

CASE NO.:

Appeal (crl.) 975 of 2000
Appeal (crl.) 956 of 2000
Appeal (crl.) 966 of 2000
Appeal (crl.) 1101 of 2000

PETITIONER:

JAYAWANT DATTATRAY SURYARAO

Vs.

RESPONDENT:

SHAMKISHORE SHAMSHARRMA GARIKAPATTI

DATE OF JUDGMENT: 05/11/2001

BENCH:

M.B. Shah & R.P. Sethi

JUDGMENT:

AND

DEATH REFERENCE CASE NO.1 OF 2000.

State of Maharashtra

Vs.

Subhashsingh Shobhnathsingh Thakur

J U D G M E N T

Shah, J.

These appeals have been filed against the judgment and order dated 7.8.2000 passed in TADA Special Case No.31 of 1993 passed by the Designated Court for Greater Bombay at Bombay. By the impugned judgment and order, out of 24 accused, the Designated Court convicted A-6 Subhashsingh Shobhnathsingh Thakur, A-2 Jaywant Dattatraya Suryarao and A-7 Shamkishor Shamsharma Garikapatti for the various offences as under: -

1. A-6 Subhashsingh Shobhnathsingh Thakur

(a) under Section 3(2)(i) of TADA (P) Act and is sentenced to death and to pay a fine of Rs.500/-, in default of payment of fine to undergo rigorous imprisonment for one month more;

(b) under Section 120-B IPC and is sentenced to death;

(c) under Section 3(2)(ii) of the TADA (P) Act and is sentenced to suffer imprisonment for life and to pay a fine of Rs.500/-, in default of payment of fine to undergo rigorous imprisonment for one month more;

(d) under Section 3(3) of the TADA (P) Act and is

sentenced to suffer imprisonment for life and to pay a fine of Rs.500/-, in default of payment of fine to undergo rigorous imprisonment for one month more;

(e) under Section 5 of the TADA (P) Act and is sentenced to suffer imprisonment for a term of 10 years and to pay a fine of Rs.100/-, in default of payment of fine to undergo rigorous imprisonment for one month more;

(f) under Section 6 of the TADA (P) Act and is sentenced to suffer imprisonment for 10 years and to pay a fine of Rs.100/-, in default of payment of fine to undergo rigorous imprisonment for one month more;

(g) under Section 302 of Indian Penal Code for causing the death of Shailesh Shankar Haldankar and is sentenced to death and to pay a fine of Rs.500/- only, in default of payment of fine to undergo rigorous imprisonment for one month more;

(h) under Section 302 of Indian Penal Code for causing the death of Police Head Constable C.G. Javsen, B.No.18005 and is sentenced to death and to pay a fine of Rs.500/- only, in default of payment of fine to undergo rigorous imprisonment for one month more;

(i) under Section 302 of Indian Penal Code for causing the death of Police Constable K.B. Bhanawat, Buckle No.22579 and is sentenced to death and to pay a fine of Rs.500/- only, in default of payment of fine to undergo rigorous imprisonment for one month more;

(j) under Section 307 read with 34 of Indian Penal Code for attempting to commit the murder of PW9 Police Constable Vijay Krishna Nagare, PW42 PSI K.G. Thakur, PW11 Shankar Ganpat Sawant, PW54 Shankar Ramchandra Jadhav and is sentenced to suffer imprisonment for life;

(k) under Section 27 of the Arms Act and is sentenced to death;

2. A-2 Jayawant Dattatray Suryarao

(a) under Section 3(4) of the TADA (P) Act and is sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs.500/-, in default of payment of fine to undergo rigorous imprisonment for one month;

(b) under Section 212 of IPC and is sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.500/-, in default of payment of fine to undergo rigorous imprisonment for one month;

3. A-7 Shamkishor Shamsharma Garikapatti

(a) under section 3(4) of the TADA (P) Act and is sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs.500/- only, in default of payment of fine to undergo rigorous imprisonment for one month;

(b) under Section 212 of Indian Penal Code and is sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.500/-, in default of payment of fine to undergo rigorous imprisonment for one month.

A-1 Jahur Ismile Faki, A-3 Mehaboobi Aziz Khan, A-4 Anil Amarnath Sharma, A-8 Ahmed Mohmed Yasin Mansoori, A-9 Jaiprakashsingh Shivcharansingh @ Bacchisingh and A-10 Prasad Ramakant Khade were acquitted for the offences for which they were charged. For A-11 to 24, it has been stated that some were shot dead during the trial and some were absconding. Therefore, the trial of the accused, present in the court, was separated.

Against the said judgment and order

(a) A-2, Jayawant Dattatray Suryarao has preferred Criminal Appeal No.975 of 2000;

(b) A-6 Subhashsingh Shobhnathsingh Thakur has preferred Criminal Appeal No.966 of 2000; and as he was sentenced to death, there is Death Reference Case No.1 of 2000.

(c) A-7 Shamkishor Shamsharma Garikapatti has preferred Criminal Appeal No.956 of 2000.

(d) The State has preferred Criminal Appeal No.1101 of 2000 against the acquittal of A-1 Jahur Ismile Faki, A-3 Mehaboobi Aziz Khan, A-4 Anil Amarnath Sharma, A-8 Ahmed Mohmed Yasin Mansoori, A-9 Jaiprakashsingh Shivcharansingh @ Bacchisingh and A-10 Prasad Ramakant Khade.

It is the prosecution version that on 12.9.1992 at about 03:20 hours the incident of shoot out took place in J.J. Hospital Campus at Mumbai, which is a Government Hospital having occupancy of 1500 beds. It is alleged that having made preparation, such as procuring sophisticated weapons like AK-47 rifles, pistols, revolvers, dynamites and hand-grenades and by firing the shots through the said weapons, accused have committed murder of (1) Prisoner Shailesh Shankar Haldankar, who was undergoing treatment in Ward No.18 in the said hospital; (2) Police Head Constable Chaintaman Gajanan Javsen; and (3) Police Constable Kawalsingh Baddu Bhanawat. The two policemen were on guard duty of prisoner Shailesh Shankar Haldankar. It is also alleged that they attempted to commit murder of six other persons including PW11 Shankar Ganapat Sawant -- a patient undergoing treatment in ward no.18, Yunus Mohamed Dadarkar a relative of a patient, PW54 Shankar Ramchandra Jadhav watchman on duty, PW9 Constable on guard duty, Vijay Krishna Nagare, PW42 PSI Thakur, the Police Officer on duty to exercise the supervision over the guard and a staff nurse Smt. Chandrakala Vithal Vinde, who was on duty. Thus, it is alleged that all the accused have committed the offence punishable under Sections 120-B of IPC read with 3(2)(i), 3(2)(ii), 3(3), 3(4), 5 and 6 of Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as the TADA) and Section 302 read with section 34, in the alternative section 302 read with section 114, in the alternative read with Sections

149, 307 read with section 34, in the alternative section 307 read with section 114, in the alternative section 307 read with section 149 of the Indian Penal Code and Section 27 read with section 5 of the Arms Act.

It is the prosecution case that in Mumbai City, criminal gangs operate and they commit organized crime and recover large sum from industrialists, businessmen, professionals, hoteliers etc. as khandani (protection money). It is also stated that sister of Dawood Ibrahim (a gangster) had married one Ibrahim Parkar who was man of confidence of Dawood Ibrahim. Ibrahim Parkar was shot dead at his residence on 26.7.1992 in Nagpada locality and an offence, under Crime No.589/93, under Section 302 IPC was registered in that connection. Deceased Shailesh Haldankar was suspected to have pointed him out. It is also alleged that the said Shailesh Haldankar was a person belonging to the gang of Arun Gawali, the arch rival of Dawood Ibrahim. On the night between 30.8.1992 and 31.8.1992 Shailesh Haldankar, Bipin Shere, Raju Batata and Santosh Patil had fired shots at one Masukh Rawat in the Kumbharwada locality and therefore the offence (at Crime No.460/92) under Section 307 IPC was registered against them and as such Shailesh Haldankar, Bipin Shere and Raju Batata were wanted accused in that crime. On 2.9.1992 at about 8.00 a.m. or so, Shailesh Haldankar and Bipin Shere and their associate Raju Batata (now deceased) were noticed by some one in Kumbharwada locality and the police was informed. On information, police party chased them and noticing police party, they tried to scare away the police by brandishing the weapons i.e. the swords and choppers. Somehow or the other, the police succeeded in overpowering Shailesh Haldankar and Bipin Shere. Third person Raju Batata managed to escape in the melee. At the same time, number of persons who had gathered there, on seeing the commotion man-handled Shailesh Haldankar and Bipin Shere. The police successfully persuaded the members of the public to maintain peace and thereafter Shailesh Haldankar and Bipin Shere were removed to J.J. Hospital for treatment of injuries sustained by them. They were transferred to J.J. Hospital and kept in Ward No.18 on the third floor. A guard comprising of one head constable and two constables was posted on duty to prevent the escape of the prisoners.

It is the prosecution version that on 12.9.1992 at about 2.00 a.m. PW42 PSI Thakur had gone for guard duty check at the J.J. Hospital. After checking guard of Bipin Shere, he went to ward no.18 to check the guard of the prisoner Shailesh Haldankar. In the said ward, Shailesh Haldankar and other patient (PW10) Siddiq Ahmed Amin were sleeping on cots. Police Constable Nagare (PW9) was sitting on the stool between the cots. Head constable Javsen and PC Bhanawat were sitting on the very same cot on which Shailesh Haldankar was lying. Shailesh Haldankar was handcuffed. PSI Thakur went inside the cabin and sat on the said cot.

It is alleged that all the accused came from the room of absconding accused Nazir Jariwala by two fiat cars. Accused no.8 Ahmed Mansoori and deceased Sunil Sawant went ahead on scooter. They were followed by cars. The blue car was in front and was occupied by accused no.6 Subhashsingh and others. Other car was occupied by other accused. Both the cars entered through the western side gate of J.J. Hospital. Some accused took their position near the staircase and accused no.6 and others went upstairs. It is alleged that accused no.6 made a show by catching the collar of absconding accused Ravi Sorte and played a hoax that he was the police man who had caught the criminal by uttering the words saale tumhare baki satthi dikhao. PW54 Shankar Ramchandra Jadhav, a watchman on duty, who was standing near the staircase in the main building in front of the lift at the ground, after noticing the weapons in the hands of accused, suspected that probably they might be the policemen.

However, when he attempted to go ahead to make an enquiry, A-10 Khade caught him and threatened him that he should not move and at the same time accused no.9 Bacchisingh hit him by the revolver butt on his face. It is stated that PW54 Shankar Jadhav fell down in semi-conscious state and re-gained consciousness later on when he was taken to casualty ward.

PW6 Police Constable Anant More, an unarmed constable attached to Police Head Quarter, Thane, on 12.9.1992, was on guard duty in Ward No.18 of J.J. Hospital because one of the accused, who was lodged in Kalyan Prison was admitted in that ward for treatment. His duty hours were from 3.00 a.m. to 6.00 a.m., he noticed three persons duly armed entering the said ward at about 3.40 a.m. Two of them were having AK-47 rifles. He rushed to the southern side wall of the ward. There was a door in that wall and the shots were being fired at that door itself and, therefore, he could not fire from his weapon in retaliation. The prisoner whom they were guarding had taken shelter underneath the cot. He went in left side room, wherein another prisoner was admitted, who was being guarded by a guard from Mumbai and noticed that the accused and two policemen were lying in the pool of blood on the ground in the said room. His statement was recorded by Byculla Police Station Staff. It is also stated that the staff nurse Ms. Chandrakala Vithal Vinde was on duty in ward no.18. After the accused entered the said ward, all of a sudden PW42 PSI Thakur heard the words hands up, do not move, else we will kill you. At that time, PW9 PC Nagare attempted to close the door but it was not fully closed. Further, PSI Thakur heard four rounds having been fired on the door which was sought to be closed and noticed that a person was standing outside the door at a distance of 1-1/2 or 2 feet. It is stated that PSI Thakur fired from the revolver and also saw one person having weapon like AK-47. He went out from the southern side of the cabin. At that time, deceased Shailesh was uttering release me, they have come to kill me. PW9 PC Nagare and the other constables became alert. PSI Thakur went out through the southern door of cabin and rushed towards the another door which connected the main ward to the eastern gallery of the ward No. 18. Then he noticed that the person who was standing outside the western door was in the same position and one or two persons were there at a distance of about 7/8 feet behind that person. He also noticed 3-4 other persons in the ward. He fired one shot in the direction of the said person. He fired one more shot and then receded through the very same door back to the veranda. He receded in the southern veranda and when he was rushing towards the bath room through the verandah, he heard somebody saying udharse bhaga maro saleko meaning (the person) had run away by that side, kill the bastard. Before rushing towards the bath room he had closed the said southern door of the ward and no sooner the aforesaid utterances were heard, he noticed that a number of shots were fired on that door. He went inside the bathroom. PW9 PC Nagare who had become alert and who had taken the position with the rifle in his hand noticed very same person whom he had seen inside the ward earlier coming towards the southern door of the cabin, therefore, he fired one shot through his rifle in his direction. It is his say that before he could fire second round, the bullet which the said person had fired hit him on his right thigh. Therefore, he receded a little and fell down by the side of the cot. Thereafter, that person entered inside the room and fired shots indiscriminately towards Shailesh Haldankar. HC Javsén and PC Bhanawat were also hit by those bullets. At that time, he heard hue and cry in the ward. Because of the injury sustained on his thigh, he felt giddy. PW9 PC Nagare has identified the person who was seen by him in the ward, who had uttered the word hands-up, hilo mat nahi to maar dalenge, and who had entered the cabin and fired the shots at Shailesh Haldankar, HC Javsén and PC Bhanawat to be the accused No.6 Subhashsingh Thakur. Other facts stated by the prosecution witnesses are not relevant and, therefore, they are not

narrated. After completion of the investigation, accused were tried for various offences and convicted as stated above.

Relevant Part of Evidence:

To prove the story, the prosecution has relied upon confessional statements, evidence of injured witnesses and other corroborative evidence. We would first refer to the relevant part of the confessional statements of A-2, A-6 and A-7 and thereafter other evidence led by the prosecution to connect the accused with the crime.

CONFESSIOAL STATEMENT OF A-2

Suryarao (A-2) has disclosed that A-7 Shamkishore was known to him since year 1988 and was frequently visiting his residence in Shanti Niketan Society on LBS Road, Ghatkopar. He had sold his motor Car No.MP-09-D09634 to one Sanjay Shetty through A-7 in July, 1992. It is further disclosed that his election to the post of President was not liked by his political rivals and the said rivals lost no time in mobilising a campaign against him for no confidence motion. In the month of July, 1992 the news had appeared in the Navashakti Marathi Daily that he had sent Shamkishor Garikapatti (A-7) to the residence of R.C. Patil (PW61 President of Thane District Congress Party) to tell him to stop the campaign against him and that Dawood Ibrahim had telephoned to R.C. Patil asking him to stop the campaign against him. Thereafter, he had issued a press-note denying these allegations. On 2.9.1992 at the behest of A-7, A-2 accompanied with his wife Priti and PW34 Himmat Raval had gone to Seema Holiday Resort in car belonging to Shri Palsule, driven by Driver Halim (PW62). He requested Pappu Kalani to ask R.C. Patil (PW61) to stop the campaign against him. Pappu Kalani promised him to do the needful through his contacts and further told him that A-7 was the man of his confidence and he should help him. Next day, he contacted A-7 on phone and enquired with him as to whether he had received any message from Pappu Kalani. Then A-7 replied in negative and told him that he was doubtful whether Pappu Kalani had gone to Delhi.

He further disclosed that on 12.9.1992 at 6.30 a.m., he got a telephone call from A-7 asking him to see him before 9.30 a.m. with an air-conditioned car. At 8.45 a.m. again A-7 telephoned him. Thereafter, he accompanied by bodyguard PC Laxman Vishe (PW12) left for Bombay in the Contessa Car No.MH-04-A-1445 driven by PW17 Shripad Tambe. When he reached at the residence of A-7 at Ghatkopar, A-7 told him that early in the morning Arun Gavlis men had fired at his friend and he is to be taken for medical treatment to the hospital and he should make arrangements for his transportation. A-7 asked him to use his official vehicle as it would be safer and he accepted the said suggestion. Thereafter, A-7 asked him to go to Sagar Hotel at Nagpada where a person would meet him and take him to the injured and after meeting the said injured he should take the injured to Goregaon in his official car. A-7 also informed him that he has booked suite in a Hotel in Juhu where he could relax. Then, the car was driven to Sagar Hotel and from there with the assistance of a young Muslim boy it was brought towards Bombay Central Area in front of a chawl. The said boy took him to the building where he saw

one person with a bandage around his abdomen, having height of 56, slim built and a shallow complexion. He met another person

there who gave his name as Dr. Bansal. Subhashsingh Thakur (A-6) was also present there. He was knowing A-6 because he met him twice before at the instance of A-7 at Seema Holiday Resort owned by Pappu Kalani situated at Varap village on Kalyan Murbad Road. He then enquired about the condition of the patient with Dr. Bansal. The injured was brought to the Contessa Car by Dr. Bansal with the help of two other persons. Dr. Bansal as well as the injured sat in the car along with him and then the car was driven to Hotel Centaur at Juhu. From there the car was taken to Hotel Holiday Inn at Juhu because there was none to receive them at Hotel Centaur. He got down from the car alongwith his body guard P.C. Vishe (PW12) and asked driver Tambe (PW17) to take the injured to the hospital as per the directions of Dr. Bansal. One person namely, Vijay, met him there in the Hotel Holiday Inn and told him that he was sent by A-7. He led him and the police constable PW12 Vishe to suite No.315. Thereafter, Vijay made telephone call and left the said room. Sometime thereafter, A-7 telephoned him and requested him to go back to Bombay Central where he had gone before. At about 1.00 p.m. driver Tambe returned from the hospital when he asked him as to whether he had left Dr. Bansal and the injured and he told him that he dropped them at Goregaon. Thereafter, he and PW12 PC Vishe sat in the car and at his behest driver Tambe drove the car to Hotel Sagar where the very same Muslim young boy who had helped him in the previous visit to lead to place, was waiting for them. A-6 came down and sat by his side and then asked the driver to proceed towards the Petrol Pump situated opposite to J.J. Hospital. A-6 asked the driver to stop the car there telling that Savtya was coming. After a few minutes Savtya came there and then A-6 asked him as to where he was going and he told him that he was going towards hotel Holiday Inn. When the car reached near Lido Cinema in Santacruz locality at about 2.30 p.m., A-6 asked the driver to stop the car in front of a petrol pump and then A-6 and Sunil Sawant got down and walked away. When they were travelling in the car, A-6 opened the zip of the airbag and showed him a stengun and four revolvers. Then they went to Hotel Holiday Inn and he collected the keys of room no.315 from the receptionist. It is his further say that near the Reception counter, he heard someone talking about the shoot out incident in J.J. Hospital and he realised that he had helped the gangsters of Dawood Ibrahim in fleeing. He became restless and returned to Bhiwandi at 6.00 p.m. On 13.9.1992 at 10.00 a.m., he received a telephone call from A-7 and then he complained to him that he had unnecessarily put him in trouble but A-7 got annoyed and threatened him and asked to keep quite on the issue and forget about it.

It is further stated that on 13.9.1992 at the instance of A-7, he met Pappu Kalani and A-7 at Seema Holiday Resort and then Pappu Kalani told him that he should not tell anybody about the removing of the injured persons and others in his official car failing which he would finish him and his family. On 14.9.1992 at about 9.00 a.m., when he was about to leave his residence, Baba Gabriel and one unknown person met him and informed him that A-7 had asked him to come at his residence with his official car. At that time, A-7 also telephoned him and asked him in a threatening tone to bring the car otherwise his family would be butchered. He got frightened and asked driver Badruddin Chimkar to get Maruti 1000 car bearing No.MH-04-A-5353. The bodyguard police constable was also with him. A-7 then asked him to bring Himmat Raval, who was known to A-7 and he was also taken from his residence. The car was then brought to the residence of A-7 at Ghatkopar and then A-7 boarded the said car and it was brought to Vile Parle. In a flat on the ground floor, he met a male person aged about 30/35 years. Himmat Raval got down from the car and stayed behind and the said male person then boarded the said car and asked the driver to proceed towards Pali Hill side. On reaching there, Vijay who had met them earlier at Hotel Holiday Inn came there. He had come there in a white coloured

Maruti Car alongwith 2/3 persons. They were carrying their suit cases with them. At about 2.00 p.m. at the behest of A-7, driver Badruddin Chimkar drove the car towards Santacruz and when the car reached one locality, probably Daulatnagar in Santacruz area, A-7 asked him to stop the car and went in a multi-storey building. He saw A-6 there with one more person. A-6 sat in the car and A-7 asked to proceed towards Manor. At about 4.30 p.m., they stopped at Sagar Petrol Pump on Western Express Highway as asked by A-7. In the meanwhile, two blue coloured Maruti cars arrived there. One of the cars bearing No.MP 09 D-9634 was identified by him and he saw Satish Rao, Ms. Meena Rao and his friend Himmat Raval getting down from the car. He also noticed other 5 to 6 persons getting down from another car. He took A-7 aside and requested him to relieve him because he did not want to go ahead with them. A-7 agreed to relieve him on the condition that he should give him Maruti 1000 Car bearing No.MH-04-A-5353 belonging to Bhiwandi-Nizampura Municipal Council with the policeman on duty. He agreed to spare the said car without a policeman. A-7 agreed and also gave him Maruti car No.MP-09-D-9634 for their return. He, his bodyguard and Himmat Rawal sat in the said car and came back to Bhiwandi. Mr. and Mrs. Rao, A-6 Subhashsingh, and others went ahead in the Maruti 1000 motor car and the other vehicle. On the same day, at 7.30 p.m., he returned to Bhiwandi and left the motor car MP-09-D-9634 at the residence of Himmat Raval. Thereafter, he took another car of his friend Mohan Amre and visited Kalava to see Rajaram Salvi, Agripada Leader. He also met Shri Anand Dighe, Thane district Shivsena Chief.

On 15.9.1992 at about 1.30 hrs., he saw Maruti Car No.MH-04-A-5353 near Pious High School. He intercepted it and found it to be occupied by Mr. Satish Rao and his wife Mrs. Meena Rao, A-7 and Driver Badruddin Chimkar. He asked driver Badruddin Chimkar to come next day morning at 9.00 a.m. On the same day at 9.00 a.m. A7 telephoned him and asked him for his car with the policeman to be sent at his residence but he refused to oblige him.

On 16.9.1992 at 9.00 a.m., A-7 telephoned him and informed him that he has done the job without his help (Probably the reference was for not providing the car with a policeman). A-7 was rude on phone saying that he could do anything and nobody can stop him. At that time, he got frightened and tore two pages from the logbook of Contessa Car bearing no. MH-04-A-1445 regarding the entries of his movements on 12.9.1992. Thereafter, as instructed by him driver Tambe (PW-17) re-wrote the logbook. The said two pages were kept by him at his residence and were recovered by the police at his instance on 16.10.1992.

It is his further say that on 19.9.1992, when he learnt that Mumbai police had come to Bhiwandi and were making inquiries of the motor car bearing No.MH-04-A-1445 and its driver, he got frightened and contacted A-7 on telephone and informed him accordingly. A-7 advised him to send driver Tambe out of Bombay for 3/4 days and in the meantime he would try to subside the matter through the sources of Pappu Kalani. He also advised him to make efforts to subside the matter through his sources. Thereafter, he paid an amount of Rs.1000/- to driver Tambe and sent him to A-7 at Ghatkopar with his nephew Bhimsen in his private white coloured Ambassador car no.MAS-300. He also called Smt. Tambe (wife of PW17 Tambe) and paid her an amount of Rs.500/- for domestic expenses and told her that her husband had gone out of Bhiwandi and would return after 3-4 days. Finally, he was arrested on 21.9.1992.

Confessional Statement of A-6:

A-6 Subhashsingh Thakur was arrested by Delhi Police in the last week of July, 1993 and that his statement was recorded on 6.11.1993. In his confessional statement, he has narrated history of his anti social activities in detail. For our purpose, it is necessary to refer to relevant part of shoot out incident at the J.J. Hospital. He stated that he murdered one Paul Patric Newman, belonging to Arun Gavlis gang. After the murder he started staying with Sunil Sawant at Kathmandu, Nepal. During that period, he used to often come to Delhi, Gonda and Bombay. When he was in Kathmandu, one Kim Bahadur Thapa, a Corporator (who was his mentor) was killed by members of Chhota Rajan gang. To avenge the killing of Kim Bahadur Thapa, he killed Sanjay Raggad, Diwakar Churi and one Amar Juker, all belonging to Chhota Rajan gang with the help of his associate Brijeshsingh (absconding accused) and others. It is his say that after previous involvement in murder cases, he was living at Delhi with one Brijeshsingh. Deceased Sunil Sawant suggested him that since number of days, they have not participated in any game and they should go to Bombay. Thereafter, they came to Bombay and started living in flat in Queens View Apartment near Lido Cinema at Juhu owned by deceased Manish Gangaram Lala. On 11.9.1992 he was informed by Sunil that in J.J. Hospital the killer of brother-in-law of Dawood Ibrahim was admitted and he was required to be murdered. Sunil was taking instructions from Dawood Ibrahim by contacting him on telephone. It is his say that Sunil informed him that everything was set and when they would reach at the hospital, at the point of AK-47 rifle policemen should be asked to raise their hands and thereafter remove the bullets from their rifles and then go in the ward, finish the killers and return. At about 1.00 or 1.30 a.m., Sunil informed Brijeshsingh to go along with some persons of Nazir at J.J. hospital to find out the situation. After one hour, he was informed that one police constable was on duty and it would be easy to carry out the work. At about 3.30 a.m. on 12.9.1992, he alongwith other persons went to J.J. Hospital. He was having 9mm pistol with magazines. Others were also having loaded pistol or revolver. Pradhan and Brijesh were also having AK-47 rifles with extra magazines. They went in two fiat cars. When they entered the gate, they saw one watchman was standing near the staircase. Najir and his man caught the colour of Ravi Sorte to make a show as if a policeman was taking an accused. On seeing them, the policeman who was on guard duty closed the door for entry to the ward. Then Brijeshsingh knocked the door but none opened. At that time, he felt that there was no setting and, therefore, he asked Brijeshsingh that they all should go back. During that time, Brijeshsingh fired three to four times from his AK-47 rifle on the closed door. Again he asked Brijeshsingh to return. Meantime, someone else fired at them from the opposite door. Thereafter, they all moved towards the side from where they were fired. During that time, policemen continued to fire towards them from one door or other and they also retaliated. Thereafter, Brijeshsingh came towards him quickly and told that he has killed all the persons inside the ward and asked them to move from that place. Finally they reached at the house of Najir Jariwala. There they found that Pradhan was having bullet injury in his abdomen and Ravi was injured on his hand. They contacted Chhota Shakeel at Dubai who gave them assurance for arranging a doctor and that he would be giving information to Dawood. After half an hour, Dawood made call and informed that one doctor would be reaching shortly. One doctor thereafter came and gave injections to Pradhan and Ravi. Doctor informed him that treatment to Pradhan is not possible. Doctor also informed on telephone to Chhota Shakeel that Pradhan is required to be operated. Chhota Shakeel thereafter informed that he will send some other doctor. Another doctor came and told that operation of Pradhan is required to be done urgently and he was not having operation accessory. Thereafter, he contacted Kishore - A-7 for making some arrangement and informed him that Pradhan has sustained bullet injury. Thereafter, A-7 informed that Suryarao has

left Bhiwandi and would be reaching there within a short time. When Suryarao came alongwith Najirs boy, he introduced himself to Suryarao and told him that due to internal conflict one of his persons has sustained a bullet injury and was required to be taken to hospital immediately. Suryarao enquired where he was to be taken. Then he told Suryarao to take him in Hotel Holiday Inn where a boy named Vijay would meet him to make further arrangement. At about 12.00 noon he received telephone call from Sunil that Pradhan has reached hospital of Dr. Mohan Gedam and Vijay was present there and that in a short while the car would be going back to Hotel Holiday Inn. He telephoned Suryarao (A-2) in Hotel Holiday Inn and asked him to bring back the car to the residence of Najir Jariwala. Suryarao agreed. After sometime, Suryarao came there alongwith Brijeshsingh. He asked Brijeshsingh to leave alongwith one boy of Najir and thereafter he sat in the car alongwith Suryarao. Najirs boy took them near a petrol pump. Suryarao thereafter left the place and they left for the flat of Manishlala. On 14.9.1992, he informed Kishore that he wanted to leave Bombay and whether he could arrange car of Suryarao. Finally, Kishore was asked to come in the car of Suryarao at BSES guest house by 4.00 p.m. In the car of Suryarao, they reached at Sagar Petrol Pump, Vasai. It is his say that finally he reached to Delhi and thereafter went to other places. For the purpose of this appeal, other part of the statement is not required to be narrated.

Confessional Statement of A-7

A-7 has also revealed the detailed facts about the incident and that he was arrested on 18.7.1993 by Delhi Police. It is his say that he is a resident of Shanti Niketan, Ghatkopar (W), Bombay. He is B.Sc. and that after graduation he started business of transportation of liquid chemicals. In January, 1985 he was playing a cricket match at Shell colony ground in the morning. At about 10.30 a.m. or so, he noticed one person running across the ground and he was profusely bleeding. While running, he collapsed on the ground. He was identified as Subhashsingh Thakur (Accused no.6) by Mangesh More and Mahboob Kunji. They took him to Dr. Lads hospital, Dhar, Bombay. Dr. Lad examined him and removed bullet from his body and informed him that it was a police case. He asked him to inform the police or remove the injured to government hospital, otherwise he would inform it to police. He got frightened and left the hospital. Next day, he came to know that accused no.6 had fired at police and in retaliation police had fired at him and he had sustained bullet injuries. In the year 1987, Subhashsingh Thakur asked him to help in the said case. Subhashsingh was acquitted from the said case. Thereafter, he has narrated other incidents wherein A-6 Subhashsingh was involved. It is his say that while he was having meeting with Subhashsingh, Himmat Raval, the then Vice President of Bhiwandi Nagar Parishad, introduced him with Suryarao (A-2). Thereafter, Suryarao sought his help as his political rival Shri R.C. Patil was to bring no-confidence motion against him and that he promised to help through Pappu Kalani. A-2 and Himmat Raval met Pappu Kalani at Seema Holiday Resort twice in the month of August, 1992. At that time, Pappu Kalani told Suryarao that he should help him (A-7 Kishore). On 12.9.1992, at about 6.00 a.m., he got a telephone call from Subhashsingh Thakur who told him that there was firing at J.J. Hospital and one of his friends was badly injured in the incident and he wanted to remove him immediately and safely out of Bombay and asked him to call official vehicle of Suryarao (A-2) and to send the same to Sagar Hotel at Nagpada. He contacted Suryarao and asked him to go at Sagar Hotel, Nagpada with his official car. Subhashsingh Thakur once again telephoned him at his residence and informed that on 12th September, 1992, in the early morning at about 4.00 a.m., he alongwith Sunil Sawant, Brijeshsingh, Pradhan, Nirmalsingh, Prasad Khade, Bacchisingh, Pappu, Babloo and two three muslim boys of Nazir stormed into ward no.18, J.J. Hospital and fired at Shailesh

Haldankar in which Shailesh Haldankar and two policemen were injured and died subsequently. He also informed him that Suryarao had come with his car and removed the injured. At about 2.00 p.m., he received telephone call from Suryarao, who informed him that he dropped the injured at Andheri and that he was leaving for Bhiwandi.

Thereafter on 14.9.1992, Subhashsingh rang him and informed that he wanted to leave Bombay and asked him for the same vehicle which removed the injured. He again contacted Suryarao and asked him to come at his residence with his official vehicle. At 10.00 a.m., Suryarao came to his residence with white colour Maruti 1000 Car No.MH-04-A-5353. He was accompanied by Himmat Raval, his driver and a police constable in uniform. Thereafter, they went at Anil Sharmas house. Anil Sharma took them at the Guest House, where he met Manishlala, who informed him that Subhashsingh was intending to leave Bombay for Gujarat.

Thereafter, he has narrated in detail how they reached upto Sagar Petrol Pump. It his say that as Suryarao was having some work, he returned to Bhiwandi in another vehicle of Satish Rao (PW22) with Himmat Raval and his driver. He kept Maruti 1000 car. Subsequently, from Vapi they returned to Bhiwandi and left the car at Suryaraos house. Thereafter, he has narrated that finally he left Bombay and went to other places including Delhi and Vaishnodevi.

Independent Corroboration to the Aforesaid Statements:

Before referring to the other evidence, we would refer to the evidence of some hostile witnesses who corroborate the above confessional statements. PW45 Mohd. Hasan Mansoori whose son is Yasin Mansoori (A-8) has stated that he was staying in Mukhtiyar Manzil in room nos.11 and 22. In cross-examination, he stated that Mukhtiyar Manzil is at a distance of 2 minutes walk from the J.J. Junction and J.J. hospital is at a distance of about 4 minutes walk from J.J. Junction and that in the Mastan Talao locality, there are number of lanes. The J.J. Junction and the Nagpada Junction are at a distance of about $\frac{1}{2}$ - $\frac{3}{4}$ km. from Nagpada and that Mastan Talao is at the distance of 5 to 10 minutes walk from Nagpada junction. He has also stated that there are number of mutton shops in mini bazar, near Mastan Talao and that he was not knowing whereabouts of his son. Similarly, PW66 Sayyed Rais Ahmed Jariwala has stated that he and absconding accused Nazir were staying in room nos.11 and 12 in Shankar Building, Mastan Tank Lane, Nagpada. This evidence alongwith confessional statements would indicate that accused before carrying out the target selected a place which was nearby J.J. Hospital.

Further, whatever has been confessed by A-2, A-6 and A-7 with regard to their movements on 12th and 14th gets full corroboration from the evidence of PW12 and PW26. PW12 Laxman Vishe, who was armed police constable attached to Thane Police Head Quarter, was assigned the duty of regular Guard to A-2, who was the President of Bhiwandi Nizampur Municipal Council at the relevant time. It is his say that A-2 Suryarao was having two houses and two wives, one at Najrana Compound in Bhiwandi Town and other in Gokul Nagar. He was having two cars, one white colour Ambassador car and other Contessa Car having No.MH0-4-1445. It is his further say that on 12.9.1992 at about 8.00 a.m., he accompanied A-2 in Contessa Car. At that time he was in police uniform. A-2 directed the driver Tambe to take the car to highway via Bhiwandi Vegetable Market. One person, who was standing in the Bhiwandi vegetable market, was taken inside by A-2 and that person got down at Thane highway. After passing one bridge on Old Agra Road, car was taken to a building in

Ghatkopar area. A-2 got down from the car and asked him to wait in the car. After 15/20 minutes A2 returned to the car and directed to drive the car to Sagar Hotel at Nagpada Junction. There, he and A-2 got down from the car. A-2 was looking around nearby and a young boy of 20/22 years of age having fair complexion and curly hair approached A-2. Both the persons after having a talk with each other sat on the rear seat in the Contessa car. After about 5 minutes of driving, the said boy asked the driver Tambe to stop the car near mutton lane. A-2 and the said boy got down from the car and A-2 asked him to wait near the car. The two then went through a by lane and disappeared. After 10/15 minutes, A-2 came back followed by 3 persons. One of the three persons was given support by taking his arms on their shoulders by the other two persons. One more person followed them with a suitcase in his hand. Of the two persons, one person was the very same person who had met them near Sagar hotel and who had led them to the mutton lane. The person who was ill and the person who was having briefcase occupied the car along with Suryarao and other two persons went away. Thereafter, they went to hotel Holiday-Inn in Juhu locality. On enquiry, A-2 told him that the patient was son of his friend and that he was suffering from kidney trouble and required to be taken to the hospital. After half-an hour drive, they reached Hotel Holiday Inn and he alongwith A-2 got down there. One young person of 25/30 years age led them to room no.315 and thereafter he went down stairs saying that he will be going to the hospital alongwith the patient. A-2 received a number of telephone calls in the room and also made number of phone calls. After half an hour, A-2 enquired with the Reception Counter about arrival of Car. Thereafter, they came down and A-2 enquired from the driver as to whether the patient reached safely to the hospital and the driver Tambe replied affirmatively. A-2 then asked the driver to take the car to Sagar Hotel in Nagpada locality. The very same person who had met them in the morning in the Sagar Hotel and who guided driver to take the car to mutton lane met them. He occupied the seat in the rear by the side of A-2 and helped the driver to take the car again to the very same place i.e. the mutton lane. A person having 59 height and strong built of about 28/30 years of age came there in a short while and sat on the rear seat by the side of A-2 Suryarao. That person was subsequently identified by him as accused no.6. That person asked the driver to take the car to the Petrol Pump near J.J. Hospital. The person who had helped the driver to take the car to mutton lane from Sagar Hotel got down from the car after they reached mutton lane. When the car reached near the Petrol Pump, one person came there and told the said tall person that the person for whom he was waiting will be reaching there within a short time. Saying so, the said person went away. 5/10 minutes thereafter, a person of about 30/32 years of age came there wearing a Kurta Pyjama and a Bohara Muslim cap and having a tin of Paan Parag in his hand. The tall person introduced the said person to A-2 as Savtya (deceased). Thereafter, all of them left for hotel Holiday-Inn. The car was stopped on way in Santacruz locality near a petrol pump at the behest of Savtya. On the way, Savtya got down from the car and went away in a lane and disappeared. The car was then brought to hotel Holiday-Inn and there they went to room no.315. They stayed there for half an hour. He then questioned A-2 as to why they had come to that place. A-2 replied that all the Municipal Members of Bhiwandi-Nizampura Council were expected to come there for a meeting to be attended by the son of Shiv Sena Leader Bal Thackeray. The Municipal Members as well as the son of Bal Thackeray did not come there. Thereafter, A-2 asked the driver Tambe to take the car to Thane. A-2 went inside the bungalow of Shiv Sena leader Anand Dighe. Within half an hour, he returned to the car and then they went to Bhiwandi at the residence of A-2 near Najrana Compound. On 26.9.1992, he was called at the DCB CID Office for an identification parade held by the Special Executive Magistrate and in that parade he identified the person who met them near Sagar Hotel and led them to mutton lane as accused

no.1 Jahur Ismail Faki. On 22.10.1993, after the arrest of A-6, identification parade was held and he identified A-6 by saying that he was the very same person who sat in their car when they visited mutton lane second time. He was the person who asked the driver Tambe to bring the car to the petrol pump near J.J. Hospital and on way to the hotel Holiday Inn, he got down in Santacruz locality. In his detail cross-examination, nothing material was found so as to disbelieve his evidence and identification made by him before the Executive Magistrate and in the Dock. He also denied the suggestion that prior to the test identification parade, accused no.6 was shown to him by the police.

Similarly, PW26 Ramesh Shankar Patil, who was armed police constable and Guard to accused no.2, corroborates the prosecution version with regard to travelling of A-2, A-6 and A-7 by Maruti car. It is his say that on 14.9.1992, at 8.30 a.m., he accompanied A-2 Suryarao in a white coloured Maruti bearing No.MH-04-A-5353, being driven by Badruddin Chimkar driver. There was a metallic nameplate of President Bhiwandi, Nizampura Municipal Council affixed on the front side of the car. A-2 directed the driver Badruddin to take the car to Dhamankar Naka at Bhiwandi. When they approached Dhamankar Naka, a person was standing there and A-2 asked him to sit inside. On making enquiry, he came to know that he was Himmatbhai Raval (PW34). A-2 told driver to drive the car towards Bombay via Pipeline. After about 30/35 minutes, after crossing the Mulund Check Naka along the highway, A-2 asked the driver to take a right turn. He realised that they were in Ghatkopar locality. When the car entered in the compound, A-2 asked the driver to stop the car. A-2 asked him to wait. A-2 alongwith Himmatbhai went away and after 15 minutes came back alongwith one another person. At that time, one NE 118 car was there. A-7 occupied the rear seat of Maruti 1000 car and asked the driver to follow the said NE 118 Car. After some time, both the cars reached a colony, namely Post and Telegraph Employees Colony. After getting down from the car, Himmatbhai and A-2 went in a building nearby and returned after about 15/20 minutes. Thereafter, after driving the car for about 20 minutes, the driver stopped the car and Himmatbhai got down from the car and one person (accused no.4) boarded that car. Then under the guidance of A-4, the car was taken to a place where there was a big garden. There was a gate to the compound. The watchman on duty was wearing uniform having nameplate reading Bombay Suburban Electricity Supply Company (BSES). The car was taken inside the compound, where A-2, A-4 and A-7 got down from the car and he continued to wait near the car. All the three went on the first floor of the building. After half an hour, he alongwith A-7 and driver went to have lunch and thereafter returned to the same place. 10/15 minutes thereafter, A-2 came there accompanied with one more person, who was having a suitcase and a leather bag, which were kept inside the dicky of the car of A-2. Then the said person occupied the rear seat with A-7 and directed the driver to drive the car on the High Way. After 20/25 minutes they reached near the garage on the high way. The car was driven nearby a multi storey building. The car was taken inside the compound. Then a tall person (A-6) wearing a salwar-kamij came there. Thereafter, A-6 accompanied them and led the car to Sagar Petrol Pump at Vasai. There, one blue colour Maruti 800 car was standing at the petrol pump. In that car one woman, one another person and Himmatbhai Raval were there. Occupants of both the cars got down. A person came there from the petrol pump and led all of them to a first floor room at the petrol pump. He and driver stayed near the car. The remaining person returned to the car after 30/35 minutes. They all boarded their respective cars for going to Shirsat Fata. On the way, they all got down from the cars. Persons got down from the blue Maruti 800 Car and took the seat in the Car MH-04-A-5353. A-6 and A-7 also sat in the same car. He alongwith A-2 and Himmatbhai sat in the blue Maruti 800 car. A-2 drove the

blue maruti car and asked his driver to leave all the occupants of the Car MH-04-A-5353 to Vapi and come back. They came back to Gokul Nagar in Bhiwandi. On 6.9.1993, he was called by the police for test identification parade in the DCB CID Office near Crawford Market at Mumbai. He was shown 10/11 persons in a row. He identified A-4 Anil Amarnath Sharma as the person who had boarded the car near the railway crossing and who had guided the driver to take the car to BSES guest-house. Likewise, on 21.10.1993 he identified A-7 and A-6. In cross-examination, there is nothing which would affect the version given by the witness or which may support the accused.

Next important witness is PW9 Vijay Nagare, who at the relevant time was posted on the guard duty in the J.J. Hospital in which Shailesh Haldankar was lodged. It is his say that Shailesh Haldankar was sleeping in a cot having handcuffed with the upper side rod of the cot. Other two police constables Javsen and Bhanavat were also sitting on the said cot. PSI Thakur came there in mufti to check the guard on duty. He also sat there on the cot where Shailesh Haldankar was sleeping. At about 3.40 a.m. or there about, he saw one person inside the ward and in front of the room. He was having firearm like a rifle in his hand. He shouted loudly hands up, do not move else we will kill you. Immediately, shots were fired like crackers. He tried to close the door but the door was not fully closed. PSI Thakur thereafter fired one shot in the direction of the said person through his revolver. Thereafter, door was closed. He took his rifle in position to defend himself. Shailesh Haldankar attempted to get up by force to rescue himself by freeing his hands from the handcuff. At that time, constables Javsen and Bhanavat caught hold of him so that he does not run away. To that, Shailesh Haldankar pleaded that assailants have come to kill him and they should allow him to go away. He also heard that shots were being fired on the door which was closed. Thereafter, PSI Thakur receded from another door towards the verandah. He noticed that very same person whom he had seen inside the ward earlier had come near the southern door of the cabin and, thereafter, he fired one shot from the rifle in his direction and before he could fire the second round, the bullet which the said person had fired hit his right thigh. He receded a little and fell down by the side of the cot. Very person who was firing from outside entered the room and fired shots indiscriminately at Shailesh Haldankar as well as other two police constables. It is his say that at that time there was hue and cry in the ward and because of injury he felt giddiness. He identified A-6 - Subhashsingh Thakur in the test identification parade by stating that he was the person whom he had seen firing the shots indiscriminately and who uttered the words hands up, hilo mat nahi to maar dalenge. Minor contradictions emphasised by the defence have rightly been dealt with and are not given any importance by the learned Special Judge. Hence, we are not discussing the same in detail.

Other Corroborative Evidence

PW27 Manohar Padarinath Gabdule, a police Naik who was on duty of maintaining EPR register at JJ hospital has stated that at about 1.40 a.m./1.45 a.m., a woman and a man went to the cabin of clerk Borge, PW21 and enquired about a patient who had met with an accident, namely, Aziz Khan. As there was no one of that name admitted in that hospital, they went away. It is his further say that at about 2.30 a.m. both of them again came and asked the clerk Borge who supplied the information that generally the patients in accident cases are admitted in the ward Nos. 17, 18 and 19 and both of them had gone upstairs. The witness wrote down the name of the woman and her address whom he has identified as A-3. He has also identified absconding accused Mohd. Hussain who accompanied her.

Confessional statement of A6 that inquiries were made at the hospital, gets corroboration from the say of PW 27 who was on duty at JJ hospital that one man and woman went to the cabin of clerk Borge for making inquiries.

PW54 Shankar Ramchandra Jadhav was watchman of the J.J. Hospital and his duty time at the relevant time, i.e. on 12.9.1992, was between 10 p.m. to 6 a.m. He was posted at the main gate near the statue of Parsibaba in the new building and his duty was to check the persons entering the hospital. On that night, at about 3.55 a.m., nine persons having weapons like revolvers in their hands, entered through the main gate and came in the direction of the staircase when one of the persons had caught the collar of another person and they were making enquiry about his other associates. He guessed that they might be the policemen having come for some enquiry. When he asked them whether they had entry pass with them, they told him that they are police inspectors and how dare he could ask them for entry pass. Some of those persons went upstairs and some stayed at the ground. A-10 Khade caught him and dragged to one corner and threatened him that he should not move and at the same time accused no.9 Bacchisingh hit him by the revolver butt on his face and resultantly, he fell down and became unconscious. He regained consciousness later on when he was taken to casualty ward. In the test identification parade, he identified accused no.6, Subhashsingh Thakur to be the person who was holding the collar of the person and asking him to show his other associates, and accused no.9 and accused no.10, but refused to identify them in the dock. Thereafter he was declared hostile. This also corroborates the say of A-6 in his confessional statement.

PW6 Constable Anant More has stated that at about 3.30 a.m. to 3.45 a.m., he noticed three persons entering Ward No.18 through the main door. He also noticed that two of them were having AK 47 rifles in their hands. The third person was also armed with a weapon. They had entered the hall by firing shots. He stated that it was not possible for him to fire at them in the open place and shots were fired in his direction, therefore, it was not possible to fire in the opposite direction. He rushed to the southern side of the ward, entered the door, shots were fired at that door, but he could not fire from his weapon in retaliation by the side of the door. He heard the sound of firing. He saw that the patients were frightened, some of them were taking shelter underneath the cot or in the corners. Some had pulled chadder on their bodies and kept quiet. The prisoner, whom he was guarding, had taken shelter underneath the cot. After the firing stopped, he went to the gallery, where other constables were guarding Shailesh Haldankar. He saw Shailesh Haldankar and two policemen lying in the pool of blood on the ground in the said room. He noticed some 30-35 cartridges lying there. Then the police came there. They took the injured for treatment. In all 6 persons were injured including PWs 9, 10, 11, 42, 54 and one nurse and one Yunus Dadarkar.

PW10, Siddiq Ahmed Amin (hostile witness) who was in the same room where deceased Shailesh Haldankar was kept, stated that he heard some loud shouts of people and therefore, he woke up. One police inspector was there having a revolver in his hand and talking with some one outside the room. He heard shots being fired. The firing stopped after 2/3 minutes. As he got frightened, took shelter under the cot, and after the firing stopped, he went to the hall, continued to sit there till policemen came there. He had sneaked in the hall by crawling. He did not identify any one in the Court and denied having identified accused No. 6, Subhashsingh Thakur in the TI parade and denied giving the description of other two persons who had followed Subhashsingh Thakur.

Brief halt of A2 and others at Bombay Suburban Electricity

Supply Company (BSES) Guest House:

PW63 Arvind Pinge was in charge of a BSES guest house, Marol, Andheri. According to him on 12.9.92, one Felix Alex Dsouza, PW29 (a hostile witness), came to him and told him that the nephew of Union Minister of Energy, Mr. Kalpanath Rai was staying in BSES guest house and he would like to introduce him. He has stated that he had brought him at his residence. PW30 Harry Parasaram was the Deputy General Manager of BSES Guest House in the year 1992. He has stated that they had received a telephone message from Delhi from one S.P. Rai, P.A. of Kalpanath Rai, the then Minister of Energy for booking the accommodation. Later, he came to know that nine guests were staying in two rooms and he had asked who these guests were. Later on, he came to know that the guests were involved in shoot out in the JJ Hospital. PW31 Arvindan Kunjivan (a hostile witness) was working as a cook in the BSES Guest House. He had shown two rooms to the guests and they stayed in those rooms. He did not identify anyone. This part of the evidence of BSES Guest House is also stated in the confessional statement of Anil Nirbhay Narayan Sharma A-5.

PW18 Prabhakar Durve, the Chief Security Manager Holiday-Inn establishes that room no.315 was occupied by VIP who arrived there on 12.9.1992 at 11.10 a.m., which was in the name of Suryarao and was signed as S. Rao. Departure was shown on the same date. This also corroborates the say of A-2 with regard to their going at BSES Guest House and Hotel Holiday Inn.

Injuries to PW9 and C.A. Reports

Evidence of PW9 gets further corroboration from Ex.128, which is an entry in the MLC register at Sr. No.7154 dated 12.9.1992. It shows that a part of the bullet, which was retrieved from the thigh of Vijay Krishna Nagare was put in a bottle and it was handed over to the police. The same was taken to the Forensic Laboratory by PW40, head constable Suryakant Kupwadekar. Ex.129 is the injury certificate of PW9, Nagare and Ex.117 is the Chemical Analysers Report. The result of the analysis also gives the reading that 7.62 mm shot rifle cartridge cases, which were found on the scene of offence are generally fired from either AK47 rifle of Russian make or Chinese version of the same. The two pieces of bullets which were retrieved from the body of the deceased police constable K.G. Bhanawat were sent to the Forensic Laboratory by the Police Surgeon under a covering letter Ex.97. Ex. 145 is the post mortem notes of the dead body of Shailesh Haldankar. In the Chemical Analysts report, Ex.147, the bullet retrieved from the right thigh and the left thigh of deceased Shailesh Haldankar have been opined by the chemical analyser to be the fragment of 7.62 mm bullets. The CA Ex.1 is one .303 rifle which was carried by Nagare and Ex.3K is the one .303 inch rifle empty and Ex.7 is four intact .303 rifle cartridges. These facts show that PW9 Nagare had fired one bullet from .303 rifle and the other four bullets were intact in the rifle and the result of Analysis shows that Ex.3K has been fired from Ex.1 i.e. .303 rifle. These circumstances go to show that PW9 Nagare did fire one round aiming at Subhashsingh Thakur (A-6) and the circumstances that Shailesh Haldankar was shot dead from AK47 rifle is also made out from the CA reports. The Chemical Analysers report on the X-ray plates is Ex.122. Ex.Nos.2A to 2D (CAs exhibit) are consistent with the fire of 7.62 mm rifle bullets. From the CA report, it is evident that the assailants have used 9 mm pistols and AK47 rifles in the incident. As per the confessional statements of Subhashsingh Thakur, Bachhisingh A-9, Ex.239 and Prasad Khade A-10, Ex.237 in all 12 fire arms like AK-47 assault rifles, 9 mm pistols, .32 revolvers, .38 revolvers and

also two hand grenades were taken by 10 assailants in the J.J. Hospital.

Further, PW42 PSI Krishnavatar Thakur (complainant and hostile witness) has supported the prosecution entirely on the incident, but refused to identify accused No.6, Subhashsingh Thakur and admitted identifying one person in the TI parade. He proved Ex.140, the FIR. He admitted that he saw a person near the door of the cabin, with a weapon like AK 47 rifle and claimed that he had fired one shot at him and closed the door by latching it from inside and claimed that 4/5 persons were present in the Ward No.18 and that he was hiding in the bathroom as he had exhausted all the six rounds from his revolver. After some time, he went to the cabin, saw constable Bhanawat fallen down by the side of the cot of Shailesh Haldankar and head constable Javsen lying in the cabin. He also claimed that constable Nagare PW9, was lying underneath the cot of Shailesh Haldankar. He patted him and gave the call Nagare, Nagare and Nagare opened his eyes for a moment and again closed the eyes. He noticed the blood and all the bodies were bleeding having fire arm wounds. Thereafter, he went downstairs, noticed the blood stains all along the staircase. He said that doctors examined 4 injured in the casualty ward. Javsen and Bhanawat were declared dead. Constable Nagare, PW9 had injury on his leg. Nagare was taken to the operation theatre. He himself had a brushing injury on the left leg and he had noticed the trail of blood upto the big tree outside the building. He had handed over his service revolver and empty cartridges. In his cross examination, he admitted that he had submitted his resignation because a cash reward of Rs.1 lakh was reduced to Rs.25,000/- which he did not accept as he was not happy about it. He also stated that he had suffered mental depression, was spending sleepless nights and was taking tablets for the same. This incident was a part and parcel of his worries and was feeling tense about the safety of his family. In the FIR, Ex. 140, he had described two persons, one person who had fired at the constable and killed them by firing from an automatic rifle and also who had fired at him at the southern side of the verandah. He gave the description of the person as aged about 25/26 years, height about 58, strong built, fair complexion, wearing a metal framed spectacle, round face, wearing white full shirt and pant, shirt tucked in side the coloured pant. Description of the other person who was holding an automatic weapon was given by him as aged about 22/25 years, medium built, height about 56, wearing snuff coloured shirt, dark colour pant. The description of the first person tallies with accused No. 6, Subhashsingh Thakur.

From the evidence of hostile witness PW25 Girish Kumar Shrinath Singh, who is owner of petrol pump namely Sagar Auto Dealers at Sativali near Vasai, it is apparent that on 14.9.92, at about 3.30 p.m., one lady and two three other persons including one constable came in a car, having red light on the top, at his petrol pump and while sitting in his cabin they had called tea and drinking water from the nearby hotel. He had paid the bill. On that day, he had seen only two cars having come there one after another with the gap of 5/10 minutes. One of those persons tried to connect some number on telephone but as the phone was not connected, they went away. In his cross-examination, he stated that his brother Ajay told him that a lady guest has come in a car having the red light on the top and she wanted to go for the toilet. As the lady guest had arrived in the car having the red light on the top, he thought that she might be some VIP and, therefore, he led her to the self-contained room. He also stated that those persons came at his petrol pump on 14.10.1992 and not on 14.9.1992 and failed to identify accused no.2 and accused no.6. Further, there is testimony of PW33, Bhagchand Soni, who was serving with Milan Auto Service, a fuel pump at Agra road, Bhiwandi, which was supplying fuel to the Bhiwandi Municipal Council. His statement corroborates to the extent that 55 litres of petrol was taken

by PW17 Tambe in Contessa Car on 10.9.92. He has produced slip Ex. 102.

PW17 Shripad Tambe (hostile) was the driver of Contessa Car belonging to Bhiwandi Nizampur Municipal Council. He has stated that he was shown 2 sheets of papers. On the right corner of both the papers the vehicle number 1445 was entered. Those were the entries of 1.9.92, 10.9.92, 11.9.92 and 13.9.92. He admits that the two pages match the alignment in the said log book so far as they relate to the entries from 1.9.92 to 13.9.92. According to his say the 2 pages appeared to have been torn from the said register and the entry in the register made subsequently. To facilitate the reading the entries on those two sheets are now pasted together to form one sheet showing column number 1 to 13 mentioning the entries of 11.9.92, 12.9.92 and 13.9.92. He has further admitted that the entry also indicates that on 1.9.92, 45 litres of petrol was filled up in the tank. The said entry is identical with the entry in the log bok dated 1.9.92 to 7.9.92. He has denied that Suryarao A-2 asked him to adjust the entries of 12.9.92 and 13.9.92 in the register. He has further denied the suggestion that he managed to procure a false certificate of illness from Dr. Sontakke (PW37). He has admitted that on 20.9.92, he boarded a luxury bus for going to Bangalore along with his 3 friends, Ramesh, Anil and Suresh. He stayed in Bangalore for 2 days and then went to Mysore.

It is in the confessional statement of A-2 that he (A-2) got frightened on 16.9.92 and torn two pages from the logbook of Contessa car regarding the entries of movement on 12th September, 1992. Driver Tambe re-wrote the logbook at his instance. He advised his driver Tambe to go out of Bombay because he had learnt that Bombay police was making enquiries with regard to Contessa car on 19th September, 1992. This is corroborated by aforesaid evidence and that of PW37 Dr. Kantilal Vishnu Sontakke, who gave certificate of illness to Tambe on 19.9.92 when he visited Indira Gandhi Memorial hospital.

Then, there is evidence of PW19, Matatil Damodar Itty who was working as Engineer in Bhiwandi Nizampur Council and was required to look after the maintainance and repairs of the Municipal vehicles. He stated that each vehicle had got a logbook and a petrol slip book. He has admitted that the Art. Nos.61 and 60 were the same logbooks, which he had produced before the police under Panchnama. PW20 Subhash Kadam is a Panch witness. He has stated that the police called one officer from the Municipality and took 2 logbooks in their possession from that officer. Those books consisted of one log book of Contessa Car and one slip book. He had signed the panchnama Ex.72-A. PW23 Ashok Bagul is another panch witness. He has stated that he had gone to Crowford market and a policeman came there to call him to be a panch witness. Accused No. 2 Suryarao was present in the DCB CID office. In his presence, he made a statement that he had torn the pages from the log book and had kept those pages at Bhiwandi and he would produce the said pages from Bhiwandi. Accordingly, the panchnama was drawn. He has further stated that the police along with Suryarao took them to the house of Suryarao in a jeep. Accused No.2 Suryarao produced some pages from a book. The police took charge of those papers and put the same in the packet. A detailed panchnama Ex.76A was drawn. He along with co-panch signed the panchnama.

Hostile witness PW22 Satish Bhujang Rao, an Interior Decorator, resident of Ghatkopar (W), Bombay has stated that he knew accused no.7 Shamkishore and Himmat Raval (PW34). Shamkishore used to treat his wife as his elder sister. In the year 1989-90, when Shamkishore was arrested by the police in a case of attempt to murder, he stood surety for Shamkishore. Himmatbhai

Raval had entrusted him the job of fixing PVC tiles at the residence of Suryarao at Gokul Nagar at Bhiwandi and he did the job. He had no occasion to meet Suryarao. Himmatbhai Raval had paid the amount for the above work. He saw Suryarao only in the DCB CID Office. Further, he had no occasion to see accused no.6 Subhashsingh Thakur and that he has seen him for the first time in the dock. Whenever Shamkishore came to attend the dates in the court in connection with that case, he used to stay at his house.

PW34 Himmat Rupchand Raval, businessman, resident of Bhiwandi, Distt. Thane was also a hostile witness. He has stated that from 1988 he is in the business of Powerloom Shed construction. In the period between 1988 to 1993, Ratnadeep son of Jayawant Dattatray Suryarao and one Narayan Bhoir were his partners in the said business. He remained as President and Vice President of Bhiwandi Nizampur Municipal Council. He stated that he knew accused no.2 Suryarao since 1984, who was sitting in the dock before the court. They were having cordial relationships. He also knew accused no.7 Shamkishor since 1986, who was sitting in the dock before the court. Thereafter, he has not supported prosecution version as narrated in his statement under Section 164 Cr.P.C.

From the aforesaid evidence led by the prosecution following facts emerge:

1. If the confessional statements of A2, A6 and A7 are taken into consideration as they are, then the Designated Court has rightly convicted them

2. The aforesaid statements are corroborated

(a) By the confessional statements of other accused as discussed by the Designated Judge.

(b) By the evidence of PW 12 Laxman Vishe and PW 26 Ramesh Patil.

(c) By evidence of PW9 who was an injured witness at the time of incident. There are no reasons to disbelieve the evidence of PW9 who was police constable on duty in ward no.18. He received bullet injury in the incident.

(d) For the movement of A2, A6 and A7 on 12th and 14th after the incident, there is no reason to disbelieve the evidence of two independent witnesses who were bodyguards of A-2, who was President of Bhiwandi Municipal Corporation.

(e) The confessional statement of A-6 gets corroboration from PW27, who has specifically stated that at about 1.40/1.45 p.m., A-3 and absconding accused Mohd. Hussain went to the clerk Borge and made enquiry about patients. It also gets corroboration from PW54 Shankar Ramchandra Jadhav.

(f) The statements of A2 and A6 that they stayed at BSES Guest House are corroborated by the evidence of PW63, PW30 and PW37.

(g) Evidence of PW25 Girish Singh, PW17 Tambe and that of PW37 Dr. Sontakke corroborates the statement of A-2 with regard to movement of car on 12th and 14th as well as asking driver Tambe to go out of city as directed by A-7 as police was making enquiry about movement of car. The evidence with regard to logbook and tearing of

two pages therefrom also reveals guilty consciousness of A-2.

(h) Hostile witnesses PW22 Satish Rao and PW34 Himmat Rawal admitted that they were having relations with A-2 Suryarao and A-7 Kishore since years.

Submissions:

On the basis of the aforesaid evidence, learned counsel for the accused submitted that judgment and order passed by the Designated Court is illegal and erroneous as

- (a) Provisions of TADA are not applicable.
- (b) Confessional statements are not admissible in evidence and in any case are not true, voluntary and reliable.
- (c) Identification of A-6 is doubtful.
- (d) Sanction to prosecute under TADA is without application of mind.

Whether provisions of TADA are applicable ?

Learned senior counsel Mr. Rajinder Singh appearing on behalf of accused no.6, Mr. Sushil Kumar appearing for accused no.7 and Mr. Niteen Pradhan, Advocate appearing for accused no.2 submitted that the present case is one of gang rivalry and the provisions of TADA would not be applicable; there is nothing on record that accused intended to create any terror and at the most intention to commit the murder of Shailesh Haldankar could be inferred. For this purpose, it is pointed out that only minor injuries are caused to other persons except the intended men and the injuries caused to other police constables who were on duty and who are dead were unintentional. It is also submitted that incident took place at 3:45 a.m. i.e. early in the morning and, therefore, also there was no question of creating any terror in the mind of public at large. For this purpose, learned counsel referred to *Niranjan Singh Karam Singh Punjabi, Advocate vs. Jitendra Bhimraj Bijjaya and others* [(1990) 4 SCC 76].

In the aforesaid case, this Court held that the Designated Court was right in coming to the conclusion that the intention of the accused was to eliminate Raju and Keshav for gaining supremacy in the underworld and observed thus:

A mere statement to the effect that the show of such violence would create terror or fear in the minds of the people and none would dare to oppose them cannot constitute an offence under Section 3(1) of the Act. That may indeed be the fall out of the violent act but that cannot be said to be the intention of the perpetrators of the crime.

In the aforesaid case, the Court has clarified that intention of the accused was only to eliminate Raju and Keshav and, therefore, they killed the former and caused injury to later and it was not possible to hold that their intention was to strike terror in the people or a section of the people. The Court thereafter pertinently observed that it would have been a different matter if to strike terror some innocent persons were killed and in such case the intention could be to strike terror and the killings would be to achieve that objective.

Learned counsel further referred to the decision in *State vs. Nalini and others* [(1999) 5 SCC 253]. This judgment also does not in any way support their contentions. A three-Judge Bench of this

Court quoted the dictum laid down in *Hitendra Vishnu Thakur vs. State of Maharashtra and others* [(1994) 4 SCC 602] with approval and concluded thus (Para 51 p.298): -

The legal position remains unaltered that the crucial postulate for judging whether the offence is a terrorist act falling under TADA or not is whether it was done with the intent to overawe the Government as by law established or to strike terror in the people etc.

In *Hitendra Vishnu Thakur* (Supra) dealing with similar contention, this Court held (para 7, p. 618) thus:

.A terrorist activity does not merely arise by causing disturbance of law and order or of public order. The fall out of the intended activity must be such that it travels beyond the capacity of the ordinary law enforcement agencies to tackle it under the ordinary penal law. Experience has shown us that terrorism is generally an attempt to acquire or maintain power or control by intimidation and causing fear and helplessness in the minds of the people at large or any section thereof and is a totally abnormal phenomenon. What distinguishes terrorism from other forms of violence, therefore, appears to be the deliberate and systematic use of coercive intimidation. More often than not, a hardened criminal today takes advantage of the situation and by wearing the cloak of terrorism, aims to achieve for himself acceptability and respectability in the society because unfortunately in the States affected by militancy, a terrorist is projected as a hero by his group and often even by the misguided youth..

Similarly, in *Girdhari Parmanand Vadhava vs. State Of Maharashtra* [(1996) 11 SCC 179] this Court observed that if an innocent boy is killed only because the demand for ransom amount was not met by the family members, such killing cannot but send a shockwave and bring about terror in the minds of the people of the locality. The Court further held thus:
It is the impact of the crime and its fallout on the society and the potentiality of such crime in producing fear in the minds of the people or a section of the people which makes a crime, a terrorist activity under Section 3(1) of TADA.

In our view, it is not possible to define terrorism by precise words. Whether the act was committed with intent to strike terror in the people or a section of the people would depend upon facts of each case. Further, for finding out intention of the accused, there would hardly be a few cases where there could be direct evidence. Mainly it is to be inferred from the circumstances of each case. In appropriate cases, from the nature of violent act, inference can be culled out. There can also be no doubt that fall out of violent act vary from person to person and society to society but is well understood by a prudent person and by those who are affected.

The prosecution version as revealed from the confessional statements and other evidence is that there are two gangs operating in Mumbai, i.e. one of Dawood Ibrahim and other of Arun Gavli. Their activities are of eliminating or causing harm or injury to those who do not obey their dictates and of extortion from builders, hoteliers, industrialists, professionals and others persons. They also indulge in smuggling and drug trafficking and for undertaking all these activities in organised manner, they employ number of persons. Their code

word for such activities is game. May be that they are getting some support from the authorities or politicians and a vice versa. Not only this, it would be totally unjust to ignore the ground reality that these terrorist gangs operate and extort large amount of money. Through terrorism, they acquire or maintain power or control by intimidation and causing fear and helplessness in the minds of the people at large. They are hardened criminals and take advantage of the situation and in many cases, police authorities fail to protect victims. As confessed by A-2 Suryarao, President of Bhiwandi Municipal Corporation, he sought assistance from A-7 and others and thereafter it is his say that he was required to comply with the illegal demand of A-7 of rendering assistance to A-6 and A-7 after commission of the offence. Further, the intention of the accused could be gathered from their act of shooting the police guards who were on duty and causing injury to others whosoever came in their way. In such a situation, it could be inferred that the dastardly act was to administer a terror or a shock wave in the people at large and convey that the fate of all those who did not obey their dictates or oppose them would be the same as that of Shailesh Haldankar. It further conveys that police guard on duty can not save the victim, but they also may meet the same fate. Not only this, the crime was perpetuated in a protected place i.e. J.J. Hospital by master-minding the operation of achieving the target. Necessary information was collected and after equipping themselves with sophisticated weapons they went to the hospital where patients and staff on duty went helter-skelter, witnesses turned hostile, PW42 PSI Thakur who was police officer on duty could not do anything to protect anyone and after giving detailed FIR failed to support the same before the Court. How the witnesses are terrorised can be seen from the evidence of PW42, who had lodged the FIR. He resigned from the post and was suffering mental depression and spending sleepless nights and was much more worried because of the incident about the safety of his family. At the time of giving evidence, he was feeling tense even after lapse of seven years of the incident. Similar was the position of PW54 Shankar Ramchandra Jadhav. Further, PW28 Shrirang Gangaram Uttekar, (hostile witness) a watchman at the gate of J.J. Hospital was so scared that in the cross-examination, when he was asked about accused no.10, Court noted the witness appears to be scared and started looking to the Court and turning his eyes in various directions. The Special Judge also observed that, from the appearance, the witness appears to be scared and attempt was made to make him easy but attempt failed and finally witness started weeping in the witness box. Further, confession by A-2 reveals how the persons in clutches of these gangs are terrorised. Hence, there is no substance in the contention of the learned counsel for the accused that there was no intention on the part of the accused to strike terror and that the crime would not be covered by the terrorist activity as provided under Section 3(1) of TADA. We would again reiterate that whether the crime committed creates terror or not, depends upon the facts and circumstances of each case and cannot be defined by precise words.

Admissibility of Confessional Statements:

The next submission raised by the learned counsel for the accused is with regard to the admissibility and evidentiary value of the confessional statements. It has been contended that confessional statements of the accused were recorded by the police officers when accused were in police custody; after recording of confessional statements, they were not produced before the Judicial Magistrate and the confessional statements were sent to the concerned Chief Judicial Magistrate after lapse of time thereby committing breach of Rule 15 of TADA Rules and, therefore, the confessional statements are not admissible in evidence and, in any case, they are not voluntary, reliable and truthful.

In our view, for appreciating this contention we have to bear in mind the provisions of Section 15 which begin with non-obstante clause that notwithstanding anything contained in the Code or in the Indian Evidence Act, such statements shall be admissible in trial of such persons or co-accused, abettor or conspirator for an offence under the Act or Rules made thereunder. If we keep in mind that the provisions of the Evidence Act to the aforesaid extent are to be ignored then there would not be much force in the contention raised by the learned counsel for the appellants. Under the Act and the Rules, conditions for recording the confessional statements are required to be satisfied. If those conditions are complied with then the statements are admissible in evidence for connecting the accused or co-accused with the crime. However, this aspect does not require much discussion as it has been dealt with and considered in various decisions of this Court. In Lal Singh vs. State of Gujarat and another [(2001) 3 SCC 221], this Court has held that in view of Section 15 of the TADA, which lifted the bar provided under the Evidence Act, confessional statement recorded by the police officers is admissible in evidence, is substantive evidence and during the trial it could be relied upon against the co-accused also. The Court held (in para 23) thus:

Custodial interrogation in such cases is permissible under the law to meet grave situation arising out of terrorism unleashed by terrorist activities by persons residing within or outside the country. The learned counsel further submitted that in the present case the guidelines suggested by this Court in Kartar Singh v. State of Punjab [(1994) 3 SCC 569] were not followed. In our view, this submission is without any basis because in the present case confessional statements were recorded prior to the date of decision in the said case i.e. before 11.3.1994. Further, despite the suggestion made by this Court in Kartar Singh case, the said guidelines are neither incorporated in the Act nor in the Rules by the Parliament. Therefore, it would be difficult to accept the contention raised by learned counsel for the accused that as the said guidelines are not followed, confessional statements even if admissible in evidence, should not be relied upon for convicting the accused. Further, this Court has not held in Kartar Singh case that if suggested guidelines are not followed then confessional statement would be inadmissible in evidence. Similar contention was negatived by this Court in S.N. Dube v. N.B. Bhoir [(2000) 2 SCC 254] by holding that a police officer recording the confession under Section 15 is really not bound to follow any other procedure and the rules or the guidelines framed by the Bombay High Court for recording the confession by a Magistrate under Section 164 Cr.P.C.; the said guidelines do not by themselves apply to recording of a confession under Section 15 of the TADA Act and it is for the Court to appreciate the confessional statement as the substantive piece of evidence and find out whether it is voluntary and truthful. Further, by a majority decision in State v. Nalini and others [(1999) 5 SCC 253] the Court negatived the contentions that confessional statement is not a substantive piece of evidence and cannot be used against the co-accused unless it is corroborated in material particulars by other evidence and the confession of one accused cannot corroborate the confession of another, by holding that to that extent the provisions of Evidence Act including Section 30 would not be applicable. The decision in Nalini case was considered in S.N. Dube

case. The Court observed that Section 15 is 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 and that 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.

In this view of settled legal position, confessional statement is admissible in evidence and is substantive evidence. It also could be relied upon for connecting the co-accused with the crime. Minor irregularity would not vitiate its evidentiary value. Further, the contention of the learned counsel for the accused that, because, there was delay in sending the confessional statement to the Chief Judicial Magistrate and it was not sent forthwith as required under Rule 15 of the TADA Rules, it becomes doubtful and inadmissible in evidence, also requires to be rejected. As per Rule 15 what is mandatory is that the confessional statement should be forwarded to the Designated Court, which may take cognizance of the offence. Such violation of the Rule cannot be held to be incurable illegality. [Re: Wariyam Singh and Others vs. State Of UP (1995) 6 SCC 458].

Learned senior counsel further submitted that confessional statements of other acquitted accused cannot be relied upon for connecting the accused with the crime. In case of Nalini (Supra), this Court while dealing with the contention that if the accused are acquitted for the offence punishable under TADA then their confessional statements cannot be relied upon for convicting the accused for other offences, negatived the same and observed (in para 82), the correct position is that confessional statement duly recorded under Section 15 of TADA would continue to remain admissible as far the other offences under any other law which too were tried along with TADA offences, no matter that the accused was acquitted of offences under TADA in that trial. The Court observed that it was undisputed that a duly recorded confessional statement is a substantive evidence in the trial of offences under TADA.

Evidentiary Value of such Confessional Statements

It is true that if the confessional statements are taken as they are, accused can be convicted for the offences for which they are charged as the said statements are admissible in evidence and are substantive piece of evidence. However, considering the facts of the case, particularly that the confessional statements were recorded by the police officer during investigation; said statements were not sent to the Judicial Magistrate forthwith; and that after recording the statements, accused were not sent to judicial custody, in our opinion, unless there is sufficient corroboration to the said statements, it is not safe to convict the accused solely on the basis of the confessions. Therefore, we have considered confessional statements with the other evidence connecting the accused with the crime. Learned senior counsel Mr. Sushil Kumar submitted that if we remove the evidence of PW26 from the scene then it is difficult to maintain the conviction of A-7. It is his contention that A-2 and A-6 were knowing each other as per their admission in confessional statements. He emphasized minor contradictions and submitted that evidence against A-7 is not sufficient to connect him with the crime. In our view other evidence as stated above fully corroborates the confessional statements and there is no reason to discard the evidence of PW26.

Learned counsel for A-2 Suryarao submitted that considering the facts, he cannot be held guilty for the offence punishable under section 3(3) of TADA as he had no knowledge that A-6 and others were involved in the shoot out at J.J. Hospital. He further submitted

that in any set of circumstances, he was compelled and threatened by A-7 Shamkishore to send the car, otherwise he and his family would meet the same fate as that of Shailesh.

It is true that there is no direct evidence that A-2 was knowing that A-7 had called the car for the purpose of moving out other accused who were involved in the shoot out. However, from his confessional statement, it is apparent that he was not ignorant of the fact that A-7 was involved in criminal activities. He sought assistance with regard to the no confidence motion which was sought to be moved against him and in return as per his say, Pappu Kalani had asked him to help A-7 when such help was sought for. Further, as per his own say, A-6 was introduced to him on 12th. All throughout in a suspicious manner, the official car, with police guard was taken from one place to another. Even after coming to know about the incident on 12th, he on 14th along with his car moved the accused from place to place and aided them in moving out of Bombay. In these circumstances, it would be difficult to hold that A-2 was not having any knowledge with regard to the fact that A-6 and others were involved in shoot out at the J.J. hospital or that he was not assisting the said culprits. It is unfortunate that the President of the Bhiwandi Municipal Corporation who normally would be a respected political leader would be party to such heinous acts.

Identification of A-6

Next question is whether identification of A-6 by PW9 in test identification parade and in the dock could be relied upon for convicting him. For appreciating this contention it is to be stated that witness has specifically mentioned that A-6 was around 58 in height and having fair complexion and was well built. Same is the version of PW12 Laxman Vishe and PW26 Ramesh Patil who had seen A-6 while sitting in the car of A-2 on 12th and 14th.

Apart from the contradictions here and there, learned counsel appearing for A-6 vehemently submitted that no reliance can be placed upon the identification of A-6 by this witness because the incident of firing must have happened within few minutes and in that set of circumstances it is difficult for a witness to identify the person who fired shots. It is also contended that test identification parade held on 22.10.1993 i.e. after more than one year, cannot be relied upon as corroborative evidence.

No doubt, it is true that incident of firing must have happened within few minutes, at the same time, it is the say of PW9 that he saw A-6 thrice once, when he tried to come in the room from northern gate, again when he came from southern gate and finally when he entered the room and fired shots indiscriminately. Further, considering the nature of duty of a police constable, there is no reason to doubt his statement. We would also reiterate that substantive evidence of a witness is his evidence in Court. Identification parade is not primarily meant for the court but is meant for investigation purposes. It serves two purposes, namely, to enable the witness to satisfy that prisoner whom he suspects is really the one who was seen by him in connection with the commission of the crime and for satisfying the investigating authority that suspect is the real person whom the witness had seen in connection with the said occurrence. In case when the evidence is cogent, consistent and without any motive, it is no use to theoretically imagine that as the witness has seen the accused for few minutes it would be difficult for him to identify. It always depends upon one's capacity to recapitulate what he has seen earlier. Power of perception and memorising differs from man to man and also depends upon situation. Finally, appreciation of such evidence would depend upon the strength and trustworthiness of

witnesses. [Re: Rameshwar Singh vs. State of J & K, [AIR 1972 SC 102], Suraj Pal vs. State of Haryana [(1995) 2 SCC 64], Daya Singh vs. State of Haryana [(2001) 3 SCC 468]. In the present case, as stated, PW9 was the police constable who was present in the room, he was injured, he saw accused no.6 coming in the room thrice and firing indiscriminately and hence, there is no reason to doubt identification by him.

The learned counsel for accused no.6 contended that considering the evidence against him, it is doubtful whether he fired at Shailesh Haldankar and other two police constables because he was accompanied by other injured accused Pradhan, who was also having similar weapon and had fired. It is also submitted that Pradhan was having bullet injury as per the prosecution version and, therefore, it would be difficult to arrive at the definite conclusion that identification of A6 by PW9 is reliable. To meet this contention, it has been pointed out that complexion of absconding accused Pradhan was different from that of A6. For this purpose, reliance is placed upon the evidence of PW48 Dr. Mukund Karia and PW49 Dr. Rajendra Thakare. PW47 Madhukar Yadavrao Shirsat of Athavali Police Station, Surat recorded the statement of injured Pradhan at Surat and he also described Pradhan as having 56 height, medium built and of shallow complexion. PW48 Dr. Karia who had examined Pradhan at about 2.30 to 2.45 a.m. on 14.9.1992 at the residence of Dr. Kamble at Surat has also described the patient as 28/30 years of age having 56 height, shallow complexion, thin built. Same is the version of PW49 Dr. Rajendra Thakare, who retrieved 2 cm long bullet from the body of Pradhan. As against this, it has come on record that height of A-6 was around 58. He was of fair complexion and well built and that is what has been stated by PW9, PW12 and PW26. Therefore, it would be difficult to hold that PW9 has committed any error or mistake in identifying A-6.

Validity of Sanction

Mr. Sushil Kumar, learned senior counsel for accused no.7 submitted that sanction granted by the Commissioner of Police is without application of mind and thereby illegal. For proving sanction, the prosecution has relied upon the evidence of PW72 Satish Sahni, who at the relevant time was Commissioner of Police, Mumbai. He has specifically stated that after necessary scrutiny of the papers, sanction to prosecute as per Ex.266 was granted. In detail cross-examination, he has clarified that he arrived at a definite conclusion for according sanction after perusing the papers and report of the Chief P.P. covering the legal aspects and the report of the Additional Commissioner of Police. He has also clarified that incident was certainly designed to spread a wave of terror in the minds of the people by indiscriminate firing with lethal weapons in a place like hospital. Sanction order Ex.266 also recites that relevant material was perused by him and thereafter he accorded sanction under Section 20-A(2) of the TADA for the offences committed by the accused under Section 3(2), 3(3), 3(4), 3(5), 3(6), 5 and 6 of TADA. Similar is the sanction order Ex.286 dated 5.8.1993. Both these orders are exhaustive and relevant material is referred to. Hence, it cannot be said that there is any illegality or irregularity in granting sanction to prosecute the accused under the provisions of TADA.

From the aforesaid discussion, we arrive at the conclusion that:

1. Learned Designated Judge has rightly tried and convicted the accused for the offences punishable under the TADA. There is no substance in the contentions raised by the learned counsel for the accused that the shoot out at the J.J. hospital was mere an act of gang rivalry. Shoot out at the J.J. Hospital, which is a

Government Hospital of 1500 beds in Mumbai, at midnight causing death of three persons and injuries to six others was, in the facts of the present case, is nothing but an act of terrorism. It cannot be termed as simple act of gang rivalry. It is true that it is difficult to define terrorism in precise terms. Whether the criminal violent act was committed with intent to strike terror in people or section or people would always depend upon facts of each case. For finding out the intention of the accused, there would hardly be any case where there could be direct evidence. It is to be inferred from the manner and mode adopted while committing the act and its after effect including fear psychosis. From the circumstances in the present case, irresistible inference can be drawn that crime was committed to create terror and also to take revenge. Such act creates terror in the minds of the people or section of the people so that the targeted persons would succumb to the dictates or extortion because of fear for survival. In the present case, PSI who was on duty resigned from his job, suffered mental depression, spent sleepless nights and worried about the safety of his family after lapse of seven years of incident. A retired army officer deposing before the court appeared to be scared and started weeping in the witness box. Effect of fear psychosis also can be seen from the statement of President of Bhiwandi Municipal Corporation (accused) that he was compelled to use his official vehicle along with police constable for the movement of the accused. In such cases, we should accept the ground reality that it would hardly be possible to get evidence of eye-witnesses.

2. Confessional statement before the police officer under Section 15 of the TADA is substantive evidence and it can be relied upon in the trial of such person or co-accused, abettor or conspirator for an offence punishable under the Act or the rules. The police officer before recording the confession has to observe the requirement of sub-section (2) of Section 15. Irregularities here and there would not make such confessional statement inadmissible in evidence. If the Legislature in its wisdom has provided after considering the situation prevailing in the society that such confessional statement can be used as evidence, it would not be just, reasonable and prudent to water down the scheme of the Act on the assumption that the said statement was recorded under duress or was not recorded truly by the concerned officer in whom faith is reposed. It is true that there may be some cases where the power is misused by the concerned authority. But such contention can be raised in almost all cases and it would be for the Court to decide to what extent the said statement is to be used. Ideal goal may be: confessional statement is made by the accused as repentance for his crime, but for achieving such ideal goal, there must be altogether different atmosphere in the society. Hence, unless a fool-proof method is evolved by the society or such atmosphere is created, there is no alternative, but to implement the law as it is.

3. Sanction to prosecute under TADA granted by the competent authority cannot be said to be in any way illegal or erroneous.

4. Confessional statements of A2, A6 and A7 are corroborated:-

(a) By the confessional statements of other accused as discussed by the Designated Judge.

(b) By the evidence of PW12 Laxman Vishe and PW26 Ramesh Patil.

(c) There is no reason to disbelieve the evidence of PW9

who himself is an injured witness and who was police constable on duty in ward no.18 for the deceased Shailesh Haldankar. He got bullet injury at the relevant time. There is no reason to disbelieve the identification of A-6 by him. Description given by him gets full corroboration from evidence of PW12, PW26 and PW42 PSI Thakur.

(d) Evidence of PW25 Girish Singh, PW17 Tambe and that of PW37 Dr. Sontakke corroborates the version of A-2 with regard to movement of car on 12th and 14th as well as asking driver Tambe to go out of city as directed by A-7 because police was making enquiry about movement of car. The evidence with regard to logbook and tearing of two pages also reveals guilty consciousness of A-2.

Hence, in our view, the Designated Court was fully justified in convicting the A2, A6 and A7 and we uphold the same.

SENTENCE

REGARDING A-2:

Learned counsel for A-2 submitted that accused has undergone more than six years of imprisonment and considering the fact that he was required to send the cars under threat, sentence may be reduced to the sentence already undergone. In our view, this submission also does not merit any consideration. May be that A-2 is a political leader or that there may be some threat or compulsion in using his official vehicle for moving the accused from one place to another, but that would hardly be a ground for reducing the sentence. As a responsible citizen, he ought to have informed the concerned police authorities. To this, learned counsel for A-2 submitted that when the police failed to give protection to the person who was in custody, it would be difficult to imagine that police would have given such protection to him or could have saved him from the wrath of the gangsters. In our view, it is difficult to hold that police would not have given necessary assistance to A-2 who was President of Bhiwandi Municipal Corporation. The citizens are not supposed to help the criminals on the assumption that in case of need police would not come to their rescue and should succumb to illegal demands of the gangsters.

REGARDING A-7:

Learned senior counsel Mr. Sushil Kumar submitted that there was no reason to impose sentence of 10-years RI to A-7 while the Designated Court has imposed sentence of 7-years RI to A-2. In our view, considering the activities carried out by A-7 as confessed by him, it cannot be said that sentence imposed by the learned Judge is in any way excessive or discriminatory. From the rôle played by A-7, it is clear that he was vitally involved. At his instance, on 12th and 14th, A-2 was compelled to bring the cars of Bhiwandi Nagarpalika that too with the police guard, for giving treatment to injured accused and for facilitating further to move from one place to another. Considering the overwhelming evidence against A-7, particularly the evidence of PW26 and confessional statements, it cannot be said that learned Judge has committed any error in convicting A-7 and sentencing him to suffer RI for 10 years.

REGARDING A-6:

Death Reference Case No. 1 of 2000:

Learned counsel for A-6 submitted that if we take confessional statement as it is, then it is apparent that he has not taken part in shoot out. It is his say that after going to the hospital as Brijeshsingh knocked the door and none opened, and at that time, he felt that there was no setting and he asked Brijeshsingh that all should go back. During that time, Brijeshsingh fired 3-4 times from his AK-47 rifle on the closed door. Again he asked Brijeshsingh to go back from that place. Meantime, someone else fired at them from the opposite door. Subsequently, Brijeshsingh came towards him quickly and informed that he has killed all the persons inside the ward and asked them to move from that place. It is the contention of the learned counsel that on the basis of this statement which is substantive evidence brought on record by the prosecution, this would not be a fit case of sentencing the accused to death.

In our view, there is force in the aforesaid submission. Accused no.6, who has confessed his involvement in the crime including the crimes committed by him previously, has specifically stated that he asked Brijeshsingh to go back from the hospital without firing. He has not confessed that he has fired any shot during the incident. In this set of circumstances, even though we hold that it was an act of terrorism committed by the accused, this would not be a fit case for imposing death sentence. However, considering the confessional statement as a whole coupled with the other evidence and the terror created by the accused, we confirm the conviction but modify the sentence from death penalty to imprisonment for life till rest of life.

In Subhash Chander vs. Krishan Lal and others [(2001) 4 SCC 458] the Court referred to the decision in State of M.P. vs. Ratan Singh [(1976) 3 SCC 470] and held that a sentence of imprisonment for life does not automatically expire at the end of 20 years, including the remissions. The Court in Ratan Singh's case has observed that:

4. As regards the first point, namely, that the prisoner could be released automatically on the expiry of 20 years under the Punjab Jail Manual or the Rules framed under the Prisons Act, the matter is no longer res integra and stands concluded by a decision of this Court in Gopal Vinayak Godse v. State of Maharashtra [(1961) 3 SCR 440], where the Court, following a decision of the Privy Council in Pandit Kishori Lal v. King Emperor [(LR 72 IA 1 : AIR 1945 PC 64)] observed as follows:

Under that section, a person transported for life or any other term before the enactment of the said section would be treated as a person sentenced to rigorous imprisonment for life or for the said term.

If so, the next question is whether there is any provision of law whereunder a sentence for life imprisonment, without any formal remission by appropriate Government can be automatically treated as one for a definite period. No such provision is found in the Indian Penal Code, Code of Criminal Procedure or the Prisons Act.

* * * * *

A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the

convicted persons natural life.

The Court further observed thus:

But the Prisons Act does not confer on any authority a power to commute or remit sentences; it provides only for the regulation of prisons and for the treatment of prisoners confined therein. Section 59 of the Prisons Act confers a power on the State Government to make rules, inter alia, for rewards for good conduct. Therefore, the rules made under the Act should be construed within the scope of the ambit of the Act. . . . Under the said rules the orders of an appropriate Government under Section 401, Criminal Procedure Code, are a pre-requisite for a release. No other rule has been brought to our notice which confers an indefeasible right on a prisoner sentenced to transportation for life to an unconditional release on the expiry of a particular term including remissions. The rules under the Prisons Act do not substitute a lesser sentence for a sentence of transportation for life.

The question of remission is exclusively within the province of the appropriate Government; and in this case it is admitted that, though the appropriate Government made certain remissions under Section 401 of the Code of Criminal Procedure, it did not remit the entire sentence. We, therefore, hold that the petitioner has not yet acquired any right to release.

Similarly, in *Shri Bhagwan vs. State of Rajasthan* [(2001) 6 SCC 296] the Court relied upon the decision in *Ratan Singh's case* (supra) and observed as under:-

A question may arise whether in view of the provision of Section 433(b) read with Section 433-A Cr.P.C. an accused should be released on completion of 14 years of imprisonment. For this purpose, we would make it clear that under Section 433 (b) enables the appropriate Government to commute the sentence of imprisonment for life, for imprisonment of a term not exceeding 14 years or for fine. Under Section 433-A, there is an embargo on that power by providing that where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided under the law, such person is not to be released from prison unless he had served at least fourteen years of imprisonment. This question is considered by various decisions rendered by this Court and by the Privy Council and it has been reiterated that a sentence of imprisonment for life imposed prima facie be treated as imprisonment for the whole of the remaining period of the convicted persons

natural life. It is also established law that rules framed under the Prisons Act do not substitute a lesser sentence for a sentence of transportation for life.

Similar are the observations of this Court in Sohan Lal vs. Asha Ram and others [(1981) 1 SCC 106], Bhagirath vs. Delhi Administration. [(1985) 2 SCC 580] and in Zahid Hussein and others vs. State of W.B. and another [(2001) 3 SCC 750].

In this case also, considering the heinous act of terrorism and brutal murder of two police constables who were on duty to guard Shailesh Haldankar, even though we hold this would not be a fit case for imposing death sentence, we direct that accused will not be entitled to any commutation or pre-mature release under Section 433-A of Criminal Procedure Code, Prisoners Act, Jail Manual or any other statute and the rules made for the purpose of commutation and remissions.

In the result, Criminal Appeal No.975 of 2000 filed by accused no.2 Jayawant Dattatray Suryarao, Criminal Appeal No.956 of 2000 filed by accused no.7 Shamkishore Shamsharma Garikapatti are dismissed and Criminal Appeal No.966 of 2001 filed by accused no.6 Subhashsingh Shobhanathsingh Thakur is partly allowed as stated above. Death Reference Case No.1 of 2001 stands disposed of accordingly.

Criminal Appeal No. 1101 of 2000

Considering the evidence brought on record, the Designated Court rightly acquitted A-1 Jahur Ismail Faki, A-3 Smt. Mehboobi Azizkhan, A-4 Anil Amarnath Sharma, A-8, Ahmed Mohmed Yasin Mansoori and A-9 Jayprakash Shivcharansing @ Bacchisingh (since dead) A-10 Prasad Ramkant Khade. The Court has rightly held that confessional statements without there being sufficient corroborative evidence would not be sufficient for convicting the accused for the offences for which they are charged. In this view of the matter, it cannot be said that the said part of judgment and order passed by the Designated Court calls for any interference. Hence, this appeal is also dismissed.

..J.
(M.B. SHAH)

.....J.
(R.P. SETHI)

November 5, 2001.