Constructions vide Exhibit 69A executed on 20th October, 1986. It is admitted that the disputes arose with respect to the disposal of the property referred to as the property (B) which ultimately resulted in the commission of the crime of murder.

A3 claiming to be the owner of the property, referred to as Property (B) wanted to dispose of it to Labh Constructions of Ahmedabad for which an Agreement Exhibit 93 was executed on 1.11.1994. A3 claimed that he and Matbadal Yadav had purchased the landed property from Dastur Narayan Ramchander and Lawrence Winston Misquetta. He referred to various agreements allegedly executed by Matabadal Yadav and his heirs and represented to the Labh Constructions that in the premises mentioned in the agreement Exhibit 93, he had a right in the property which he wanted to transfer on the terms and conditions specified therein. The property was agreed to be sold for the lumpsum price of Rs.10.93 crores to be paid to A3 in the manner specified in clauses (a), (b) and (c) of Condition No.1 of the Agreement. Condition Nos.3 and 4 of the Agreement provided:

"3. Upon the said certificate under Chapter XX-C of the Income Tax Act having been obtained, the purchaser shall deposit with the Vendor's Advocates & Solicitors Messrs. Haridas & Co. the said sum of Rs.3,80,00,000/- as set out in Clause 1(b) hereinabove, giving an authority to the Vendor to utilise the said amount firstly only for the purpose of getting the said tenants/occupants/ the tenants of the khillas as well as the structures and godowns vacated from the respective premises let out to or occupied by them and to obtain release, transfer, or assignment of the claim of the said M/s.Kamla Construction in respect of the said property more particularly described in the Second Schedule hereunder written as hereinafter provided on such terms and conditions as the Vendor may deem fit. The Vendor covenants that as long as the tenants/occupants do not vacant and surrender their respective title and interest in the said premises situated in the said property, the vendor shall not utilise any amount from out of this amount for his purpose.

4. The Vendor shall remove all such tenants within period of one month from the date of the purchaser depositing the said amount as aforesaid. The Vendor further declares that one Messrs.Kamla Construction is claiming to be the purchasers of the said property and the Vendor shall also settle the claim of the said Messrs.

Kamla Constructions at his own costs by obtaining from them release and/or assignment and/or transfer of their right title and interest in the said property more particularly described in the Second Schedule hereunder written before the payment of the amount under clause 1(b) above is paid to the vendor. the vendor shall also discharge all the liabilities or to ensure the same as arising out of the said agreements entered into between the said owners of the said property and the vendors."

The aforesaid agreement is stated to have been prepared by A1 who is the partner of the Solicitors Firm known as Haridas & Company. As earlier noticed, according to the terms of the Agreement, A3 had taken the responsibility to settle the claim of Kamla Constructions at his cost by obtaining release deeds.

Criminal conspiracy is alleged to have been hatched for the purposes of getting the release deeds executed by the Jain Brothers of Kamla Constructions by resort to persuasion, threat, duress and ultimately killing. In furtherance of the conspiracy, A1 is alleged to have prepared the desired release deeds. The Jain Brothers are stated to have been pressurised to sign the aforesaid release deeds for which various meetings are shown to have been held in the office of A1. In those meetings, A1 is alleged to have told the Jain Brothers that there was no substance in their documents. In one of the meetings A4, allegedly belonging to the gang of Dawood Ibrahim, threatened Jain Brothers that unless they signed the deeds prepared by A1, they would not be allowed to leave the office alive. Such threats are stated to have been given in the presence of A1, who despite protest from the deceased, did not take any action against anyone nor did he dis-associate himself from the said accused.

Anand Bhat (PW14), another solicitor was initially engaged by Labh Constructions for the purposes of getting the deal completed with A3. In October, 1994 Anand Bhat is stated to have received a document Exhibit 78 purporting to be a draft agreement prepared by Haridas & Company, the firm of solicitors of A1. By letter (Exhibit 79), Labh Constructions directed the solicitor firm of PW14 to hand over a sum of Rs.45 lakhs to the solicitor firm of A1. PW14 went to the office of A1 and personally handed over the cheque of Rs.45 lakhs.

It is in the evidence that sometime in August, 1994 A4 visited the office of Jain Brothers situated in Brijkamal Building, where he met Ashok Jain (PW45) and informed him that a builder from Ahmedabad (Labh Constructions) had purchased the old Koldongri property and their firm, namely, Kamla Constructions should give up that property. When Ashok Jain told A4 that he and his brothers were in possession of title deeds and not prepared to give up the property, the said accused told Ashok Jain that the purchaser party had connections with the underworld and if the Jains did not surrender their rights in the property, the consequences would be very bad. In October, 1994, Ashok Jain (PW 45), Suresh Jain (PW13), Pradeep Jain, the deceased and Sunil Jain (PW15) attended the office of A1 where A2, A3, A4 and some other persons were also present. The Jain Brothers handed over their title documents to A1 and asked him to go through the papers.

A4 continued to meet the Jains in the office of Kamla Constructions besides giving telephonic calls every now and then. A1 sometimes thereafter telephoned Ashok Jain (PW45) asking him that the Jain Brothers should visit his office to discuss over the matter. Consequently a second meeting was held in the office of A1 which was attended by Ashok Jain (PW45), Pradeep Jain, the deceased, Sunil Jain (PW15) from the side of Kamla Constructions and A1, A2, A3 and A4 represented the other side in the meeting. It is alleged that when A1 told the Jains that "your documents are not having any substance", the arguments followed. A4 used abusive language and warned the Jain Brothers that they were wasting everybody's time and their such dilly dalling tactics would not succeed. Pradeep Jain is stated to have

reacted very sharply to the threats given by A4 and told A1 "You are a solicitor of well repute and how can you tolerate this Hangama in your office". It is further alleged that A4 threatened the Jain Brothers that they should accept the amount being given to them or else ultimately lose their lives. In the third meeting held in November, 1994 attended by Jain Brothers and A1 to A4 an intimation was given to the partners of Kamla Constructions that A1 had received the money from the intended purchasers for being paid to them. The insistence of Jain Brothers to know the name of the intending purchasers and their desire to meet them was retorted by A1 telling that the party was so big that they had no time to meet the Jains. When Pradeep Jain stated that he was not interested in getting the money, A4 threatened by saying that if he did not accept the money and surrender the rights, the said money would be treated as "Supari" for the murder of Jain Brothers (Supari is a marathi word which stands for beetleput and in common parlance it has gained the meaning of money for contract killing). In all the six meetings which were held in the office of A1, the Jain Brothers were insisted to take decision quickly for surrendering their rights. As the Jain Brothers did not give up their claims at any cost, the transaction in favour of Labh Construction did not materialise. The immediate loser on account of delay was A3.

A2, A3 and A4 are stated to be having maintained a regular liaison with Abu Salem (A9), known to be the right hand man of Dawood Ibrahim. The said A9 was contacted by A2, A3 and A4 on telephone Nos.226670, 242939 at Dubai.

One day in the second week of February, 1994 at about 10 p.m. telephone bell rang in the house of Pradeep Jain. When Jyoti Pradeep Jain (PW23), the widow of the deceased picked up the telephone, the caller told her that he was Abu Salem and was speaking from Dubai. As he wanted to speak to Pradeep Jain, Jyoti Pradeep Jain handed over the receiver to her husband. Pradeep Jain was heard telling Abu Salem that he, along with his brothers were legal occupants of the land and could not be removed therefrom. When Pradeep Jain appeared upset, his wife inquired for the cause. Pradeep Jain told her that the person calling from Dubai had told him to sign the documents which had been kept ready in the office of A1 or face the consequences.

On 7.3.1995, the day of occurrence at about 8-8.15 p.m. A4 telephoned the office of Kamla Constructions and inquired from Sunil Jain (PW15) as to who all were present in the office. When told that besides PW15, Pradeep Jain and Anil Kumar Pillai (PW11) were in the office, A4 asked him as to whether everything was alright. PW15 observed that A4 was exceedingly polite on that day. 15 minutes thereafter two boys entered the office of Jains with pistols in their hands. One of the two persons had caught hold of the watchman Vishnu from his neck and the other was waiting outside the gate of the office. The persons who had pistols in their hands and had entered the office inquired, "who is Pradeep?". When Pradeep Jain replied that he was Pradeep Jain, both the aforesaid persons showered bullets on him. They also fired at Sunil Jain (PW15) and went away. During investigation the aforesaid two persons have been identified to be Rajesh Igwe (A10) and Sunil Nair (A12). As already noticed, A10 has died in an encounter with the police on 27.11.1995 and Sunil Nair (A12) is absconding. The person who stood outside the cabin of the deceased has been identified to be Subhash Bind (A5). After the shots had been fired at and the accused walked away, the witnesses found both the brothers in the pool of blood. Anil Kumar Pillai (PW11) thereafter rang the Police Control Room from the cabin of the deceased and informed about the incident. Ashok Jain (PW45) who was in the bungalow upstairs also reached on the spot. PW11, PW15, PW45 and Watchman Vishnu put Pradeep Jain in the car and took him to the Cooper Hospital where Pradeep Jain was declared brought dead. However, Sunil Jain, injured was admitted in the hospital as Indoor Patient.

After registration of the case and during investigation, after their arrest, A5 and A6, made confessional statements which were recorded by the Deputy Commissioner of Police on 21st August, 1995 and

28th August, 1995 in exercise of powers vested in him under Section 15 of TADA Act.

A4, while in custody of the police, made disclosure statements pointing out a number of communication centres from where he made telephone calls to Abu Salem on various occasions. Consequently, the police collected bills Exhibits 200, 203, 204, 205, 206 and 207 from those communication centres. Exhibit 200 indicated that a call was made on 7.3.1995 on telephone No.226670 of Dubai at about 5.35 p.m. On 12.4.1995 A4 pointed out certain other communication centres, in consequence of which Bills Exhibits 210, 211, 212 were collected.

Dr.Ashok Shinde who conducted the post mortem on the body of the deceased noticed in all 29 fire arm wounds of entry and exit altogether. In his post-mortem notes Exhibit 122, the Doctor stated that the cause of death was due to fire arm injuries. The injury certificate in respect of Sunil Jain (PW15) is Exhibit 124 which indicates that there a gun wound on the anterior and posterior aspect of the right arm.

After the framing of charges for the offences as noticed earlier, all the six accused persons, facing the trial, denied the charges and claimed to be tried. A1 admitted the geneological tree of the Yadavs and claimed that Koldongri property was not a joint family property of Yadav Brothers, namely, Garib, Kallu, Ballu and Jayanandan. According to him the property belonged to Ballu Yadav alone during his lifetime and after his death had devolved upon his sons, namely, Ramdhar, Ramkeval and Ramroop. He denied of having seen the draft documents in favour of A3. He admitted to have seen some documents executed in favour of Kamla Constructions, such as Agreement Exhibit 50, copy of the conveyance executed by Bhola Yadav, Exhibit 56 and copy of the conveyance executed by Laltaprasad Exhibit 58. He also submitted that copies of the proceedings in the City Civil Court being Suit No.260 of 1987 were shown to him. He denied his knowledge about other documents allegedly executed by Yadavs in favour of Kamla Constructions. He admitted that Anand Bhat (PW14) had agreed to pay Rs.5 lakhs to A3. He admitted the preparation of drafts of Exhibits 76 and 77. He also admitted that a cheque of Rs.45 lakhs was deposited with him by Wadia Gandhi & Company. He denied of having any contact with Dawood Ibrahim whom he described as notorious underworld don responsible for continuing with criminal activities in the city of Bombay through his hirelings. He also knew that Anees Ibrahim, the brother of Dawood Ibrahim and Abu Salem (A9) were helping Dawood in collecting money by extortion through their hirelings. He admitted the holding of six meetings but denied that A4 had ever attended any meeting.

A2 admitted that Kamla Constructions had purchased some property out of Koldongri property but denied his knowledge about the area of that property. He admitted of having attended the meetings with Bharat Shah (A1) and Subedarsingh (A3) for negotiation of a deal with Labh Constructions. He denied that A3 insisted in any meeting for payment of Rs.50 lakhs as initial payment. According to him he had read in the newspapers about the activities of the notorious underworld don Dawood Ibrahim and had no knowledge about his associates. He admitted having attended only one meeting in the office of A1. He denied his contacts with A4 whom he claimed to have seen for the first time in police custody. He denied of having any knowledge about the occurrence of 7.3.1995 and submitted that he was falsely implicated.

A3 also admitted the geneological tree of the Yadav Family and claimed that Koldongri property was not the joint family property of the four Yadav Brothers. He claimed that all the documents referable to him Exhibits 107, 108, 109, 110, 111, 112, 113, 114, 116, 131 and 138 were the genuine documents. He claimed his interest in the property as of right and not on the basis of fake documents. He admitted the fact of Kamla Constructions having purchased the portion of the property marked "A" in Exhibit 49 and construction of two buildings thereon. He denied of having knowledge about the documents executed by Yadav Brothers in favour of Kamla Constructions. He admitted the receipt of Rs.5 lakhs from Haridas & Company of A1. He

also admitted that the draft of documents Exhibits 76 and 77 were prepared by A1. He denied of having any knowledge about the activities of underworld don Dawood Ibrahim and his aides. He denied of having ever visited the office of Kamla Constructions. According to him Ashok Jain and Rakesh Jain had come to his shop and from there they took him to the office of A1 where they handed over some documents to the said accused. No threat is stated to have been given to Jain Brothers in the office of A1.

A4 denied to have threatened the Jain Brothers any time either on phone or in any meeting held in the office of A1. He denied of having telephoned the Bridgekamal Bungalow on 7.3.1995. He had no knowledge about the seizure of weapons from A5 and A6. According to him he is not concerned with the crime and had unnecessarily been involved in the crime.

A5 Subhash Bind and A6 Shekhar Kadam denied of having any knowledge about the Koldongri property. They did not have any knowledge about the meetings held in the office of Wadia Gandhi & Company or Haridas & Company. They claimed that they had no knowledge about the happenings of Kamla Constructions on 7.3.1995. They denied the seizure of any weapon from them. They also denied the confessional statements made before Kausha K. Pathak (PW38). They however, admitted that they were produced before Arundhati A. Walawalkar (PW44), Metropolitan Magistrate on 28th August, 1995 but submitted that they have no knowledge of envelopes containing their confessional statements. They stated that PW44 did not question them about the voluntary character of the confessional statements. As regards the Identification Parade, A5 submitted that in the Parade he was identified by one person about whom he complained to the SEM that the said person had accompanied PSI Buddha in the past to the office of Crime Branch at Bandra where he was shown to him.

To prove its case, the prosecution relied upon oral testimony of Narendra Gurudas (PW1), Abdul Jabbar Mohammad (PW2), Naim Baig, (PW3), Sk.Naseeruddin (PW4), Jameel Ismail (PW5), Nilesh Mukund Lal (PW6), Rajendra P. Barde (PW7), Arvind B. Dave (PW8), Manohar Narayan Bane (PW9), Jayantilal Devichand Gundecha (PW10), Anil Kumar R. Pillai (PW11), Abdul K. Sheikh (PW12), Suresh Kumar B. Jain (PW13), Anand S. Bhatt (PW14), Sunil Kumar B. Jain (PW15), Chandravadan B. Shastri (PW16), Jayprakash J. Mangatani (PW17), Bharatbhai C. Shah (PW18), Suresh P. Bhole (PW19), Shriniwas R. Naik (PW20), Sadanand r. Valvalker (PW21), Avinash Chandra S. Dube (PW22), Rahul P. Ambegaokar (PW23), Janardhan R. Kandke (PW24), Dr.Ashok G. Shinde (PW25), Dr.Prashant V. Patil (PW26), Arvind A. Tamhane (PW27), Lalita prasad J. Yadav (PW28), Subhash Chand R. Yadav (PW29), Kirti M. Shrivastava (PW30), Ramkeval B. Yadav (PW31), Baijnath Kallu Yadav (PW32), Jyoti Pradeep Jain (PW33), Ramashankar R. Yadav (PW34), Ramroop B. Yadav (PW35), H.C. Waman J. Bagul (PW36), PSI Satish M. Gadhe (PW37), DCP Kausha K. Pathak (PW38), Suhel M.S. Buddha (PW39), Jayant K. Kher (PW40), SEM Satyaprakash Sarda (PW41), H.C. Rajaram S. Patil (PW42), API Yeshwant R. Nerkar (PW43), Arundhati A. Walawalkar (PW44), Ashok Jain (PW45), PI Jadhav (PW46), Vishwajit Bhusane (PW47), ACP Anil Talade (PW48), Jt.Commissioner of Police (PW49), besides hundreds of documents which were legally proved and exhibited at the trial. Prosecution also relied upon confessional statements of Subhash Bind A5 and Sekhar Kadam A6.

A5 and A6 produced four witnesses in their defence. Namdeo (DW) is the father of A6 who has stated that on 3.7.1995 at about 3.30 a.m. the DCM officers of the CID entered in his house and took away A6 in a white Ambassador Car telling that the said accused will be released in the morning after his elder son returns. Ramjeevan Yadav (DW2) stated that on 3.7.1995 at about 8.00 a.m. A6 along with some officers came to the house of A5. They had tethered the hands of A5 by rope and took him away in the car. Anil Kumar Singh (DW4) who is a Press Reporter for Times of India stated about a press conference which was addressed by Joint Commissioner of Police Shri R.S. Sharma. He proved the report Exhibit 271 which was published in Times of India on 4.7.1995. Hewmant (DW5) stated that he had taken the photograph Exhibit 271 which was

published in the Times of India dated 4.7.1995.

After discussing the prosecution evidence in detail, the trial court held that the following circumstances had been proved by the prosecution:

(1) The Koldongri property is a substantially big land which will fetch the value of much more than Rs.10 crores.

(2) The accused No.3 Subhedarsingh Yadav on 30.9.80 prepared the fake documents, namely, Exhibits 107, 108, 109, 110, 111, 112, 113, 114, 116, 131 and 138.

(3) Accused No.3 Subhedarsingh is closely connected with accused No.2 Rajan Fernandes in the sense that through Rajan Fernandes alone, he approached PW16 Chandravadan Shastri and thereafter, the link was established with Lab Constructions.

(4) Accused No.3 Subhedarsingh is also having connection with accused No.4 Shaukatali. In the meeting at Rizvi Park which took place in November, 1992, he was present alongwith the close associate Abu Salem and Riyaz Siddiqui.

(5) Accused No.1 Bharat Raghani cannot be said to be a stranger to the criminals from Dubai in the sense that he had the occasion to meet Lalit Dholakia and Riyaz Siddique at Dubai on or about 22.4.92 (the passport at Ex.209 states that he lived in Dubai in the period between 22.4.92 to 24.4.92).

(6) Accused No.4 Shaukatali visited the office of Kamla Constructions from time to time from September 1994 onwards and forced the Jain brothers to attend the meetings at the office of Bharat Raghani by posing that the purchaser party was a big party. They had links with the underworld and they should give up their share in the property.

(7) The contacts were regularly maintained from various communication centres by telephoning Dubai on T.Nos.226670 and 242939.

(8) In the meetings which were held in the office of accused No.1 Bharat Raghani under his very nose, accused No.3 Subedarsingh and accused No.4 Shaukatali threatened the Jain Brothers asking them to sign the documents.

(9) The women folk in the house of Jain Brothers were threatened on phone and the caller used to tell sometimes that he was Shaukatali and sometimes that he was Bharat Raghani and they were speaking from the office of Bharat Raghani.

(10) Accused No.4 Shaukatali about 8-10 days prior to the date of offence asked PW12 Abdul Kadir Shaikh, that he would advise his friend Pradeep Jain that "Pradeep Jain balbacchewala aadmi hai, usne gali Diya hai, usko bolo mafi maang lo, baat khatam ho jayegi." These words he had uttered after telephoning the witness that Pradeep Jain had abused Abu Salem. Accused No.3, a day or two thereafter, again inquired with this witness as to whether he had spoken about the same to Pradeep Jain. The witness avoided to tell the truth telling that he did not meet Pradeep Jain and he should not talk on that matter again to him. Still a day or two thereafter, Shaukatali telephoned him and inquired with him as to whether he had any discussions with Pradeep Jain and then he told him that he should not contact him again on that count and saying so, he disconnected the phone.

(11) On 27.2.95, as is seen from the statement of PW30 Kirti Shrivastav, accused No.4 Shaukatali and one other person were seen talking Pradeep Jain and in that Pradeep Jain told accused No.4 Shaukatali "Mai who sab nahi Janata, mere to film business hai, aap log mere piche kyon pade hai?" and later on, Shaukatali said to Pradeep Jain while going that "Pradeepbhai Sambhalke rahena baadme muze bolana mat."

(12) Accused No.4 Shaukatali telephone PW15 Jain about 15-20 minutes prior to the incident on 7.3.95 in the office and

inquired with him "sab kuch tik hai kya"? He was exceedingly polite for the first time on that day. He also questioned as to who all were present in the office and when the witness replied that he himself Pradeep Jain and Anil Kumar were there, then he made the query, "Sab kuch tik hai kya?"

(13) Accused No.4 on that day, at about midnight went to the house of PW9 Manohar Bane and telling that he will phone up his wife and return soon, went out and came back and slept at his place.

(14) On the next day, after reading the news item at the Churchgate station, he went to the DCP, DCB CID office and surrendered before the police. This circumstance of accused No.4 Shaukatali surrendering himself to the police was submitted to be a circumstance in favour of the accused by Shri Pashbola. There appears to be some substance in what Shri Pasbola says. But at the same time, the human mind has got unfathomable depth and if accused No.4 Shaukatali felt that the investigation is likely to lay a hand on him, he may think of reporting to the police on his own and create a circumstance in his favour."

The trial court thereafter posed a question to itself: "If all these circumstances are taken up together do they lead us to say that accused Nos.1 to 4 had conspired to commit the murder of Pradeep Jain and attempt the murder of PW15 Sunil Jain? Are these circumstances in any way sufficient to say that accused Nos.1 to 4 contacted Abu Salem (A9) and managed the contract killing"? After negating the voluntary nature of confessions and conceding a doubt in establishment of contacts at Dubai, the trial court concluded:

"By excluding the evidence in the form of the telephone bills, then what remains in the case is that accused Nos.1 to 4 threatened the Jain Brothers and exerted unusual pressure on them to come to the terms and to sign the documents. This circumstance coupled with the previous and subsequent conduct of accused No.3 Shaukatali may appear to be a very strong circumstance, but does this circumstance leads us for recording a finding of proof of the conspiracy to kill Pradeep Jain or to attempt to kill Sunil Jain. thus looking to all these circumstances, it appears to the judicial mind that these circumstances fall short in concluding that there existed a conspiracy to kill Pradeep Jain and attempt to kill PW15 Sunil Jain".

The Court further held:

"Had the witnesses of all the communication centres also identified the accused telling that they had visited their communication centres and they had contacted on the particular number at Dubai, then in that event, this would have been an additional circumstance against the accused. Then in that event, this would have been an additional circumstance against the accused. the confessional statements had they been believed by the court, would have been sufficient to hold that the particular number was used for contacting Abu Salem at Dubai."

It was found that prosecution had created a suspicion in the mind of the court about the probability of A1, A2 and A3 managing through A4 to get in touch with Abu Salem A9 who ordered the killing but observing that suspicion, however strong cannot take the place of proof, the trial court concluded for giving the benefit of doubt to the accused vide the judgment impugned in this appeal filed under Section 19 of the

Constitution of India.

We have heard the learned counsel appearing for the parties at length and the appeal being a statutory appeal have critically examined the evidence of the prosecution witnesses, the effect of the documents produced and proved and the legality of the confessional statements made by A5 and A6.

It is not disputed that epicenter of all the prosecution evidence are the confessional statements of A5 and A6 recorded by DCP Kaushal K. Pathak (PW38). The confessional statement of A5 Exhibit 147 (pages 1720-1722, Vol.VII of the paperbook), Exhibit 149 (Pages 1726-1732, Vol.VII of the paperbook), Exhibit 148 (pages 1723-1725, Vol.VII of the paperbook), Exhibit 150 (pages 1733-1739, Vol.VII of the paperbook) were recorded in exercise of the powers conferred upon the Police Officer under Section 15 of the TADA Act. The confessional statements were not relied upon and excluded from the evidence by the trial court on the grounds that (i) the Magistrate, before whom the accused were directed to be produced along with original statements of confession in terms of Rule 15(5) of the rules framed under the TADA Act (hereinafter referred to as "TADA Rules"), had failed to inquire from the accused as to whether they had made voluntary statements before the police officer and to record the replies of the accused; (ii) that as PW48 had received a call on 27th August, 1995 to carry the confessional statements to the Magistrate, its recording on 28th August, 1995 was highly improbable; and (iii) that there were interpolations in the original confessional statements recorded by PW38.

Before dealing with the ground which prevailed upon Designated Trial Judge to exclude the confessional statements, it is necessary to note some of the observations of the trial Judge regarding the confessional statements. In para 76 of his judgment (page 214 of the Paperbook) after referring to Exhibits 147 to 150, the Judge observed: "By looking to the questions, it appears that by putting certain questions to these accused the officer did ascertain that the accused persons very voluntarily confessing the guilt....."

Despite noticing the omission of the certificate, below the confessional statements as per requirement of Rule 15(3) of the TADA Rules and relying upon the judgment of this Court in *Mr. Sharafathussain Abdulrahman Shaikh & Ors. vs. State of Gujarat & Anr.* [1996 (4) Crimes 244 (SC)] the Court held that "absence of the certificate below the confessional statement will not make the confessional statement ipso facto a piece of paper worth throwing in the dustbin. The officer can very well appear in the witness box and satisfy the court that the confessional statement was voluntarily made....". The trial court further held that "looking to the statement of DSP it appears that the confessional statements have been made voluntarily by the accused".

Rule 15 of the TADA Rules provide:

"15. Recording of confession made to police officers. --(1) A confession made by a person before a police officer and recorded by such police officer under Section 15 of the Act shall invariably be recorded in the language in which such confession is made and if that is not practicable, in the language used by such police officer for official purposes or in the language of the Designated Court and it shall form part of the record.

(2) The confession so recorded shall be shown, read or played back to the person concerned and if he does not understand the language in which it is recorded, it shall be interpreted to him in a language which he understands and he shall be at liberty to explain or add to his confession.

(3) The confession shall, if it is in writing, be--

(a) signed by the person who makes the confession; and

(b) by the police officer who shall also certify under his own hand that such confession was taken in his presence and recorded by him and that the record contains a full and true account of the confession made by the person and such police officer shall make a memorandum at the end of the confession to the following effect:

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing and recorded by me and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

Sd/- Police Officer."

(4) Where the confession is recorded on any mechanical device, the memorandum referred to in sub-rule (3) in so far as it is applicable and a declaration made by the person making the confession that the said confession recorded on the mechanical device has been correctly recorded in his presence shall also be recorded in the mechanical device at the end of the confession.

(5) Every confession recorded under the said Section 15 shall be sent forthwith to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate having jurisdiction over the area in which such confession has been recorded and such Magistrate shall forward the recorded confession so received to the Designated Court which may take cognizance of the offence."

Sub-rule (5) of Rule 15 of the TADA Rules provides that the confession recorded under Section 15 of the TADA Act shall be sent forthwith to the Chief Metropolitan magistrate or the Chief Judicial Magistrate having jurisdiction over the area in which such confession has been recorded and such Magistrate shall forward the record of confession so received to the Designated Court which may take cognizance of the offence. Rule 15 does not oblige such Magistrate either to open the envelop containing the confessional statement recorded by the police officer or to satisfy himself regarding the voluntary nature of the confession. The Magistrate, at the most, can record the statement of the accused if made regarding alleged harassment, torture or the like. If the Magistrate, referred to in Sub-rule (5) of Rule 15 has to ascertain the voluntary nature of the confessional statement, the purpose of Section 15 authorising a police officer to record the confessional statement shall stand frustrated. It was, therefore, not correct on the part of the Designated Judge to hold, "it was obligatory on the part of the Magistrate to question the accused as to whether they had made the said statements voluntarily or otherwise and that ought to have been formed as a part of the record of the confessional statements which were sent to her". The Designated Judge has also erred in holding that the Magistrate had not discharged the duties which were cast on her properly. The observations, "Had she recorded a memorandum below the confessional statements that she had questioned the accused about the averments in the said statements and she would the said confessional statements to be voluntary and correct, then in that event, the confessional statements would have inspired the confidence of the court to believe that they are free from any of the

influences. The Magistrate is not expected to take the position of a superior postman in the sense, receive the confessional statements and forward the same to the TADA Court by putting it in another envelope. The moment she receives the confessional statement, it should occur to her as to why they are sent to her? What is she required to do with them? Had the Magistrate been meticulous, it would have occurred to her that she is required to question the accused as to whether they have really confessed in the manner recorded in the statement and in that event, in normal course, she would not have forgotten to make a memorandum below the confessional statements. Her writing to this effect below the confessional statements would have been of great assistance to the cause of justice" are, therefore, uncalled for.

In *Kartar Singh v. State of Punjab* [1994 (3) scc 569] a Constitution Bench of this Court laid down the following guidelines to ensure that the confession obtained in the pre-indictment interrogation by a police officer was not tainted with any vice but was in the strict conformity with the well recognised and established aesthetic principles of fundamental fairness:

"(1) The confession should be recorded in a free atmosphere in the same language in which the person is examined and as narrated by him;

(2) The person from whom a confession has been recorded under Section 15(1) of the Act, should be produced before the Chief Metropolitan Magistrate or the Chief Judicial Magistrate to whom the confession is required to be sent under Rule 15(5) along with the original statement of confession, written or recorded on mechanical device without unreasonable delay;

(3) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate should scrupulously record the statement, if any, made by the accused so produced and get his signature and in case of any complaint of torture, the person should be directed to be produced for medical examination before a Medical Officer not lower in rank than of an Assistant Civil Surgeon;

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no police officer below the rank of an Assistant Commissioner of Police in the Metropolitan cities and elsewhere of a Deputy Superintendent of Police or a police officer of equivalent rank, should investigate any offence punishable under this Act of 1987.

This is necessary in view of the drastic provisions of this Act. More so when the Prevention of Corruption Act, 1988 under Section 17 and the Immoral Traffic Act, 1956 under Section 13, authorise only a police officer of a specified rank to investigate the offences under those specified Acts.

(5) The police officer if he is seeking the custody of any person for pre-indictment or pre-trial interrogation from the judicial custody, must file an affidavit sworn by him explaining the reason not only for such custody but also for the delay, if any, in seeking the police custody;

(6) In case, the person, taken for interrogation, on receipt of the statutory warning that he is not bound to make a confession and that if he does so, the said statement may be used against him as evidence, asserts his right to silence, the police officer must respect his right of assertion without making any compulsion to give statement of disclosure;"

Guideline (3) mandated the concerned Magistrate to scrupulously record the statement if any made by the accused so produced and get his signature. In the event of any complaint of torture, the person should be directed to be produced for medical examination before a medical officer not lower in rank than the Assistant Civil Surgeon. (Emphasis supplied). No duty is cast upon concerned Magistrate to record the confessional statement afresh or himself/herself ascertain the nature of and the circumstances under which the confessional statement was made unless a complaint is made by the accused regarding torture, etc.

Smt.Arundhati A. Walawalkar (PW44) in her statement recorded by the trial court on 17.4.1997 (page 1910, Vol.VII of the paperbook) stated that A5 and A6 were brought to her for remand along with two separate envelopes allegedly consisting of their confessional statements. She deposed that it was the usual practice to put question to the accused when they are produced for remand asking them if they had any grievance. If the accused made any grievance, the same used to be made a part of the remand order. She further stated, "in this case the accused did not make any such grievance and, therefore, the remand report does not mention that they have got any grievance..... I was aware that the confessional statements are to be sent to the Designated Court after verifying from the accd. whether the confessional statements are voluntary or it was extracted by using pressure or coercion. The Magistrate's task was to ascertain this fact and accordingly I did so and send the same to the Designated court".

Therefore, in view of the provisions as contained in Section 15 of the TADA Act, Rule 15 of the TADA Rules and law laid down by this Court in Kartar Singh's case (supra), the Designated Judge committed a mistake of law in not relying upon the confession on the ground that PW44 had not given a separate certificate and had not herself inquired about the voluntary nature of the confessional statement.

Similarly, referring to the investigating officer ACP Anil Talpade (PW48), the Designated Court wrongly held that the confessional statements could not have been made on 28th August, 1995 as the said witness had stated to have received telephone message from DCP on 27th August, 1995 directing him that the arrangements should be made for carrying the packets to Metropolitan Magistrate containing the confessional statements recorded by him. The trial Court observed: "If the confessional statements were recorded on 28.8.95, how could the DCP telephone the ACP to collect the packets containing the said confessional statements on 27.8.95 in the evening?"

It has come in the evidence of PW38 that the statements of the accused were recorded on 21st August, 1995 and on 28th August, 1995. On the first date, i.e. 21st August, 1995 PW38 had put certain questions to the accused to ascertain as to whether they were making the voluntary statement or such statement was being made under the influence of the police. Despite the fact that the accused persons told PW38 that they were making statements of their own free will, were not under the influence of the police, had not been threatened or lured to make the confessional statements nor assured to be released after making the confessional statements and not bound to make the statement, the accused had replied that they wanted to admit everything, PW38 informed the accused, "I will not record your statement inspite of your willingness to do so. You are being given time till 28th August, 1995 to think over it. Do you understand this??. the DCP then recorded that accused were being given time till 28th August, 1995 to finally make their mind. He recorded: "I told to produce the accused again on 28.8.1995". It is, therefore, clear that PW38 knew that the accused had to make a statement on 28th August, 1995 whether confessing the crime or retracting from making the confessional statement. In order to ensure that the statements to be recorded on 28th August, 1995 are immediately sent to the concerned Magistrate, PW38 appears to have

directed on 27th August, 1995 in the evening to ACP Anil Talpade (PW48) that arrangements should be made on the next date for carrying the packets containing the confessional statements to the Metropolitan Magistrate. In view of the statement of PW38 it cannot be said that the confessional statements were not made on 28th August, 1995 particularly when the accused had not taken a stand that any statements of theirs was recorded on 27th August, 1995. The learned trial court rejected the confessional statements of A5 and A6 by adopting a hypertechnical approach on the basis of its imaginative thoughts without having regard to the actual evidence led in the case particularly ignoring the statement of PW48 who, in his statement recorded on 5.5.1998, had specifically stated:

"My office is housed on the first floor of Santacruz P.Stn. On 28.8.95 at about 10/10.30 a.m. I received the telephone from the DCP Zone-X telling that the confessional statements were recorded and I should make arrangements to collect the sealed packets and to take the accused in the custody. Accordingly I directed PI Bhalwankar to do the needful. In the evening PI Bhalwankar met me and told me that he had taken the sealed packets and handed them over to the 44th Court Andheri. He also told me that the accused were also produced before the court and the Crime Branch Officer took the accused in their custody from the Court."

The other ground for rejecting the confessional statement, as noticed by the Designated Judge, is alleged interpolations in confessional statements. It may be noticed that the confessional statements were recorded in Marathi language in Devnagri script. The statements were typed wherein some names and dates have been shown in bold letters. The use of bold letters does not make the confession doubtful justifying the conclusion that there had been interpolations. The bold letters are intended to highlight the importance of the names and words. The bold letters in darker ink refer to the name of "Kushal Kumar Pathak, IPS and dates of 21st August, 1995 and 28th August, 1995". Referring to such bold letters in darker ink and some space in typing, the trial court held, "great room of doubt is created in the mind of the court that the confessional statements Exhibits 147 and 148 are ante dated statements". To a question: "You referred to the writing reading 'Kaushalkumar Pathak' and writing reading 'Bhalwankar A.N.' and the writing reading '21' and the writing '11.45' and the writing '923/Upa' and the writing '8.8.1995' and the writing 'Vilas Madhukar Dabhokar' and the writing 'Bhalwankar A.N.' in Ex.147 on page one and the writing '28.8.95' on page No.2 and the writing '28.8.95' and '28.8.95' on page 3 and the writing on the same line in Ex.148 and the further writing '28.8.95' '21' on page 1 of Ex.149 and similar writing on Ex.150 and tell the court as to whether those appears to be the blanks filled up subsequently?", the witness (PW38) replied that there were no blanks filled in, but the typist might have pressed the fingers hard so that those writings appeared a bit darker. The witness categorically stated that: "It is not true to say that the confessional statements were already typed by leaving the above stated places blank and subsequently my office did the job of only filling the blanks under my directions and in reality none of the accused have confessed the guilt before me as alleged by me and that it is only a record created to suit the purpose of the prosecution. I deny the averments that the aforesaid figures are not in alignment with the other writings. It is not true to say that the said aforesaid words and figures are not from the same typewriter on which the other matters were typed and that the said interpolation has been carried out by using a different typewriter". In view of specific denial and there being no evidence to the contrary, the trial court committed a mistake of law in not relying upon the confessional statements of A5 and A6 which were otherwise held by him to be voluntarily made.

Appearing for the aforesaid accused person Mr.Bhaskar Y. Kulkarni

and Mr.R.C. Kohli contended that as the mandate of Rule 15(3) of the TADA Rules has not been complied with because PW38 had not made a memorandum at the end of the confession in the form specified therein, the confessional statements cannot be held admissible in evidence and relied upon as a piece of evidence against the accused persons. It is true that PW38 has not recorded the memorandum as desired by Sub-rule (3) of Rule 15 of the TADA Rules but it is equally true that except for the aforesaid memorandum, PW38 has complied with all the mandatory provisions of Section 15 of the TADA Act. He has also proved to have followed the guidelines laid down by this Court in Kartar Singh's case (supra). From the questions put by PW38 to the accused, the trial court was satisfied and we do not have any hesitation to hold that the confessional statements Exhibits 147 to 150, were made by A5 and A6 voluntarily, without any threat, inducement or pressure and strictly in accordance with the mandate of the TADA Act as interpreted by this Court from time to time.

The reliance of the learned counsel on Sharafathussain's case(supra) is misplaced, as rightly pointed out by the trial court. In that case, admittedly, in none of the four confessions any memorandum was appended and PW6 who recorded the confessional statement, when appeared in the Court did not testify about his such satisfaction or belief. That is not the position in the present case where PW38 has categorically stated that "I was satisfied that he was voluntarily making the confessional statement. Still I give him time to think over the matter. I also warned him that he will be called again on 28th August, 1995 for recording the confessional statement.... From the question I had put and the replies which he had given, I was convinced that the accused is giving the statement voluntarily."

The confessional statements of A5 and A6, Exhibits 147 to 150 are, therefore, held to have been voluntarily made and legally recorded which are admissible in evidence and can be used against all or some of the accused in the light of other evidence produced in the case.

In his confessional statement Subhash Bind (A5) had stated that at the time of murder of Pradeep Jain, he along with Rajesh Igwe (A10), Sunil Nair (A11), Udai Pawar (A12), Sekhar Kadam (A6) and Sanjay Kadam (A13) were present at the place of occurrence. He was friendly with Udai Pawar (A12), Sekhar Kadam(A13), Rajesh Igwe (A10), Sunil Nair (A11), and Sanjay Kadam (A13). Udai Pawar (A12) was working in Rubi Mills, Dadar but that work did not soothe his criminal nature. He along with Sekhar Kadam (A6) and Sanjay Kadam (A13) were earlier arrested in 1991-92 in connection with threatening and murdering at Dongriwali in which he was released on bail. Since the accused was jobless and could not get a job, he was persuaded by accused Sekhar Kadam and Sanjay Kadam to work with them for which he would be highly rewarded. When asked about the nature of the work, he was told that he would have to do fighting, kidnapping and murder, etc. He came to know the connections of the other accused persons with Dawood Ibrahim. Under the directions of Udai Pawar (A12), he and Sunil Nair (A11) had opened firing at the owner of Hamco Steel Centre, Andheri on 31st October, 1994. On 7.3.1995 the said accused Rajesh Igwe (A10), Sunil Nair (A11), Udai Pawar (A12), Sekhar Kadam (A6) and Sanjay Kadam (A13) had all fired at Pradeep Jain. He along with others had also kidnapped one Harish Bhatia of Kandiwoili. Udai Pawar was having contacts with Abu Salem (A9) and Anees Ibrahim of Dawood Ibrahim gang in Dubai over the phone where he used to call frequently. The accused used to get Rs.500 to Rs.700 per week besides Rs.5,000/- to 10,000/- after every firing. He had learnt to handle revolver, pistol loading, etc. when he was in the Army attachment camp of NCC. Rajesh Igwe (A10), after calling on telephone numbers 009714226670 and 009714242939 at Dubai told him that "Bhai" had ordered to murder Pradeep Jain. By "Bhai", he meant Abu Salem (A9). He was further told that Rajesh Igwe (A10) and Suni Nair (A11) would stand in front of Mithibai College at a time when a person would come and show the house of Pradeep Jain. Rajesh Igwe (A10) had told Sekhar Kadam (A6) that Pradeep Jain was causing obstruction in a land transaction whereas his other two brothers were

ready and when Bhai (A9) contacted Pradeep Jain, he talked to him rudely which invited the wrath of Bhai to order his murder. They had kept the watch on the house of Pradeep Jain for one week. Rajesh Igwe (A10) had made a plan to attack Pradeep Jain. As per plan Rajesh Igwe (A10) and Sunil Nair (A11) were to inquire from the watchman of the building as to whether Pradeep Jain was in the office or not. The moment watchman said yes, both of them were to take him to the office at the point of revolver and Udai Pawar and Sekhar Kadam were supposed to be on the main gate to ensure that none else entered the premises. Sanjay Kadam was to stand on the road to keep a watch outside. On 7.3.1995 in the evening Subhash Bind (A5), along with Rajesh Igwe (A10), Sunil Nair (A11), Udai Pawar (A12), Sekhar Kadam (A6) and Sanjay Kadam (A13) assembled on the ground behind the house of Sunil Nair at Motilal Nagar No.1. He took revolver .38. Sekhar Kadam had a small pistol of 7.65 bore whereas Udai Pawar had a small pistol of .32 bore. A5 had brought one 9 mm revolver and .38 bore revolver in a plastic bag. 9 mm pistol was taken by Rajesh Igwe and .38 bore revolver was taken by Sunil Nair. All the weapons were filled with live cartridges. After the distribution of weapons behind the house of Sunil Nair, all the aforesaid accused persons travelled by bus route No.252 to the house of Pradeep Jain at about 1930 hours. They stood at some distance in front of the bungalow and kept a watch. At about 8 or 8.15 p.m., the watchman of Pradeep Jain came out with the kids. While he was going in, the small kids ran inside. When watchman was walking towards the gate, Rajesh Igwe (A10) caught hold of him and took him inside with the assistance of Sunil Nair (A11). Sekhar Kadam and Udai Pawar closed the gates. Rajesh Igwe (A10) and Sekhar Kadam (A6) entered through the glass door along with the watchman and A5 stood outside the glass door. He heard the sound of firing whereafter Rajesh Igwe and Sunil Nair and the other accused came out and starting running. They came to the Rickshaw stand from where they left for Andheri. He was paid Rs.10,000/- for this attack by Rajesh Igwe (A10). He confessed that he along with Shashikant Yadav had brought the weapons from Bhendi Bazar. He gave the details of how the weapons were earlier supplied to them. He further confessed that whenever he needed money, he used to contact Bhai, i.e. A9 over the telephone who would tell him to go to Jogeshwari or Bandra, Mahim, Haji Ali, Bhendi Bazar, etc. where a person used to come and give him the requisite money.

To the same effect is the confessional statement of A6.

Both the accused persons have not disclosed about their connections with A1, A2, A3 and A4. There is no other evidence on record to show that any of the accused, namely, A7, A8, A9, A12, A13 were known or had met A1, A2 and A3 at any point of time before 7.3.1995. The cause of murder, as disclosed in confessional statements, is refusal of Pradeep Jain to part with the property and alleged misbehaviour of talking rudely to Abu Salem (A9). In the absence of any evidence of A1, A2 and A3 having secured the services of A9, it cannot be said beyond all reasonable doubts that they were parties to the conspiracy for the crime of murder of Pradeep Jain or for the commission of the offences under TADA Act. A3 is shown to have harassed and coerced the Jain Brothers through A4 to sign the release deeds with respect to property (B) in their possession. To connect A1 to A4 with the other accused persons for the commission of main offence, the prosecution has relied upon an important circumstance, namely, the threats given by A4 to Jain brothers in the office of A1. If the aforesaid circumstance of giving threats of being eliminated in case they did not sign the release deeds is accepted, it may be possible to hold that A1 to A4 are also involved in the conspiracy with the other accused, the object of which was to cause the death of Pradeep Jain and injuries to Sunil Jain (PW15).

Shri Kotwal, learned Senior counsel appearing for A1 drew our attention to the statement of Sunil Jain (PW15) wherein he had stated "I do not remember if I stated before the police that Shaukatali visited our office 15 times before Diwali". He had stated in his examination-in-chief that in the fourth meeting held in the office of

A1 which was attened by the witnesses Ashok Jain, Pradeep Jain, A1, A2, A3, A4 and four-five other persons, the accused persons had threatened Jain Brothers that without signing the document they will not reach the downstairs alive. In cross-examination he reiterated that, "I had stated before the police that when we were sitting in the chair the persons on the side of the accused who were sitting on the other chairs at times got up and took the posture to indicate that they were likely to use force, Pradeep told Raghani then that you are a famous solicitor and such things should not happen in your office I gathered an impression that accd No.1 Raghani had gone through the documents still he did not open his mouth when other threatened us in the meeting, in that meeting they all threatened us that without signing the documents if we dare to go downstairs we will not go to downstairs, we told them that there were lots up of investors, they told us we should sign the documents". When confronted with the statement recorded under Section 161 of the Criminal Procedure Code, the witness stated "I cannot state the reason if it is not so written in my statement before the police". ACP Anil Talpade (PW48) who is investigating officer of the case and had recorded the statement under Section 161 Cr.P.C., in his cross-examination before the court submitted:

"PW15 Sunil Jain did not tell before police that accd. no.4 Shaukatali came to his office to tell that he should surrender his right in Koldongri property. PW15 Sunil Jain did not state before me that in the meeting of Diwali 94 he was told to attend the office of Bharat Raghani. PW15 Sunilkumar did not state before the police that his brother Suresh attended the first meeting. PW15 Sunil Jain did not state before me that his brother Pradeep Jain attended any meeting at the office of Raghani. PW15 Sunil Jain did not state before me that when they were sitting in the chair the persons on the side of the accd who were sitting on the other chair at times got up and took the posture to indicate that they were likely to use force, Pradeep told Raghani then that you are a famous solicitor and such things should not happened in your office, he gathered an impression that accd no. Raghani had gone through the documents still he did not open his mouth. When others threatened them in the meeting, in that meeting they all threatened them that without signing the documents if they dared to go downstairs they will not go downstairs."

In the light of the statement of PW48, it cannot be said that Sunil Jain (PW15) had made a statement with respect to the threats allegedly given by A4. Had it been true, such an important aspect of the case could not be lost sight of. Failure to mention such an important circumstance cannot be held to be merely an omission. Such an omission would amount to contradiction. The word "contradiction" is of a wide connotation which takes within its ambit all material omissions and under the circumstances of the case a court can decide whether there is one such omission as to amount contradiction. This Court in *Tahsildar Singh & Anr. v. State of U.P.* [AIR 1959 SC 1012] held: "'Contradict' according to the Oxford Dictionary means to affirm to the contrary. Section 145 of the Evidence Act indicates the manner in which contradiction is brought out. The cross-examination Counsel shall put the part or parts of the statement which affirms the contrary to what is stated in evidence. This indicates that there is something in writing which can be set against another statement made in evidence. If the statement before the police officer - in the sense we have indicated - and the statement in the evidence before the Court are so inconsistent or irreconcilable with each other that both of them cannot co-exist, it may be said that one contradicts the other.

It is broadly contended that a statement includes all omissions which are material and are such as a witness is expected to say in the normal course. This contention ignores the intention of the legislature expressed in S.162 of the Code and the nature of the non-evidentiary value of such a statement, except for the limited purpose of contradiction. Unrecorded statement is completely excluded. But recorded one is used for a specified purpose. The record of a statement, however, perfunctory, is assumed to give a sufficient guarantee to the correctness of the statement made, but if words not recorded are brought in by some fiction, the objection of the section would be defeated. By that process, if a part of a statement is recorded, what was not stated could go in on the sly in the name of contradiction, whereas if the entire statement was not recorded, it would be excluded. By doing so, we would be circumventing the section by ignoring the only safeguard imposed by the legislature, viz., that the statement should have been recorded."

It appears that after the death of his brother Sunil Jain (PW15), upon his belief, tried to implicate A1 to A3 in the case of murder of his brother. In the absence of any threat or any other circumstance indicating the intention of A1, A2 and A3 to kill any of the Jain Brothers, it would not be safe to hold them guilty of murder on such a shaky and unreliable evidence to that extent. It may further be noticed that no overt and covert act in this regard is attributed to A2. A1 is shown to have not observed the professional norms by calling the Jain Brothers in his office to facilitate the execution of release deeds in favour of his client A3. Such a course of conduct may be unprofessional but cannot be described to be criminal warranting a conviction under any provisions of the IPC or TADA. We are, therefore, satisfied that A1 and A2 were not involved in the commission of the crime for which they were charged or any other crime of lesser effect. There is no need of returning a finding against A4 who was also a broker and is stated to have died in a police encounter, unless his complicity is required for the purpose of determining the guilt of any other accused.

It is established by the prosecution that by the intended transaction of property deal in favour of Labh Constructions, the immediate beneficiary was A3 and ultimate beneficiary Labh Constructions. Subedarsingh A3 is proved to have forged documents Exhibits 107, 108, 109, 110, 111, 112, 113, 114, 116, 131 and 138 for the purposes of completing the sale with the Labh Constructions for which he procured the legal services of respondent No.1. He is also proved to have got the services of Shaukatali A4, a broker for completion of the deal. Even though there is no evidence that A3 contacted or knew any of the Accused Nos.A5 to A13, yet it has come on record that Shaukatali A4 helped him in the transaction. Disbelieving the portion of the statement relating to the threats given by the said accused to the Jain Brothers, the prosecution has placed on record sufficient evidence to show that Shaukatali A4 had been visiting the Jain Brothers and compelling them to complete the transaction by executing the release deeds in favour of A3. On appreciation of evidence, the trial court reached a conclusion that A3 was having connection with A4 who visited the office of Kamla Constructions from time to time from September, 1994 onwards and forced the Jain Brothers to attend the meetings at the office of Bharat Raghani (A1), the womenfolk in the house of Jain Brothers were threatened on phone and the caller used to tell sometimes that he was Shaukatali. A4 telephoned in the office of Jain Brothers 15-20 minutes prior to the incident and surrendered himself to the police after registration of the case. It is true that on the basis of such conclusions Subedarsingh (A3) cannot be held to be a party to the conspiracy of

killing Pradeep Jain or for the commission of other offences under the TADA Act but it is equally true that his involvement in the transaction having been proved needs the determination of the nature of offence committed by him.

Learned counsel appearing for respondent No.3 submitted that as his client has not been charged for any other minor offence, he cannot be convicted for the same. We are not impressed with such an arguments. Section 222 of the Code of Criminal Procedure provides:

"222. When offence proved included in offence charged. --

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

(3) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.

(4) Nothing in this section shall be deemed to authorise a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied."

Sub-section (2) of Section 222 of the Code provides that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of a minor offence, although he is not charged with it. This Court in *Shamnsaheb M. Multani v. State of Karnataka* [2001 (2) SCC 577] dealt with the scope of sub-section (2) of Section 222 of the Code and held:

"What is meant by a 'minor offence' for the purpose of Section 222 of the Code? Although the said expression is not defined in the Code it can be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. The two illustrations provided in the section would bring the above point home well. Only if the two offences are cognate offence, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-À-vis the other offence."

In *Lakhjit Singh v. State of Punjab* [1994 Supp. (1) SCC 173] this Court held that if the prosecution failed to establish the offence under Section 302 IPC which alone was included in the charge but if the offence under Section 306 IPC is made out in the evidence, it is permissible for the court to convict the accused for the latter offence. The only safeguard provided is that the alteration of the charge and conviction for a minor offence should not cause failure of justice to the accused person.

In this case the prosecution has alleged that for completing the transaction of selling the property to Labh Constructions, A3 procured the services of A4 who is shown to have put the Jain Brothers in fear of injury with the object of dishonestly inducing them to deliver their valuable property to Labh Constructions by execution of release deeds, which were for the immediate benefit of A3. In other words A3 was charged for the offence of murder by resorting to extortion. The offence of extortion is a lesser offence which, under the circumstances

of the case, was so connected with the main transaction that no failure of justice can be caused if A3 is convicted and sentenced for the said offence. The offence with which A3 was charged consisted of several particulars, the combination of some of those particulars constitute a complete minor offence of extortion. It cannot be disputed that the offence of extortion in the context of the facts of the case has all the ingredients connected with the major offence. Respondent No.3 was charged for an offence consisting of several particulars which the prosecution failed to prove so far as the major offence is concerned but succeeded in showing the commission of the minor offence punishable under Section 384 read with Section 34 IPC as it is proved that A3 intentionally put Jain Brothers in fear of injury and availing the services of A4 dishonestly induced them in fear to deliver their valuable property in favour of Labh Constructions with whom A3 had agreed to get the release deeds with respect to the property executed by Jain Brothers. A3 though not as a conspirator but sharing common intention with A4 committed the offence of extortion. We have, therefore, no hesitation to hold him guilty of offence of extortion, punishable under Section 384 read with Section 34 IPC.

Learned counsel appearing for A5 and A6 submitted that despite holding the confessional statements Exhibits 147 to 150 being admissible, their clients cannot be convicted and sentenced for the offences charged because the confessions have been retracted and there is no corroboration of their contents. There is no denial of the fact that the judicial confessions made are usually retracted. Retracted confessions are good confessions if held to have been made voluntarily and in accordance with the provisions of law, as A5 and A6 are proved to have made. Corroboration of the confessional statement is not a rule of law but a rule of prudence. Whether in a given case corroboration is sufficient would depend upon the facts and circumstances of that case. In order to sustain a conviction on the basis of a confessional statement, it is sufficient that there is its general corroboration. Dealing with the scope of Section 15 of the TADA Act and referring to its earlier judgments this Court in *S.N. Dube v. N.B. Bhoir & Ors.* [2000 (2) SCC 254] held that confession of the accused recorded under Section 15 of TADA Act is a substantive piece of evidence which can be used even against the co-accused if held to be inadmissible voluntarily and believable. Explaining the position of law the Court held:

"Section 15 of the TADA Act makes certain confessions made to police officers admissible in the trial of such persons or co-accused, abettor or conspirator for an offence under the Act or rules made thereunder. This Court considering its constitutionality in *Kartar Singh v. State of Punjab* [1994 (3) SCC 569] observed at (SCC p.680, para 253) that:

"having regard to the legal competence of the legislature to make the law prescribing a different mode of proof, the meaningful purpose and object of the legislation, the gravity of terrorism unleashed by the terrorists and disruptionists endangering not only the sovereignty and integrity of the country but also the normal life of the citizens, and the reluctance of even the victims as well as the public in coming forward, at the risk of their life, to give evidence."

and held that the impugned section cannot be said to be suffering from any vice of constitutionality. Section 15 is thus an important departure from the ordinary law and must receive that interpretation which would achieve the object of that provision and not frustrate or truncate it. Interpreting the said provision this Court in *State v. Nalini* [1999 (5) SCC 253] (popularly known as the Rajiv Gandhi murder case), has held that a confession recorded

under Section 15 of the TADA Act is to be considered as a substantive piece of evidence not only against the maker of it but also against its co-accused. There was a difference of opinion amongst the three learned judges who decided that case regarding the evidentiary value of such a confession against the co-accused if tried in the same case. Wadhwa, J. observed that what weight should be attached to such a confession is a matter of discretion of the court and as a matter of prudence the court may look for some corroboration before relying upon such confession against the co-accused. Quadri J, held that the rule of prudence would require that the court should examine the same with great care and it should not be relied upon unless it is corroborated generally by other evidence on record. Thomas, J. held that: (SCC p.309 para 99):

"Thus the established position which gained for a very long time is that while a confession is substantive evidence against its maker it cannot be used as substantive evidence against another person even if the latter is a co-accused, but it can be used as a piece of corroborative material to support other substantive evidence."

Relying upon the decision of this Court in Kalpnath Rai v. State [1997 (8) SCC 732] it was submitted by the learned counsel for the respondents that even a confession made admissible under Section 15 of the TADA Act can be used as against the co-accused only in the same manner and subject to the same conditions as stipulated under Section 30 of the Evidence Act. An observation to the same effect is to be found in para 75 of the judgment. In fact no such point fell for decision in that case and it appears to be a passing observation only. In view of the decision of this Court in Nalini Case the said observation can now be regarded as the correct position of law. The correct legal position is that a confession recorded under Section 15 of the TADA Act is a substantive piece of evidence and can be used against a co-accused also otherwise held to be admissible, voluntary and believable."

In that case also the trial Judge had held the confession inadmissible on the ground of having been recorded in breach of Rules 15(2) & (3) of the TADA Rules. In the facts and circumstances of that case the court held that:

"We fail to appreciate how any departure from the form or the words can adversely affect the object of the provision or the person making the confession so long as the court is able to conclude that the requirements have been substantially complied with. No public purpose is likely to be achieved by holding that the certificate and memorandum should be in the same form and also in the same terms as are to be found in Rule 15(3)(b). We fail to appreciate how the sanctity of the confession would get adversely affected merely because the certificate and the memorandum are not separately written but are mixed up or because different words conveying the same thing as is required are used by the recording officer. We hold that the trial court committed an error of law in holding that because the certificates and memorandums are not in the same form and words they must be regarded as inadmissible."

Looking at the record of the case including the testimony of

witnesses and the documents produced, we find sufficient general corroboration of the confessional statements made by A5 and A6. It is proved that they were associates of Dawood Ibrahim and Abu Salem (A9) and were continuously in touch with them on telephone for the purposes of getting directions and receiving remuneration. They were seen at and near the place of occurrence on 7.3.1995. They had brought weapons of offence and distributed to other accused. Recoveries of the weapons were made from them which were seized in the presence of witnesses as is evident from the Panchanamas. They were identified by the witnesses at the test identification parade. Their other associates in crime have either been killed or absconding. The cause which provoked Abu Salem (A9) to kill Pradeep Jain stands corroborated by the testimony of Jyoti Pradeep Jain (PW23), widow of the deceased. What more corroboration was required in such a case has not been pointed out by the learned counsel appearing for A5 and A6.

To weaken the case of the prosecution, learned counsel appearing for A5 and A6 relied upon the finding of the trial court holding that the recoveries made from the aforesaid accused persons were not proved. In reply to question No.7 A5 had stated that he had produced two .38 revolver, one 9 mm pistol and one AK 56 assault rifle and the cartridges which he had kept in his house and handed over to the police. The trial court found that as the weapons were seized from the person of the accused when they were on the road, there existed contradiction, making the recoveries doubtful. Another circumstance which weighed with the trial court to disbelieve the factum of recovery was the Press Conference held by the police wherein the weapons seized from the accused are stated to have been shown. Referring to those two circumstances, the trial court held:

"Therefore, by considering the aforesaid two circumstances that is, the press conference and the narration made by the accused in the confessional statements, even if any one circumstance is to be accepted, to be nearer to the truth or in other words, if it is accepted in the sense that the possibility of the said circumstance being true is not ruled out, the only way out is to say that the seizure of the weapons as alleged by the prosecution is not at all free from doubt. Therefore, the evidence relating to the seizure will have to be totally kept aside when we consider the aspect of criminal conspiracy."

We are of the opinion that the trial court adopted a technical approach in appreciating the factum of recovery of weapons and wrongly held that, "the evidence relating to the seizure will have to be totally kept aside". In the Panchnama dated 3.7.1995, (Exhibit 119 at page 1758 to 1760 of the paperbook), signed by the panch witnesses it is stated that the panchas were called by the police on road in front of Room No.1469, Chawl No.184 and the recoveries effected. The panch witnesses have fully proved the panchanamas. If in a statement recorded after about two months the accused tried to mislead the court by making a different statement regarding the recovery of the weapon of offence, no credit of it should have been given to him. If the prosecution had successfully proved the panchanamas, it was not proper for the court to fish out a contradiction regarding the recovery and seizure of the weapons on the ground of subsequent confessional statement of the accused recorded on 28th August, 1995. The Court was only concerned with the corroboration of the factum of recovery mentioned in the confessional statements. If the weapons had actually been recovered, no fault can be found with the confessional statements on account of alleged contradiction. We are further of the view that a perusal of the confessional statement of A5 did not disclose that he had stated anywhere that the weapons were actually recovered from his house. What he had stated in his confessional statement was that the weapons which he had kept in his house were produced and handed over to the police which the prosecution fully proved by Panchanama Exhibit

119. The statement of A6 relating to the recovery of weapons from the house of A5 could not have been made a basis for holding that there existed contradiction which persuaded the court not to believe the recoveries as a piece of corroborative evidence. Much has been made out from the display of seized weapons at the Press Conference held by the police after the arrest of the accused. Such an information is based upon the press reports published in the newspapers. The Joint Commissioner of Police who held the press conference stated that if any good work is done with a good detection relating to crime, occurrence of which had been earlier reported in the press or the accused of serious offence or the shooters in the case as may be arrested then to enhance the image of the police in the public, a wide publicity is usually given for which press conferences are held. He presided over the press conference on 3.7.1995 and as he had got information from the DCP about the seizure of weapons. He stated that he directed those officers to produce one AK 56 assault rifle and smaller weapons which were to be displayed in the press conference. According to him such weapons were available with the Special Operation Squad Branch. According to him similar weapons like the weapons seized from the accused were displayed in the press conference. When a question was put to him as to whether there was any hitch in displaying the seized articles and showing the same to the press persons, he replied that normally there was no hitch and in that particular case because of the lack of time to the DCP he might not have been able to bring the seized weapons. The seized weapons were shown in the office of CID Crime in the same building where the office of the Joint Commissioner of Police is also located. There was no cause or occasion for the court to disbelieve the testimony of the Joint Commissioner of Police. Holding that the only seized weapons were shown to the press, the trial court committed a mistake and it has unnecessarily tried to make a mountain out of mole on such a frivolous ground.

Similarly there is no substance in the submission made on behalf of A5 and A6 that they were not properly identified in the test identification parade. After holding the confessional statements of A5 and A6 to be voluntarily made and legally admissible in evidence, there is no much significance of the identification parade.

We, therefore, hold that the trial court committed a mistake of law in not relying upon the confessional statements of A5 and A6 to ascertain their involvement in the commission of crime with which they were charged. Confessional statements having been proved to be voluntarily made and legally recorded, which generally stood corroborated, were sufficient to hold that the aforesaid persons were guilty of hatching the conspiracy with A7 to A13 for commission of offence with which they were charged. Setting aside the judgment of the trial court to that extent we convict A5 and A6 for the offences under Sections 302, 307 read with Sections 120B, 23, 114 of the Indian Penal Code, Section 3 read with Sections 25(1-B)(a), Section 5 read with Section 27 of the Arms Act, Sections 3(2)(I), 3(2)(ii), 3(3), 3(5), 5 and 6 of the Terrorist and Disruptive Activities (Prevention) Act, 1987. We are, however, of the opinion that being mislead youth they do not deserve the maximum penalty imposable under law and the case is not the rarest of the rare cases warranting death sentence. Subhash Bind (A5) and Shekhar Kadam (A6) are, therefore, sentenced to life imprisonment for the major offence of murder, punishable under Section 302 read with Section 120B of the IPC. We do not award separate sentences to the aforesaid accused persons for the other offences committed by them.

Under the circumstances of the case, the appeal is partly allowed by setting aside the judgment of the trial court by which A3, A5 and A6 were acquitted. Holding A3 guilty for the commission of the offence punishable under Section 384 read with Section 34 of the IPC we convict him for the same. He is sentenced to rigorous imprisonment for two years with fine of Rs.5,000/-. In case of default in the payment of fine, the said accused shall undergo further imprisonment of six months. A5 and A6 are convicted for the offences under Sections 302,

307 read with Sections 120B, 23, 114 of the Indian Penal Code, Section 3 read with Sections 25(1-B)(a), Section 5 read with Section 27 of the Arms Act, Sections 3(2)(I), 3(2)(ii), 3(3), 3(5), 5 and 6 of the Terrorist and Disruptive Activities (Prevention) Act, 1987. and sentenced to life imprisonment for the major offence. We do not award them separate sentences for the other offences. A3, A5 and A6 are directed to surrender to serve the remaining part of their sentences. The judgment of the trial court so far as A1, A2 are concerned, is upheld and their acquittal maintained.

JUDIS