MOHD. FAROOQ ABDUL GAFUR AND ANOTHER
v.
STATE OF MAHARASHTRA
(Criminal Appeal Nos. 85-86 of 2006)

AUGUST 6, 2009

[S.B. Sinha and Dr. Mukundakam Sharma, JJ.]

2009 (12) SCR 1093

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA J. 1. These appeals are filed against a common judgment and order dated 17th December, 2003 passed by a Division Bench of the High Court of Judicature at Bombay in Confirmation Case No. 01 of 2001 and Criminal Appeal Nos. 661 of 2000; 679 of 2000; 753 of 2000 and 758 of 2000 and are being disposed of by this common judgment.

2. The prosecution case in brief is as follows: -

One Milind Vaidya is the ex-Mayor of Mumbai. He belongs to the Shiv Sena, a political party, active in Maharashtra. On 4th March, 1999 at about 9.45 p.m. he alongwith 7-8 workers were sitting in an open shed by the side of Mori Road. He was guarded by his two body guards, namely, Constable Dinanath Pawar (PW-2) and Constable Sandeep Eaghmare (PW-3). They were armed with a 9 mm pistol and 9 mm carbine with 90 rounds respectively. The said shed house is an office of Shiv Sena 'Shakha'. At about 5 minutes past 10.00 p.m. a white Maruti car with a number plate MH-03-H-1749 came from the side of Mahim Railway Station. When it reached near the said open shed three persons started firing at Milind Vaidya and others who were sitting in the shed. One of the assailants was sitting alongside the driver on the front seat and the other two were sitting at the back seat. . In the aforesaid

incident three persons died while seven to eight persons, including Shri Milind Vaidya, injured.

3. The said Maruti car was being driven allegedly by Abdul Hasan (Accused No.8) and Azzizuddin (Accused No.7) was sitting by his side being armed with a AK-56 rifle. Mohd. Zuber (Accused No.5) and Fazal Mohd. (Accused No.6) were sitting on the rear side of the said car and were armed with 9 mm pistol. All the aforementioned three persons were said to have fired at Milind Vaidya and his associates indiscriminately, who were sitting in the shed.

4. Body guard Dinanath Pawar, who examined himself as PW-2, is said to have fired three rounds from his pistol on the Maruti Car. Other body guard namely Sandeep Waghmare (PW-3), is said to have chased the car upto some distance but did not fire any shot, although armed with a carbine. The incident of firing lasted for a few seconds whereafter the Maruti car sped away. Milind Vaidya sustained bullet injuries. Besides six others, namely – Nishchal Krishna Chaudhari; Vinay Narayan Akare; Babu Kashinath Mangela; Niteen Narayan Mehar; Murugan V Tewar; and Vijay Kashinath Akare also sustained bullet injuries. Three of his associates, namely – Milind Gunaji Chaudhari, Vilas Gopinath Akare and Deepak Sitaram Akare succumbed to their injuries.

5. All the aforesaid victims were immediately rushed to Hinduja Hospital, Mumbai where they were admitted for examination and treatment. Post mortem examinations of the three deceased were carried out on the next day. They were found to have sustained bullet injuries on different parts of their body and lead pieces were recovered therefrom.

6. It is worthwhile to mention here that a similar attempt on the life of Milind Vaidya had also been made by unknown persons three months prior to the incident in question. At that time he had escaped with some injuries. He earlier used to have a body guard for his personal safety. However, after the said incident he was provided with three body guards during day time and two during night time. One of the guards was provided with a carbine weapon while the other two were provided with 9 mm pistols. Milind Vaidya used to sit alongwith his workers at night time in the shed adjoining the foot-path of Mori Road, Mahim for the purpose of hearing the grievances of the people. At that time he used to be escorted by his body-guards.

7. First Information Report was lodged on 4th March, 1999 at Mahim Police Station. The investigation of the case was taken up by PI Yashwant Puntambekar (PW-36). However, having regard to the gravity of the offence the Commissioner of Police, Mumbai, directed the Senior Police Inspector, CID – Unit IV, to take over further investigation of the case, pursuant whereof Senior P.I. Bagul took over the investigation. Thereafter PI Bharat Tambe (PW-59) took over the investigation on 06.03.1999. A Maruti car was located on 8th March, 1999 in an abandoned condition having been found parked in Jain Derasar Lane at Wadala. On inspection of the car one empty shell of AK-56 rifle; 2 empties of 9 mm caliber pistols and two empties of mouser pistols etc. were found. It was suspected that the said car was used in the commission of the aforesaid crime.

8. After appellant No.1 (Mohd. Farooq) was arrested on 13th March, 1999, the Joint Commissioner of Police (Crime) granted

permission to apply the provisions of Maharashtra Control of Organised Crime Ordinance, 1999 to the present case pursuant whereto the investigation was taken over by an Assistant Commissioner of Police namely, Pradeep Sawant (PW-61) from PI Bharat Tambe on 26th March, 1999. He was said to have been supervising the investigation of the case in his capacity as ACP (Detection-I) and for effective and extensive investigation of the present case, he formed a team of 13 police officers.

9. In all there were eight accused persons namely, Mohammed Farooq Abdul Gafur Chipa Rangari (Accused No. 1), Aslam Mohammed Kutti (Accused No. 2), Abdul Kadar Abdul Gafoor Rizvi (Accused No. 3), Mansoor Hasan Haji Iqbal Pankar (Accused No. 4), Mohd. Juber Kasam Shaikh alias Tabrej alias Jugnu (Accused No. 5), Fazal Mohd. Shaikh alias Manni Argamutu Shetiyar (Accused No. 6), Azzizuddin Zahiruddin Shaikh alias Abdul Sattar (Accused No. 7) and Abdul Hasan Bande Hasan Mistri (Accused No. 8) involved in the case.

10. Accused No.1 (Appellant No.1 herein) was arrested on 13th March, 1999 whereas Accused No.4 (Appellant No.2 herein) was arrested on 21st June, 1999 along with Accused Nos. 2 and 3. Accused Nos. 5 and 6 were arrested on 18th June, 1999 by the Special Cell of Delhi Police. Accused No. 7 was arrested on 15th June, 1999 with AK-56 rifle by Hazariganj Police Station, Lucknow, U.P. and Accused No. 8 was arrested on 21st July, 1999.

11. On 4th April, 1999 the Appellant No.1 took police and panchas to certain places and STD booths on Mohd. Ali Road, Masjid Road, near J. J. Marg Police Station at Dongri wherefrom he used to contact Faheem. Appellant No.1 made a confessional

statement on 10th April, 1999 regarding his involvement in the incident. It was recorded by DCP Parambir Singh (PW-51).

12. On 25th June, 1999, Mansur Hasan (Accused No. 4) took police party to the garage of one Chaggan Vithal where he is said to have given the Maruti car used in the commission of the crime for repairs. He also showed to the police on 6th July, 1999 an STD booth at Dongri wherefrom he had contacted Faheem and obtained mobile phones as well as a duplicate motor driving licence. At the instance of Mohd. Zuber (Accused No. 5) on 18th July, 1999, discovery of 9 mm China made pistol, which was found kept in a cup-board in a hut behind Mahim Bus Depot was made. His confessional statement was recorded on 30.07.1999 by Ravindra Kadam, DCP (Zone IV) who examined himself as PW-39 which was however subsequently retracted.

13. Confessional statement of appellant No.2 was recorded on 30th July, 1999 by DCP Kadam who examined himself as PW-39. However, appellant No.2 retracted his confession when he was produced before the Chief Judicial Magistrate.

14. On 9th August, 1999 Accused No. 5 led the police party to a telephone booth at Mahim wherefrom he had contacted Faheem and Chhota Shakeel in Karachi, Pakistan. Discovery of AK 56 rifle together with 5 cartridges which was found kept in a rexine bag on the loft of a hut behind Mahim Bus Depot was made on 17th July, 1999 at the instance of Azzizuddin (Accused No.7). A finger print expert, who was called, found one chance finger print on the said rifle. Discovery of two plates from room No.15 on the ground floor of building No.1 in Kidvai Nagar, Wadala , was made at the instance of Abdul Hasan (Accused No.8).

15. Confession of the aforementioned six persons was recorded by three DCPs namely, Mr. Kadam (PW-39), Mr. Paramvir Singh (PW-51) and Mr. Shindre (PW-60). Test Identification Parade of accused Nos. 4 to 8 was conducted on 10th August, 1999 by the Special Executive Officer who examined himself as PW-32.

16. Upon completion of the investigation, a voluminous charge sheet was filed before the Designated Court on 8th September, 1999. The charges were framed against all the aforesaid accused persons under various provisions of the Indian Penal Code, 1860 (for short 'the IPC') and the Arms Act. Considering the gravity of the crime and the fact that all the eight accused persons being members of organized crime syndicate of Chhota Shakeel, the provisions of Maharashtra Control of Organised Crime Act, 1999 (hereinafter referred to as 'MCOCA') were also invoked. All the aforesaid accused persons were charged for conspiring, abetting and facilitating commission of the aforesaid crime as members of the said organized crime syndicate.

17. In the charge sheet Chhota Shakeel and Mohd. Faheem have been shown as the absconding accused. The prosecution case proceeded on the premise that all the accused had hatched a conspiracy to eliminate Milind Vaidya and with that common object in mind they aided each other for causing his murder. They were said to be in constant touch with Mohd. Faheem for the purpose of taking instructions from him on telephone. They had been provided with arms and ammunitions and money by the absconding accused persons namely, Chhota Shakeel and Mohd. Faheem.

18. Appellants herein are said to be belonging to the gang of fugitive criminal namely Chhota Shakeel who allegedly operates his organised crime activities from Karachi, Pakistan. He is also aided by another ganglord namely, Mohd. Faheem. Both of them are said to belong to the gang of underworld don Dawood Ibrahim.

19. All the eight accused persons allegedly being members of organized crime syndicate of Chhota Shakeel were charged under Sections 3(1) r/w 2(e) of MCOCA. They were further charged of conspiring, abetting and facilitating commission of aforesaid crime as members of the said organized crime syndicate under Sections 3(2) of MCOCA read with Section 120B of IPC. For their agreement to do the abovesaid illegal act they were also charged under Section 120-B IPC.

20. Mohammed Farooq Abdul Gafur Chipa Rangari (Accused No.1) was separately charged under Sections 302, 307 read with Section 120B/34 and 109 IPC on the ground that he, in pursuance of the said conspiracy, was in constant contact on mobile with Faheem, collected money and also three mobile phones from Guddu and delivered the same to Accused Nos. 5 and 6, provided driver i.e. Accused No. 8 with the car facilitating commission of the crime and thus had the common intention to commit the crime. He was also charged under Sections 201, 34 IPC for assisting accused Nos. 5, 6 and 7 to cause disappearance of AK-56 rifle with intent to screen the offenders from legal punishment.

21. Aslam Mohammed Kutti (Accused No. 2) was separately charged under Sections 302, 307, 120B r/w 34, r/w 109 of IPC being in contact with Mohd. Faheem, who was in Karachi, Accused Nos. 2 and 3 collected weapons from Neeta from Mazgaon and

handed it over to Accused Nos. 4 and 7 for using the same in the aforesaid offence. Further, Accused No. 2 purchased three mobile phones and handed over the same to Accused No. 4 thus, facilitated commission of crime as a member of conspiracy in furtherance of common intention. He was further charged under Sections 25(1A) and 25(1B) of the Arms Act for possessing jointly with Accused No. 3 a rexin bag containing two 9 mm pistols and AK-56 rifle in contravention of Section 3 & 7 of the Arms Act.

22. Abdul Kadar Abdul Gafoor Rizvi (Accused No. 3) was charged under Sections 25 r/w 3 & 7 of the Arms Act for collecting jointly with Accused No.2 a rexin bag from Neeta containing two pistols, one rifle for use in the aforesaid offence and handed over the same to accused Nos. 4 & 7 and thus committed offence of possession of unlicensed and prohibited arms in contraventions of Sections 3 & 7 of the Arms Act. He was also charged under Sections 302, 307 of IPC r/w 120B, 34 & 109 of IPC for delivering weapons to accused Nos. 4 and 7 which were later used in the commission of the aforesaid offence thus, facilitated commission of offence as a member of conspiracy and in furtherance of common intention. He was further charged under Sections 302, 307 r/w 34, 120B, and 109 of IPC for purchasing three mobile phones along with Accused No. 2 from Hira Panna Market to facilitate the aforesaid crime.

23. Mansoor Hasan Haji Iqbal Pankar (Accused No.4) was charged under Sections 411 r/w 34 and 120-B of IPC for conspiring, as per the directions of Faheem, in collecting white coloured Maruti 800 Car from Phila House, Mumbai and the aforesaid stolen car was used by accused Nos. 4 and 7 and thus

was a member of conspiracy and committed offence of dishonestly receiving stolen property. He was further charged under Sections 302, 307 r/w 34, 120-B and 109 of IPC for handing over the stolen car to Accused No. 8 which was actually used in the aforesaid offence. He was further charged under Section 201 r/w 34 and 120-B of IPC for taking over charge of two mobile phones from accused Nos. 5 and 7 after the aforesaid offence and for concealing the same in his house.

24. Mohd. Juber Kasam Shaikh alias Tabrej alias Jugnu, Fazal Mohd. Shaikh alias Manni Argamutu Shetiyar, Azzizuddin Zahiruddin Shaikh alias Abdul Sattar and Abdul Hasan Bande Hasan Mistri (Accused Nos. 5 to 8) respectively were charged under Sections 25 r/w 3 & 7 of the Arms Act for traveling in the stolen Maruti Car, carrying unlicensed pistols and prohibited firearms i.e. A-56 rifle in furtherance of conspiracy and common intention with accused Nos. 5 to 7. They were further charged under Sections 25 (1A), 25(1B) r/w 3, 7 and 35 of the Arms Act for having joint possession/control of the said vehicle i.e. the stolen Maruti car which was used in the aforesaid crime and were aware of existence of fire arms in the vehicle.

25. Accused Nos. 5 to 7 were charged under Sections 3 (1) (i) of MCOCA read with Sections 302 & 120B of IPC for committing the offence of organized crime on behalf of the syndicate with the object of gaining advantage of syndicate and promoting insurgency. They were also charged under Sections 3 (1) (ii) of MCOCA read with Sections 307 & 120B of IPC for firing with weapons, causing injuries and endangering the life of 7 persons. They were further charged under Sections 302, 307 r/w 34 and

120-B of IPC for being taken in a stolen Maruti Car by Accused No. 8 at the spot and for firing with their pistols and rifles on the victims. They were charged under Sections 25(1A), 25(1B) and 27(3) of the Arms Act for possessing fire arms in contravention of Section 3 & 7 of the Arms Act. They were also charged under Section 201 r/w 34 and 120-B of IPC for hiding their respective fire arms knowing that they were used in commission of offence thus, attempted disappearance with an intention to screen the offender.

26. Abdul Hasan Bande Hasan Mistri (Accused No. 8) was separately charged under Sections 302, 307 r/w 34 and 120-B of IPC for taking Accused Nos. 5 to 7 in Maruti car in furtherance of conspiracy and common intention thereby facilitating the crime of murder and fatal injuries. He was also charged under Sections 424, 414 r/w 34 and 120-B of IPC for dishonestly receiving the stolen Maruti Car and changing the number plate and thus assisting in concealment of stolen property in furtherance of conspiracy and common intention. He was further charged under Section 212 of IPC for harbouring Accused Nos. 5 to 7 in stolen Maruti Car immediately after the aforesaid offence with the intention of screening them.

27. In support of its case the prosecution examined 64 witnesses out of them 5 were eye witnesses including the injured persons. Six STD/ISD booth owners were also examined to prove that some of the accused had made telephone calls from their booths to Karachi, Pakistan. 4 witnesses were examined to depose about subsidiary circumstances. 14 witnesses were panch witnesses. 4 medical officers were examined to prove the post-mortem reports as well as the certificates of injuries. 25 Police

Officers including two investigating officers were also examined. 5 other witnesses were examined on different points. A large number of documents were produced by the prosecution.

28. Sabiul Hasan (PW-15) was the owner of the Maruti car bearing registration No. MH-03-H-1759 which was stolen. He had lodged a complaint to that effect on 30th January, 1999. The evidence of PW-20, who is a panch witness, established recovery of the car on 25th June, 1999. Accused No. 4 led police to a garage situated opposite to Chhagan Mitha Petrol Pump where the car was given for repair. Manager of petrol pump PW-17 stated that on 5th February, 1999 Accused No. 4 had brought one white car bearing No. BLD 1949 for certain repairs and servicing. He did not take back the car immediately, although he was informed that the repairing and servicing had been completed. He visited the petrol pump later on. A card was prepared by him making certain noting regarding the number of the car, the repairs done to it, the name of the customer and his telephone number etc. A note was also made in the card stating "Do not take again for servicing". He, however, did not know Accused No. 4 earlier. He saw and identified Accused No.4 for the first time in the court on 31st March, 2000. However, the identification of Accused No. 4 was found to be doubtful.

29. The Special Court, Mumbai by its judgment and order dated 05.09.2000 acquitted Accused Nos. 2 and 3 and recorded judgment and order of conviction and sentence against the other six accused which are as under:-

"I (a) The Accused No. 1 Mohammed Farooq Chipa Rangari is found guilty and convicted of an offence punishable under

Section 3(2) of the Maharashtra Control of Organised Crime Act, 1999 (hereinafter referred as “M.C.O.C. Act, 99”) read with section 120-B I.P.C. and is sentenced to Rigorous Imprisonment for ten years and to pay fine in the sum of Rs.5 lakhs. In default of payment of fine he shall undergo R.I. for three years.

(b) The Accused No.1 is also found guilty and convicted of an offence punishable under section 3(4) of M.C.O.C. Act 99 read with section 120-B I.P.C. and is sentenced to R.I. for ten years and shall also pay fine in the sum of Rs.5 lakhs. In default of payment he shall under go R.I. for three years.

(c) The Accused No.1 is further held guilty and convicted for an offence punishable under Section 212 read with section 52-A read with section 120-B I.P.C. and is sentenced to Rigorous Imprisonment for five years and shall also pay a fine in sum of Rs.5000/-. In default of payment of fine he shall undergo R.I. for six months.

IV. (a) The Accused No. 4 Mansur Hasan Haji Iqbal Pankar is found guilty and convicted of an offence punishable under Section 3(2) of M.C.O.C. Act 99 read with Section 120-B I.P.C. and is sentenced to R.I. for ten years and to pay fine in the sum of Rs.5 lakhs. In the default of payment of fine he shall undergo R.I. for three years.

(b) The Accused No.4 is further held guilty and convicted of an offence punishable under Section 3(4) of M.C.O.C. Act 99 read with Section 120-B I.P.C. and is sentenced to R.I. for ten years and shall pay fine in sum of Rs.5 lakhs. In default of payment of which he shall undergo R.I. for three years.

(c) The Accused No.4 is also found guilty and convicted of an offence punishable under Section 411 read with Section 120-B I.P.C. and is sentenced to suffer R.I. for two years and shall pay a fine in sum of Rs.5000/-. In default of payment of fine he shall undergo R.I. for six months.

V. (a) The Accused No. 5 Mohd. Zuber Kasam Shaikh is found guilty and convicted for an offence punishable under Section 302 I.P.C. read with Section 3(1)(i) of M.C.O.C. Act 99 read further with Section 120-B further read with Section 34 I.P.C. for causing murder of:-

(i) Shri Milind Gunaji Chaudhary, aged 34 years.

(ii) Shri Vilas Gopinath Akre, aged 28 years

(iii) Shri Deepak Sitaram Akre, aged 30 years

And is hereby sentenced to death. He shall be hanged by neck till he dies.

(b) (i) The Accused No. 5 is also found guilty and is convicted for an offence punishable under Section 27(3) read with Section 7 of the The Arms Act 1959 and is hereby sentenced to death. He shall be hanged by neck till he dies.

(ii) The Accused No. 5 is also found guilty and convicted of an offence punishable under Section 25(1-A) read with Section 7 of the Arms Act and is sentenced to R.I. for ten years and payment of fine of Rs.5000/-. In default of payment of fine he shall undergo R.I. for one year.

(c) The Accused No.5 is also found guilty and convicted for an offence punishable under Section 307 I.P.C. read with Section 3(i) (ii) of the M.C.O.C. Act 99 read further with Section

34 and Section 120-B I.P.C. for attempted murder of Ex mayor and sitting corporator of Bombay municipal corporation Shri Milind Dattaram Vaidye, aged 35 years and is sentenced to R.I. for life and payment of fine of Rs.5 lakhs. In default of payment of fine he shall undergo R.I. for three years.

(d) The Accused No. 5 is also found guilty and convicted for an offence punishable under Section 326 read with section 120-B I.P.C. read with Section 34 I.P.C. and further read with Section 3(i) (ii) M.C.O.C. Act 99 for causing grievous hurt to-

(i) Shri Nischal Krishan Choudhari aged 27 years

(ii) Shri Vinay Narayan Akre

and is hereby sentenced to R.I. for ten years and payment of fine in the sum of Rs. 5 lakhs. In default of payment of fine he shall undergo R.I. for three years.

(e) The Accused No. 5 is also convicted for an offence punishable under section 324 I.P.C. read with section 34 and 120-B I.P.C. read further with section 3(1)(ii) of M.C.O.C. Act 99 and is sentenced to suffer R.I. for five years and shall pay fine in the sum of Rs.5 lakhs for causing fire arm injuries by dangerous weapons with pistols and AK-56 rifle to-

(i) Shri Babu Kashinath Mangela, aged 40 years.

(ii) Shri Niteen Narayan, aged 43 years.

(iii) Shri Murguan V. Tewar, aged 26 years

In default of payment of fine he shall undergo R.I. for one year.

(f) The Accused No.5 is also convicted of an offence punishable under section 3(2) M.C.O.C. Act 99 read with Section 120-B I.P.C. and is sentenced to suffer R.I. for life and

to pay fine in the sum of Rs.5 lakhs. In default of payment of fine he shall undergo R.I. for three years.

(g) The Accused No.5 is also convicted of an offence punishable under section 3(4) M.C.O.C. Act 99 read with section 120-B I.P.C. and is sentenced to suffer R.I. for life and also pay fine in the sum of Rs.5 lakhs. In default of payment of fine he shall undergo R.I. for three years.

VI. The Accused No.6 Fazal Mohd. Shaikh @ Manni Argamutu Shetiyar is found guilty and-

(a) Convicted for an offence punishable under Section 302 I.P.C. read with section 3(1)(i) of M.C.O.C. Act 99 read with Section 34 and section 120-B I.P.C. for causing murder of-

(i) Shri Milind Gunaji Chaudhari, aged 34 years

(ii) Shri Vilas Gopinath Akre, aged 28 years

(iii) Shri Deepak Sitaram Akre, aged 30 years.

And is hereby sentenced to death. He shall be hanged by neck till he dies.

(b) (i) Convicted for an offence punishable under section 27(3) read with section 7 of the The Arms Act 1959 read with section 120-B I.P.C. and is hereby sentenced to death. He shall be hanged by neck till he dies.

(iii) also convicted for an offence punishable under section 25(1-A) of the The Arms Act and is sentenced to R.I. for ten years and payment of fine in the sum of Rs.5000/-, and in default of payment of fine to undergo further R.I. for one year.

(c) Convicted for an offence punishable under Section 307 I.P.C. read with Section 3(1)(ii) of the M.C.O.C. Act 99 read further with Section 34 and 120-B I.P.C. for attempted murder of Ex-Mayor and sitting Corporator of Bombay Municipal Corporation Shri Milind Dattaram Vaidya aged 35 years and sentenced to R.I. for life and shall pay fine in the sum of Rs.5 lakhs and in default of payment of fine to undergo further R.I. for three years.

(d) Convicted for an offence punishable under Section 3(2) of the M.C.O.C. Act 99 read with section 120-B I.P.C. for facilitating the organized crime and is sentenced to suffer R.I. for life and to pay fine in the sum of Rs.5 lakhs and in default of payment of fine to undergo further R.I. for three years.

(e) Convicted for an offence punishable under Section 326 read with section 34 and section 120-B I.P.C. further read with Section 3(i)(ii) of the M.C.O.C. Act 99 for causing grievous hurt to-

(i) Shri Nischal Krishna Choudhari aged 27 years

(ii) Shri Vinay Narayan Akre, aged 31 years.

and is sentenced to undergo R.I. for ten years and payment of fine in the sum of Rs.5 lakhs and in default of payment of fine to undergo R.I. for two years.

(f) also convicted for an offence punishable under Section 324 I.P.C. read with Section 3(1)(ii) of M.C.O.C. Act 99 read further with Section 34 and 120-B I.P.C. for causing fire arm injuries to persons namely-

(i) Shri Babu Kashinath Mangela, Aged 40 years.

(ii) Shri Niteen Narayan, aged 43 years

(iii) Shri Murguan V. Tewar, aged 26 years.

and is hereby sentenced to R.I. for five years and shall pay fine in the sum of Rs.5 lakhs and in default of payment of fine to undergo R.I. for one year.

VII. The Accused No. 7 Azizuddin Zahiruddin Shaikh @ Abdul Sattar is found guilty and-

(a) Convicted for an offence punishable under Section 302 read with section 3(1)(i) of the M.C.O.C. Act 99 read further with section 34 and 120-B I.P.C. for causing murder of-

(i) Shri Milind Gunaji Chaudhari, aged 34 years.

(ii) Shri Vilas Gopinath Akre, aged 28 years

(iii) Shri Deepak Sitaram Akre, aged 30 years.

and is hereby sentenced to death. Accused No. 7 shall be hanged by neck till he dies.

(b) (i) Convicted for an offence punishable under section 27(3) read with Section 7 of the The Arms Act, 1959 and is hereby sentenced to death. He shall be hanged by neck till he dies.

(ii) Also convicted under section 25(1-A) of the The Arms Act for possession of AK-56 rifle prohibited arms and is sentenced to suffer R.I. for ten years and payment of fine in the sum of Rs.5,000/- and in default of payment of fine to undergo R.I. for one year.

(c) Convicted of an offence punishable under Section 307 I.P.C. read with section 3(i) (ii) of M.C.O.C. Act 99 further read with section 34 and 120-B I.P.C. for attempted murder of Ex-

Mayor and sitting Corporator of Bombay Municipal Corporation Shri Milind Dattaram Vaidya, aged 35 years and is sentenced to undergo R.I. for life and payment of fine in the sum of Rs.5 lakhs and in default of payment of fine to undergo R.I. for three years.

(d) Convicted for an offence punishable under Section 326 read with section 120-B I.P.C. further read with Section 3(i) (ii) of M.C.O.C. Act 99 for causing grievous hurt to--

(i) Shri Nischal Krishan Choudhari, aged 27 years

(ii) Shri Vinay Narayan Akre, aged 31 years.

and is sentenced to suffer R.I. for ten years and payment of fine in the sum of Rs.5 lakhs and in default of payment of fine to undergo further R.I. for two years.

(e) Convicted for an offence punishable under section 324 I.P.C. read with section 3(1)(ii) of M.C.O.C. Act read further with section 34 and 120-B I.P.C. for causing fire arms injuries to persons namely,

(i) Shri Babu Kashinath Mangela, Aged 40 years

(ii) Shri Niteen Narayan Akre, aged 43 years

(iii) Shri Murguan V. Tewar, aged 26 years

and is hereby sentenced to R.I. for five years and shall pay fine in the sum of Rs.5 lakhs. In default of payment of fine he shall undergo R.I. for one year.

(f) Convicted of an offence punishable under Section 3(4) of the M.C.O.C. Act read with Section 120-B I.P.C. and is sentenced to R.I. for life and fine in the sum of Rs.5 lakh and in

default of payment of fine to further undergo R.I. for three years.

VIII. The Accused No. 8 Abul Bande Hansan Mistry is found guilt and --

(a) Convicted of an offence punishable under Section 302 read with section 34 I.P.C. read with Section 3(1)(i) of M.C.O.C. Act 99 read further with section 109 read with section 120-B I.P.C. and is sentenced to undergo R.I. for life and shall pay fine in the sum of Rs.1 lakh and in default of payment of fine to undergo R.I. for three years.

(b) Convicted of an offence punishable under Section 307 I.P.C. read with section 3(1)(ii) of M.C.O.C. Act 99 read with Section 34, 109 and 120-B I.P.C. for attempted murder of Shri Milind Dattaram Vaidya, aged 35 years and is sentenced to R.I. for life and shall pay fine in the sum of Rs.5 lakhs and in default of payment of fine to undergo further R.I. for three years.

(c) Convicted under section 326 I.P.C. read with section 3(1)(ii) of M.C.O.C. Act 99 read with section 34 I.P.C. for causing grievous hurt to -

(i) Shri Nischal Krishna Choudhari, aged 27 years.

(ii) Shri Vinay Narayan, aged 31 years

and is sentenced to undergo R.I. for ten years and payment of fine in the sum of Rs.5 lakhs and in default of payment of fine to undergo further R.I. for two years.

(d) Convicted also for an offence punishable under Section 324 read with (34, 109) and 120-B I.P.C. read with

section 3(1)(ii) of M.C.O.C. Act 99 for causing fire arm injuries caused to--

(i) Shri Babu Kashinath Mangela, Aged 40 years,

(ii) Shri Niteen Narayan, aged 43 years

(iii) Shri Murguan V. Tewar, aged 26 years.

and is sentenced to R.I. for five years and fine in the sum of Rs.5 lakhs and in default of payment of fine to suffer R.I. for six months.

(e) Convicted for an offence punishable under section 201 I.P.C. read with section 120-B I.P.C. and is sentenced to R.I. for five years and shall pay fine in the sum of Rs.5,000/- and in default of payment of fine to undergo further R.I. for six months.

(f) Convicted for an offence punishable under Section 424 IPC and is sentenced to R.I. for two years.

(g) Convicted for an offence punishable under section 414 I.P.C. and is sentenced to suffer R.I. for three years."

As regards fine, the Special Judge directed :-

"Thirty percent of the amount of total fine if recovered shall be paid towards compensation payable under section 357 Cr. P.C. to family members of three victims in 1/3 share for each victim who were died. This is without prejudice to their rights to recover compensation independently at Civil Law.

Twenty percent of the amount of total fine if recovered be paid as compensation payable under section 357 Cr. P.C. to each of the of the injured, Viz.

(i) Shri Milind Dataram Vaidya

(ii) Shri Nischal Krishna Choudhari

(iii) Shri Vinay Naryan Akre

in equal shares. This is without prejudice to their right to recover compensation at Civil law.

Fifty percent of the amount of total fine if recovered appropriate by State of Maharahstra towards defrayal of costs/expenses of the prosecution properly incurred."

30. Feeling aggrieved by the aforesaid judgment and order dated 05.09.2000 passed by the Special Court, Mumbai Accused No. 7 filed Criminal Appeal No. 661 of 2000; Accused Nos. 1, 5 and 6 preferred a common appeal which was registered as Criminal Appeal No.679 of 2000; Accused No. 8 filed Criminal Appeal No. 753 of 2000; and Accused No. 4 filed Criminal Appeal No. 758 of 2000 in the High Court of Bombay. The State of Maharashtra did not prefer any appeal against the aforesaid judgment and order of acquittal of Accused Nos. 2 and 3. So far as the death sentence imposed by the Special Judge against Accused Nos. 5, 6 and 7 is concerned, the matter was referred to the High Court for confirmation which was registered as Confirmation Case No. 1 of 2001.

31. The Division Bench of the High Court by its impugned judgment and order dated 17.12.2003 confirmed the conviction of Accused No. 1 under Section 3(2) of MCOCA read with Section 120-B IPC and under Section 3(4) of MCOCA read with Section 120-B IPC and acquitted him of the charges under Section 212 read with Section 52A and Section 120-B IPC. The appeal filed by

Accused No. 4 was dismissed and his conviction and sentence on all counts were confirmed. So far as Accused Nos. 5 and 6 are concerned, they have been acquitted of all the charges by the High Court. Though conviction of Accused No. 7 was confirmed under Sections 302 read with Section 34, 120-B of IPC read with Section 3(1)(i) of MCOCA, his death sentence was substituted by rigorous imprisonment for life plus a fine of Rs.24,000/- and in default thereof, simple imprisonment of one year was imposed. His conviction under Sections 304 read with Section 34, 120B IPC read with Section 3 (1) (ii) MCOCA; 326 read with Section 120B IPC read with 3 (1) (ii) MCOCA; 324 read with Section 34, 120B IPC read with Section 3 (1) (ii) MCOCA and Section 3(4) of MCOCA read with Section 120B IPC was maintained. Conviction and sentence of Accused No. 8 was also maintained.

32. Aggrieved by the aforesaid judgment and order dated 17.12.2003 passed by the High Court of Bombay Mohammed Farooq Abdul Gafur Chipa Rangari (Accused No.1), Mansoor Hasan Haji Iqbal Pankar (Accused No. 4) and Abdul Hasan Bande Hasan Mistri (Accused No. 8) have filed Criminal Appeal No. 85 of 2006, Criminal Appeal No. 86 of 2006 and Criminal Appeal No. 87 of 2006 respectively. Azzizuddin Zahiruddin Shaikh alias Abdul Sattar (Accused No.7) had preferred a special leave petition being SLP (Crl.) No. 1469 of 2004 which stood dismissed on 8th April, 2004.

33. The State of Maharashtra has also filed Criminal Appeal Nos. 91-94 of 2006 against the acquittal of Accused No.1 of the charges under Section 212 read with Section 52 (A) and Section 120-B IPC; acquittal of accused Nos. 5 and 6 of all the offences

and substitution of sentence from death to life of Accused No. 7 by the High Court.

34. Accused Nos. 5 and 6 were not being represented before us. We, therefore, requested Dr. Rajeev B. Masodkar, Advocate, to represent them as amicus curiae. It is necessary to place on record that two of the aforesaid accused have jumped the bail and are absconding.

35. Having dealt with the facts leading to the initiation of the criminal proceedings and having given a detailed account of the trial held against all the accused persons, we have set out the nature of the orders of convictions and sentences passed by the trial court as also the orders passed by the High Court on the appeals filed before it by the accused persons. Accused Nos. 1, 4 and 8 as well as the State of Maharashtra filed cross appeal in this Court. All the aforesaid appeals were listed before us for final hearing upon which we heard the learned counsel appearing for the respective parties extensively. Some of the submissions of the learned counsel appearing for the parties were overlapping and, therefore, we are going to set out the said submissions of the learned counsel broadly. We, however, deal with the appeals filed by the accused persons in respect of each of the accused and the State separately for the purpose of convenience.

36. The broad submissions of the counsel appearing for the accused persons mainly center around the confessional statements of Accused Nos. 8 and 4 having been retracted subsequently, the same are inadmissible not only against the co-accused but also against the accused who allegedly have made some confessional statements particularly with regard to the

making of such confessional statements which fact was not put in their examination under Section 313 of Criminal Procedure Code, 1973 (for short 'CrPC').

37. It was submitted that no credence should have been placed on the Test Identification Parade (for short 'TIP') held in respect of Accused Nos. 4, 5, 6, 7 and Accused No. 8 particularly when they were arrested on different dates i.e. Accused No. 4 was arrested on 21.06.1999, Accused Nos. 5 and 6 were arrested on 18.06.1999, Accused No. 7 was arrested on 15.06.1999 and Accused No. 8 was arrested on 21.07.1999. TIP was held on 10.08.1999 after inordinate delay in as much as in case of Accused No. 4 it was held after 50 days, in case of Accused Nos. 5 and 6 it was held after 53 days, in case of Accused No. 7 it was held after 55 days and in case of Accused No. 8 it was held after 19 days. Therefore, in that view of the matter the said TIP has been rendered inadmissible in evidence and should not and cannot be relied upon for the purpose of convicting the accused persons.

38. Another submission which was very forcefully placed before us was that the confessional statements cannot be the basis of conviction in the present cases as the said confessional statements which were proved in the instant case did not contain the mandatory certificate as mentioned under Rule 15 of Maharashtra Control of Organized Crime Rules, 1999 (for short 'the MCOC Rules'). Rule 15 of the MCOC Rules requires a certificate to be attached with the confessional statement but the same apparently is not a part of the record in the instant case thereby rendering the confessional statement as invalid. The

mandatory certificate contained the warning which are admittedly not proved in the trial and the same having been not proved, all the confessional statements lost its sanctity and, therefore, could not have been the basis of any conviction.

39. It was submitted that the basic ingredients for a conviction under MCOCA were not made out in any of the cases. It was further submitted that there are a number of major and vital contradictions in the evidence of the witnesses produced on behalf of the prosecution in support of its case. It was pointed out that the incident admittedly happened during the night time and it was a case of sudden happening as alleged by the prosecution itself and, therefore, none of the accused could have been identified in such a short span of about few seconds. Since the identity of the accused persons could not be established and there are a number of vital contradictions in the evidence of the prosecution witnesses, the accused persons are liable to be acquitted.

40. The next contention was that the recovery of weapon alleged to have been used by Accused No. 7 was made from an open space i.e. the hutment roof of a house in a slum hutment, which was accessible to all for which Accused No. 7 could not have been held responsible as the weapon was not in his exclusive possession. It was submitted that there cannot be any conviction and sentence under the provisions of Arms Act in as much as the sanction order which was issued was illegal and vitiated and the recovery of the weapons allegedly at the instance of the accused persons are also not in accordance with law rather in violation of the same.

41. The learned counsel appearing for the State of Maharashta, however, refuted all the aforesaid contentions and submissions and submitted that all the ingredients of the offences alleged against each of the accused were fully established in the present case and, therefore, the only punishment which should have been given to the accused persons is the capital punishment for carrying out the daredevil attack and for killing innocent persons. It was submitted that there are substantive and clinching evidence available on record against all the accused persons and, therefore, the High Court was not justified in converting the capital punishment awarded to the accused-appellants i.e., Azzizuddin Zahiruddin Shaikh alias Abdul Sattar (Accused No. 7) to that of life imprisonment, acquitting Mohammed Farooq Abdul Gafur Chipa Rangari (Accused No. 1) of the charges under Section 212 read with Section 52(A) and Section 120-B IPC and acquitting Accused Nos. 5 and 6.

42. It was submitted by the learned counsel appearing for the State that necessary warnings were given to the accused persons before recording their confessional statements but part one of the said statements which contained warning was misplaced and, therefore, the same could not be brought on record. The said confessional statements were recorded in accordance with the required formalities and after giving proper warning to the accused person which fact is proved by the police officer recording such statements and also by the stenographers who recorded the said statements. It was further submitted that there could be some minor irregularities while recording the aforesaid statements but the same would not in any manner vitiate the trial. Besides, reference was made by the counsel appearing for the Government

of Maharashtra to Section 15 of MCOCA and placing reliance on the same he submitted that the said section contained a non-obstante clause and, therefore, it cannot be held that the confessional statements were not recorded in accordance with law.

43. Learned counsel appearing for the State pointed out that the submissions of the learned counsel appearing for the appellants that the sanction order is vitiated is not borne out from the record as the sanction order passed by the competent authority was a detailed order and not a mechanical order as sought to be suggested by the accused persons. He submitted that the weapons used by the various accused is proved and established by the prosecution witnesses and injury caused to the deceased and the injured tally substantially with the medical report and, therefore, the accused persons should have been convicted and sentenced to the maximum punishment provided in law. He further submitted that the order of acquittal passed by the High Court in respect of Accused Nos. 5 and 6 namely Mohd. Juber Kasam Shaikh alias Tabrej alias Jugnu and Fazal Mohd. Shaikh alias Manni Argamutu Shetiyar is liable to be set aside for which the State has filed an appeal against the order of acquittal which should be allowed and the said accused-appellants should be convicted and sentenced to the maximum punishment.

44. In the light of the aforesaid submissions of the counsel appearing for the parties we have scrutinized the entire records and the relevant provisions of law applicable to the case at hand.

Section 2 (1) (e) of the MCOCA defines “organsied crime” as follows: -

“(e) "organised crime" means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency;”

Section 3 of the MCOCA reads as follows: -

“Section 3 - *Punishment for organised crime*

(1) Whoever commits an offence of organised crime shall.-

(i) if such offence has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees one lac;

(ii) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(2) Whoever conspires or attempts to commit or advocates, abets or knowingly facilitates the commission of an organised crime or any act preparatory to organised crime, shall be punishable with imprisonment for a term which shall be not less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx”

Section 3 of the Arms Act, 1959 reads as follows:

“Section 3 - *Licence for acquisition and possession of firearms and ammunition*

[(1)] No person shall acquire, have in his possession, or carry any firearm or ammunition unless he holds in this behalf a licence issued in accordance with the provisions of this Act and the rules made thereunder:

Provided that a person may, without himself holding a licence, carry any firearms or ammunition in the presence, or under the written authority, of the holder of the licence for repair or for renewal of the licence or for use by such holder.

[(2) Notwithstanding anything contained in sub-section (1), no person, other than a person referred to in sub-section (3), shall acquire, have in his possession or carry at any time, more than three firearms:

Provided that a person who has in his possession more firearms than three at the commencement of the Arms (Amendment) Act, 1983, may retain with him any three of such firearms and shall deposit, within ninety days from such commencement, the remaining firearms with the officer in charge of the nearest police station, or subject to the conditions prescribed for the purposes of sub-section (1) of section 21, with a licensed dealer or, where such person is a member of the armed forces of the Union, in a unit armoury referred to in that sub-section.

(3) Nothing contained in sub-section (2) shall apply to any dealer in firearms or to any member of a rifle club or rifle association licensed or recognised by the Central Government using a point 22 bore rifle or an air rifle for target practice.

(4) The Provisions of sub-section (2) to (6) (both inclusive) of section 21 shall apply in relation any deposit of firearms under the proviso to sub-section (2) as they apply in relation to the deposit of any arms or ammunition under sub-section (1) of that section.]"

Section 7 of the Arms Act, 1959 reads as follows:

"Section 7 - *Prohibition of acquisition or possession, or of manufacture or sale of prohibited arms or prohibited ammunition*

No person shall--

(a) acquire, have in his possession or carry; or

(b) [use, manufacture,] sell, transfer, convert, repair, test or prove; or

(c) expose or offer for sale or transfer or have in his possession for sale, transfer, conversion, repair, test or proof;

any prohibited arms or prohibited ammunition unless he has been specially authorised by the Central Government in this behalf."

Section 25 - Punishment for certain offences

"Xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

[(1A)Whoever acquires, has in his possession or carries any prohibited arms or prohibited ammunition in contravention of section 7 shall be punishable with imprisonment for a term which shall not be less than five years, but which may extend to ten years and shall also be liable to fine.

Xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

(1B) Whoever--

(a) acquires, has in his possession or carries any firearm or ammunition in contravention of section 3;or

(b) acquires, has in his possession of carries in any place specified by notification under section 4 any arms of such class or description as has been specified in that notification in contravention of that section; or

(c) sells or transfers any firearm which does not bear the name of the maker, manufacturer's number or other identification mark stamped or otherwise shown thereon as required by sub-section (2) of section 8 or does any act in contravention of sub-section (1) of that section; or

(d) being a person to whom sub-clause (ii) or sub-clause (iii) of clause (a) of sub-section (iii) of clause (a) of sub-section (1) of section 9 applies,acquires, has in his possession or carries any firearm or ammunition in contravention of that section;

(e) sells or transfers, or converts, repairs, tests or proves any firearm or ammunition in contravention of clause (b) of sub-section (1) of section 9; or

(f) brings into, or take out of, India, any arm or ammunition in contravention of section 10; or

(g) transports any arms or ammunition in contravention of section 12; or

(h) fails to deposit arms or ammunition as required by sub-section (2) of section3, or sub-section (1) of section 21;

(i)being a manufacturer of, or dealer in, arms or ammunition, fails, on being required to do so by rules made under section

44, to maintain a record or account or to make therein all such entries as are required by such rules or intentionally makes a false entry therein or prevents or obstructs the inspection of such record or account of the making of copies of entries therefrom or prevents or obstructs the entry into any premises or other place where arms or ammunition are or is manufactured or kept or intentionally fails to exhibit or conceals such arms or ammunition or refuses to point out where the same are or is manufactured or kept;

shall be punishable with imprisonment for a term which shall not be less than 5 [one year] but which may extend to three years and shall also be liable to fine;

Provided that the Court may for any adequate and special reason to be recorded in the judgment impose a sentence of imprisonment for a term of less than 6 [one year]"

Section 35 of the Arms Act, 1959 reads as follows:

"Section 35 - *Criminal responsibility of persons in occupation of premises in certain cases*

Where any arms or ammunition in respect of which any offence under this Act has been or is being committed are or is found in any premises, vehicle or other place in the joint occupation or under the joint control of several persons, each of such persons in respect of whom there is reason to believe that he was aware of the existence of the arms or ammunition in the premises, vehicle or other place shall, unless the contrary is proved, be liable for that offence in the same manner as if it has been or is being committed by him alone."

45. Now we propose to deal with the various aspects of the contentions raised in respect of each of the accused persons separately.

46. We first proceed to deal with the case of Mohammed Farooq Abdul Gafur Chipa Rangari (Accused No. 1) who was arrested on 13.03.1999. Mr. Zafar Sadique, learned counsel appearing for Accused No. 1 very forcefully submitted before us that Accused No. 1 was convicted only on the basis of the confessional statement but there is no corroboration of the said confessional statement. It was also submitted that even no allegation regarding making of any confessional statement was put to the accused when he was examined under Section 313 CrPC. It was further submitted that since the aforesaid confessional statement was inadmissible against a co-accused and the same not being a part of Section 313 CrPC, the sentence passed against the said accused is liable to be set aside and quashed.

47. The aforesaid submission when examined in the light of the records does not find favour. Though it is proved and established from the records that Accused No. 1 did not himself participate in the actual shootout, it is alleged against him that he was a part of the gang of Chhota Shakeel, that he was in touch with the gang leaders in Karachi (Pakistan) and he also acted on behalf of the said gang so much so that he had effected payment of money arranged by the leaders of the gang to Accused Nos. 5, 6, and 8 for causing the shootout. It was submitted by the Public Prosecutor appearing for the State of Maharashtra that Accused No. 1 paid Rs. 25,000/- to Mohd. Juber Kasam Shaikh alias Tabrej alias Jugnu (Accused No. 5) on 06.03.1999 and Rs. 10,000/- to

Abdul Hasan Bande Hasan Mistri (Accused No. 8). He pointed out that the allegation is that Accused No. 1 had paid a similar amount even to Fazal Mohd. Shaikh alias Manni Argamutu Shetiyar (Accused No. 6).

48. The evidence that is placed before us clearly establishes that Accused No. 1 was responsible for procuring a pistol and handing over the same to Accused No. 5 which was used in the shootout. The said fact is also established and proved by the confessional statement of Accused No. 5. Whether or not the said confessional statement could be used against a co-accused is a different matter which we will discuss at an appropriate stage.

49. Evidence is also available to prove and establish the fact that Accused No. 1 is also responsible for arranging a driver i.e. Accused No. 8 who drove the car which was used in the shootout. The other material which is placed against Accused No. 1 is his own confessional statement recorded under Section 18 of MCOCA. The legality of the aforesaid confessional statement is, however, challenged by Accused No.1 on the ground that the same does not bear a certificate in the identical terms as specified under Rule 3(6) of the MCOC Rules and that the same was recorded by Parambir Singh (PW-51) who was an officer associated with or interest in the investigation of the same.

50. A perusal of Section 29 of MCOCA shows that it confers a rule making power on the State. The State of Maharshtra in exercise of the said power under sub-section (1) of Section 29 of the Act framed rules known as ‘Maharahstra Control of Organised Crime Rules, 1999’. Rule 3 provides for the procedure to be

followed for recording of confession under Section 18 of MCOCA. Section 18 of the MCOCA reads as follows:

> "Section 18 - *Certain confessions made to police officer to be taken into consideration*
>
> (1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (I of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not below the rank of the Superintendent of Police ad recorded by such police officer either in writing or on any mechanical devices like cassettes, tapes or sound tracks from which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator:
>
> Provided that, the co-accused, abettor or conspirator is charged and tried in the same case together with the accused.
>
> (2) The confession shall be recorded in a free atmosphere in the same language in which the person is examined and as narrated by him.
>
> (3) The police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he is satisfied that it is being made voluntarily. The concerned police officer shall, after recording such voluntary confession, certify in writing below the confession about his personal satisfaction of the voluntary

character of such confession, putting the date and time of the same.

(4) Every confession recorded under sub-section (1) shall be sent forthwith to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate having jurisdiction over the area in which such confession has been recorded and such Magistrate shall forward the recorded confession so received to the Special court which may take cognizance of the offence.

(5) The person whom a confession had been recorded under sub-section (1) shall also be produced before the Chief Metropolitan Magistrate or the Chief Judicial Magistrate to whom the confession is required to be sent under sub-section (4) alongwith the original statement of confession, written or recorded on mechanical device without unreasonable delay.

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

Further, Rule 3(6) of the Rules reads as follows:-

"3. Procedure for recording of confession under Sector 18 of the Act.

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(6) The confession recorded under sub-rule (5) shall, if it is in writing, be signed by the person who has made such

confession and by the Police Officer, who has recorded the said confession. Such Police Officer shall, under his own hand, also make a memorandum at the end of the confession to the following effect:-

"I have explained to (name of the confessor) that he is not bound to make a confession and that, if he does so, any confession that he makes, may be used as evidence against him and I am satisfied that this confession has been made voluntarily. It has been made before me and in my hearing and has been recorded by me in the language in which it is made and as narrated by, the confessor. I have read it over to the confessor and he has admitted it to be verbatim and correct, and containing also full and true account of the confession/statement made by him."

51. We have perused the aforesaid confessional statement which substantially complies with the requirements of Section 18 of MCOCA read with the aforesaid rule.

52. It was a categorical case of the prosecution that Parambir Singh (PW-51) who recorded the said confessional statement was never involved with the investigation of the case. The prosecution has also brought on record that PI Yashwant Puntambekar (PW-36) of Mahim Police Station was handling the investigation from 04.03.1999, then PI Bharat Tambe (PW-59) took over investigation on 06.03.1999 and thereafter, ACP Pradeep Sawant (PW-61) took charge of the investigation from Police Inspector Bharat Tambe on 26.03.1999. On going through all the material available on record the High Court came to the categorical finding that the aforesaid confessional statement was made voluntarily and while recording

the same post confessional formalities were followed. It was held by the High Court that although the confessional statement does not bear any certificate in the identical terms as specified under Rule 3(6) of the MCOC Rules, 1999, it nevertheless complies with the requirements of Section 18. Apart from that, there is also evidence on record indicating that Accused No. 1 made several phone calls to gang leaders in Pakistan from various phone booths. The said fact is also accepted by the trial court as well as by the High Court. We find no plausible reason as to why this Court should take a different view than what is taken by the trial court and the High Court on proper appreciation of the evidence on record.

53. The confessional statement of Accused No. 8 was held to be admissible by both the courts below in which he had categorically stated that he knew Accused No. 1 from childhood and that Accused No. 1 had brought him to act as a driver in the said shootout and also paid him Rs. 10,000/- for the job. Accused No. 8 in his confessional statement had also stated that Accused No. 5 visited Accused No. 1.

54. The confessional statements of Accused Nos. 5 and 6 are also relevant to prove and establish the involvement of Accused No. 1 with the incident. In the said confessional statement, Accused No. 5 had stated that on 02.03.1999, Faheem informed Accused No. 5 on the phone that he would be sending two pistols with Accused No. 1. In fact, Accused No. 1 came to the house of Accused No. 5 to deliver the said pistols. It has also come out in the said confessional statement that out of the two pistols one was not in order and so the same was returned to Accused No. 1 and

that on 05.03.1999 Accused No. 5 called Accused No. 1 who informed him that he (Accused No. 1) has spoken to Chhota Shakeel over the phone and informed him about the incident on the previous day. Accused No. 5 has also stated in his confessional statement that Accused No. 1 informed him that Chhota Shakeel had asked Accused No. 1 to pay Accused No. 5 some money. Thereupon, Accused No. 1 paid Rs. 20,000/- to Accused No. 5 at Vakola and Accused Nos. 5 and 6 together informed Accused No. 1 that they were going to Kolkata.

55. Besides aforesaid evidence on record there is also evidence of other witnesses namely PW-21, owner of an STD booth which was functioning under the name and style of J. J. Brothers Communication Centre. He stated in his statement that on 01.03.1999, Accused No. 1 made a phone call to a specific number in Karachi (Pakistan). PW-35, who is the owner of phone booth named Data Link, stated that he personally knew Accused No. 1. He deposed that Accused No. 1 would come to his booth regularly to make phone calls to Pakistan. PW-37, who was another witness and the owner of Azari Communication Action Centre, stated in his evidence that Accused No. 1 had made calls on specified numbers in Pakistan on 01.03.1999 and 09.03.1999. This evidence of PW-37 is also found to be corroborated by the evidence of PW-54. Similar is the evidence of PW-43 who deposed that calls were made by Accused No. 1 to Pakistan.

56. The High Court disbelieved the aforesaid confessional statements of Accused Nos. 5 and 6 on the ground that the said confessional statements were inadmissible in evidence thereby it reversed the findings of the trial court. The High Court came to the

aforesaid conclusion on the basis that there is no evidence to show that any preliminary warning was given prior to the recording of the confessional statement and that in absence of proof of the fact that a warning was given prior to the recording of the confessional statement, the same was inadmissible in evidence.

57. In our considered opinion the High Court ignored the fact that there is evidence of PW-64, the typist who had deposed that the preliminary warning was in fact given which was so recorded on 23.07.1999. Considering the facts and circumstances of the case we find no reason not to accept the said statement of PW-64, the typist. We also hold that the aforesaid confessional statement of the co-accused could be the basis of conviction under the provisions of MCOCA.

58. We, therefore, hold Accused No. 1 guilty of all the charges which were already found to be proved and established by the trial court and affirmed by the High Court. So far the sentence is concerned we, however, uphold and confirm the sentence passed by the High Court and also restore the punishment awarded by the trial court under Section 212 read with Section 52(A) read with Section 120-B IPC.

59. So far as conviction under MCOCA is concerned, it is quite clear that conviction could be based solely on the basis of the confessional statement itself and such conviction is also permissible on the basis of the confessional statement of the co-accused which could be used and relied upon for the purpose of conviction. In the case of *State v. Nalini,* (1999) 5 SCC 253, it was held by this Court in the context of Section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (now repealed), which

is pari materia with Section 18 of the MCOCA that the evidence of a co-accused is admissible as a piece of substantive evidence and in view of the non obstante clause, the CrPC will not apply. The Court observed as follows in the relevant paras:

> **"415.** When Section 15 TADA says that confession of an accused is admissible against a co-accused as well, it would be substantive evidence against the co-accused. It is a different matter as to what value is to be attached to the confession with regard to the co-accused as that would fall in the realm of appreciation of evidence.
>
> **416.** The term "admissible" under Section 15 has to be given a meaning. When it says that confession is admissible against a co-accused it can only mean that it is substantive evidence against him as well as against the maker of the confession.
>
> **417.** Mr Natarajan said that the confession may be substantive evidence against the accused who made it but not against his co-accused. He reasoned that the confession was not that of the co-accused and it was not the evidence; it is the confessor who owned his guilt and not the co-accused; it is not evidence under Section 3 of the Evidence Act; it is not tested by cross-examination; and lastly, after all it is the statement of an accomplice. According to him it can have only corroborative value and that is a well-established principle of the evidence even though Section 3 and Section 30 of the Evidence Act be ignored. But then Section 15 TADA starts with non obstante clause. It says that neither the Evidence Act nor the Code of Criminal Procedure will apply. This is certainly a departure from the ordinary law. But then it was also the submission of

Mr Natarajan that the bar which is removed under Section 15 is qua Sections 24, 25 and 26 of the Evidence Act and not that all the provisions of the Evidence Act have been barred from its application. He, therefore, said that the view taken by this Court in *Kalpnath Rai* case7 that Section 30 of the Evidence Act was in any case applicable, was correct. We think, however, that the view expressed in that case needs reconsideration.

418. If we analyse Section 15, the words which have been added by the amending Act, 1993 have to be given proper meaning and if we accept the argument of Mr Natarajan these words will be superfluous which would be against the elementary principles of interpretation of statute. For the confession of an accused to be admissible against a co-accused, proviso to Section 15 says that they should be tried together. That is also Section 30 of the Evidence Act. Clauses (c) and (d) of Section 21 were deleted which raised a presumption of guilt against the co-accused. According to Mr Natarajan, that provision made the confession of a co-accused a substantive evidence and Parliament did not think it proper that it should be so. But then why add the words in Section 15?

419. "Admissible" according to *Black's Law Dictionary* means:

"Pertinent and proper to be considered in reaching a decision. Used with reference to the issues to be decided in any judicial proceeding."

420. It defines "admissible evidence" as:

"As applied to evidence, the term means that the evidence introduced is of such a character that the court or judge is

bound to receive it; that is, allow it to be introduced at trial. To be 'admissible' evidence must be relevant, and, inter alia, to be 'relevant' it must tend to establish material proposition...."

If we again refer to *Black's Law Dictionary* "substantive evidence" means:

"That adduced for the purpose of proving a fact in issue, as opposed to evidence given for the purpose of discrediting a witness (i.e. showing that he is unworthy of belief), or of corroborating his testimony."

421. TADA was enacted to meet extraordinary situation existing in the country. Its departure from the law relating to confession as contained in the Evidence Act is deliberate. Law has to respond to the reality of the situation. What is admissible is the evidence. Confession of the accused is admissible with the same force in its application to the co-accused who is tried in the same case. It is primary evidence and not corroborative. When the legislature enacts that the Evidence Act would not apply, it would mean all the provisions of the Evidence Act including Section 30. By judicial interpretation or judicial rigmarole, as we may put it, the court cannot again bring into operation Section 30 of the Evidence Act and any such attempt would not appear to be quite warranted. Reference was made to a few decisions on the question of interpretation of Sections 3 and 30 of the Evidence Act, foremost being that of the Privy Council in *Bhuboni Sahu v. R*.8 and though we note this decision, it would not be applicable because of the view which we have taken on the

exclusion of Section 30 of the Evidence Act. In Bhuboni Sahu case8 the Board opined as under:

"Section 30 seems to be based on the view that an admission by an accused person of his own guilt affords some sort of sanction in support of the truth of his confession against others as well as himself. But a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of 'evidence' contained in Section 3, Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of those infirmities. Section 30, however, provides that the court may take the confession into consideration and thereby, no doubt, makes it evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence. Their Lordships think that the view which has prevailed in most of the High Courts in India, namely that the confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction, is correct."

422. In *Kashmira Singh v. State of M.P.*9 one of the questions was how far and in what way the confession of an accused person can be used against a co-accused. The Court relied on the observations made by the Privy Council in Bhuboni Sahu

case8 and said that testimony of an accomplice can in law be used to corroborate another though it ought not to be used save in exceptional circumstances and for reasons disclosed.

423. In *Haricharan Kurmi v. State of Bihar*10 this Court again relied on its earlier decision in Kashmira Singh case9 and on the decision of the Privy Council in Bhuboni Sahu case8. It said that technically construed, definition of evidence as contained in Section 3 of the Evidence Act will not apply to confession. Even so, Section 30 provides that a confession may be taken into consideration not only against its maker, but also against a co-accused person; that is to say, though such a confession may not be evidence as strictly defined by Section 3 of the Act, it is an element which may be taken into consideration by the criminal court and in that sense, it may be described as evidence in a non-technical way. But it is significant that like other evidence which is produced before the court, it is not obligatory on the court to take the confession into account. When evidence as defined by the Act is produced before the court, it is the duty of the court to consider that evidence. What weight should be attached to such evidence is a matter in the discretion of the court. But a court cannot say in respect of such evidence that it will just not take that evidence into account. Such an approach can, however, be adopted by the court in dealing with a confession, because Section 30 merely enables the court to take the confession into account.

424. In view of the above discussions, we hold the confessions of the accused in the present case to be voluntarily and validly made and under Section 15 of TADA confession of an accused

is admissible against a co-accused as a substantive evidence. Substantive evidence, however, does not necessarily mean substantial evidence. It is the quality of evidence that matters. As to what value is to be attached to a confession will fall within the domain of appreciation of evidence. As a matter of prudence, the court may look for some corroboration if confession is to be used against a co-accused though that will again be within the sphere of appraisal of evidence."

60. Reiterating the aforesaid position of law, this Court in *Devender Pal Singh v. State of NCT of Delhi,* (2002) 5 SCC 234, at page 261 observed as follows:

"33. As was noted in *Gurdeep Singh* case2 whenever an accused challenges that his confessional statement is not voluntary, the initial burden is on the prosecution for it has to prove that all requirements under Section 15 of TADA and Rule 15 of the Terrorist and Disruptive Activities (Prevention) Rules, 1987 (hereinafter referred to as "the Rules") have been complied with. Once this is done the prosecution discharges its burden and then it is for the accused to show and satisfy the court that the confessional statement was not made voluntarily. The confessional statement of the accused can be relied upon for the purpose of conviction, and no further corroboration is necessary if it relates to the accused himself. It has to be noted that in *Nalini* case7 by majority it was held that as a matter of prudence the court may look for some corroboration if confession is to be used against a co-accused though that will be again within the sphere of appraisal of evidence. It is relevant to note that in *Nalini* case7 the Court was considering

the permissibility of conviction of a co-accused on the confessional statement made by another accused. In this case, we are concerned with the question as to whether the accused making the confessional statement can be convicted on the basis of that alone without any corroboration. The following observations in *Jayawant Dattatray* case6 are relevant: (SCC p. 146, para 60)

"60. 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 officer concerned in whom faith is reposed. It is true that there may be some cases where the power is misused by the authority concerned. 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 foolproof method is evolved by the society or

such atmosphere is created, there is no alternative, but to implement the law as it is."

(emphasis supplied in original)

61. In the case of *Jameel Ahmed v. State of Rajasthan,* (2003) 9 SCC 673, at page 689, this Court summarized the aforesaid legal position as follows:

"35. To sum up our findings in regard to the legal arguments addressed in these appeals, we find:

(i) If the confessional statement is properly recorded, satisfying the mandatory provision of Section 15 of the TADA Act and the Rules made thereunder, and if the same is found by the court as having been made voluntarily and truthfully then the said confession is sufficient to base a conviction on the maker of the confession.

(ii) Whether such confession requires corroboration or not, is a matter for the court considering such confession on facts of each case.

(iii) In regard to the use of such confession as against a co-accused, it has to be held that as a matter of caution, a general corroboration should be sought for but in cases where the court is satisfied that the probative value of such confession is such that it does not require corroboration then it may base a conviction on the basis of such confession of the co-accused without corroboration. But this is an exception to the general rule of requiring corroboration when such confession is to be used against a co-accused.

(iv) The nature of corroboration required both in regard to the use of confession against the maker as also in regard to the use of the same against a co-accused is of a general nature, unless the court comes to the conclusion that such corroboration should be on material facts also because of the facts of a particular case. The degree of corroboration so required is that which is necessary for a prudent man to believe in the existence of facts mentioned in the confessional statement.

(v) The requirement of sub-rule (5) of Rule 15 of the TADA Rules which contemplates a confessional statement being sent to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate who, in turn, will have to send the same to the Designated Court is not mandatory and is only directory. However, the court considering the case of direct transmission of the confessional statement to the Designated Court should satisfy itself on facts of each case whether such direct transmission of the confessional statement in the facts of the case creates any doubt as to the genuineness of the said confessional statement."

62. Reverting back to the factual position of the present case, so far as Aslam Mohammed Kutti (Accused No. 2) and Abdul Kadar Abdul Gafoor Rizvi (Accused No. 3) are concerned, they have been acquitted by the trial court as against which no appeal was filed in the High Court, therefore, the said acquittal is not the subject matter of appeal before us and we are not called upon to look into the aforesaid order of acquittal passed by the trial court.

63. We now come to the case of Mansoor Hasan Haji Iqbal Pankar (Accused No. 4) who was also represented by the same counsel who appeared for Accused No. 1. He was arrested on 21.06.1999 along with Accused Nos. 2 and 3. Mr. Zafar Sadique, learned counsel appearing for Accused No. 4, who is also appearing for Accused No. 1, submitted before us that the prosecution failed to show that the confession statement made by him was voluntary or truthful as there is no corroboration of the said confessional statement. It was also submitted that the confessional statement made by Accused No. 4 having been retracted and the same having not been corroborated by the prosecution witnesses, the impugned judgment cannot be sustained. It was further submitted that since the aforesaid confessional statement was inadmissible against a co-accused and the same not being a part of Section 313 CrPC, the sentence passed against the said accused is liable to be set aside and quashed. The learned counsel next submitted that Accused No. 4 had not played an active role in the shootout and had no knowledge of the conspiracy.

64. The aforesaid submissions when examined in the light of the records cannot be accepted. Though it is proved and established from the records that Accused No. 4 did not himself participate in the actual shootout, it is alleged against him that he was a part of the gang of Chhota Shakeel, that he was in constant touch with Mohd. Faheem and also he acted on behalf of the said gang so much so that he purchased mobile phones and sim cards and he also arranged the Maruti Car on the instructions of Mohd. Faheem which was used for the shootout and received payment for the same, that he was present during the handing over of AK-

56 and pistol to Accused No. 7 on the morning of the incident and he was privy to the conversations between Chhota Shakeel, Mohd. Faheem and Accused No. 7 on the day of the shootout.

65. Accused No. 4 himself has admitted that he was in regular contact over phone with Mohd. Faheem, the associate of Chhota Shakeel, that he purchased mobile phone and sim cards on the instructions of Mohd. Faheem and received payment for the same, that he arranged the Maruti car which was used for the shootout on the instructions of Mohd. Faheem, that he was present during the handing over of AK-56 and pistol to Accused No. 7 on the morning of the incident and he was privy to the conversations between Chhota Shakeel, Mohd. Faheem and Accused No. 7 on the day of the shootout and that he was an active member of the gang of Chhota Shakeel who actively participated in the activities of the organized crime syndicate which fact is corroborated by his confessional statement.

66. So far as confessional statement of Accused No. 4 is concerned, we find the same to be trustworthy and reliable. It is evidently clear from the records that the confessional statement of Accused No. 4 was recorded on 30.07.1999 by Ravindra Kadam (PW-39) who was DCP (Zone-IV) which was produced before CMM in a sealed envelop. The aforesaid confessional statement was found to be in substantial compliance with the requirements of Section 18 of MCOCA. The High Court came to the categorical finding that post confessional formalities have been followed and although the confessional statement does not bear a certificate in the identical terms as specified under Rule 3(6) of the MCOC Rules, there is nevertheless compliance of Section 18 of MCOCA.

We find no plausible ground to discard the view taken by the High Court in this regard.

67. The submission of the learned counsel appearing for the State that Accused No. 4 has rendered assistance to the organized crime syndicate by providing phones, sim-cards and arranging the car which was used in the shootout gets support from the fact that Accused No. 4 himself admitted in his confessional statement that he was in constant touch with Mohd. Faheem on the phone, bought secondhand mobile phones and sim cards for gang members, stole the Maruti car, brought it to the petrol pump for repairs and subsequently handed over the same to Accused No. 7.

68. The aforesaid confessional statement is supported by the deposition of Deepak Narayan Shinde (PW-53), PSI, Crime Branch, Unit IV who deposed that Accused No. 4 led the police to Asia Communication Centre from where he had bought six or seven mobile phones. The aforesaid confessional statement is also supported by the evidence of the Manager of Chhagan Mitha Petrol Pump, who corroborated the fact that the aforesaid Maruti car was brought by Accused No. 4 to his petrol pump for repairs and servicing. Further, the evidence of PW-20, a pancha witness, whose name was kept secret establishes and proves that Accused No. 4 led the police to the said petrol pump on 25.06.1999. Accused No. 4 also led the police to Lucky Motor Training School wherefrom he obtained a duplicate driving license in the name in his brother. The evidence of Shabibul Hasan Munir Hasan Sayyed (PW-15), real owner of the Maruti Car, proves that the car bearing No. BLD 1949 was stolen and that he had lodged a complaint to

that effect on 30.01.1999. The evidence of another witness Abdul Nabi Bagwan(PW-42), PSI, RA Kidwai Marg, Police Station who deposed about the seizure of the aforesaid Maruti car at Jain Derasar Lane clearly throws light on the fact that Accused No. 4 was using the stolen car.

69. Confessional statement of Accused No. 7, which was found to be admissible in evidence by the trial court as well as the High Court, also corroborates and supports the facts admitted by Accused No. 4 in his confessional statement with regard to his (Accused No. 4's) role in arranging the Maruti Car which was used in the shootout, his presence during the handing over of the deadly weapons by Accused No. 3 to Accused No. 7 and that he was present when Accused No. 7 was talking to Chhota Shakeel on 04.03.1999. Therefore, it is clear that Accused No. 4 had heard the conversation prior to the shootout and thus had the knowledge about the conspiracy.

70. PW-18, cousin of Milind Vaidya, who was an eye-witness to the incident described in detail what he saw on the day of the incident. He deposed that he had seen Accused No. 4 along with Accused Nos. 5, 6 and 7. Later he identified him during TIP. Apart from him, Accused No. 4 was also identified by PW-2, PW-3, PW-12, PW-13, PW-22 and PW-30 in the TIP.

71. In view of the aforesaid submissions made by the learned counsel appearing for the State and the materials placed on record, we do not find any reason to interfere with the findings recorded by the High Court so far as involvement of Accused No. 4 in the incident is concerned. There are cogent and convincing evidence available against him to prove and establish his

involvement in the entire incident which justifies his convictions and sentences on each count. Therefore, in our considered opinion, the High Court rightly held that Accused No. 4 had played an active and important role in the conspiracy even though he did not participate in the actual shoot out and that he had the knowledge of the conspiracy. In that view of the matter the contention of the learned counsel appearing for Accused No. 4 that he had not played any active role in the shootout and he had no knowledge of the conspiracy is found to be baseless.

72. We now take up the case of Mohd. Juber Kasam Shaikh alias Tabrej alias Jugnu (Accused No. 5) and Fazal Mohd. Shaikh alias Manni Argamutu Shetiyar (Accused No. 6) who were brought to Mumbai on 26.06.1999, pursuant to wireless message received from Delhi Police regarding their arrest by the Special Cell of Delhi Police.

73. Learned counsel appearing for Accused Nos. 5 and 6 vehemently argued that the present appeal being an appeal against acquittal, in a situation wherein two views are manifestly possible, this Court must not interfere with the decision of the High Court. It submitted that the judgment of the High Court is a perfectly valid based on the basis of true appreciation of the material on record and the same does not call for any interference.

74. On the other hand, learned counsel appearing for the State refuted the aforesaid submissions. He submitted that evidence of PW-18, a 12th standard student, who was the eye-witness of the incident and identification by him in the court has been found to be extremely credible by both the courts below. He submitted that PW-18 saw the car from which the assailants alighted shortly prior

to the incident and observed them quite carefully and he saw the car again with the assailants shortly after the incident as well and has given a detailed description of assailants i.e. Accused Nos. 5, 6 and 7. He also described Accused No. 4 and identified all these persons i.e. Accused Nos. 4 to 7 in court. He identified Accused No. 7 as the person who had fired shots in the air. Counsel further submitted that in addition to the evidence of PW-18 there are evidence of certain eye-witnesses namely, PW-2, PW-3, PW-12, PW-13 and PW-30 also which prove the guilt of accused persons. He next submitted that confessional statement made under Section 18 of MCOCA as well as confessional statements of the co-accused namely, Accused Nos. 1, 7 and 8 are strong evidence against Accused Nos. 5 and 6. Moreover, the confessional statements of co-accused have been found to be admissible by both the courts below. He further submitted that discovery of 9 mm pistol which was used in the firing at the instance of Accused No. 5 proves and establishes the guilt of Accused No. 5.

75. On a careful perusal of the material on record and in the light of the submissions made by the learned counsel for the parties we find that the evidence of PW-18 who was an eye-witness of the incident is credible and trustworthy as he described the incident as well as the assailants in detail. Furthermore, he identified the accused persons i.e. Accused Nos. 4 to 7 in the court as well as during the TIP. His evidence has been found to be trustworthy and reliable by both the courts below. The High Court held that TIP with respect to Accused Nos. 5 and 6 was vitiated because Accused No. 5 had a squint in the right eye and the dummies used in the TIP did not have the similar squint in the right eye. But, the High Court did not make it clear as to why the

identification of Accused No. 6 was also vitiated. Accused Nos. 5 and 6 were also identified by ten witnesses. Therefore, we find the TIP as a reliable piece of evidence as the same proves the identity of accused persons beyond reasonable doubt.

76. The contention of the learned counsel appearing for accused persons that there was inordinate delay in conducting the TIP cannot be accepted in view of the fact that both the accused persons were taken into custody on 25.06.1999 whereas the TIP was held on 10.08.1999. Therefore, the TIP was conducted only after a period of 45 days which is not such a long period to cast any doubt over the evidentiary value of the TIP. Even otherwise, a TIP does not constitute substantive evidence but can only be used for corroboration of the statement in court. It is primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation is proceeding on the right lines. The substantive evidence is the evidence of identification in court, which in the present case has been done by PW-18. This Court in the case of *Amitsingh Bhikamsingh Thakur v. State of Maharashtra,*(2007) 2 SCC 310, at page 315, has succinctly observed as follows :

> *"13.* As was observed by this Court in *Matru v. State of U.P.*1 identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in court. (See *Santokh Singh v. Izhar Hussain*2.) The necessity for holding an identification parade can arise

only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code of Criminal Procedure, 1973 (in short "the Code") and the Evidence Act, 1872 (in short "the Evidence Act"). It is desirable that a test identification parade should be conducted as soon as after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

14. "7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general

rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See *Kanta Prashad v. Delhi Admn.*3, *Vaikuntam Chandrappa v. State of A.P.*4, *Budhsen v. State of U.P.*5 and *Rameshwar Singh v. State of J&K*6.)."

77. Next contention of the learned counsel appearing for the accused persons that the photograph of Accused No. 5 was

published in an Urdu daily thereby making the identity of Accused No. 5 public also does not find favour in view of the fact that the witnesses are Maharashtrians and, therefore, there is no likelihood of their reading the paper and seeing the photograph of Accused No. 5.

78. The evidence of another eye-witness PW-13, a student who was a by-stander, was not believed by the High Court on the premise that he did not disclose the incident to anybody for four days. In our view, the evidence of PW-13 ought to have been relied upon by the High Court as he clearly stated in his evidence that though he did not see the faces of the assailants, he saw the face of the driver-Accused No. 8 whom he described. He stated that he saw the bodyguard of Milind Vaidya chase the car with a rifle. He also noted the number of the car as MH 01 N 7514. His statement gets support from the evidence of PW-3, the body-guard of Milind Vaidya who was an eye-witness of the incident and who deposed that he chased the car up to some distance but did not fire any shot, although armed with a carbine. The statement of PW-13 also gets corroboration from the evidence of PW-30, who was an injured witness of the incident and who deposed that he saw both the bodyguards of Milind Vaidya chase the car and one of them fired at it. Therefore, it would not be proper and justified to discard his evidence only because he did not state about the incident to anyone for four days. Since his evidence is corroborated and supported by other material evidence on record the same cannot be discarded only because of the aforesaid reason.

79. The evidence of PW-12 and PW30, who were injured witnesses, was disbelieved by the High Court though these witnesses have given a reasonable description of the assailants. Moreover, their evidence was not shaken in the cross-examination. PW-30 deposed that he saw all the 3 assailants and saw both the bodyguards of Milind Vaidya chase the car and one of them fired at it. He also described the assailants. In our opinion, the injured witnesses as well as the other eye-witnesses have no reason to falsely depose against the accused persons as it was not shown that they had either any prior enmity with the accused persons or they are interested parties. In fact, they are the victims of the horrendous and ghastly attack made by the perpetrators.

80. Dinanath Pawar PW-2 and Sandeep Waghmare PW-3, who were the bodyguards of the intended target, Milind Vaidya were eye-witnesses of the incident. PW-2 stated in his deposition that he fired three rounds from his pistol at the Maruti car. PW-3 stated in his deposition that he chased the car up to some distance but did not fire any shot, although armed with a carbine. Their statements are corroborated by the evidence of PW-30 who deposed that he saw all the 3 assailants and saw both the bodyguards of Milind Vaidya chase the car and one of them fired at it. Statements of both the eye-witnesses i.e. PW-2 and PW-3 are also supported by the evidence of another eye-witness PW-13, a student who was a by-stander who deposed that he saw the bodyguard of Milind Vaidya chase the car with a rifle. Both of them were the persons who actually witnessed the shootout and were present at the site of the shootout. Furthermore, both of them have given a description of the physical features of the assailants including Accused Nos. 5 and 6. Therefore, in our considered

opinion, the High Court ought to have relied upon the evidence of PW-2 and PW-3 in the light of the circumstantial evidence brought on record. Thus, the trial court rightly found the evidence of PW-2 and 3 trustworthy and reliable as both of them have the best available opportunity to see the assailants.

81. Confessional statements of Accused Nos. 5 and 6 were recorded before DCP Shinde on 26.07.1999. Accused No. 5 stated in his confessional statement that he had joined the Chhota Shakeel gang and was constantly in touch with Chhota Shakeel. He also stated that he had been receiving funds from Chhota Shakeel and had been arrested on three different occasions. On an analysis of the confessional statement of Accused No. 5 we find that he has made a detailed statement of the instructions he received from Mohd. Faheem and Chhota Shakeel in Karachi, Pakistan to kill Milind Vaidya and has stated the involvement of Accused Nos. 1, 6, 7 and 8 in the shootout. After the shootout he was advised by Mohd. Faheem to leave Mumbai and so he fled to Kolkata and subsequently to Nepal wherefrom he was finally arrested on or about 09.06.1999.

82. Accused No. 6 stated about his earlier involvement in murder cases in his confessional statement. He also stated as to how he met Accused No. 5 in Aurther Road Jail and that Accused No. 5 introduced him to the Chhota Shakeel gang. Confessional statement of Accused No. 6 is found to be almost identical to the confessional statement of Accused No. 5.

83. Both the aforesaid confessional statements of Accused Nos. 5 and 6 were held to be vitiated and inadmissible by the High Court on the ground that the requirements under Section 18 (3) of

MCOCA were not fully complied with. The High Court came to this conclusion on the basis that the record of the preliminary inquiry in respect of Accused Nos. 5 and 6 recorded on 23.07.1999 could not be traced. The High Court also held that there was no compliance of the mandatory provisions of Rule 15 of the MCOC Rules which requires a certificate to be attached with the confessional statement.

84. When we analyze the material on record and the aforesaid confessional statements of Accused Nos. 5 and 6 we find that although the fact that the pre-confessional statements were recorded on 23.07.1999 is not traceable, the fact that they were actually recorded is corroborated by the evidence of PW-64, the typist who had deposed that the preliminary statements were recorded on 23.07.1999. Thereafter, they were given a period of reflection for 48 hours which is corroborated by PW-60, PW-63 and PW-64. Therefore, there can be no doubt that the accused were sufficiently warned in advance about the consequences of their confessions. In our considered opinion, the High Court altogether failed to take into account the evidence of PW-64, the typist. The trial court has rightly held that all the requirements under Section 18 (3) of MCOCA were fully complied with while recording the confessional statements. Moreover, Accused Nos. 7 and 8 also described the involvement of Accused Nos. 5 and 6 in the shootout in their respective confessional statements. We find that the confessional statements of Accused Nos. 7 and 8 are consistent with the confessional statements of Accused Nos. 5 and 6. Reliance in this regard may be made to the decision of this Court in the case of *Jaywant Dattatray v. State of Maharashtra,*

(2001) 10 SCC 109, wherein it was held that irregularities here and there would not make the confessional statement inadmissible.

85. The reasoning of the High Court that the confessional statements of the co-accused are not admissible in evidence because Section 313 of CrPC had not been complied with is not tenable as there is a non-obstante clause in Section 18 (3) which precludes the application of CrPC and, therefore, the evidence of a co-accused is admissible as a piece of substantive evidence. [See Nalini case (supra)]

86. When we examine the report of the ballistic expert and the submission of learned counsel appearing for the State with respect to the discovery of 9 mm pistol at the instance of Accused No. 5 which was used in the firing, we find that the report of the ballistic expert shows that the weapon and bullets tally with each other and, therefore, we come to a clear conclusion that the weapon was used in firing during the shootout. Moreover, there is a clear finding of fact by both the courts below that the 9 mm pistol was recovered on 18.07.1999 at the instance of Accused No. 5 from his hut in Mahim. Therefore, in our considered opinion, this recovery of weapon clearly proves and establishes the guilt of Accused No. 5.

87. It is clear from the material on record that Accused No. 5 made certain telephone calls to gang leaders in Karachi, Pakistan. This fact gets corroboration from the discovery of 3 telephone booths in Bandra and Mahim at the instance of Accused No. 5 wherefrom telephone calls were made by him to the gang leaders in Karachi, Pakistan. This evidence gets further corroboration from the evidence of the owners of the telephone booths who deposed that calls were actually made to certain specific numbers in

Karachi, Pakistan by Accused No. 5. In our opinion the High Court was not justified in holding that it was not established with certainty that those telephone calls even though made indeed from the booths identified by Accused No. 5 and on the numbers disclosed by him, were actually made by Accused No. 5 because the prosecution has examined six STD/ISD booth owners to prove that some of the accused had made telephone calls from their booths to Karachi, Pakistan and their evidence was found to be cogent and trustworthy by both the trial court as well as by the High Court itself. Therefore, the view taken by the High Court with respect to Accused No. 5 is not a plausible view as the same is in contradistinction of the view taken by the High Court with regard to other accused persons and it is proved from the material on record that Accused No. 5 has made certain telephone calls to gang leaders at specific numbers in Karachi, Pakistan.

88. The High Court erroneously held that conviction under Section 27 (3) read with Section 7 of the Arms Act could not be sustained although a 9 mm pistol was recovered at the instance of Accused No. 5 and it is proved that Accused No. 5 had used the pistol. Further, the report of the ballistic expert establishes and proves that the weapon and the bullets tally each other. The ballistic expert also opined in the report that one of the victims of the shootout was killed due to a bullet from a 9 mm pistol. Apart from the report of ballistic expert there is medical evidence available on the record which show that the death of the three deceased persons was caused by the injuries sustained due to fire arms during the shootout and, therefore, it can be inferred that the weapon was used in the shootout. It is pertinent to note that Accused No. 6 had also used the pistols and fired during the

shootout. Moreover, though in case of Accused No. 7 the High Court held that the evidence does not disclose that the bullets fired from AK-56 had resulted in the death of any person, it convicted him under Section 27 (2) of the Arms Act.

89. The finding of the High Court that the sanction order under Section 39 of the Arms Act suffered from non-application of mind is not sustainable in view of the material available on record as we find that the sanction order in the present case is a detailed one and displays proper application of mind. Reference in this regard may be made to the decision of this Court in *Gunvantlal v. State of M. P.,* (1972) 2 SCC 194, wherein it was held that under the Arms Act all that is required for sanction for prosecution under Section 39, is that the person to be prosecuted was found to be in possession of the firearm, the date or dates on which he was so found in possession and the possession of the firearm was without a valid licence.

90. In view of the above, the order of acquittal passed by the High Court in respect of Accused Nos. 5 and 6 is hereby set aside in the appeal filed by the State of Maharashtra. Both the accused persons are convicted for the charges as alleged against them and sentenced to undergo rigorous imprisonment for life.

91. So far as Azzizuddin Zahiruddin Shaikh alias Abdul Sattar (Accused No. 7) is concerned, he was sentenced to capital punishment by the trial court. The High Court, however, on appeal while maintaining the order of conviction altered the sentence from capital punishment to that of imprisonment for life. Being aggrieved by the aforesaid order of conviction passed by the High Court, Accused No.7 preferred a special leave petition being SLP (Crl.)

No. 1469 of 2004 which was dismissed by an order dated 8th April, 2004. Therefore, the order of conviction passed against Accused No. 7 sentencing him to undergo imprisonment for life stood upheld. So far as the State appeal as far as Accused No. 7 is concerned, it is filed only for the purpose of enhancement of his sentence in as much as the State by filing the present appeal has questioned the order of the High Court altering the sentence of capital punishment to that of imprisonment for life. However, considering the entire facts and circumstances of the case and the evidence placed on record against him, we find that capital punishment in the instant case would not be justified and, therefore, the appeal of the State so far the issue with regard to alteration of the sentence of imprisonment of life to that of capital punishment is dismissed.

92. Lastly, we take up the case of Abdul Hasan Bande Hasan Mistri (Accused No. 8) who was arrested on 21.07.1999. The learned counsel appearing for Accused No. 8 vehemently contended that the confessional statement was recorded in contravention of Section 18 of MCOCA and Rules and the said confessional statement was not corroborated by any cogent evidence to establish the guilt of the accused. It was further contended that the identification of Accused No. 8 by PW 22 in TIP does not inspire confidence and the same should not have been taken into consideration by the Court.

93. Learned counsel appearing for the State, submitted that Accused No. 8 was the person who drove the car on the day of incident. He made Accused No. 1 drive the Maruti car in which Accused Nos. 5, 6 and 7 reached the place of incident and from

the said car they fired at the victims. Furthermore, he was paid for the job by Accused No. 1.

94. On a meticulous perusal of the materials placed on record we find that the confessional statement of Accused No. 8 was recorded under Section 18 of MCOCA by DCP Ravindra Kadam (PW-39) on 16.08.1999 in which Accused No. 8 disclosed that he knew Accused No. 1 and has seen Accused No. 5 visiting Accused No. 1, that Accused No. 1 promised to pay Rs. 10,000/- to him for acting as a driver for the purpose of committing the crime and the amount was actually paid to him by Accused No. 1 on 06.03.1999, that he met Accused No. 5 at the instance of Accused No. 1 and both of them then contacted Chhota Shakeel, that he was driving the car and Accused No. 7 sat by his side while Accused Nos. 5 and 6 sat at the back seat.

95. The aforesaid confessional statement of Accused No. 8 is found to be admissible in evidence and relied upon by both the courts below having been found to be recorded in compliance with Section 18 of MCOCA. When we examine the aforesaid confessional statement we find that Accused No. 8 has given a detailed account of the incident and the modus operandi of the accused persons. He has given complete description of the role played by Accused Nos. 5, 6 and 7 in the shootout. Therefore, in our considered opinion, the High Court rightly came to the conclusion that Accused No. 8 conspired with the other accused persons and also rendered assistance in the commission of organized crime even though he did not fire any shot or carry arms with him. His participation in the crime was significant.

96. On an analysis we find that the aforesaid confessional statement of Accused No. 8 is supported by the confessional statements of the co-accused namely, Accused Nos. 5, 6 and 7. The confessional statement of Accused No. 7 which is found to be admissible in evidence and relied upon by both the courts below clearly establishes the role played by Accused No. 8. The role played by Accused No. 8 is also proved and established from the evidence of PW-22, a boy from Vadala (Jain Darsan Lane), who has given a sufficiently detailed account of what he saw on the day when the car was abandoned. He deposed that he had seen Accused No. 8 on 07.03.1999 while he was abandoning the car which was used in the shootout. He identified Accused No. 8 in the TIP. Accused No. 8 was also identified by PW-13, an eye-witness to the crime. The High Court found the testimony of PW-22 as truthful and trustworthy.

97. Evidence of Shrirang Balwanrao Shinde (PW-54), PSI, Crime Branch, Unit-IV and PW-31, pancha witness proves that Accused No. 8 led the police to Room No. 15, 3rd Floor, Building No. 1, Kidwai Nagar, Vadala on 29.07.1999 where his parents were also present and he took out two number plates of the car from the place which was used in the shootout wrapped in a paper underneath a wooden bench. Both the number plates bore No. MH 01 N 7514.

98. In the light of the aforesaid evidence on record we find that even though Accused No. 8 has not fired any shot and he was not carrying any arms with him but he played an active role in the crime and his participation in the crime was significant. He was the person who took the assailants to the place of incident by driving

the stolen Maruti car and he received the money for driving the car which fact was admitted by him in his confessional statement. It is also clear from the records that he was an active member of the gang of Chhota Shakeel and was involved in the criminal activities of the organized crime syndicate run by the gang leaders. Therefore, we uphold the order of conviction and sentence passed by the High Court against him.

99. In nutshell, order of conviction and sentence passed by the High Court in respect of Accused Nos. 1, 4 and 8 are to be maintained. Since no appeal against the acquittal of Accused Nos. 2 and 3 filed in the High Court against their acquittal by the trial court, the said acquittal is not the subject matter of appeal before us. Order of acquittal passed by the High Court in respect of Accused Nos. 5 and 6 is set aside in the appeal filed by the State and they are directed to undergo rigorous imprisonment for life. Accused No. 7 has been sentenced to capital punishment by the trial court which was altered to the rigorous imprisonment for life by the High Court against which an SLP was filed in this Court which was dismissed. Since in one of the appeals relating to a co-accused, life sentence awarded was upheld by this Court without issuing any notice for enhancement of sentence, we find no reason to take a different view in cases of the other accused herein, particularly when in respect of Accused Nos. 5 and 6 there was an order of acquittal by one Court. Lastly, the order of conviction and sentence passed by the High Court against Accused No. 8 is upheld and the sentence of imprisonment of life is maintained on the same ground. Before parting with the records, we would like to place on record our deep appreciation for the valuable assistance

provided by Dr. Rajeev B. Masodkar, Advocate as amicus curiae of Accused Nos. 5 and 6.

S.B. SINHA, J.

INTRODUCTION

1. I have had the opportunity of going through the draft circulated by my brother judge Mukundakam Sharma, J. and I am in complete agreement with the views expressed by him therein.

2. However, I may add a few words on the appeals by the State of Maharashtra against the impugned judgment as regards imposition of capital sentence on three Accused herein namely, Accused 5, M Zuber Kasam Shaikh, Accused 6, Fazal Mohd Shaikh and Accused 7, Azzizuddin Zahiruddin Shaikh.

CONTENTIONS OF THE STATE

3. It was argued before us by the State of Maharashtra that the case at hand falls within the category of the `rarest of rare'. It was submitted that in the facts and circumstances of the case only a death sentence would meet the requirements of justice. Contention of the State that what brought this case within the special category of the `rarest of rare cases' was the fact that the incident in question was not a stray crime of murder but was in fact an extremely sophisticated and organised crime whose strings had been attached to outside the country. Accordingly the incident which resulted in the death of three persons and caused grievous injury to seven, was an assault on civilised society.

4. The State of Maharashtra has further relied on the long criminal history of all the three accused namely, Accused 5, M Zuber Kasam Shaikh , Accused 6, Fazal Mohd Shaikh and

Accused 7, Azzizuddin Zahiruddin Shaikh to show that they were hardened and seasoned criminals. It is emphasized that Accused 7, Azzizuddin Zahiruddin Shaikh had received training from the ISI in Pakistan, likewise both Accused 5, M Zuber Kasam Shaikh and Accused 6, Fazal Mohd Shaikh were contract killers who were working for Chotta Shakeel and Faheem. It has been argued that the imposition of a prison sentence on the accused would not be deterrent but would only serve as an opportunity for these criminals to further network on behalf of their gang. In fact it has been argued that Accused 5, M Zuber Kasam Shaikh had come in contact with Accused 6, Fazal Mohd Shaikh while serving his prison sentence and therefore the jail sentence would hardly prove a deterrent to such seasoned and hardened criminals. These submissions of the State in our opinion deserve to be rejected in the strongest words.

CAPITAL SENTENCING AND PROCEDURAL JUSTICE

5. Indian courts have a long experience in exercising wide discretion to select penalty under section 302. A fair capital sentencing system, which aims towards achieving a consistent and principled approach and delineating articulate sentencing pegs has long been the concern of this court. *Bachan Singh v. State of Punjab* [(1980 2 SCC 684] and thereafter numerous judgments have tried to clear the fog on this issue.

6. In this regard, it is pertinent to revisit the basic tenets of our sentencing system. Any capital sentencing system, by virtue of the nature of penalty it deals with, inheres a hierarchical review mechanism. A tiered court system is at the heart of achieving a substantial standard of review which essentially kicks in as soon

as death punishment is awarded. The review courts are supposed to assess the findings emerging from the pre-sentencing hearing at the trial stage as also other available material and then arrive at conclusion of its own on the propriety of sentence. In this context, apex court as the final reviewing authority has a far more serious and intensive duty to discharge. The court not only has to ensure that award of death penalty does not become a perfunctory exercise of discretion under section 302 after an ostensible consideration of Rarest of Rare doctrine, but also that the decision making process survives the special rigors of procedural justice applicable in this regard. Procedural justice threshold not only emphasizes the substantive compliance of Bachan Singh dicta, [for a comprehensive treatment of *Bachan Singh* (supra) see *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* [2009 (7) SCALE 341] in relation to selection of penalty, but also compliance of other due process requirements. It must be noted that administration of Death Penalty is carried out in the intensive gaze of Article 14 and Article 21 requirements. *Bariyar* (supra) aptly captures the sentiment in this regard:

> "We are also governed by the Constitution of India. Article 14 and 21 are constitutional safeguards and define the framework for state in its functions, including penal functions. They introduce values of institutional propriety, in terms of fairness, reasonableness and equal treatment challenge with respect to procedure to be invoked by the state in its dealings with people in various capacities, including as a convict. The position is, if the state is precariously placed to administer a policy within the confines of Article 21 and 14, it should be applied most sparingly. This view flows from *Bachan Singh* (supra) and it

this light, we are afraid that Constitution does not permit us to take a re-look on the capital punishment policy and meet society's cry for justice through this instrument."

7. It is universally acknowledged that judicial discretion is subjective in nature and left to itself has potential to become erratic and personality based which makes it antithetical to the spirit of Article 14. Article 14 applies to judicial process including exercise of judicial discretion as it applies to the executive process. Of course, the nature of Article 14 application in this case will be on a different plane altogether and an objective analysis on that count would have to meet the Ceteris paribus (with other things the same) requirement. The disparity in capital sentencing has been unequivocally asserted not only in *Bariyar* (supra) but also in *Aloke Nath Dutt and ors. v. State of West Bengal,* [2006 (13) SCALE 467] and in *Swamy Shraddananda @ Murli Manohar Mishra v. State of Karnataka* [2008 (10) SCALE 669].

8. In such a scenario, rule based judging norms and sound rules of prudence are the only guarantee to fair and equitable sentencing. This emerges from the constitutional context to the administration of capital sentencing problem as also a closer reading of rarest of rare test. The *Bachan Singh* court invoked the superlative standard safeguarded the judicial space to award death penalty. We should bear in mind that the test will be fulfilled not merely by employing the "personal predilection" of a judge [see *Swamy Shraddananda* (supra)] and deciding the rarest of rare instance on the facts of the case, but only after due consideration of the intangibles relating to the case. The assessment of "rarest of the rare case" is incomplete without coming to the conclusion that

the "the lesser alternative is unquestionably foreclosed". And procedural fairness and justice concerns form part of the latter condition.

9. What are the other due process requirements such that the lesser alternative can be said to be unquestionably foreclosed? It is to be noted that the selection of Life Imprisonment as a lesser alternative can not be deemed to be "unquestionably foreclosed" till the time objective fairness standards as to the sentencing process are attained with regard to capital sentence. We may come across instances where the case may belong to the rarest of rare category, but in court's view the objective fairness standards necessary to be met before death penalty can be awarded have not been complied with diligently. In *State of Maharashtra v. Suresh,* [(2000) 1 SCC 471]), this court observed:

> "regarding sentence we would have concurred with the Sessions Court's view that the extreme penalty of death can be chosen for such a crime, but as the accused was once acquitted by the High Court we refrain from imposing that extreme penalty in spite of the fact that this case is perilously near the region of `rarest of rare' cases."

10. Objective fairness standards as engrained under *Bachan Singh* (supra) will include opportunity of review of capital sentence, timely trial, and comparative review. In *Bariyar* (supra), this court held:

> "The aggravating and mitigating circumstances have to be separately identified under a rigorous measure. *Bachan Singh* (supra), when mandates principled precedent based sentencing, compels careful scrutiny of mitigating

circumstances and aggravating circumstances and then factoring in a process by which aggravating and mitigating circumstances appearing from the pool of comparable cases can be compared.

The weight which is accorded by the court to particular aggravating and mitigating circumstances may vary from case to case in the name of individualized sentencing, but at the same time reasons for apportionment of weights shall be forthcoming. Such a comparison may point out excessiveness as also will help repel arbitrariness objections in future.

A sentencing hearing, comparative review of cases and similarly aggravating and mitigating circumstances analysis can only be given a go by if the sentencing court opts for a life imprisonment.

....

To translate the principle (to translate the rarest of rare case) in sentencing terms, firstly, it may be necessary to establish general pool of rare capital cases. Once this general pool is established, a smaller pool of rare cases may have to established to compare and arrive at a finding of Rarest of rare case."

PRIMACY TO RULES OF PRUDENCE

11. In an apparent conflict between a "fair and equitable" sentencing system and an "efficient and deterrent" sentencing philosophy in the context of Death Penalty, the Bachan Singh verdict, without a doubt, favours the former. It is not to suggest that deterrent as a theory of punishment is not relevant at all in section

302, but that there is more to this question. Capital Sentencing is not a normal penalty discharging the social function of punishment. In this particular punishment, there is heavy burden on court to meet the procedural justice requirements, both emerging from the black letter law as also conventions. In terms of rule of prudence and from the point of view of principle, a court may choose to give primacy to life imprisonment over death penalty in cases which are solely based on circumstantial evidence or where high court has given a life imprisonment or acquittal.

12. At this juncture, it will be pertinent to assess the nature of rarest of rare expression. In light of serious objections to disparity in sentencing by this court flowing out of varied interpretations to the Rarest of Rare expression, it is clear that the test has to be more than what a particular judge locates as rarest of rare in his personal consideration. There has to an objective value to the term rarest of rare, otherwise it will fall foul of Article 14. In such a scenario, a robust approach to arrive at rarest of rare situations will give primacy to what can be called the consensus approach to the test. In our tiered court system, an attempt towards deciphering a common view as to what can be called to be the rarest of rare, vertically across the trial court, high court and apex court and horizontally across a bench at any particular level, will introduce some objectivity to the precedent on death penalty which is crumbling down under the weight of disparate interpretations.

13. This is only a rule of prudence and as such there is no statutory provision to this effect. Minority opinion of Justice Thomas in *Suthendraraja alias Suthenthira Raja alias Santhan*

and Ors. v. State [AIR 1999 SC 3700] very aptly capture this point of view:

> "17. The Constitution Bench in *Bachan Singh v. State of Punjab* has narrowed down the scope for awarding death sentence to the extremely restricted radius of "rarest of rare cases" in which the alternative lesser sentence of imprisonment for life is unquestionably foreclosed. In the main judgment in the present case one of the three Judges found that sentence of imprisonment for life would be sufficient to meet the ends of justice as far A-1 Nalini.
>
> 18. In a case where a Bench of three Judges delivered judgment in which the opinion of at least one Judge is in favour of preferring imprisonment for life to death penalty as for any particular accused, I think it would be a proper premise for the Bench to review the order of sentence of death in respect of that accused. Such an approach is consistent with Article 21 of the Constitution as it helps saving a human life from the gallows and at the same time putting the guilty accused behind the bars for life. In my opinion, it would be a sound proposition to make a precedent that when one of the three Judges refrains from awarding death penalty to an accused on stated reasons in preference to the sentence of life imprisonment that fact can be regarded sufficient to treat the case as not falling within the narrowed ambit of "rarest of rare cases when the alternative option is unquestionably foreclosed".
>
> ...
>
> "I may add as an explanatory note that the reasoning is not to be understood as a suggestion that a minority opinion in

the judgment can supersede the majority view therein. In the realm of making a choice between life imprisonment and death penalty the above consideration is germane when the scope for awarding death penalty has now shrunk to the narrowest circle and that too only when the alternative option is "unquestionably foreclosed". In a special situation where one of the three deciding judges held the view that sentence of life imprisonment is sufficient to meet the ends of justice it is a very relevant consideration for the Court to finally pronounce that the prisoner can be saved from death as the lesser option is not "unquestionably foreclosed" in respect of that prisoner."

14. *Justice Shah (in minority) in Devender Pal Singh v. State, N.C.T. of Delhi and anr.* [(2002) 5 SCC 234] also heavily relied on the minority opinion in *Suthendraraja* (supra) for that matter.

15. In *Licchamadevi v. State of Rajasthan,* AIR 1988 SC 1785 this court observed:

"Where there are two opinions as to the guilt of the accused, by the two courts, ordinarily the proper sentence would be not death but imprisonment for life."

16. The rule that it would not be proper to award the death sentence where the two lower courts disagreed on conviction developed in *Licchamadevi v. State of Rajasthan* (supra) was followed in *State of Maharashtra v. Suresh* [(2000) 1 SCC 471]). Reliance has also been placed on the same principle in *State of U.P. v. Babu Ram* [(2000) 4 SCC 515], *State of Maharashtra v. Damu s/o Gopinath Shinde and ors.* [(2000) 6 SCC 269] and *State of Maharashtra v. Bharat Fakira Dhiwar* (AIR 2002 SC 16). It will also be in the fitness of this discussion that we mention the

departure from this rule in *State of Rajasthan v. Kheraj Ram* [(2003) 8 SCC 224], *Devender Pal Singh v. State, N.C.T. of Delhi and anr.* (with Krishna Mochi) (AIR 2003 SC 886) and *State of U.P. v. Satish* (AIR 2005 SC 1000).

17. It is only apt to mention here that the Law Commission in its 187th Report has recommended that in cases where the Supreme Court Bench hearing a particular case finds that an acquittal by a High Court should be overturned and the accused be sentenced to death, or where it finds that the punishment should be enhanced from life imprisonment to death, such cases should be transferred by the Chief Justice to a Bench of at least five judges.

"SWINGING FORTUNES"

18. Swinging fortunes of the accused on the issue of determination of guilt and sentence at the hand of criminal justice system is something which is perplexing for us when we speak of fair trial. The situation is accentuated due to the inherent imperfections of the system in terms of delays, mounting cost of litigation in High Courts and apex court, legal aid and access to courts and inarticulate information on socio-economic and criminological context of crimes. In such a context, some of the leading commentators on death penalty hold the view that it is invariably the marginalized and destitute who suffer the extreme penalty ultimately.

19. One of the accused in the instant case was acquitted in December 2003 by the High Court. It has been more than 8 years since he was freed in relation to the matter at hand. At this juncture, this becomes a relevant factor. In *State of Maharashtra v.*

Manglya Dhavu Kongil, AIR 1972 SC 1797, even though the Supreme Court reversed the acquittal by the High Court and restored the original conviction of the trial court, it did not award the sentence of death observing that the death sentence had been awarded over four years previously and in the period in between, the accused had been freed from prison.

20. In *State of Uttar Pradesh v. Sughar Singh and Ors,* AIR 1978 SC 191 this court awarded life imprisonment stating, "having regard to the considerable time that has elapsed since the date of the occurrence and having regard to the fact that the High Court's decision of acquittal in their favour is being set aside by us, the extreme penalty of death ought not to be imposed...". Similar reasoning was offered by this court in *State of Haryana v. Sher Singh and Ors.,* [(1981) 2 SCC 300], *State of U.P. v. Hakim Singh and Ors.* (AIR 1980 SC 184), *Gurnam Kaur v. Bakshish Singh and Ors.* (AIR 1981 SC 631), *State of Uttar Pradesh v. Sahai and Ors.* [(1982) 1 SCC 352] and *State of Uttar Pradesh v. Suresh alias Chhavan and Ors.* [(1981) 3 SCC 635]) (for a rigorous and comprehensive review of death penalty jurisprudence on this issue and otherwise please see Amnesty International Report titled *"Lethal Lottery: The Death Penalty in India - A study of Supreme Court judgments in death penalty* cases 1950-2006")

RECENT DECISIONS

21. Recently the question as to the imposition of death penalty again came for consideration before this court in *State of Punjab v. Manjit Singh & Ors,* [2009 (8) SCALE 622]. Therein the two accused had been held responsible for the murder of four persons which included the husband and the son of the women both of

them were having an illicit relationship with. The deceased had objected to the said relationship and even physically abused the lady. This is what ultimately incited the accused to murder the deceased persons in cold blood. The trial court sentenced both the accused to a death sentence. The High court in reference however commuted the sentence to one for life. Brother Sharma, J. while deciding the question of sentencing reiterated the law with respect to the imposition of a death penalty, observing:

> "17. The above discussed legal principles have been followed consistently in numerous judgments of this Court. Whether the case is one of the rarest of the rare cases is a question which has to be determined on the facts of each case. It needs to be reiterated that the choice of the death sentence has to be made only in the rarest of the rare cases and that where culpability of the accused has assumed depravity or where the accused is found to be an ardent criminal and menace to the society and; where the crime is committed in an organized manner and is gruesome, cold-blooded, heinous and atrocious; where innocent and unarmed persons are attacked and murdered without any provocation."

22. The Court accordingly affirmed the judgment of the High Court on the ground that the accused had only acted out in the gruesome manner after coming to know of the ill treatment meted out by the deceased persons to the women they had feelings for.

23. We may also place on record that in *Rameshbhai Chandubhai Rathod v. State of Gujarat* [2009 (6) SCALE 469], two of the Hon'ble Judges of this Court differed on the question of imposition of death penalty.

FACTS AND SITUATIONS OF THE PRESENT CASE

24. In the facts and circumstances of the case, and having regard to the well settled principles of law that we have referred to hereinbefore, we are not persuaded, as has rightly been held by Brother Sharma, that it is not a case where the only sentence to which the accused persons herein were entitled to that of death.

25. In our opinion the trail court had wrongly rejected the fact that even though the accused had a criminal history, but there had been no criminal conviction against the said three accused. It had rejected the said argument on the ground that a conviction might not be possible in each and every criminal trial. In our opinion unless a person is proven guilty, he should be presumed innocent.

26. Further nothing has been brought on behalf of the State even after all these years, that the criminal trials that had been pending against the accused had resulted in their conviction. Unless the same is shown by documents on records we would presume to the contrary. Presumption of innocence is a human right. The learned trail judge should also have presumed the same against all the three accused.

27. In our opinion the alleged criminal history of the accused had a major bearing on the imposition of the death sentence by the trial court on the three accused. That is why in our opinion he had erred in this respect.

28. It is also to be noted that the trail court has brought on record various irrelevant and invidious considerations with respect to sentencing. The trial court observes that death penalty must be awarded in this case so as to motivate police not to indulge in encounter killings and catch the accused alive. Role of ISI agency

of Pakistan, black money racketeering in the organized crime syndicate has also been discussed at great length in the sentencing part of the judgment. These aspects are not only absolutely irrelevant to sentencing in the instant case but also bears an extremely subjective and loose articulation and delineation of factors relevant to sentencing in the instant case.

29. It is worth mentioning that in the present case the High Court had acquitted both Accused 5, M Zuber Kasam Shaikh and Accused 6, Fazal Mohd Shaikh. It is from that acquittal that appeals for their conviction and sentencing come before us. While imposing the sentence of life on the accussed the Court must have the judgment of acquittal of the High Court in the back of its mind. In our considered opinion if at least one of the courts below had acquitted the accused person in respect of the crimes for which they are to be sentenced, the burden on the prosecution would be even more heavier, which the State in our opinion has not been able to discharge.

30. If a person is sentenced to imprisonment, even if it be for life, and subsequently it is found that he was innocent and was wrongly convicted, he can be set free. Of course, the imprisonment that he has suffered till then cannot be undone and the time he has spent in the prison cannot be given back. Such a reversal is not possible where a person has been wrongly convicted and sentenced to death. The execution of the sentence of death in such cases makes miscarriage of justice irrevocable. It is a finality which cannot be corrected.

31. And once Accused 5, M Zuber Kasam Shaikh and Accused 6 Fazal Mohd Shaikh have been sentenced to life there remains

no question of awarding a death sentence to Accused 7, Azzizuddin Zahiruddin Shaikh who had played no greater a role in the said incident as Accused 5, M Zuber Kasam Shaikh and Accused 6 Fazal Mohd Shaikh. All the three accused stand on an equal footing and therefore the sentences to be imposed upon them must not differ. It is for the aforementioned reasons that the appeals filed by the State as regard the imposition of a death Sentence deserves to be dismissed.

32. We must not lose sight of another fact. The High Court has awarded life imprisonment. This Court, save and except in very rare cases, should interfere therewith. One view has been expressed. Unless it can be objectively held that such a view is illogical, a contrary view should not be taken for the purpose of imposing death penalty.

33. I respectfully agree with the opinion of Brother Sharma, J. that the appeal of the State should be dismissed.