A MOHD. IQBAL M. SHAIKH AND ORS.

v.

STATE OF MAHARASHTRA

APRIL 15, 1998

B [G.N. RAY AND G.B. PATTANAIK, JJ.]

Criminal Law :

Terrorist and Disruptive Activities (Prevention) Act, 1987: Section C *2(h).*

'Terrorist act'—Meaning of—As a sequel to the demolition of Babri Masjid, the house of Hindus was set afire by members of the rival community with the result that several persons were burnt alive—Held: 'Terrorist act' D *produces a prolonged psychological effect on society, disturbs even the tempo and tranquillity of society and creates a sense of fear and insecurity in the minds of a section of the society or society at large—Therefore, having regard to the sensitive and tense atmosphere then prevailing in the society and the real impact of the gruesome and atrocious activities on the society, the aforesaid act amounted to a 'terrorist act'.*

E

Section 20-A (1) (introduced w.e.f. 22-5-1993)—District Superintendent of Police (DSP) competent authority to accord approval for application of TADA—Occurrence took place on 7-1-1993—Commissioner of Police accorded approval for application of TADA—Validity of—Held: Occurrence took place prior to coming into force of S. 20-A (1)—Hence, question of F *obtaining prior approval of DSP for application of TADA does not arise—Even otherwise, the Commissioner of Police, on the basis of the report of Senior Police Inspector of the concerned police station, had accorded approval to apply TADA—In the circumstances of the case, there is no infirmity with the investigation being proceeded under TADA, charges being* G *framed therein and trial being held by the Designated Court.*

Section 20-A (1)—Prosecution—Sanction for—Cognizance by court—Condition precedent—Application of mind before according sanction—Valid sanction—Held: If the sanction order shows that sanction was granted only after consideration of relevant material then validity of such sanction order H *cannot be questioned on ground of non-application of mind—But if the*

sanction order does not clearly indicate application of mind, then prosecution is entitled to adduce evidence allude of the sanctioning authority, based on which court can be satisfied about application of mind—The fact that sanction was accorded on the very same day of receipt of relevant papers does not indicate non-application of mind or invalidate sanction—Administrative Law.

Appreciation of evidence—Held: Law does not make a distinction in the matter of appreciation of evidence in a case under TADA or under normal criminal law.

Criminal Trial :

Appreciation of evidence—Witness—Questioning of—By police—Delay in—Held: Delay in questioning the witness by itself does not render his evidence unreliable—But while testing the credibility and assessing the intrinsic worth of such evidence court should scrutinise it strictly—Non-examination of a witness at the earliest point of time, though he was available right from the time of occurrence, indicates callousness on the conduct of the investigating agency.

Appreciation of evidence—Separation of—Chaff from grain—Duty of court—Held: If the witness is wholly unreliable the question of corroboration does not arise—Hence, the question of separating the chaff from grain also does not arise—Unless the prosecution evidence conclusively establishes the offence conviction cannot be recorded on mere conjectures and hypothesis.

Evidence Act, 1872: Section 9.

Test Identification Parade—Necessity of—Accused was known to the witness by face only and not by name—Accused was also shown to the witness during investigation—Held: Under such circumstances, evidence of TI Parade can corroborate the evidence of identification in court—As the accused was shown to the witness the so-called identification parade loses its value and identification in court also becomes inconsequential.

The appellant-accused were convicted by the Designated Court for the offences under Sections 120-B and 149 of the Penal Code, 1860 read with Section 3(2)(i) of the Terrorist and Disruptive Activities (Prevention) Act, 1987, Section 302 IPC and read with Section 149 IPC, Section 436 IPC read with Section 149 IPC, Sections 147 IPC and 148 IPC and sentenced to undergo imprisonment for life. Hence this appeal.

A According to the prosecution on 7-1-1993, as a sequel to the demolition of Babri Masjid, the accused persons, who were Muslims, terrorised the minority Hindus of the locality in consequence of which the Hindus remained inside their respective rooms in the chawl. One of the houses in which some Hindus had taken shelter was set afire by the accused persons with the result that several of them were burnt alive. The accused persons were B arrested and approval of the Commissioner of Police was taken under Section 20-A(1) of TADA for investigation of the case. The Police Commissioner on 27-1-1993 gave the sanction for prosecution of the accused persons under Section 20-A(1) of TADA.

C On behalf of the accused persons it was contended that the violence committed in the house of the Hindus was not a 'terrorist act' within the meaning of Section 3(h) of TADA and, therefore, the provisions of TADA would be inapplicable; that the order passed by the Commissioner as well as his evidence in court show that the sanction for prosecution was given without application of mind and, therefore, it was invalid; that the competent D authority for granting approval for investigation under Section 20-A(1) of TADA was the District Superintendent of Police and not the Commissioner of Police; that there was an inordinate delay in questioning the witnesses by the police and, therefore, their evidence was untrustworthy and unreliable; that the accused persons were known to the witnesses by name and not by face; that the accuse persons were shown to the witnesses by the police E during investigation; that there was no Test Identification Parade; and, therefore, the identification of the accused persons by the witnesses in court was of no consequence.

On behalf of the respondent-State it was contended that the testimony F of the witnesses could not be held untrustworthy and unreliable merely on the ground of delay in questioning them by the investigating agency; and that although there were several omissions in the evidence of witnesses yet the court should separate the chaff from the grain and decide if conviction could be sustained based on the available grains.

G Allowing the appeal, this Court

HELD : 1.1. It is not possible to give a precise definition of terrorism or to lay down what constitutes terrorism. But it may be possible to describe it as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological H effect it produces or has the potential of producing on the society as a whole.

If the object of the activity is to disturb harmony of the society or to terrorise people and the society with a view to disturb the even tempo, tranquillity of the society, and a sense of fear and insecurity is created in the minds of a section of the society or society at large then it will, undoubtedly, be held to be a terrorist act. The question, therefore, does not really boil down to an examination as to whether for the activities, under the normal criminal law, the accused persons can be punished but to examine the real impact of such gruesome and atrocious activities on the society at large or at least on the section of the society. [747-B-E]

1.2. If the case in hand is examined from the aforesaid stand point, on the facts that shortly after the demolition of Babri Masjid, a communal riot erupted and during that period in the locality in question which was predominantly occupied by Muslims, a chawl occupied by Hindus who were in minority was set to fire by the people belonging to the rival community and on account of such fire, several people were burnt alive, it is difficult to accept the contention that the activities do not fall within the ambit of the Terrorist and Disruptive Activities (Prevention) Act, 1987. Judging from the atrocity of the activities and judging from the sensitive and tense atmosphere prevailing in the town under which the acts were perpetrated resulting ultimately in the death of several persons, the conclusion becomes irresistible that such activities has far reaching consequences and it affects the society at large and the even tempo had been greatly disturbed and as such the provisions of TADA get attracted to such activities. [747-E-G]

Hitendra Vishnu Thakur v. *State of Maharshtra*, [1994] 4 SCC 602, relied on.

2. Section 20-A(1) of TADA was brought on the statute book on 22-1-1993 and the said provision was not in existence on the date of the occurrence on 7-1-1993 and consequently, the question of obtaining the prior approval of the District Superintendent of Police before proceeding with the investigation into the offence under TADA does not arise. Even otherwise, the Commissioner of Police by his Order dated 27-1-1993, on the basis of the report of the Senior Police Inspector of the concerned police station, accorded approval to apply the provisions of TADA. There is, therefore, no infirmity with the investigation being proceeded under TADA, charges being framed therein and trial being held by the Designated Court. [748-E-G]

Anirudshinhji Karansinhji Jadeja v. *State of Gujarat*, [1995] 5 SCC 302, relied on.

A 3.1. When a statute requires a sanction of the competent authority as a pre-condition for taking congnizance by the Court and the relevant sanction order is produced which itself indicates the materials considered and then after applying mind, the sanctioning authority accorded sanction, the same would be sufficient to hold that there is a valid section. Besides, when the sanction order itself is not sufficient to indicate that the sanctioning authority B applied his mind then the prosecution is entitled to adduce evidence alliunde of the person who accorded sanction and that would be a sufficient compliance. After going through the said evidence the court can come to the conclusion that relevant materials were considered by the sanctioning authority whereafter he accorded the sanction in question. [749-C-E]

C 3.2. In the case in hand if the order passed by the Commissioner of Police sanctioning prosecution of the accused persons under TADA is examined, it would be apparent that the sanctioning authority clearly persued the records of investigation and then on being satisfied passed the impugned order of the sanction. The sanctioning authority was examined as a witness D in the court and his evidence clearly establishes that it is only after thoroughly applying his mind to the relevant materials and the proposals, he accorded sanction on being satisfied that a prima facie case exists against the accused persons to proceed against them under TADA. It cannot, therefore, be said that there has been no valid sanction as required under Section 20-A(1) of TADA. There was no infirmity with the sanction accorded in the case and E as such there was no illegality in taking cognizance and trying the accused persons under TADA. [749-E-G]

4.1. Merely because a witness was examined after a considerable period from the date of occurrence his evidence need not be discarded on that ground alone but at the same time while testing the creibility and assessing F the intrinsic worth of such witnesses the delay in their examination by the police has to be borne in mind and their evidence would require a stricter scrutiny before being accepted. [750-D]

4.2. When a witness who happens to be a resident of the locality where the incident occurred and took active part in rescuing the injured persons from the burnt house in the presence of the police and then accompanied G them to the hospital and was also available at the hospital when police had come but for some mysterious reasons police did not choose to ask him anything about the occurrence, then this conduct on the part of the investigation is highly reprehensible and indicates the callousness on the part of the investigating agency in carrying out the investigation in the case. H [751-F-G]

5. If the witness knew the accused persons either by name or by face, question of police showing him the accused becomes irrelevant. If the witness did not know the accused persons by name but can only identify from their appearance then a test identification parade was necessary, so that the substantive evidence in court about the identification, which is held after fairly a long period, could get corroboration from the identification parade. But in this case the prosecution did not take any steps in that regard and no test identification parade had been held. Then again if the police show the accused persons in the police lock-up to the identifying witness then the so-called identification loses its value, inasmuch as, it is only because of the police showing the persons, the witness is being able to identify the alleged accuse. If the accused has been shown to him in the course of investigation then the so-called identification in court is of no consequence and cannot form the basis of convicting. Therefore, if the witness was called to the police station while the accused persons were in police lock-up and the witness had been given the opportunity of seeing those persons in the police lock-up then the so-called identification made by the witness in court is of no significance. [753-D-F; 757-G]

6. It is true that in a country like India where it is difficult to find a witness who has not made any embellishment or exaggeration and, therefore, in such a case court would be justified in separating the chaff from the grain and then act upon the grain. But where the evidence consists of only chaff, as in the present case, question of separating chaff from the grain would not arise. Then again when all the eyewitnesses suffer from the same infirmities the question of one corroborating the other would not arise. If a witness is partly reliable and partly unreliable then one may look for corroboration to the reliable part of the ocular version of a witness. But if a witness is wholly unreliable the question of corroboration does not arise. Even though the present case was a ghastly one and on account of communal frenzy several people belonging to one community were brunt alive by some others but unless and until the prosecution evidence conclusively establishes those others, as the perpetrators of the crimes, it is not possible for a court of law to record conviction on mere conjectures and hypothesis. [761-D-G]

7. The law does not make any distinction in the matter of appreciation of evidence in a case under TADA or under normal criminal law. [761-A]

Dilawar Husssain v. *State of Gujarat JT*, (1990) 4 SC 282, relied on.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 97-100 of 1997.

A From the Judgment and Order dated 16.10.96 of the Designated Court in Bombay in TADA Special Case Nos. 35/93 @ 1/94 @ 37/94 @ 17 of 1995.

P.C. Jain, A. Vachher and K.L. Mehta for M/s. K.L. Mehta, Co., for the Appellants.

B M.S. Nargolkar, S.S. Shindhe and D.M. Nargolkar for the Respondents.

The Judgment of the Court was delivered by

PATTANAIK, J. These appeals by the 11 accused persons under Section C 19 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as ' the TADA) are directed against the judgment dated 16.10.1996 passed by the Additional Judge, Designated Court for Greater Bombay in TADA Special Case Nos, 35/93 @ 1/94, 37/94 and 17/95. These appellants and six other stood charged under Sections 120(B), 147, 148, 149, 302, 326, 436, 506 I.P.C. and Section 3(2)(i) and (ii) of the TADA for the ghastly occurrence D dated 7th of January, 1993, wherein six persons died out of burn injuries being locked in a room and the room having been put to fire by putting petrol on it. The occurrence is a sequel to the demolition of Babri Masjid at Ayodya. Shortly after the demolition of the mosque at Ayodya communal riots erupted all over the country including the city of Mumbai. When communal riots E erupted in the city in the suburban Jogeswari, an area known as Bandra plots was predominantly occupied by the Muslims and Hindus were in minority. A number of Hindu families were staying in chawls known as Gandhi Chawl, Rajbhai Chawl, Nail Chawl etc. The accommodation usually consists of one-room-tenements having one entrance door and the tenements are situated adjacent to each other. The tragic incident occurred in the house of deceased F Rajaram Bane who was residing in room no. 2 of Gandhi Chawl. As stated earlier the Hindu community being in minority, while a group of residents had taken shelter in room no. 2 of Gandhi Chawl, it is alleged that the Muslim accused persons put petrol on the roof of said room no. 2 of Gandhi Chawl and set it on fire and in course of occurrence Rajaram Bane, his wife Sulochana, his neighbours Laxmi Bai Batalu and her daughter Kamla, one crippled girl by G name Meenakshi Narkar and one Vandana Todkar died out of burn injuries. It may be stated, out of these deceased persons Sulochana and Vandana were removed to the hospital and they died in the hospital on 10th of January, 1993 and 16th of January, 1993, respectiveiy, while the rest died at the spot itself. While the occurrence is undoubtedly a ghastly one and exhibits the brutality H with which the members of one community attacked the members of another

community at a point of time when people had been depraved of their sense of judgment and decency and when people had behaved like animals, the still more painful is the manner in which the prosecuting agency picked up indiscriminately people from one community as they were residing in the locality and booked them under different sections of the Penal Code and the TADA and ultimately the learned Designated Court convicted these 11 appellants and acquitted six other co-accused persons. This case exhibits not only callousness on the part of the investigating agency and the cavalier fashion with which the investigation proceeded but also the extent to which the trial judge has been swayed away to record conviction without any legally admissible trustworthy evidence. It would, therefore, be necessary for this Court to scrutinise the evidence with care and caution and to find out as to whether notwithstanding the infirmities in the evidence of the prosecution witnesses whether conviction of any of the accused appellants can at all be sustained.

The prosecution case in brief is that on 7th of January, 1993 the accused persons along with some other Muslims terrorised the minority Hindus of the locality in consequence of which the Hindus remained inside their respective rooms in the Chawl. The prosecution further alleged that these accused persons came with deadly weapons in their hands at 9.30 p.m. and warned the Hindus of the locality not to come out of their respective tenements as otherwise they would be killed. The Hindus got frightened, and therefore, preferred to remain inside their respective houses. At 11.30 p.m. while the Hindus had taken shelter in their respective tenements they could hear some noise outside and then through the windows they could see that some of these accused persons had sprinkled petrol/kerosene on the ota and door of the room of Rajaram Bane and then set the said room to fire. As the room had been closed from outside, the persons who were inside the room of Rajaram Bane shouted for help but none of the Hindu community could come out, because of fear for their lives from the unruly Muslim accused persons who had been armed with lethal weapons. Seeing the flames, however, the police rushed to the spot and seeing the police the accused persons ran away. After the police arrived at the spot the other Hindus who were living in their respective tenements and some of whom are the prosecution witnesses mustered courage and came out and tried their best to extinguish fire. By the time the fire could be extinguished and the people were able to get into the room, Rajaram Bane, his neighbour Laxmi Bai Batalu and her daughter Kamla and another crippled girl by name Meenakshi Narkar were found dead. Rajaram Bane's wife Sulochana and another lady Vandana Todkar were alive but had

A suffered serious burn injuries, and therefore, they were removed to the hospital. Sulochana died in the hospital on 10.1.1993 and Vandana died on 16.1.1993 in the hospital. The police then shifted the Hindu population of the locality to a nearby Municipal School and accommodated them in a room under strict police vigilance. Vandana who was alive and had been removed to the Cooper Hospital gave her statement on the basis of which CR No. 15 of 1993 in B Jogeshwari Police Station was registered and police took up investigation of the said case. After the police officers of Jogeshwari Police Station had proceeded with the investigation to some extent, the investigation was entrusted to D.C.P (CID) who registered CR No. 14 of 1993. The approval of the Police Commissioner was taken under Section 20A. (1), for investigation C of the case, under TADA and after completion of the investigation sanction of the Commissioner under Section 20A.(2) was obtained and charge sheet was submitted against 14 accused persons in TADA Special Case No. 35 of 1993. Subsequent to the filling of the aforesaid charge sheet when accused No. 15 was arrested a fresh charge sheet was filed against him in TADA Special Case No. 1 to 1994 and similarly Special Case No. 37 of 1994 was filed D against accused No. 16 and Special Case No. 17 of 1995 was filed against accused No. 17. The learned Designated Court framed charges against all the 17 accused persons under Sections 120 (P), 147, 143, 149, 302, 326, 436, 506 I.P.C. and under Section 3(2)(i) and (ii) of the TADA. The accused persons denied their complicity in the crime and took the stand that as the investigating E agency failed to arrest the real culprit and a communal riot had erupted in the area and some Hindus were burnt and ultimately died, the accused persons who belonged to the Muslim community were residing in the locality were arrested and were arrayed as accused persons. The defence also challenged the validity of the sanction given by the Commissioner of Police.

F The learned designated court formulated 12 points for being answered and then after analysis of the oral and documentary evidence on record as well as the material produced came to hold that prosecution has proved valid permission of the competent authority for applying the provisions of TADA and valid sanction to prosecute the accused as required under Section 20A of the Act. The learned court also came to hold that the accused persons Nos. G 1, 2, 4, 7, 8, 9, 10, 11, 14, 15, and 17 struck terror in the minds of Hindus public to adversely affect the disharmony amongst Hindus and Muslims and for that purpose used explosives like petrol and kerosene and entered into a conspiracy to commit the terrorist act. It further came to hold that the said 11 accused persons were the members of an unlawful assembly whose common object H was to threat the Hindus to kill and further to strike terror in the minds of

Hindu persons with lethal weapons. It also came to hold that the 11 accused persons used force with the common object to kill the Hindus and committed riot and while committing riot used deadly weapons like choppers and knives. The designated court further held that the aforesaid 11 accused persons being members of an unlawful assembly and in furtherance of their common intention to kill the deceased knowingly burnt the house of Rajaram Bane with intention and knowledge that thereby they will cause the death of the deceased and in the process committed murders of Rajaram Bane, Sulochana, Laxmi Bai, Kamla, Meenakshi and Vandana. The learned designated court also came to hold that the aforesaid 11 accused persons being members of an unlawful assembly committed terror in the minds of the Hindu public possessing swords, choppers, petrol and kerosene and burnt the house of Rajaram Bane after pouring kerosene and petrol on the house and set the said house on fire. With these conclusions the aforesaid 11 accused persons having been convicted and sentenced to different terms as hereinafter. The accused appellants were convicted for the offences under Section 120 B read with Section (3(2) (I) of TADA, under Section 149 IPC read with Section 3(2)(i) of TADA, under Section 302 IPC read with Section 149 IPC, under Section 436 read with Section 149 IPC and under Sections 147 and 148 of the Indian Penal Code. For such conviction they are sentenced to imprisonment for life and to pay a fine of Rs. 500, in default to suffer R.I. for six months. The Designated Court did not, however, award separate sentence for each of the offence. The present appeal has been preferred against the aforesaid conviction and sentence passed by the designated court. Be it be stated that out of 17 accused persons, who stood trial, 6 of them have been acquitted of all the charges against them. The prosecution in support of its case examined several witnesses of whom PWs 1, 2, 3, 4, 9 and 10 are stated to be the eye-witnesses to the crime. In coming to the conclusion that the prosecution case has been established beyond reasonable doubt and it is these accused appellants who are the perpetrators of the crime the learned designated court examined the evidence of the aforesaid 6 eye-witnesses and held them to be reliable and on the basis of their identification of the accused persons in court convicted those accused persons who could be identified by two or more witnesses. In assessing the testimony of the aforesaid eye-witnesses and in deciding the question of the reliability of these witnesses the learned designated court has examined whether it was at all possible for the witnesses to see the occurrence from the place where they alleged to have been seen, the inordinate delay in their examination by the investigating officer under Section 161 Cr. P.C., their non-disclosure of the incident to anybody else, and the fact that they were admittedly residing in the locality where the occurrence took place. Having

A examined the impugned judgment of the learned designated court, we find that what persuaded the learned Judge to believe the testimony of these witnesses is the fact that they are the residents of the locality and the accused persons also belonged to the said locality and they know each other well and as such there could not have been any mistaken identity of the accused persons. The learned designated court, however, took the precaution, B since large number of accused persons were involved, to hold that the prosecution case has been proved beyond reasonable doubt against those accused persons who have been identified by more than two eye witnesses of the occurrence.

C Mr. Jain the learned Senior counsel appearing for the appellants contended before us that the evidence of the so-called eye-witnesses examined in this case by the prosecution is totally unworthy of credit and no credence can be given to their testimony of account of several infirmities in the same. According to the learned counsel the method adopted by the learned Judge while the witnesses were being examined to get t he accused persons identified D is a peculiar one and, therefore, no reliance can be placed on such identification in court after so many years of the occurrence. According to Mr. Jain, if the witnesses really knew the accused persons being resident of the same locality nothing stood in their way to name them and in case they did not know the name but could identify them only on seeing them then in the absence of any E earlier test identification parade and merely pointing out one or two persons from amongst the 17 accused persons who stood tried it is not possible to hold that in fact the accused persons were duly identified by the witnesses in court.

Mr. Jain also further urged that Vandana, the deceased, had categorically F stated that some unknown Muslim people threw petrol on the house and set fire to the house. While in the hospital, she made a statement on 14.1.1993 that she could see petrol being sprinkled on the roof and then the house being set to fire but yet did not name any of the accused persons and on the other hand stated that the faces of the accused persons were covered with napkins. Sulochana, the other deceased, was specifically asked as to G whether she could recognise any of the persons who set fire to the house, she replied in the negative as the faces of the accused persons had been covered with napkins. Naina as well as Sandeep and Sailesh who survived in the incident were not examined by the prosecution and practically no explanation has been offered. The eye-witnesses, who were examined, though H stated in court that they knew the accused persons from the childhood or at

least for 25 years yet they did not know the names of the accused persons. Mr. Jain also severely commented upon the fact that the time of the incident has been shifted from 12.30 in night to 11.30, which was necessary because PW-7 in his evidence had indicated that he had learnt about the burning of the room in the Chawl at 11.00 p.m. So far as PW1 and PW 9 are concerned, according to Mr. Jain, it would be difficult for any person to see the incident from where they alleged to have seen in view of the existence of the cement grill in their front. The learned counsel also contended that after the arrest of the accused persons and before they were put to trial and the witnesses were called upon to identify those accused persons on several occasions and as such the witnesses had the opportunity of seeing them and in fact they so deposed in their evidence in court. Mr. Jain also submitted that though several other independent witnesses from the adjacent locality were examined by the prosecution in course of investigation but during trial those witnesses were not produced. Even Smt. Sukesha Bane occupying room just opposite to Rajaram Bane whose room was set to fire, though had been examined by the police during investigation but was not examined during trial. This being the nature of evidence of the eye-witnesses, Mr. Jain urged that conviction of the appellants on the basis of such infirm evidence is wholly unsustainable and as such the appellants are entitled to be acquitted. Mr. Jain also urged that the case in hand reveals a problem relating to ordinary criminal law and alleged violence on the house of Rajaram Bane at Gandhi Chawl on the relevant date cannot be held to be a 'terrorist act' within the meaning of Section 3(h) of the TADA and, therefore, the provisions of TADA would be wholly inapplicable. On the basis of the evidence of the Police Commissioner and the sanction granted by the Commissioner the learned counsel urged that there had been no application of mind by the Commissioner of Police to the relevant materials and on the other hand the said Commissioner has mechanically signed the order of sanction and as such the cognizance of the offence itself becomes vitiated as the provisions of Section 20A(2) must be held not to have been complied with.

Mr. Nargolkar, learned senior counsel appearing for the respondent on the other hand contended that a ghastly occurrence took place on the fateful night where several people were burnt alive and such a ghastly crime should not go unpunished. According to the learned counsel, taking into account the situation then prevalent arising out of demolition of Babri mosque at Ayodya, the delay caused in examining the witnesses by the investigating agency cannot be held to be a ground for impeaching the testimony of the witnesses in court. The learned counsel also urged that the so-called contradictions or

A variance inter se between the witnesses have to be viewed from the stand point that they were utterly stunned by the ferocity and ghastly act of the accused persons and when near and dear ones were found to have been burnt in their front, it is just possible that they have not been able to remember the incident with minute detail and on that score some variance is reasonable but the witnesses can't be held to be untrustworthy on that score. B Mr. Nargolkar further contended that the witnesses being sufficiently familiar with the accused persons who were residing in the same locality, there cannot be any doubt about their capacity to identify nor the identification made by them in the court can be said to be infirm and, therefore, the learned designated court rightly took the precaution and convicted only those persons who C could be identified by two or more eye-witnesses to the occurrence. Mr. Nargolkar also urged that the presence of the witnesses at the scene of occurrence cannot be disputed as they were admittedly the residents of the locality, opportunity on their part to see the accused persons was sufficient as the activities continued for a fairly long period and, therefore, it was quite natural for the witnesses to remember the role played by the accused persons D and there is no justification to discard such trustworthy evidence. Judged from this stand point the conviction recorded by the learned designated court is unassailable. Mr. Nargolkar also submitted that the order of sanction prima facie indicates clear application of mind of the sanctioning authority who accorded the sanction after perusing all the relevant material. That apart, the E sanctioning authority also deposed in court and indicated the materials considered by him before according sanction and in this view of the matter the challenge of the appellants to the validity of the order of sanction cannot be sustained. According to the learned counsel, Mr. Nargokar, the atrocities and activities perpetrated by the accused persons at a point of time when the communal riots had broken in this city of Bombay had such impact on the F society that such activities cannot but be held to be 'terrorist activity' within the ambit of TADA and as such the provisions of TADA have rightly been applied. Mr. Nargolkar, lastly submitted that undoubtedly there are some embellishments and omissions in the statements of the eye-witnesses made in court from their statements made to the police during investigation but such omissions and embellishments are not in respect of the substratum of G the prosecution case and, therefore, the evidence of such witnesses cannot be discarded as a whole. According to the learned counsel, court must in such case separate the chaff from the grain and then on the grains available would examine whether the conviction of the accused persons can be sustained or not. In this view of the matter, it is contended by the learned H counsel for the respondent that the appeal deserves to be dismissed.

In view of the rival submissions at the bar, the first question that arises for our consideration in whether the activities can be held to be 'terrorist activities' so as to bring it within the purview of TADA. The expression 'terrorist act' has not been defined and, on the other hand, Section 2(h) stipulates that it would have the same meaning as has been assigned to it in sub-section (1) of Section 3. The expression 'terrorism' has not been defined under the Act and as has been held by this Court, in the case of *Hitendra Vishnu Thakur and Ors.* v. *State of Maharashtra*, [1994] 4 SCC 602, it is not possible to give a precise definition of terrorism or to lay down what constituted terrorism. But the Court had indicated in the aforesaid decision that it may be possible to describe it as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. It has also been stated in the aforesaid decision that if the object of the activity is to disturb harmony of the society or to terrorise people and the society with a view to disturb even the tempo, tranquillity of the society, and a sense of fear and insecurity is created in the minds of a section of the society or society at large, then it will, undoubtedly, be held to be a terrorist act. The question, therefore, does not really boil down to an examination as to whether for the activities, under the normal criminal law, the accused persons can be punished but to examine the real impact of such gruesome and atrocious activities on the society at large or at least on the section of the society. If the case in hand is examined from the aforesaid stand point, on the facts that shortly after the demolition of Babri Masjid at Ayodhya, a communal riot erupted in Mumbai and during that period in the locality in question which was predominantly occupied by Muslims, a Chawl occupied by Hindus who were in minority was set to fire by the people belonging to the rival community and on account of such fire, several people were burnt alive, it is difficult to accept the contention of Mr. Jain that the activities do not fall within the ambit to TADA. In our considered opinion, judging from the atrocity of the activities and judging from the sensitive and tense atmosphere prevailing in the town under which the acts were perpetrated resulting ultimately in the death of several persons, the conclusion becomes irresistible that such activities has far reaching consequences and it affects the society at large and the even tempo had been greatly disturbed and as such the provisions of the Act get attracted to such activities.

The next question that arises for consideration is whether there has been an infraction of sub-section (1) of Section 20(a) inasmuch as the competent authority prescribed under the statute have not exercised jurisdiction vested

A in him and, on the other hand, an authority who was not competent, has accorded approval for application of the provisions, and as such entire proceeding starting from investigation and culminating in conviction gets vitiated. This contention of Mr. Jain is mainly based upon the fact that though under the provisions of TADA only the district Superintendent of Police could accord approval but in fact it is the State Government who accorded B approval and the State Government being not the prescribed authority under the statute, investigation made must be held to be without jurisdiction and consequently the ultimate conviction cannot be sustained. Reliance has been placed on the decision of this Court in the case of *Anirudhsinhji Karanshinhji Jadeja and Anr.* v. *State of Gujarat*, [1995] 5 SCC 302. In the said case, what C has been held by this Court is that for invocation of the Act, the District Superintendent of Police is the authority whose prior approval is condition precedent, and since the said statutory authority, who has been vested with jurisdiction, did not exercise his discretion and, on the other hand, orders were based at the behest of the higher authority, then in the eye of law, it is to be held that the prescribed authority has not exercised discretion at all. D On examining the facts of the present case, we are of the considered opinion that the ratio of the aforesaid case has no application at all.

Firstly, Section 20A(1) was brought on the statute book by Central Act 43 of 1993 w.e.f. 22nd May, 1993 and said provision was not in existence on E the date of the occurrence on 7th of January, 1993 and consequently, the question of obtaining the prior approval of the District Superintendent of Police before proceeding with the investigation into the offence under TADA does not arise. Even otherwise, the Commissioner of Police, Greater Bombay, by his Order dated the 27th of January, 1993, on the basis of the report of the Senior Police Inspector, Jogeshwari Police Station dated 13th of January, F 1993, accorded approval to apply the provisions of TADA, in Jogeshwari Police Station CR No. 15 of 1993 and we find no infirmity with the said Order. In this view of the matter, we do not find any infirmity with the investigation being proceeded under TADA, charges being framed therein and trial being held by the designated Court, Mr. Jain's contention on this score, therefore, G must be rejected.

The next question that arises for consideration is whether the sanction accorded under Section 20A(2) is invalid. Undoubtedly, without the previous sanction of the Commissioner of Police no Court can take cognizance of any offence under the Act. Mr. Jain does not dispute that factually their exists and H Order of the Commissioner of Police sanctioning the prosecution of the

accused persons under TADA but according to the learned Sr. Counsel, Mr. Jain, the said sanction is the outcome of total non-application of mind to the relevant materials and, therefore, cannot be held to be a valid sanction in the eye of the law. It is, in this connection, Mr. Jain, the learned Senior Counsel, took us through the order passed by the Commissioner of Police, Greater Bombay, Shri A.S. Samra as well as his evidence in Court and from the fact that the day on which he received all the papers in course of investigation together with the proposal for filling of the charges, he has accorded the impugned sanction, exhibit total non-application of mind, and therefore, the sanction accorded is vitiated. We are unable to accept this contention raised by the learned counsel. The law is well settled that when a statute requires a sanction of the competent authority as a pre-condition for taking cognizance by the Court and the relevant sanction Order is produced which itself indicated the materials considered and then after applying mind, the sanctioning authority accorded sanction, the same would be sufficient to hold that there is a valid sanction. Besides, when the sanction order itself is not sufficient to indicate that the sanctioning authority applied his mind then the prosecution is entitled to adduce evidence aliunde of the person who accorded sanction and that would be a sufficient compliance. After going through the said evidence, the Court can come to the conclusion that relevant materials were considered by the sanctioning authority whereafter he accorded the sanction in question. In the case in hand if the Order passed by the Commissioner of Police sanctioning prosecution of the accused persons under TADA is examined, it would be apparent that the sanctioning authority clearly perused the records of investigation and then on being satisfied passed the impugned order of the sanction. The sanctioning authority was examined as witness in the Court and his evidence clearly establishes that it is only after thoroughly applying his mind to the relevant materials and the proposals, he accorded sanction on being satisfied that a prima facie case exists as against the accused persons to proceed against them under TADA. We are, therefore, unable to accept the submission of Mr. Jain, the learned Senior Counsel appearing for the appellants that there has been no valid sanction as required under Section 20A(2) of the Act and we see no infirmity with the sanction accorded in the case and as such there was no illegality in taking cognizance and trying the accused persons under TADA.

Let us now examine the reliability of the prosecution witnesses through whom the prosecution has to establish that the case against the appellants has been proved beyond reasonable doubt. As has been stated earlier the six witnesses who were supposed to be the eye-witnesses to the occurrence are

A PWs 1, 2, 3, 4, 9 and 10. It is to be noticed that while PW 4 was examined by the police on 17.1.1993 and PW 3 was examined by the police on 18.1.1993 but PW 2 Surya Kant was examined on 25.1.1993 and the three other eye-witnesses were examined on 29.1.1993 while the occurrence was on 7.1.1993. It is established from the prosecution evidence itself that these witnesses were the inhabitants of Gandhi Chawl where the ghastly incident occurred B and immediately on the next day of the occurrence they were shifted to a local school for safety and were staying there. Normally, therefore, there was no justification on the part of the investigating agency in not examining them for this length of time. The only explanation offered by the investigating officer is that on account of riot the police was busy with law and order problem but C that problem did not continue for this length of time and in fact the investigating officer has failed to indicate as to why the eye-witnesses though available had not been examined till 29.1.1993. We are conscious of the fact that merely because a witness was examined after a considerable period from the date of occurrence his evidence need not be discarded on that ground alone but at the same time while testing the credibility and assessing the D intrinsic worth of such witnesses the delay in their examination by the police has to be borne in mind and their evidence would require a stricter scrutiny before being accepted. We would, therefore, apply the test of stricter scrutiny and consider the value of their evidence. It may be stated at this stage that even though the statement of Vandana Todkar which was treated as FIR did E not reveal the name of any accused person and PW 4 - Mohinder Eknath was the first eye-witness to be examined by the police on 17.1.1993 but much prior to that date accused No. 1, accused No. 2 and accused No. 3 were arrested by the police. PW 1 - Nitin Pandurang, in his evidence-in-chief has stated that he could see through the window of his house that four persons were sprinkling kerosene and petrol on the doors and the roof of the house of F Rajaram Bane and those persons are : Sallo, Iqbal, Kalya Kasam and Langda Bachchan. According to the witness he knew these four persons from his childhood and he could identify them in court. On being asked to identify them he correctly identified accused Sallo and Iqbal. Thus, it appears that a witness who was acquainted with the accused persons right from his childhood though named four of them in the chief but could identify only two of them, G namely, accused 9 and accused 1. This itself throws considerable doubt on the reliability of the witness. The witness had further stated that when he saw the room occupied by his sister Vandana Todkar has been set to fire he came out of his room and at that point of time he could see a person called Tubelight Baba who was holding a chopper in his hand and Baba Rickshawala H who was also holding a chopper in his hand and Musa was holding a Sword

and several other persons had gathered there. In the court, the witness pointed out accused No. 8 as accused Hayatu and accused No. 7 as Musa. The witness also identified accused Tubelight Baba. The witness pointed out another accused and told his name as Salim Istriwala but he was actually Shaikh Salim Babamiyan. The witness further stated that the person by named Tubelight Baba was shown to him in the Crime Branch. If the accused has been shown to him in the course of investigation then the so-called identification in court is of no consequence and cannot form the basis of conviction. It is, of course, true that accused Nos. 7 and 8 have been correctly named and identified by the witness in court but not the accused Shaikh Salim Babamiyan as the name indicated by the accused was Salim Istriwala and there is no material on record to indicate that Shaikh Salim Babamiyan was also being called as Salim Istriwala. It further appears that witness told in his evidence that even he did not know the names, but the persons who were present at the time of incident are also present in the court and then could point out two persons who are accused Nos. 17 and 13. It may be stated that the witness having not known these persons by name and there having not been any test identification prade earlier by mere pointing in court after so many days, the said alleged identification cannot be pressed into service by the prosecution. From the evidence of this witness it further transpires that after the fire was extinguished he entered into the house of Rajaram Bane and took out the injured persons at a point of time when the police was also present and the injured persons were carried to the hospital through the Ambulance and he had accompanied the injured to the hospital and then he remained in the hospital till next morning and police had come to the hospital but the police never examined him or asked him anything about the occurrence. It is really amazing to note that a witness who happens to be a resident of the locality where the incident occurred and took active part in rescuing the injured persons from the burnt house in the presence of the police and then accompanied them to the hospital and was also available at the hospital when police had come but for some mysterious reasons police did not choose to ask him anything about the occurrence. This conduct on the part of the investigation is highly reprehensible and indicates the callousness on the part of the investigating agency in carrying out the investigation in the case. It is also revealed from the evidence of this witness that even though all the accused persons were present while the witness was being examined but he stated that accused Lengda Bachchan was not present in the court. In his former statement made to the police he had omitted to state several aspects and those omissions have been confronted to the witness to which he denied and the investigating officer also had brought out as to what the witness

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A stated in his examination under Section 161 Cr. P.C. and those material omissions amount to contradiction and such contradiction makes the witness untrustworthy.

According to PW1 he saw the occurrence from the cement grill of the window of his house but PW 6, the draftsman, who has been examined by B the prosecution categorically stated in his evidence that if a person stands inside the house of Nitin Gardi and tries to see through window of the house then the house of Rajaram Bane will not be visible as the cement grill in the house of Nitin Gardi has sufficient thickness and thereby obstruction is caused. This statement of PW 6 makes it impossible for PW 1 to see the C occurrence from inside his house as narrated by him in Court. PW 1 stated in Court that police had recorded his statement immediately after the incident but the said statement has not been produced by the prosecution. He categorically stated in Court that he had stated to the police when examined on 29th January, 1993, that he saw Rajaram Bane, Sulochna, Vandana, Meenakshi and Laxmibai when they were burning with fire, but infact, he had D not stated so in his earlier statement to the police and on being confronted he states that the had not stated so. In Court the witness had stated that he found Rajaram Bane dead when he entered the burnt house. Curiously enough he had not stated so in his statement recorded by the police on 29th January, 1993. Even in his earlier statement to the police he had not even stated about E accused persons pouring kerosene on the house of Rajaram Bane and on being confronted he states that he does not know as to why it has not been mentioned in his earlier statement. In view of the aforesaid glaring infirmities it would be unwise to rely on this witness and, therefore, his evidence cannot be pressed into service by the prosecution for bringing home the charge against the accused persons.

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PW 2-Suryakant, was a resident in the room No. 5 of Gandhi Chawl. According to his evidence he saw from inside his house that accused Sallo was holding a plastic cane containing Kerosene. But in the court when he was asked to identify the said accused Sallo he went and pointed out one of the accused persons in court who on enquiry revealed that his name is Khwaja G Sattar Shaikh. It is really amazing that a person who claims to be an inhabitant of the locality for long years and claims to have closed association with the accused persons would make such a wrong identification and such wrong identification totally makes the witness unbelievable. Such erroneous identification can be the result of the fact that he does not know the accused H persons at all or that he was not present when the occurrence took place. The

witness, of course, correctly identified accused No. 4 Mohd. Yusuf Gul. He also stated that accused Baba Rickshawala was armed with Sallya (Iron Rod) and on being asked to identify the said accused he pointed out to one person who tole his name as Mohammed Jafar. There is no evidence to indicate that Mohammed Jafar was also commonly called as Baba Rickshawala. Similarly, he stated that accused Tubelight Baba was holding a sword and when he pointed out the person to whom he knew as Tubelight Baba that person concerned revealed his name as Mustaque Yasin Khan. Prosecution has not been able to establish any evidence to indicate that Mustaque Yasin Khan was also being called as Tubelight Baba. This witness correctly identified accused Iqbal Hussain and accused Musa. But the question for consideration would be whether any credence can be given to such identification. According to the witness he has been in the locality since 1972 and, therefore, he knew the accused persons personally. If that is the correct state of affairs it is not expected as to how he could commit mistake in identifying the accused Sallo who was supposed to have played the key role of holding a plastic cane containing kerosene and sprinkling kerosene. Evidence of this witness also indicates that he had been called to the Police Station on several occasions and had been shown the accused persons. If the witness knew the accused persons either by name or by face, question of police showing him the accused persons becomes irrelevant. If the witness did not know the accused persons by name but can only identify from their appearance then a test identification prade was necessary, so that, the substantive evidence in court about the identification, which is held after fairly a long period, could get corroboration from the identification parade. But unfortunately the prosecution did not take any steps in that regard and no test identification prade had been held. Then again if the police shows the accused persons in the police lock-up to the identifying witness then the so-called identification loses its value, inasmuch as, it is only because of the police showing the persons, the witness is being able to identify the alleged accused. It is further revealed from the evidence of this witness that when the accused persons were pouring kerosene on the house of Rajaram Bane the door was open and Rajaram Bane later closed the door when the witness also closed the door of his house, obviously, referring to the period when the accused came. This on the face of it is improbable inasmuch as if accused persons are seen to be pouring petrol and kerosene on the roof of the house, where people has taken shelter nobody would close the door so as to give opportunity to the accused persons to achieve their goal of burning the persons inside alive. On the other hand the normal human conduct is that the persons would come out of the house irrespective of the danger which they may face even coming out. If his

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A statement to the police recorded under Section 161 Cr.P.C. is compared with the statement in court it appears that there has been material contradictions and omissions which would make his statement wholly unbelievable and unreliable. If, Gullu was holding a cane containing kerosene and poured kerosene on the house of Rajaram Bane as stated by the witness in court there cannot be any possible explanation why that did not find place in his B earlier statement made to the police. The said statement made to the police had been duly confronted and the witness merely admits the fact. Such a glaring omission in the earlier statement of the witness in respect of the most important aspect of Gullu's conduct unhesitatingly points out to the unreliability of the witness. In the court the witness had stated that he could see the C incident from the window of the house where he was staying but he did not state so while being examined by the Police under Section 161 Cr.P.C. It is also interesting to note that while the witness in his statement under 161 had stated that Sulochana, Vandana, Naina had several burn injuries and Sandeep and Sailesh had minor burn injuries but in that court he stated that he saw only one injured person - name - Sulochana and on being confronted he D stated that he cannot ascribe any reason as to why police had recorded such incorrect statement. While according to this witness accused Sallo (A-9), Gullu (A-4) were the persons who were pouring petrol and kerosene on the roof of Rajaram Bane's room but according to PW 1 accused No. 1, accused No. 17 and Langda Bachchan were pouring petrol and kerosene. According E to this witness he had seen accused Baba Tubelight, Musa, Baba Rickshawala sometimes in February 1993 in the Police Station while these people were in the police lock-up but the case reveals that accused No. 14 Baba Tubelight was arrested only on 23rd of July, 1993 five months after the witness saw him in the police lock-up. Similarly, accused No. 11 was arrested on 20th April, 1993. No explanation is forthcoming as to why the accused persons had not F been arrested even though they had been shown to the witness at the police station much earlier. Then again Kasim Badshah, accused No. 17 was shown to the witness on 20th of March, 1993 at the Police Station and the said accused was arrested on 21st April, 1995 and when the witness was asked to identify in court he even could not tell the said person was present in the G court. The witness in his evidence has stated that he did not see who actually lit match stick and put on fire the house of Bane but later he could only see the fire. According to the witness on the very night of the incident at Jogeshwari Police Station he had narrated the entire incident and the police also reduced the same in writing but the said statement has not seen the light in course of the criminal proceeding. In this state of affair, it is difficult to rely H on any part of the statement of PW 2, who in our opinion is a wholly

unreliable witness.

PW 3-Shivaji Shankar Todkar, is the husband of Vandana and his two sons are Sandip and Sailesh. Vandana died on account of burn injury in course of the incident. Admittedly, he was a resident of the locality. PW 1 is the brother of his wife Vandana. He has deposed in court that on the night of 7th January, 1993 the atmosphere was tense and the Muslim people were threatening the Hindus. He categorically stated that he would not be in a position to tell the names of the persons who were threatening but he can only identify them by faces and when the witness was asked to identify the persons who were threatening from amongst the persons in the dock he pointed out at two accused persons who told their names as Mohammed Iqbal, accused No. 1, and Moosa Yakub, accused No. 7. The value of such identification will be discussed at a later stage but the redeeming feature is that while this witness has been residing in the locality for fairly long period and was otherwise known to the accused persons and according to him several accused persons were threatening in the locality before the actual incident of setting fire, it is impossible to believe that even by facial identification he could only point out two of them. His evidence in court discloses that while he was there in his house with his wife Vandana and the two sons he heard a chaos and he found that accused persons are dissuading them from sitting outside, and therefore, they all went inside their respective rooms. At the next breath he stated that his wife took his two sons and all three went inside the room of Rajaram Bane whereas the witness himself stayed in the room of Chuahan, another person in the locality. This conduct on the part of the witness is highly improbable inasmuch if he was scared to remain alone with his family members in their own room and wanted to say inside the neighbour's room then it is expected from all of them they would remain together. Further if he was expecting trouble from accused persons as stated in his evidence it is highly improbable that he would leave his wife and children in one place and he himself would stay in some other room. The place from where the witness has stated to have seen the occurrence is from inside Chuahan's room though open place at upper portion of the door and he is supposed to have stood over a stool and witnessed the occurrence. The witness in his evidence has stated that he does not know the names of the persons who were holding the petrol cane and on being asked to identify them in court he stated that he would not be in a position to identify anybody as all the persons were having similar appearance. According to this witness after the fire was set in when police people arrived at the place occurrence the accused persons ran away and at that point of time his wife Vandana and

A two sons Sandip and Sailesh as well as Naina Bane came from the back side of the house of Rajaram Bane. He then entered inside the house of Rajaram Bane and saw Sulochana Bane lying with burn injuries on the cot and he also saw Rajaram Bane with flames all over the body. He further saw Kamala Batalu and Laxmi Batalu were lying on the ground with burn injuries and Minakshi was lying in the bathroom with burn injury. This part of the evidence of this B witness is totally at variance with the evidence of Nitin, PW 1, since according to Nitin it is he who accompanied the injured persons to the Cooper Hospital by an Ambulance and no police man travelled in the Ambulance along with the injured persons. He also stated in his evidence that Inspector Mahadik showed him all the accused persons in the office of Crime Branch at Boribandar C but he does not remember the name of any of these five persons. Even on being asked by the court to identify those five persons he candidly stated that he cannot identify anybody else excepting one person and that person told his name to be Mohammed Iqbal. Thus, neither he know the name of those five accused persons who were shown to him by the Inspector Mahadik nor even was able to identify them in the court. It is interesting to note that D he had deposed in his evidence that when the police was recording the statement of the five accused persons shown to him but his statement was not recorded at all and it is again two or two and a half month thereafter he was called by the police to the office of Crime Branch at Andheri and then his statement was recorded. In the cross-examination it has been elicited from E this witness that house of Rajaram Bane is not visible from inside his house. It was also elicited that when his wife and children went to the house of Rajaram Bane being afraid of staying alone in their own house, he went to the house of Chauhan as Chauhan had invited him for tea. This explanation offered by the witness is hardly believable. He had indicated in his statement recorded by the police that after he tried to extinguish the fire he learnt that F his wife Vandana and two children and wife and daughter of Batalu were found insider the house of Rajaram Bane, whereas in his evidence in court he gave a completely different picture and on being confronted he stated that the statement recorded by the police is not correct. According to the witness while he was in the Municipal School he was called to the Jogeshwari Police G Station by a Police Officer and his statement was recorded but infact the 161 statement has been recorded by the Crime Branch. In view of the aforesaid inherent improbabilities in the statement of the witness in the court and the contradictions and omissions witness had made in his statement recorded by the police no part of his evidence can be relied upon and it must be held that H he is thoroughly an unreliable witness.

PW 4, another eye-witness to the occurrence was residing in room No. 3 of Gandhi Chawl at the relevant point of time and he was there since 25 years. He deposed in court that on 7th of January, 1993 while he was sitting on the ota in front of his house at 9.30 p.m. 15 persons came and threatened them as to why they are sitting outside. According to the witness the persons were armed with swords, iron rods and choppers. He stated that the names of those persons were Iqbal Madar, Shaikh, Kaliya Kasam, Langda Bachchan, Sallo Sattar, Irfan Roshan Barafwala, Baba Tubelight, Baba Rickshawala, Salim Istriwala, Gullu, Hayatu, Moosa and Salim Sagir Khan. But on being asked to identify them in court, though he could correctly point out some but could not correctly point out some others. The person whom he pointed out as Baba Tubelight told his name as Mushtaque Yasin Khan; the person whom he pointed out as Salim Istriwala told his name as Salim Babumiyan Shaikh; the person whom he pointed out as Hayatu told his name as Hayat Waris: and there is no material to co-relate that these accused persons had nick name by which the witness knew them. According to the witness the accused Noor Mohammad Khan was spreading petrol on the door of Rajaram Bane but said Noor Mohammad Khan has already been acquitted. He also stated in his evidence that he had been called to the office of the crime branch at Crawford Market where Inspector Mahadik showed him four accused persons and they were accused Iqbal Madar Shaikh and accused Gullu (accused No. 1 and 4 respectively). When he was asked to point out and identify the other accused persons he could only point out two of them and not others. It is his statement on court, he stated that he was called to the office of crime branch at Crawford Market after one month where police showed him accused No. 14. Tubelight Baba and again about one or one and a half month after he was called to the office of crime branch at Kandivali where police showed him accused Mohammad Irfan Roshan Barafwala, who has been acquitted by the learned trial judge. The witness further states that he was called to the office of crime branch at Andheri where police showed him accused Salim Istriwala and again 15 days thereafter he was shown someone of the accused persons whose name he does not remembers. If the witness was called to the police station while the accused persons were in police lock-up and the witness had been given the opportunity of seeing those persons in the police lock-up then the so-called identification made by the witness in court is of no significance. In cross-examination when this witness was confronted with his earlier statement on account of material omissions and variations the witness explained that what has been recorded in the earlier statement is not correct

A and he does not know why the police has mentioned so. Even in the earlier statement of this witness recorded on 17.1.1993 he had not stated that the accused persons came to the Chawl at 9.30 p.m. and went away and again came at 11.00 p.m. though in court he has stated so and on being confronted he replied that police has not erroneously recorded the same in the earlier B statement. While other witnesses had stated that some of the accused persons were sprinkling kerosene and petrol on the roof of Rajaram Bane's house this witness introduced a story that kerosene cloth balls were being thrown on the door and ota of Rajaram Bane's house. In his statement to the police recorded on 17.1.1993 he had categorically stated that when injured persons were brought outside the house of Rajaram Bane for the first time he came C know that his sister Minakshi was also inside the house of Rajaram Bane whereas in his evidence in court he categorically stated that he had not learnt about the presence of his sister earlier and while extinguishing the fire he knew the same and on being confronted with the earlier statement recorded by the police he merely replied that the statement recorded by the police is D incorrect. On being cross-examined as to why he has not stated to anybody else that he saw the accused persons while putting the house to fire, he answered that he was mentally confused and therefore did not approach anybody and even did not tell the police even though police reached the spot of occurrence soonafter. This witness in court had wrongly identified accused E No. 2 by saying his name as Salim Khan Shabir. He was not able to identify accused No. 1 and pointed out towards accused No. 5 on being asked to identify accused No.1. According to him accused Noor Mohammad Khan was spreading petrol from cane and said Noor Mohammad Khan has been acquitted. In view of the aforesaid inherent inconsistency and improbability in his evidence in court and in view of the fact that even those accused F persons who could be correctly identified by the witness have been shown to him by the police on different occasions while the accused persons were in the police lock-up and in view of the fact that he has not been able to identify many of the accused persons even though he claims to be residing in the locality for 25 years and for other improbability in his evidence as G discussed above it would be highly unsafe to rely on his evidence and in our considered opinion the witness must be held to be a wholly unreliable witness.

The next eye-witness is PW -9 , Laxmibai Gardi, who happens to be the mother of Nitin as well as deceased Vandana. She frankly stated in court that she would not be able to identify any of the persons who were threatening H in the locality much prior to the incident. She stated in court that she had

been called to the Andheri Police Station where she could identify two of the accused persons and one of them was Jada Karim but she was not able to identify him in the court. According to her evidence though she had identified 4 of the accused persons at Borivli Police Station but neither she can tell their names nor can she tell the court as to whether those accused persons are present in the court. In her evidence in court she stated that these accused persons were not threatening the Hindus during one month prior to the incident which is at variance with the evidence of all other witnesses. She also like other eye-witnesses stated that the crime branch police had shown her 3 or 4 accused persons on 22nd of March, 1997 but she was neither in a position to identify them even by face nor could she tell their names. She deposed in court that when the miscreants set fire to the house of Rajaram Bane her daughter Vandana was inside the house and she could hear her voice who was shouting and calling her to save her. This statement can hardly be believed in the scenario in which the room in question is alleged to have been set afire. She also stated in her evidence that her daughter along with her sons climbed up on the roof and jumped on the backside on the ground at the back side of the house of Rajaram Bane. We fail to understand how the witness could state so, when she was in her house. Coming to the identity of the accused persons the witness candidly stated in court "I cannot identify the persons who are present or were present at the time of incident in the gang of 20 to 22 persons. Today I cannot identify the persons who were threatening for about one month prior to the incident." According to the witness though she had identified earlier accused Jada Karim in the office of the police at Andheri but in court she will not be in a position to identify the said Jada Karim. This statement itself makes her wholly unreliable witness inasmuch as if she knew Jada Karim and could identify on earlier occasion there was nor reason why she was not in a position to identify the accused in court. Then again the hole thorough which she stated to have seen the occurrence was a cement grill window and the electric meter board had been installed right on the front adjacent to the window and it would be difficult for a person to see the occurrence in the house of Rajaram Bane through that window. She had been confronted with her statement recorded on different occasions wherein there had been material omissions and she only states that the earlier statement is not correct and she has not stated so before the police. She admitted that she learnt for the first time when Vandana and her tow sons came before her after the fire took place that Vandana was inside the house of Rajaram Bane even though earlier she had stated that she could hear her

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A cries from inside the house of Rajaram Bane. On the aforesaid premises the evidence of this witness does not inspire any confidence and we do not think it is safe to rely on her testimony for convicting any of the accused persons.

The only other witness on which the prosecution relied upon to bring home the charge against the accused persons is Krishna Harishchandra Kate, B PW-10, who was also residing in Gandhi Chawl. He is brother of PW 2 and his statement was recorded by the police for the first time on 29th of January, 1993. He had stated in his evidence that he was called to the office of the crime branch where police showed him 3 to 4 accused persons but he neither known their names nor would be in a position to identify them in the court C even by face. It is his further evidence that he was called upon by the police 15 days thereafter and he was shown another accused person but he does not remember the name of that accused person nor in a position to identify him in court. He also stated that he was called to the Police Station at Kandivli on 22.4.1993 where police showed him one accused but he does not know the name of that accused person nor he can identify the same by face. Though D in the Court he had stated that between 6th December, 1992 to 7th of January, 1993 the goondas of the locality were threatening them but he had not stated so in his earlier statement made before the police. In the court he had also stated that he had never made any complaint on that score before. On being cross-examined he candidly admitted that he could not insert his head through E the grill to see what is happening outside, and therefore, he climbed on a loft and from there he could see the incident through the window. But neither the investigating officer nor any other person has stated about the existence of such a loft. It was elicited in his cross-examination that he was sitting inside the house from the time when the accused started pouring kerosene till the accused went away is not correct. A scrutiny of his evidence clearly indicates F that it bristles with inconsistencies and improbabilities and the witness has contradicted from his statement made to the police which makes him thoroughly unreliable and it is difficult for us to place any reliance on the testimony of such witness.

G Mr. Nargolkar the learned senior counsel appearing for the State of Maharashtra, however, contended that no doubt, there has been several omissions on the part of the witnesses in their statement under 161 but those omissions would not impeach their evidence, in any manner, so far as, the basic prosecution case is concerned and the case being one under TADA and the circumstances under which the witnesses have given their evidence, the H court would be justified in separating the chaff from the grain and on accepting

the grain can base conviction in view of the corroboration it gets from other evidence. This submission of the learned counsel for the respondent suffers from a misgiving as law does not make any distinction in the matter of appreciation of evidence in a case under TADA or under normal criminal law. This question has been answered by this Court in a case in somewhat similar circumstances in *Dilawar Hussain* v. *The State of Gujarat & Anr.*, JT (1990) 4 S.C. 282, wherein it has been observed :

> Misgiving, also, prevailed about appreciation of evidence. Without adverting to submissions suffice it to mention that credibility of witnesses has to be measured with same yardstick, whether , it is an ordinary crime or a crime emanating due to communal frenzy. Law does not make any distinction either in leading of evidence or in its assessment. Rule is one and only one, namely, if depositions are honest and true. Whether the witnesses, who claim to have seen the incident in this case, withstand this test is the issue.

We are quite aware of the principle that in a country like India where it is difficult to find a witness who has not made any embellishment or exaggeration, and therefore, in such a case Court would be justified in separating the chaff from the grain and then act upon the grain. But where the evidence consists of only chaff as in the present case, question of separating chaff from the grain would not arise. Then again when all the eye-witnesses suffer from the same infirmities as has been discussed by us, question of one corroborating the other would not arise,. If a witness is partly reliable and partly unreliable then one may look for corroboration to the reliable part of the ocular version of a witness. But if a witness is wholly unreliable as has been assessed by us, the question of corroboration does not arise. It is no doubt true that the incident with which we are concerned in the present case was a ghastly one and one account of communal frenzy several people belonging to one community were burnt alive by some others but unless and until the prosecution evidence conclusively establishes those others, as the perpetrators of the crimes, it is not possible for a court of law to record conviction on mere conjectures and hypothesis.

As we have discussed earlier the investigating agency merely on suspicion have roped-in the persons belonging to the other community who were residing in the locality and then somehow trying to get them identified through the witnesses who belong to the community from where the people

A were burnt alive and the learned Designated Court was swayed away by the so-called evidence of identification and based the conviction. We have already discussed as to how unreliable the evidence of these eye-witnesses and no court on the basis of such unreliable evidence can base conviction, howsoever, ghastly the crime may be. In the aforesaid premises we set aside the conviction and sentence passed by the learned Designated Court under the provisions B of TADA as well as under different Sections of the Indian Penal Code and direct that the appellants be set at liberty forthwith unless they are required in any other case.

V.S.S. Appeal allowed.