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S.N. DUBE ETC.

v.

N.B. BHOIR

JANUARY 12, 2000

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[G.T. NANAVATI AND S.P. KURDUKAR, JJ.]

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Terrorist and Disruptive Activities (Prevention) Act 1987, s. 15. Terrorist and Disruptive Activities (Prevention) Rules, Rule 15(2) and (3) and Code of Criminal Procedure 1974, s. 164—Confessions of accused recorded by same police officer who was supervising investigations and without informing accused that the statements were being recorded under TADA—Whether malafide—Held, on facts, no; moreover, accused made no such grievance in their statement under s. 313 Cr.P.C.

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Mandatory requirement that police officer must explain and give statutory warning to accused so that confession is voluntary—Whether while confession is recorded in two parts warnings given while recording first part will hold good for recording the second part which is the real confession—Held, yes; the second part being in continuation of the first part both parts have to be treated as one confessional statement—Further held, the requirement of law was that police officer should ascertain voluntariness and explain to accused that confession could be used against him in evidence—On

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facts, there was no breach of rule 15(2) of TADA Rules.

Police officer mixing up the certificate and memorandum required to be made under the rules—Statement regarding voluntariness appearing in the body of the confession and not at the end of it—Whether the certificates and memorandum should be in the exact words of Rule 15(3)(b)—Held, no mandatory—Though giving of statutory warning ascertaining voluntariness and preparation of contemporaneous record is mandatory, the words of the certificate and memorandum are not—There was no violation of rule 15(3)(b).

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Whether guidelines issued by High Court for recording confessions u/s. 164 Cr.P.C. apply to those recorded u/s. 15 TADA—Held, no—Merely because some guidelines were not followed Rule does not deprive confessions of their evidentiary value.

Admissibility of confession by accused under s. 15 TADA—Held, is a substantive piece of evidence and can be used against a co-accused also otherwise held to be voluntary and believable—Further held, on facts, the confessions of the accused 1 to 6 were voluntary and reliable and could form a safe basis for convicting them.

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Test Identification Parade—Witnesses identifying accused for first time in court during trial three years after arrest of accused—Held, not holding T.I.P. does diminish the evidentiary value of the identification of the accused in court but is corroborated by other evidence—Evidence Act 1872, s. 9.

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Code of Criminal Procedure 1974, s. 173(8)—Criminal investigation—Case initially investigated dishonestly—Despite five empty cartridges being recovered from spot indicating that weapon was pistol, a revolver was seized as the weapon of offence—Two persons sent up for trial and after obtaining bail they absconded—Trial not proceeded with—Later another police officer re-investigating and finding that acts were of terrorist nature attracting TADA—Trial court holding that re- investigation was done with oblique motive—Held, on facts, trial court erred in coming to such conclusion—There were doubts about the honesty of the first investigation and the subsequent investigation was not done with any oblique motive.

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Terrorist and Disruptive Activities (Prevention) Act 1987, s.3(3)—Terrorist acts—Gang warfare over grabbing of land—Confessions of A-1 to A-6 revealing commission of terrorist acts by gangs to which they belonged—Held, although there was no specific evidence regarding terrorist acts, confessions of A-1 to A-6 corroborated by witnesses would prove A-1 to A-6 had committed terrorist acts attracting s. 3(3) TADA.

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The gang of MP had accepted supremacy of the gang of BT and both the gangs were cooperating with each other in committing terrorist acts and in carrying on the illegal activities of land grabbing. In September, 1989, it was decided between the two gangs that BT would liquidate the person whom the gang of MP wanted to eliminate and MP gang would do away with SD.

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On October 9, 1989 one of the members of the MP gang saw SD going towards the Nalasopara railway station and after locating his position immediately rushed to the nearby hotel belonging to MP and informed other members of the gang including A-1. So A-1 and some other members of the gang who were present there rushed to the platform. A-1 was armed

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A with a pistol. Other members of the gang were also variously armed. A-1 found SD standing near the newspaper stall and fired three shots from a close range. SD got injured and fell down on the platform. A-1 went near him and fired one more shot. After thus killing SD all the assailants ran away from that place.

B Within a very short time Police Inspector (PI) K, who was in-charge of Vasai Police Station, went to the house of the Dube brothers (relatives of deceased SD), and tried to persuade them not to involve BT and then threatened by stating that if they did, then the consequences would be serious. The Dube brothers therefore did not lodge any complaint. Investigation was not made honestly. Some of the empties found from the platform were substituted or tampered with. At the instance of K and N **C** A-4 and A-11 were arrested as the persons responsible for the murder of SD. A revolver was recovered at the instance of A-4 as the weapon with which SD was killed. Those two accused were then charge- sheeted and put up for trial. Hearing of the said case could not proceed further as both the **D** accused were shown absconding after they were released on bail. No effort was made by the police for getting warrants issued for securing their presence before the court.

E On February 19, 1992 the police set-up at the Vasai police station and Palghar railway police station, within whose jurisdiction the gangs were operating, had changed. DIG S of the Railways, during his visit to Palghar railway police station, had an occasion to look into the investigation papers relating to the murder of SD. He became suspicious about honesty of the investigation and identity of the real assailants. He, therefore, re-opened the case on a written complaint given by Dube brothers on **F** May 18, 1995. S forwarded it to DSP D for further enquiry. The enquiries made by him and PI Shinde revealed that the gangs of BT and MP were committing terrorist acts in Nalasopara and surrounding areas, they had created a reign of terror and that SD was killed by a person belonging to the gang of MP at the instance of BT. D, therefore, submitted a report **G** under s. 173(8) of the Code of Criminal Procedure to the Sessions Court at Thane and sought permission for re-investigation of the case. Permission was granted.

H At the conclusion of the investigations, charge sheets were laid against the accused A-1 to A-13 for offences under ss. 120B, 201, 217, 218,

302 read with ss. 149, 307 read with s. 149 of Indian Penal Code (IPC), ss. 3, 3(3) and 3(4) of TADA Act and s. 25(1)(a) of the Arms Act. A-14 to A-17 were charged under ss. 201, 217, 218 read with s. 120B IPC. They were also charged under ss. 3(3) and 3(4) of the TADA Act read with s. 120B IPC.

The prosecution mainly relied on the confessions made u/s. 15 TADA by A-1 to A-6 and recorded by PI Shinde as well as the evidence of eye witnesses PWs 48 and 49. The trial Court found many faults with the confessions and held them inadmissible in evidence. It also held that they were not voluntarily made. It disbelieved the witnesses examined to prove the terrorist acts on the ground that their evidence was too general and vague and they were not independent and responsible members of the locality. The evidence of the two eye witnesses was disbelieved on the ground that these were material improvements and contradictions in their evidence. Identification of the accused in the court by these two eye witnesses was after a long time and no previous test identification parade was held. For all these reasons the trial court held that the prosecution case against A-1 to A-13 was not proved. As regards A-14 to A-17 the trial Court held that the sanction given for their prosecution under s. 3(1) of TADA was vitiated on account of non-application of mind. It also held that the reinvestigation was done with an oblique motive. Thus the case against A-14 to A-17 was also held not proved.

The complainant and the State appealed to this Court.

Partly allowing the appeals, this Court

HELD : 1.1. A-1 was guilty under s. 302 I.P.C. and A-2 to A-6 under Section 302 read with Sections 120-B and 149 I.P.C. A-1 to A-6 were also guilty under s. 3(3) TADA Act. [245-E-F]

1.2. The confession recorded under s. 15 TADA Act was a substantive piece of evidence and could be used against a co-accused also otherwise held to be admissible, voluntary and believable. In the instant case, the confessions of A-1 to A-6 were voluntarily made, true and reliable and received independent corroboration on material points from evidence of two eye witnesses as well as that of PWs 1 to 5. The confession could form a safe basis for convicting A-1 to A-6. [232-G; 240-G-H]

Kartar Singh v. State of Punjab, [1994] 2 SCC 568; *State v. Nalini and Kalpnath Rai v. State*, [1997] 8 SCC 732, referred to.

A 1.3. There was no illegality or impropriety in PI Shinde recording the confessions even though he was supervising the investigation. Shinde had clearly stated in his evidence that he had made attempts to find out if any other Superintendent of Police was available for recording the confessions and as others had declined to oblige him he had no other option but to record them. [233-E-F]

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1.4. Shinde had committed no breach of Rule 15(2) while recording the confessions of the accused. The requirement of law was that before recording the confession the police officer should ascertain by putting questions to the maker of it that he was making the confession voluntarily and he should also explain to him that he is not bound to make the confession and that if he makes it that can be sued against him as evidence.

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[236-C; 235-G-H]

1.5. Neither s. 15 TADA nor Rule 15 contemplated recording the confession in two parts. The second part being in continuation of the first part, both parts had to be treated as one confessional statement. [235-D; F]

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1.6. The contention that when the confession is recorded in two parts, only the second part can be regarded as the confession and while recording the second part the police officer should give the statutory warning and then ascertain if the person concerned is making it voluntarily, could not be accepted. [235-G]

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1.7. The trial court was wrong in holding that there was a breach of Rule 15(3)(b) and therefore, the confessions were inadmissible and bad. Though giving of the statutory warning ascertaining voluntariness of the confession and preparation of a contemporaneous record in presence of the person making the confession were mandatory requirements of that rule, the form and the words of the certificate and memorandum were not mandatory. What were the mandatory requirements of a provision could not be decided by overlooking the object of the provision. [238-E; 237-B-C]

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1.8. The sanctity of the confession did not get adversely affected merely because the certificate and memorandum were not separately written but were mixed up or because different words conveying the same thing was used by the recording officer. [237-E]

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1.9. The rules or the guidelines framed by the Bombay High Court for recording a confession by a Magistrate under Section 164 Cr.P.C. did not by

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themselves apply to recording of a confession under s. 15 of the TADA Act. Merely because some of those guidelines were not followed while recording the confession or on the ground that it is not in conformity with s. 15(2) of the TADA Act and Rule 15 of the TADA Rules did not deprive them of their evidentiary value. The police officer recording a confession under s. 15 was really not bound to follow any other procedure. [239-G-H]

2. The infirmity of not holding the test identification parade did diminish the evidentiary value of the identification of the accused by the witness. But it stood corroborated by the evidence of another eye witness and also by the confessions of A-1 to A-4. [226-F]

State of Maharashtra v. Sukhdev Singh, AIR (1992) SC 210 and *State v. V.C. Shukla*, AIR (1980) SC 1382, referred to.

3.1. A-1 to A-6 are guilty under Section 3(3) of the TADA Act as well. Although the evidence of the witnesses, except that of P.W. 19 was not specific and by itself could not be regarded as sufficient to prove terrorist acts but they provided sufficient corroboration to the admissions made by A-1 to A-6 in their confessional statements that the gangs of BT and MP had created terror in the areas of their operation. Relying upon those confessions and the evidence of these witnesses a finding that A-1 to A-6 were engaged in committing terrorist acts, could be recorded. [244-E-H]

3.2. Apart from the confession statements of the co-accused there was no other independent evidence to show the involvement of A-14 to A-17 as alleged. Although the confessions did create a strong suspicion that A-14 to A-17 were maintaining good relations with BT and A-8 and that they had possibly helped BT and MP in screening the real offenders, it would not be safe to convict them only on the basis of the confessions of the co-accused. [245-B-D]

4.1. The circumstances do create a doubt regarding honesty of the first investigation. The subsequent investigation made by the police after September 1992 was not done with any oblique motive. [221-C]

4.2. The trial Judge was wrong in holding that there was no material for entertaining any doubt and re-opening the investigation and that it had been done so with some oblique motive. The complaint does indicate that the investigation made till then was not honest. Dube brothers, in the

A position in which they were placed at that time, could not have specifically alleged that the previous investigation was dishonest. From the fact that in the application made to the Court for permission to re-investigate it was not stated that the previous investigation was not honest, no inference of oblique motive could have been legitimately inferred. [215-C-E]

B 4.3. The trial Court grievously erred in holding that TADA was wrongly invoked. The complaint made by Dube brothers and inquiries made by D and his officers disclosed some of the illegal activities committed by the gangs of BT and MP and the terror created by them in Nalasopara and surrounding areas. It was on the basis of the examination of several witnesses and gathering material that he was satisfied that the accused had committed offences punishable under the TADA Act. [216-B-C; E]

C CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 678 of 1997 Etc.

D From the Judgment and Order dated 16.5.97 of the Designated Court, Pune in Terrorist Sessions Case No. 32 of 1993 with T.S.C. No. 1 of 1996.

E Sushil Kumar, I.G. Shah, Rajendra Singh, S.R. Chitnis, Bhim Rao Naik, M.S. Ganesh, B.S. Kotwal, A.S. Nambiar, R.K. Jain, R.D. Ovelkar, B.M. Naik, V.N. Ganpule, T.S. Arunachalam, Sanjay Jain, Atul Sharma, U.U. Lalit, S.S. Shinde, D.M. Nargolkar, T.A. Khan, P. Parmeshwaran, Manoj Goel, Shrikant Shivade, G.B. Sathe, Brij Bhushan, Ms. Hemantika Wahi, Ms. Sumita Hazarika, P.N. Gupta, Rajeev Sharma, Kishan Datta, T.C. Sharma, Ajay Sharma, Ms. Neelam Sharma, Rupesh Kumar, P.N. Parekh, Rahul Roy, D.K. Garg, A.K. Gupta, Ms. Rekha Palli, Nischal Niraj, Manoj Mohite, Ms. Lata Krishnamurthy, P.N. Gupta, S.M. Garg, Kishan Dutta, R.P. Wadhvani and S.M. Jadhav for the appearing parties.

The Judgment of the Court was delivered by

G **G.T. NANAVATI, J.** 1. One Suresh Dube was shot dead on a platform of Nalasopara (a suburb of Bombay) Railway Station in broad day light. Many persons saw it and many knew who were the murderers. Because of the terror of the gangs involved none except two persons, one accompanying the deceased and the other who was at that time polishing shoes of that person, have come forward to give evidence against the murderers. One

Mukesh Ratilal Shah (P.W.13), who was injured by one of the bullets fired at that time; has thought it fit not to name the person who had fired the shot. Initial dishonest investigation by the police, on account of close nexus between those gangs and some of the police officers of the area where the said gangs were operating, not only delayed the prosecution of the real culprits but also weakened it considerably. On these allegations 17 persons (thirteen belonging to the two gangs and four police officers) were tried in the Court of the Judge, Designated Court, Pune in Terrorist Sessions Case No. 32 of 1993 and Terrorist Sessions Case No. 1 of 1996 (amalgamated with original TSC No. 32/1993), for the murder of Suresh and for commission of terrorist acts and other offences. The Trial Court did not consider it safe to convict them on the basis of the prosecution evidence and, therefore, acquitted them of all the charges. Shyam Sunder Dube, brother of Suresh Dube, feeling aggrieved by the acquittal has filed Criminal Appeal No. 678 of 1997. The State of Maharashtra has also filed Criminal Appeal Nos. 709-710 of 1997.

2. The prosecution case is as follows :

(a) Nalasopara is a suburb of the City of Bombay. Formerly it was a small and a quite place but with the expansion of the city of Bombay it also started growing. Development of lands and construction of buildings became a lucrative business. That also led to illegal activity of land grabbing, compulsory sales and forcibly taking of possession of lands. Those illegal activities were carried on by the gangs of Pendhari, Suresh Dube and Bhai Thakur since 1980. In 1984 Manik Patil's gang also started operating in Nalasopara area. Bhai Thakur's gang was operating from Virar, a nearby suburb and the last station for the suburban trains running between Churchgate (Mumbai) and Virar. Often there were conflicts and fights between these gangs and because of that one Ram Naresh Chourasiya was murdered in 1984 and Bharat Pendhari was murdered in 1989. Dube brothers having made money stopped that illegal activity one or two years prior to the date of the incident, but continued to carry on the business of land development and construction of buildings. One of the Dube brothers, Dr. Om Prakash Dube (P.W.1) had opened a Nursing Home on the first floor of their building called 'Dube Estates'. Naresh (P.W. 3) was doing business of building materials. Another brother Jai Prakash (P.W.4) was looking after their Pandava Hotel. Shyam Sunder Dube and Suresh Dube continued to look after land development and building activity. All the

A brothers were residing on the second floor of 'Dube Estates'.

(b) Dube brothers had agreed to purchase one land bearing Survey No. 110 of Village Achole and some other lands of nearby places. Bhai Thakur wanted those lands and had forcibly taken possession of them. Bhai Thakur wanted Dube brothers to transfer Survey No. 110 of Achole to him and for that reason had called Suresh Dube at his office in Virar a few days prior to 9.10.1989. As the relations between Bhai Thakur's gang and Dube brothers were inimical Suresh Dube was not allowed to go alone to Bhai Thakur's office. Dr. Om Prakash had accompanied him. In his office Bhai Thakur, his brother Hitendra Thakur and other associates were present. They had told Suresh Dube to part with that land and also to pay 'haftas' to Bhai Thakur if he and his brothers wanted to remain in Nalasopara and carry on the land development and building construction activity. Suresh Dube was even threatened and warned that if he did not comply with that demand and took any other action, then the members of his family shall have to perform 'aarti' of his photo within a short time. Because of this threat Suresh Dube was not moving out of his house since then. As there was no response from Suresh Dube Bhai Thakur and his associates decided to finish him. On 8.10.1989 a warning was given to him on telephone that if he did not transfer that land to Bhai Thakur he would be finished. On that day at night one Srikand Pandey, who was working with Bhai Thakur and had some contact with Suresh, went to the house of Suresh and tried to convince him that if he wanted to remain alive it was advisable for him to give up the land and go away to his native place. On account of this serious threat Suresh and his brothers had decided that Suresh should leave Nalasopara and stay at his native place till there was danger of his life.

(c) Since a few days prior to 9.10.1989 Amarnath Tripathi (P.W. 48), brother-in-law of Suresh, had come to Nalasopara and was staying with them. He had to go to Vilay Parle (another suburb of Bombay) to see a boy in connection with marriage of his brother's daughter. Suresh also wanted to go in that direction for purchasing a ticket for going to his native place Gorakhpur, in Uttar Pradesh. Both of them, therefore, left their house for going to Nalasopara Railway Station at about 10.15 A.M. They reached the station within about two minutes time. There were many passengers on the platform. As the train by which they wanted to go towards Churchgate (Mumbai) side was running late Suresh purchased a

newspaper from a stall on the platform and started reading it. Amarnath Tripathi went to a shoe polish wala, who was sitting near that stall, for getting his shoes polished.

(d) The gang of Manik Patil had accepted supermacy of the gang of Bhai Thakur and both the gangs were cooperating with each other in committing terrorist acts and in carrying on the illegal activities of land grabbing and forcibly purchasing of lands. In September 1989, it was decided between the two gangs that Bhai Thakur would liquidate the person whom the gang of Manik Patil wanted to eliminate and that Manik Patil's gang would do away with Suresh Dube. Bhai Thakur's gang had already done their job but Manik Patil's gang was not able to finish Suresh. Bhai Thakur was, therefore, very angry with Manik Patil's gang and had sent messages that the work should be finished as early as possible. The members of Manik Patil's gang were, therefore, keeping a watch over the house of Suresh Dube. On 9.10.1989 one of the members of the gang saw Suresh going towards the railway station and after locating his position immediately rushed to the nearby hotel belonging to Manik Patil and informed other members of the gang including Narendra Bhoir (A-1) about the presence of Suresh on platform No. 2. So Narendra Bhoir and some other members of the gang who were present there rushed to the platform. Narendra was armed with a pistol. Other members of the gang were also variously armed. Narendra found Suresh standing near the newspaper stall and then fired three shots from a close range. Suresh got injured and fell down on the platform. Narendra went near him and fired one more shot. One of the shots fired by Narendra also caused an injury to Mukesh (P.W. 13). After thus killing Suresh all those assailants ran away from that place.

(e) Someone known to Dube brothers immediately ran to their house and informed Shyam Sunder that Suresh was shot dead on the railway platform. One of the two persons who had also accompanied Amarnath to the railway station went back and informed Naresh (P.W.3) about the incident. Shyam Sunder along with his brothers rushed to the platform and brought back his brother to their house with the help of others. Dr. Om Prakash, Dr. Ajmera and Dr. Bindwani, who were present in the Nursing Home found Suresh dead.

(f) Within a very short time PI Kukdolkar, who was in-charge of Vasai Police Station, went to the house of Dube brothers, and first talked

A to Dr. Dube (P.W.1) and tried to persuade him not to involve Bhai Thakur and then threatened him by stating that if he involved Bhai Thakur, then the consequences would be serious for him. Thereafter, PSI Padekar, attached to Palghar Railway Police Station had gone to the house of Dube brothers and made enquiries about the incident. Because of the threat given by PI Kukdolkar and also because they knew that the police was protecting and helping the gang of Bhai Thakur they did not lodge any complaint. A complaint (Ext. 615) was prepared by PSI Padekar in present of PI Kukdolkar on the basis of what was stated by Shyam Sunder (P.W.2) and his signature was taken thereon. Police Inspectors Kukdolkar and Nimbalkar often used to visit the house of Dube brothers and threaten them not to disclose the name of Bhai Thakur as he was a strong man and whoever complained against him was killed by him. Investigation was not made honestly. Some of the empties found from the platform were substituted or tampered with. At the instance of Police Inspectors Kurdolkar and Nimbalkar and Bhai Thakur, Patric (A-4) and Anant Shankar Patil (A-11) were arrested as the persons responsible for the murder of Suresh. A revolver was recovered at the instance of A-4 as the weapon with which Suresh was killed. Those two accused were then charge-sheeted and put up for trial before the Sessions Court, Thane in Sessions Case No. 88/91. Hearing of the said case could not proceed further as both the accused were shown absconding after they were released on bail and no effort was made by the police for getting warrants issued for securing their presence before the court.

(g) On February 19, 1992 the police set up at the Vasai police station and Palghar railway police station, within whose jurisdiction those gangs were operating, had changed. DIG Suradkar (P.W. 75) of the Railways, during his visit to Palghar railway police station, had an occasion to look into the investigation papers relating to the murder of Suresh. He became suspicious about honesty of the investigation and identity of the real assailants. He, therefore, sent Shyam Sunder Dube to know the truth. In view of the attitude of the police till then Shyam Sunder did not personally go but sent his mother Bhagwati (P.W.5) and Dr. Ritu, wife of Dr. Om Prakash Dube. They complained to him about the dishonest investigation made by PSI Padekar and PI Berge and the role played by PIs Kukdolkar and Nimbalkar. On being assured by Suradkar that proper investigation will be made, a written complaint (ext. 237) was then given by Dube brothers on 18.5.1992. Suradkar forwarded it to DSP Deshmukh for further

enquiry. The enquiries made by him and PI Shinde revealed that the gangs of Bhai Thakur and Manik Patil were committing terrorist acts in Nalasopara and surrounding areas, they had created a reign of terror and that Suresh was killed by a person belonging to the gang of Manik Patil at the instance of Bhai Thakur. Deshmukh, therefore, submitted a report under Section 173(8) of the Code of Criminal Procedure to the Sessions Court at Thane and sought permission for re-investigation of the case. Permission was granted. Further investigation made by Mr. Deshmukh and his officers revealed existence of the gangs of Bhai Thakur, Bharat Pendhari, Suresh Dube and Manik Patil. It also revealed that Bhai Thakur's brothers Hitendra Thakur (A-9) and Deepak Thakur, Prashant Rajaram Tandel (A-8), Istiyak Mukhtyar Khan (A-13) and some others were members of the Bhai Thakur's gang. It also revealed that terrorist acts were committed by the gangs of Bhai Thakur and Manik Patil and that those two gangs were responsible for the murder of Suresh Dube. During the investigation by Deshmukh A-1 discovered a pistol from which he had fired shots at Suresh. A-1 to A-8 and A-11 also made confessions about the terrorist acts committed by the two gangs, the motive for committing murder of Suresh Dube, the manner in which it was committed and how accused Nos. 14 to 17 had helped Bhai Thakur in concealing real offenders.

3. PI Desai (PW 90), who took over the investigation after superannuation of Deshmukh on 30.6.1993, submitted a chargesheet to the Designated Court on 27.8.1993 against A-1 to A-11 and deceased accused Narayan Gauda. Thereafter, supplementary charge-sheets were filed against A-12 to A-17 on different dates. The Designated Court, however, took cognizance against A-1 to A-13 only as no sanction to prosecute A-14 to A-17 was obtained under the TADA Act. Their case was, therefore, forwarded to the Sessions Court at Thane. Later on sanction was obtained to prosecute those police officers also under the TADA Act and their case was amalgamated with the original T.S.C. No. 32/1993 and the charge was suitably amended.

4. The charge against A-1 to A-13 was that between January 1984 and December 1989, they had entered into continued criminal conspiracy to commit terrorist acts by use and/or show of criminal force, fire arms and other lethal weapons to extort money, to illegally grab lands belonging to others and to create terror amongst the people to achieve the objects of their conspiracy. It was also alleged that in pursuance of the said objects

A they had committed various illegal and terrorist acts, the last of which was the murder of Suresh Dube and causing hurt to Mukesh Shah. A-1 was specifically charged for the murder of Suresh Dube and causing injuries to Mukesh Shah. Accused Nos. 1- 5, 11, 12, 13, deceased accused Narayan and absconding accused Sanjay were also charged for having committed the murder of Suresh in prosecution of the object of their unlawful assembly. It was alleged against A-14 to A-17 that as a part of the criminal conspiracy they had caused evidence of commission of those offences to disappear and by that dishonest investigation they had tried to screen the real offenders from legal punishment. A-1 to A-13 were also charged for commission of offences punishable under Sections 120B, 201, 217, 218, 302 read with Sections 149, 307 read with s. 149 of Indian Penal Code, Sections 3, 3(3) and 3(4) of TADA Act and Section 25(1)(a) of the Arms Act. A-14 to A-17 were charged under Sections 201, 217, 218 read with Section 120B of the Indian Penal Code. They were also charged under Sections 3(3) and 3(4) of the TADA Act read with Section 120B of the Indian Penal Code.

D 5. All the accused pleaded not guilty to the charge and their defence was of total denial. A-14 had raised the defence that on the day of the incident he had gone to Bareilly in connection with investigation of a theft case and had returned to Palghar on 12.10.1989. A-15 had also raised the defence that he was at the Vasai police station till 11.00 A.M. on the date of the incident and had reached the place of offence after about 11.30 A.M. He had merely taken steps for keeping 'bandobast' and was not involved with the investigation of the case.

F 6. The prosecution, in order to prove its case regarding existence of the two gangs of Bhai Thakur and Manik Patil and the terrorist acts committed by them and the help rendered to them by the police, had examined Om Prakash (P.W.1), Shyam Sundar (P.W. 2), Naresh (P.W.3), Pushpa Pondhari (P.W. 19), Sitaram Yadan (P.W. 25), Balaram (P.W.34), Kanhiya Lal Mishra (P.W.35), Jafar (P.W.40), Waman (P.W.41), Sakharam (P.W.42), Jagganath (P.W.45), Mohammad (P.W.52), Subhash (P.W.67), Rubab (P.W.68), Madhukar (P.W.69), Ramkishan (P.W.70), Vasant (P.W.90), Naaz Asif Patel (P.W.97) and the police officers connected with the subsequent investigation as witnesses. The prosecution had also heavily relied upon the confessions stated to have been made by A-1 to A- 8 and A-11. In order to prove the murder of Suresh Dube the prosecution had H mainly relied upon the evidence of the two eye witnesses Amarnath

Tripathi (P.W. 48) and Om Prakash Brahamania (P.W. 49). Evidence was also led to prove that the investigation made by the police prior to September 1992 was not honest. Evidence regarding discovery of pistol by A-1 and the evidence of a Ballistic Expert and medical officers and other formal witnesses was also led.

7. The Trial Court found many faults with the confessions and also held them inadmissible in evidence. It also held that they were not voluntarily made. The trial Court disbelieved the witnesses examined to prove the terrorist acts on the ground that their evidence was too general and vague and they were not independent and responsible members of the locality. The evidence of two eye witnesses was disbelieved on the ground that there were material improvements and contradictions in their evidence and their version was also not believable. Identification of the accused in the court by these two eye witnesses was not believed because it was after a long time and no previous test identification parade was held. For all these reasons it further held that the prosecution case against A-1 to A-13 was not proved. As regards A-14 to A-17 the Trial Court held that the sanction given for their prosecution under Section 3(1) of the TADA Act was vitiated on account of non-application of mind. It also held that the re-investigation was done with an oblique motive as most of the terrorist activities fell outside the jurisdiction of the railway police and yet they were investigated by them and the regular police having jurisdiction over the areas was not associated with it. Thus the case against A-14 to A-17 was also held not proved.

8. Whether the earlier investigation was dishonest or the subsequent re-investigation by Deshmukh and his officers was done with some oblique motive will have to be considered first as acceptability of the evidence of the witnesses and the confessions would depend upon the answer to that question. If the earlier investigation was honest as held by the learned trial Judge, then the contradictions and improvements found in the evidence of the two eye witnesses will assume importance. But if the earlier investigation is found to be not honest, then the major ground on which the evidence of the eye witnesses has been disbelieved will disappear. If we confirm the finding of the learned trial Judge that the re-investigation was made with some oblique motive then that would certainly affect evidentiary value of the confessions. The Trial Court held the investigation by Mr. Deshmukh and his officers motivated for the following reasons : (1) in the application

A (Ext. 237) made for re-investigation it was not stated that the earlier investigation was faulty and that A-4 and A-11 were wrongly shown as murderers of Suresh Dube. (2) There was no material before Deshmukh on the basis of which he could have stated that the earlier investigation was faulty and for that reason no good ground was mentioned in the application for re-investigation. (3) there was no reason for Deshmukh to take possession of the Mudemmal articles on the very day on which application for re-investigation was made as there was no material before him to show that an unconnected weapon was seized by the earlier investigating officer. (4) After obtaining the sealed packet of Muddamal empties and bullets from the court for getting them examined by a ballistic expert he first opened it and then again resealed it for no reason except for tampering with the Mudammal articles, particularly the three bullets recovered from the body of Suresh Dube. (5) even though there was no material before Deshmukh on the basis of which he could have lawfully invoked the provisions of TADA on 28.9.1992 very probably he did so with a view to defeat the anticipatory bail application filed by some of the accused. (6) Even though in the first FIR Shyam Sunder Dube (P.W. 2) had stated that he was suspecting none for the murder of his brother, the entire theory got changed during the subsequent re-investigation.

E 9. Suradakar (P.W.75) who took over as DIG, Railways, Bombay in August 1991 had been to Palghar Railway Police Station in February 1992. While examining case papers relating to the murder of Suresh Dube he felt some doubt about the investigation. Therefore, he had directed his subordinate officers to send a message to Shyam Sunder Dube to meet him. Pursuant thereto Bhagwati (P.W.5) and Dr. Rijuta Dube (P.W. 37) had met him within about 8 to 10 days. Suradkar has deposed that they had orally complained to him about the honesty of the police officers who had investigated the case. On his assurance that he would look into the matter and take appropriate action they again met him after about 15 days and gave further details regarding the murder of Suresh. He had, therefore, advised them to give a complaint in writing and pursuant thereto a complaint (Ext. 237) dated 18.5.1992 was given to him. This part of his evidence has almost remained unchallenged in cross-examination. Only suggestion made to the witness was that after Dubes had met him he got the investigation of the case re-opened in order to help Dube brothers. No material has been brought on record to infer that Suradakar was in any manner interested in Dubes or had any other reason to help Dubes by falsely

involving Bhai Thakur or Manik Patil or their men. The doubt felt by him regarding honesty of the investigation was justified because even though five empties were recovered from the place of offence a revolver was seized as the weapon of offence. A police officer even with little experience would have realised that the murder was committed not by using a revolver but with a pistol. The learned trial Judge was, therefore, wrong in holding that there was no material before Suradakar for entertaining any doubt and re-opening the investigation and that he had done so with some oblique motive. A B

10. The Trial Court was also not right in holding that Suradakar got re-investigation done with some oblique motive because in the complaint (Ext. 237) it was not specifically stated that the investigation made by the police officers till then was not honest. The complaint does indicate that the investigation made till then was not honest. It should have been appreciated that Dube brothers, in the position in which they were placed at that time, could not have specifically alleged that the previous investigation was dis-honest. So also from the fact that in the application made to the Court for permission to re-investigate it was not stated that the previous investigation was not honest, no inference of oblique motive could have been legitimately inferred. The application did refer to the complaint made by Dube brothers. Without further investigation no charge of dis-honesty could have been levelled against the police officers associated with earlier investigation at that stage. Therefore, Deshmukh could not have mentioned in the application that permission to re-investigate was sought as the previous investigation was not honest. C D E

11. The adverse inference drawn by the learned Trial Judge from the circumstance that Deshmukh had taken back Mudemmal articles from the Court on the same day on which permission to reinvestigate was granted and that he had opened the sealed packet containing bullets and empties and again sealed them, is wholly unjustified. For ascertaining from which type of weapon - pistol or revolver - the bullets which were found from the body of Suresh Dube were fired, it was really necessary for Deshmukh to obtain possession of those bullets and also the empties and get an opinion of a ballistic expert, particularly when no clear opinion on that point was given by him in his earlier report. As the said Mudemmal articles were lying in the Court in a sealed packet he had to obtain them from the Court and without opening the packet he could not have given a receipt as to F G H

A which articles were taken possession of by him. It was necessary for him to open that packet and verify the contents. All those steps were regular and necessary and it is difficult to appreciate how the learned trial Judge could infer from them that all that was done by Deshmukh with a view to tamper with those Muddamal articles and particularly the three bullets found from the body of Suresh.

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12. The trial Court also grievously erred in holding that the TADA Act was wrongly invoked. The complaint made by Dube brothers and inquiries made by Deshmukh and his officers disclosed some of the illegal activities committed by the gangs of Bhai Thakur and Manik Patil and the terror created by them in Nalasopara and surrounding areas. Deshmukh was handed over the complaint of Dube brothers for further enquiry on 18.5.1992. On 31.7.1992 he had interrogated Mukesh Shah and on 18.8.1992 he had interrogated Amarnath Tripathi. He had also made some discreet enquiries through his subordinates and gathered some information regarding involvement of accused other than A4 and A11. On 22.9.1992 he had interrogated accused Dnyaneshwar Patil (A-3). It was thereafter that he had submitted a report to the Sessions Court, Thane under Section 173(8) of the Code of Criminal Procedure for further investigation. After obtaining that permission he was able to obtain custody of Dilip Waghchoure (A-7) and interrogate him. On 25.9.1992 he had recorded statements of Mira Dube, Bhagwati Dube and Jayprakash Dube. It was on the basis of this material that he was satisfied that the accused had committed offences punishable under the TADA Act. Disclosing all this material he had made a report to the Superintendent of Police, Railways on 28.9.1992 for invoking the provisions of the TADA Act. It is, therefore, not correct to say that without any justifiable reason provisions of TADA were invoked by Deshmukh and that he had done so for frustrating the bail applications which were to come up for hearing on 13.9.1992.

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13. The last reason given by the Trial Court is also not sound. It wrongly assumed that the first complaint was correct and the FIR was recorded at the time stated therein. If the evidence of Shridhar Thakur (P.W.80), Rajendra Panjwani (P.W.79) and Gosaikar (P.W. 66) had been analysed more carefully it would have become apparent that the FIR could not have been recorded at Palghar railway station at 12.30 p.m. as mentioned in the FIR. The learned trial Judge also failed to appreciate that some days prior to 9.10.1989 Suresh was called by Bhai Thakur and was

threatened that if he did not part with the lands wanted by Bai Thakur, then his family members shall have to perform Aarti of his photograph and on 8.10.1989 one Srikant Pandey, who was a man of Bhai Thakur, had met Suresh and advised him to leave Nalasopara if he wanted to remain alive. Because of this threat a decision was taken by Dube brothers that Suresh should go to his native place and remain there till the danger to his life continues. Pursuant to that decision Suresh had left his house with Amarnath Tripathi on 9.10.1989 for going to Mumbai for purchasing a railway ticket for Gorakhpur. This conduct of Suresh corroborated the evidence of the prosecution witnesses on that point. It is, therefore, difficult to appreciate how in view of this evidence the learned Judge could persuade himself to hold that the first complaint was correct and during the re-investigation the whole version was changed deliberately. The statement in the complaint that the complainant did not suspect anyone as the murderer of Suresh should have made the learned Trial Judge more careful while appreciating the relevant evidence.

14. As regards the earlier investigation by PSI Padekar and PI Berge, it was contended by the learned counsel for the appellants that it was not honest. It was submitted that PI Kukdolkar, PI Nimbalkar and the police officers attached to the Vasai and Virar police stations and even higher officers were supporting and protecting Bhai Thakur, Manik Patil and their men by helping them in tampering with the evidence or by not taking action against them. There is sufficient evidence on record to hold that the gangs of Bhai Thakur and Manik Patil were operating in Vasai and Nalasopara areas since 1980 and 1984 respectively. There is also evidence to show that in order to achieve their objects of extorting money and grabbing land they used to indulge in violence and other criminal activities. Whether those two gangs were committing terrorist acts or not is a separate point and we shall deal with it later. For the present we are examining the evidence to find out whether investigation in respect of murder of Suresh Dube was honestly done. The evidence of the family members of Suresh Dube is consistent on the point that PI Kukdolar and PI Nimbalkar had pressurised them not to mention the name of Bhai Thakur or his men as the murderers of Suresh and had even threatened them that if they did so they would have to suffer serious consequences. P.W.1, Dr. Om Prakash has deposed that within about 10-15 minutes after Suresh was brought home and examined by the doctors, PI Kukdolkar had come to their house and told that as he had not personally seen who had committed the murder he should not name Bhai

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- A Thakur as a suspect. PI Kukdolkar had further told them that even if Bhai Thakur was named as the murderer nothing would happen to him and on the contrary he and all his brothers would have to die. PI Kukdolkar had thereafter gone away and had returned with PSI Padekar and had remained with him when the complaint was written down by PSI Padekar and Constable Sridhar Thakur (P.W.80). Dr. Om Prakash has also deposed
- B that PI Kukdolkar used to come to their house even thereafter and on some occasions he had come with PI Nimbalkar and that both of them had tried to impress upon him and his family members that Bhai Thakur being a strong man and whoever filed a complaint against him was killed and that it was enough that one of the Dube brothers was killed. P.W. 2, Shyam
- C Sunder has also stated that within about 10 minutes after Suresh was declared dead PI Kukdolkar had come to their house and had a talk with his brother Dr. Om Prakash. He has further stated that after talking with his brother PI Kukdolkar had told him and other members of the family that they should not name Bhai Thakur as the murderer of Suresh. PI
- D Kukdolkar had specifically told him that he was the eldest member of the family and should understand the consequences otherwise all the brothers would meet the same fate as that of Suresh. He has further stated that PI Kukdolkar had also told them that whatever property Bhai Thakur was demanding should be handed over to him and that they should leave Nalasopara and go away to their native place. He has also stated that PI
- E Kukdolkar had agains come back with PSI Padekar and told them that they should cooperate with him and that they should act according to what he had told them. P.W. 3 Naresh Dube, P.W. 4 Jaiprakash, P.W. 5 Bhagwati and P.W. 6 Meera Dube have also supported the evidence of Dr. Om Prakash and Shyam Sunder. All this evidence has been disbelieved by the
- F Trial Court on the ground the Dubes had not complained about the conduct of PI Kukdolkar and PI Nimbalkar to Mr. Zarekar, who was then working as SDPO Vasai nor to any other higher officer. It is not quite correct to say that these witnesses had not complained about the conduct of PI Kukdolkar and PI Nimbalkar to anyone. He had complained to PI Rathod who used to go to them for investigation. All these witnesses have
- G further stated that it was because of this attitude of the police officers connected with the investigation or interrogation that they had not complained to higher police officers or taken any other action. The learned counsel for the appellants submitted that the learned Trial Court was not right in brushing aside this evidence and it should have appreciated that
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there was no particular reason for the members of Dube family to make false allegations against the four police officers (A-14 to A-17) and PSI Padekar. It was submitted that the learned Trial Judge failed to appreciate that for some years Suresh Dube was also involved in similar illegal activities and was, therefore, likely to know about the relations of police with the gangs of Bhai Thakur and Manik Patil.

15. The learned counsel for the appellants also submitted that the time of recording the FIR was not correctly mentioned and that is a circumstance indicating dishonesty of the previous investigation. Undisputedly murder of Suresh took place on the Nalasopara railway platform at about 10.30 A.M. P.W. 80, Sridhar Thakur who was working as a writer constable under PI Berge at the Palghar railway police station, has stated PI Berge was absent on 9.10.1989 and PSI Padekar was in-charge of the police station. On receiving information regarding murder of Suresh he had accompanied PSI Padekar to platform No.2 of Nalasopara railway station and thereafter to the residence of Dube brothers. PSI Padekar had questioned Shyam Sunder and the reply given by him was written down by him and that writing was taken as the complaint of Shyam Sunder. The said complaint was then sent to the Palghar railway police station for registration. In his cross-examination however he denied this version and stated that on 9.10.1989 he was called by PSI Padekar at Nalasopara by sending a wireless message. It is proved that in his police statement dated 15.5.1993 he had stated that after receiving the wireless message he had gone to Nalasopara and that he had reached there at 2.00 P.M. The murder had taken place at Nalasopara railway platform at about 10.30 A.M. Palghar railway police station is at a considerable distance and as disclosed by the evidence of police constable Rajendra Panjwani (P.W. 79), who was also attached to Palghar railway police station, that the first train available at Palghar for going towards Mumbai side after 10.15 A.M. was at 12.30 P.M. It is, therefore, quite clear that writer constable Sridhar Thakur could not have taken down the complaint at Nalasopara at 10.40 A.M. Police constable Rajendra Panjwani has also stated that the message regarding murder of Suresh was received at Palghar railway police station sometime between 11.00 and 11.15 A.M. and that he was also directed to leave for Nalasopara. He caught the next available train at 12.30 P.M., got down at Virar and then caught the suburban train for Nalasopara which took him there at about 3.00 P.M. P.W. 66, Gosalkar was a police constable on duty at Palghar railway police station on 9.10.1989. He has stated that while he

- A was on duty at gate No. 38 situated on the western side the railway platform he saw some passengers running across the railway line. On enquiry he was told that firing had taken place on the railway platform and so he rushed to that place and found one person lying in an injured condition. He then went to the station master's room to send a telephone call to Vasai railway station master for sending more police force. That was between 10.45 and 11.00 A.M. Thereafter he went to the house of Dube brothers and after about 20 minutes PI Kukdolkar had come there. From this evidence also it becomes quite clear that the complaint could not have been recorded by Sridhar Thakur at 10.40 A.M. nor could it have reached Palghar railway police station by 12.30 P.M. as deposed by P.W. 72, Hanumant Jadhav. In all probability the first information was recorded at Palghar railway police station much later and after PSI Padekar had gone back to Palghar. No time was mentioned in the register. Copy of the FIR was not sent to the Magistrate either on that day or on the next day. It had reached the Magistrate on 12.10.1989. This delay does create a suspicion regarding influence of the two gangs over the police. Another circumstance and a stronger one indicating that the first investigation was not honest is the attempt made by the previous investigating officers to connect revolver article (No. 47) with the crime. It is not in dispute and also stands proved by the spot panchnama and the entry made in the case diary (Ext. 754) that five empties were recovered from the scene of offence. If shots had been fired from a revolver then the empties would have remained inside the chamber of the revolver and would not have fallen out on the platform. Presence of five empties on the platform clearly indicated that the weapon used for firing shots was a pistol. Yet a revolver (Article 47) was seized and shown as the weapon of offence. Obviously that was done with the object of helping the murderers as no Court could have convicted them on the basis of such evidence. Very probably two of the five empties seized from the railway platform were substituted. That becomes apparent on comparison of the description given in the Panchnama with the description mentioned in the case diary.
- G 16. Another circumstance which creates a doubt regarding honesty of the previous investigation is the making of a false statement in the application for taking A-4 on remand. The police had already recovered the revolver on 20.10.1989 sometime between 5.30 and 6.30 A.M. and yet in the application made to the Court at about 12.30 P.M. on that day it was stated that the weapon of offence was yet to be recovered. One more
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circumstance having a bearing on the connection of the previous investigating officers with accused A-1 to A-13 is absence of any serious attempt by the police till 1992 to secure presence of the accused before the Court and see that the trial proceeded against them. Even though A-4 and A-11 were released on bail and were not attending the court and summons were not served upon them, yet no attempt was made by the police to get any warrant for their arrest issued by the court. The proceedings of the Court discloses that the case was required to be adjourned from time to time on the ground that the summons could not be served upon them.

17. In our opinion these circumstances do create a doubt regarding honesty of the first investigation. We are also of the opinion that the subsequent investigation made by the police under the direction of Suradakar after September 1992 was not done with any oblique motive.

18. The prosecution had led evidence of P.W.1 (Dr. Om Prakash), P.W.2 (Shyam Sunder), P.W. 3 (Naresh Dube), P.W. 4 (Jaiprakash), P.W. 5 (Bhagwati) and P.W. 6 (Meera Dube) to prove the motive for the murder of Suresh. The evidence of P.Ws. 1 and 2 discloses that Dube brothers had purchased certain lands of villages Achole, Nilemore, Manikpur, Tuinej and other villages touching Nalasopara. Bhai Thakur and his associates had taken illegal possession thereof. Suresh was trying to take back those lands. Bhai Thakur wanted those lands to be transferred to him and wanted Suresh to pay 'haftas' for carrying on land developing and house building activities in that area. In this connection, Suresh was called by Bhai Thakur at his office at Virar a few days before 8.10.1989. We have already referred to the discussion and the threats given by Bhai Thakur and his associates to Suresh. We have also referred to the warning given to Suresh on telephone on 8.10.1989. P.W.6 had also stated in her evidence that Suresh was much worried after he had received the threat. The evidence of P.Ws. 1, 4 and 6 further discloses that it was decided by all the family members that Suresh should leave Nalasopara and go to his native place till the danger to his life continued. In the cross-examination of those witnesses it has been brought out that except in respect of Survey No. 110 of Achole there was no document to establish that Suresh and his brother were ever in possession of those lands pursuant to agreements of sale. The evidence of these witnesses is found trustworthy and the motive can be held proved.

A 19. The evidence of P.Ws. 1 and 2 and that of P.W. 28, Amarnath Tripathi proves and that is not in dispute that Suresh had left his house at about 10.15 A.M., reached platform No. 2 within about 2 minutes time and was shot between 10.30 and 10.35 A.M. At that time Amarnath Tripathi was with him. Two other persons had also accompanied as Suresh wanted
B to have a talk with them in connection with his business. One of them was Mukesh Shah (P.W. 53). As to what happened thereafter on platform No. 2 of the Nalasopara railway station has been deposed by Amarnath Tripathi (P.W. 48) and Om Prakash (P.W. 49). Others who had seen the incident and were examined as eye witnesses but did not support the prosecution
C were Ranjit Thakkar (P.W.10), Alex Marthin (P.W. 31), Sanjay Dube (P.W.39), Dinesh Kashyap (P.W. 39) and Mukesh Shah (P.W.53). Ranjit and Sanjay were the passengers waiting on that platform for the train to come. Both of them have deposed about firing of shots and seeing Suresh lying on the platform in an injured condition, but they did not identify any
D of the accused as the assailants of Suresh. Sanjay stated that A-1 and A4 were not the persons who were seen by him running away on the railway track. Alex Martin (P.W. 31) was the person near whose book-stall the incident had happened. He has stated that he had seen the person who had fired shots at Suresh and had also seen other persons running away
E after the incident, but he did not identify the assailants stating that he had seen them from the back side. He specifically denied that A-1 was the person who had fired the shots. Dinesh Kashyap (P.W. 44) had a pan-bidi stall on the platform. He also stated in the Court that he was not able to identify the assailants. All these witnesses were, therefore, declared hostile.
F Mukesh Shah (P.W.53), who knew Suresh and A-1 and who was also injured, did not say in the court that A-1 and some of the accused were the assailants of Suresh. The learned Trial Judge doubted involvement of A-1 on the ground that Mukesh Shah being close to Suresh would have disclosed the identity of the real assailants if he had really seen them. This
G witness must have been very close to Suresh as he had gone on the platform to have a talk with Suresh. The fact that he was injured by one of the shots fired at Suresh also indicates that he must have been close to Suresh. This witness at first denied that he knew A-1, but admitted in cross-examination by the public prosecution that he knew A-1 since before the incident. It
H was, therefore, more probable that he did not want to identify them out of

fear and not because in fact he had not identified them. His evidence, however, remains unhelpful to the prosecution. A

20. Amarnath Tripathi (P.W. 48) had come from his native place to Nalasopara on 4.10.1989 or 5.10.1989 and was staying with his sister and brother-in-law Shyam Sunder (P.W.2). He had come to see his sister and also to find a match for the daughter of his younger brother. Between 5.10.1989 and 9.10.1989 he had seen two boys. On 9.10.1989 he wanted to go to Ville Parle to see one boy. As further stated by him Suresh wanted to purchase a railway ticket for going to his native place Gorakhpur and, therefore, both of them had left together at 10.15 A.M. They went to platform no.2 and were waiting for the train to arrive. As the train by which they were to leave for Mumbai was running late he went to a shoe-polish-wala to get his shoes polished. Suresh Dube purchased a newspaper from a nearby book-stall and started reading the same. While his shoes were being polished he heard the sound of a firearm shot and when he looked in that direction he saw one person with a pistol firing further shots at Suresh. He has also stated that 4 to 5 persons had encircled Suresh. Because of firing persons standing on the platform started running helter skelter. The shoe polishwala also got up and ran away. He then got a push from one of those persons who had encircled Suresh and, therefore, fell down from the platform. He immediately got up and looked at Suresh. He saw the same person who had earlier fired shots firing one more shot at Suresh who was by then lying on the platform. He, therefore, raised shouts "Save Save". By that time one train arrived and taking advantage thereof all the assailants ran away. He has also deposed about how Suresh was taken home and declared dead by the doctors. According to him he become giddy, fell down and on hearing that Suresh was dead he became unconscious and remained unconscious for three days. After he regained consciousness he was told by the relatives of Suresh that murder was committed by Bhai Thakur's men and he should not say anything to the police about the incident as that could prove to be dangerous to their lives because the police was well connected with Bhai Thakur. Therefore, he refused to give a statement to the police on 12.10.1989 when they had come to record it. In the court he identified A-1 to A-4 as the persons who had encircled Suresh. He also identified A-1 as the person who had fired shots at Suresh. This witness was confronted in his cross-examination by the police statements dated 12.10.1989 and 20.10.1989 purported to have been recorded by PI Berge. What the defence wanted to establish was that on B
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- A 12.10.1989 he had given a different version as regards the manner in which the incident had happened. His version in the said statement was that Suresh was standing on his left side while he was getting his shoes polished and when the bootwala was polishing his shoes with cloth, suddenly words "Are Is Ki Ma Ki" came out of Suresh's mouth. At that time people on the
- B platform started shouting "Run Run". Immediately a big sound like bursting of a cracker was heard. He received a push from somebody, lost his balance and remained standing by leaning against the book-stall. He looked at Suresh. He had bent down keeping his hand on his stomach. It was also brought out in the cross-examination that this witness had not given any
- C description of the assailants in his statement dated 18.8.1992 and that he had further stated that the person who had fired shots was having in his hand a weapon like pistol. He was also contradicted by his police statement dated 18.8.1992 wherein he had stated that "immediately thereafter Suresh Dube sat down with his both hands on his forehead and I had fallen down
- D on the railway track because of the push. In the meantime local train from Virar side and Churchgate side arrived. During that time people who fired on Suresh Dube ran away towards Nalasopara West. This witness had not stated in his said statement that "after I stood up on the railway track I saw Suresh Dube lying on the platform and the person who was firing bent down and fired on the head of Suresh Dube". It was submitted by the
- E learned counsel appearing for the respondents-accused that these omissions and contradictions clearly disclose an attempt on the part of this witness to make improvements upon his earlier version so as to make his evidence against A-1 to A-4 certain and acceptable. It was also urged that this witness in his statement dated 18.8.1992 had stated that "I had given
- F my statement before the police during my stay of 20-25 days with Dubes' family after the incident of murder". It was urged that this witness has falsely stated while giving evidence that he had not given any statement to the police either on 12.10.1989 or 20.10.1989. It was further urged that this witness had denied to have made any statement on 12.10.1989 and 20.10.1989 as he knew that it contained a different and an uncertain version
- G not only as regards the manner in which the incident had happened but also with regard to his seeing the assailants. The Trial Court was also much impressed by these omissions and contradictions and taking into consideration the circumstance that the incident had happened suddenly and large number of persons who were standing on the platform had started running
- H helter skelter after hearing the sound of firing of a shot, held that this

witness could not have sufficiently seen the assailants so as to correctly identify them in the court after many years. In arriving at this conclusion the Trial Court also relied upon the statement in his cross-examination that he did not know from which direction the sound of the first shot had come and from what distance it was fired. We have earlier held that the previous investigation was not honest and, therefore, no importance could have been given to these omissions and contradictions proved from the statement dated 12.10.1989. Even if we proceed on the assumption that a statement of this witness was recorded by the police on 12.10.1989 it is not possible to agree with the submissions made on behalf of the respondents that the earlier version of this witness was totally different from his version in the Court. The discrepancies were with respect to number of assailants and number of shots fired by the assailants and also on the point of his seeing the assailant firing one more shot after he had received a push and fallen down on the railway track. Even the omissions and contradictions with respect to the statement dated 18.8.1992 are also not such as would lead to an inference that this witness was deliberately making improvements before the court in order to falsely say something that he had not seen. What appears from the statement is that this witness had stated in his statement dated 18.8.1992 that he had seen the last shot fired on Suresh after he had fallen down from the platform. What he had not stated was that he had seen the assailant firing the last shot after he had got up from the railway track. The fact that this witness had gone to Nalasopara to meet his sister and had some work has remained unchallenged. The fact that on 9.10.1989 he had left the house of Dubes with Suresh at 10.15 A.M. has also remained unchallenged. The presence of this witness on the platform at the time of incident has not been questioned. His version that he was getting his shoes polished at the time of the incident has also not been disputed. What was urged before the Trial Court and what has been believed by it is that as the incident had happened suddenly and the people standing on the platform had started running helter skelter immediately after the first shot was fired this witness could not have seen the assailants clearly for a sufficiently long time so as to correctly recognise them after a lapse of few years. It was also urged that as this witness was not able to make out from which direction the sound of firing a shot had come and was not able to state the distance from which it was fired would also support the finding that this witness really did not know the manner and circumstances in which the assault on Suresh had taken place. This witness

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- A has said that he was at a distance of about 3 ft. from Suresh when the incident had happened. That appears to be more probable and natural also. Both of them had left the house together and were to go together in the train. Except the circumstance that people on the platform had started running helter skelter after hearing the sound of firing of shots, there was nothing before the court on the basis of which it could have held that Amarnath could not have seen the assailants firing shots at Suresh and surrounding him. Though the incident had happened suddenly, firing of five shots from a pistol must have taken some time. The witness in our opinion had sufficient time to see and register in his mind what was then happening to Suresh, his brother-in-law. In our opinion the learned trial Judge was not right in holding that this witness very probably did not have sufficient opportunity to see the manner in which the whole incident had happened and who were the assailants.

21. The next point to be considered is whether identification of the accused by this witness in the Court can be believed when no attempt was made earlier by holding a test identification parade for identification of the real culprits. The trial Court has found it unsafe and it was contended by the learned counsel for the accused that such identification has no value as held by this Court in *State of Maharashtra v. Sukhdev Singh*, AIR (1992) SC 210 and *State v. V.C. Shukla*, AIR (1980) SC 1382. A-1 to A-4 who were identified by this witness were arrested between September 1992 and February 1993. Three years had passed by then. Perhaps that was the reason why test identification parade was not held. Anyway this infirmity of not holding a test identification parade does diminish the evidentiary value of identification of these accused by this witness in the Court. If this was the only evidence regarding identification of those accused we would have held that it was not sufficient for convicting any of those four accused. But it stands corroborated by the evidence of another eye-witness and also by the confessions of A-1 to A-4, if they are held admissible and voluntary.

22. It was contended by the learned counsel for the respondents-accused that the version of this witness that he had become unconscious on hearing that Suresh had died and had remained unconscious for three days was not believable and the Trial Court was right in rejecting the evidence of this witness on that ground. It is difficult to appreciate what this witness would have gained by falsely saying so. He had seen his

brother-in-law being shot dead. Therefore it was not unlikely that he got a shock and became unconscious. If what he has stated was not correct then the police would have recorded his statement before 12.10.1989. The fact that his statement could not be recorded before 12.10.1989 lends support to his evidence that he had remained unconscious, though not continuously, for three days.

23. Om Prakash Brahmania (P.W.49), another eye-witness, was earning his livelihood in Bombay by working as a boot-polisher on the platforms of Nalasopara railway station. He had been doing so since about 10 years before the date of the incident. He used to sit on the platform from 6.30 in the morning till 6.00 o'clock in the evening. He knew Suresh and some accused as they often used to come to the railway platform to get their shoes polished. He also knew some of the accused as he was threatened by them on some occasions as a part of their activity of terrorising people of the locality. He has deposed that on the date of incident he had seen Suresh Dube and one person accompanying him on the railway platform at about 10.30 A.M. The person who had accompanied Suresh came to him for getting his shoes polished. While he was polishing his shoes Suresh was reading a newspaper near the book-stall at a distance of about 2 ft. from him. He then saw Narendra (A-1) nephew of Manik Patil, coming there and firing shots at Suresh. He also saw that 3 or 4 persons were with A-1. Narain was one of them and he had a chopper with him. As a result of that firing people started running. He also got frightened and ran away and took shelter behind a nearby building. After waiting there for some time he went home. He identified Narendra (A-1), Dayaneshwar Patil (A-3) and Patric (A- 4) in the Court. He identified Narendra (A-1) as the person who had fired shots at Suresh and Dayaneshwar (A-3) as the person who was standing with a chopper by the side of Suresh Dube. He has further deposed that because of this incident and fear of Manik Patil's gang he left Bombay within about 2 to 3 days and went to his native place in Haryana. He stayed there for three years. When he returned to Bombay he came to know that the police was searching for him. Therefore, he met the police and his statement was recorded on 5.10.1992. In his cross-examination he stated that it was after about 8 to 10 days from his return from Haryana that his statement was recorded by the police. He also stated that his father had all the time remained in Bombay. The learned trial Judge has held this part of the evidence of this witness unbelievable. The Trial Court held that

- A there was no reason for this witness to remain away from Mumbai for a period of 3 years, particularly when his father had stayed back. The learned trial Judge also held that this witness had shifted to Bombay as he did not have enough work in Haryana and, therefore, it was not likely that he would have remained in Haryana for 3 years before returning to Bombay. The
- B learned Judge also relied upon the circumstance that in his statement before the police he had given his Bombay address and stated that he was staying at that place since about 10 years. The reasoning of the Trial Court was that if he was absent for 3 years from Bombay then he would not have stated to the police that he was staying at that address since about 10 years.
- C In our opinion, the reasons given by the trial Court for disbelieving this part of the evidence of this witness are not at all sound. The fact that this witness belongs to a small town in Sonapat District of Haryana State is not disputed. It is also proved that summons were served upon this witness while he was in Haryana. It was also suggested by the defence in his cross-examination that the police had arrested him from Haryana and
- D brought him back to Bombay. The version of this witness was that he had come to Bombay on his own and he was not arrested or brought by the police. But the fact that he had gone back to Haryana and returned in 1992 has remained almost unchallenged. It is true that according to the previous investigation made by PI Padekar and PSI Berge statements of this witness
- E were recorded on 11.10.1989, 13.10.1989 and 20.10.1989. This witness had denied to have given those statements and we are inclined to believe this witness on this point in view of the finding recorded by us earlier that the previous investigation was not honest. This witness had been staying in Bombay and earning his livelihood. He had come to Bombay as he did not
- F have any source of livelihood in Haryana. It was, therefore, not likely that without any compelling reason he would have left Bombay and gone to Haryana. Therefore, his evidence that he had left Bombay and gone back to Haryana because of fear of Manik Patil's gang deserved to be accepted. He was an eye-witness to the incident. The investigation had disclosed that he was an eye-witness and that was the reason why a statement alleged to
- G have been made by him was recorded by the police on 11.10.1989. The conduct of this witness was quite natural and there was hardly any justification for discarding his evidence on the ground that his version was not believable. This witness knew Suresh and also the accused. He stated so in his examination-in-chief. We find hardly anything in the cross-examination
- H of this witness which would create any doubt regarding his knowing Suresh

and some of the accused since before the date of the incident. He had been working at Nalasopara railway station for about 10 years. He has given the reason why he knew Suresh and some of the accused. It was, therefore, more probable that he knew Suresh and also some of the accused including A-1. This witness had no reason to falsely involve any of the accused. Moreover, being aware of the existence of Manik Patil's gang and the terror which they had created he would not have dared to falsely depose against them. His presence on the railway platform on the date and time of the incident cannot be seriously disputed as that was the usual thing for him to do. There is nothing on record to show that he was close to Dube or was under any influence of the police and for that reason would depose falsely against A-1, A-3 and A-4.

24. The Trial Court also has recorded a finding that possibly he knew the accused belonging to the gang of Manik Patil. His evidence by the Trial Court has been disbelieved mainly on the ground that the description of the assailants given by him in the earlier statements did not tally with A-1 and that on 20.10.1989 he had identified A-4 and A-11 as the assailants of Suresh, while in the Court he had identified A-1, A-3, A-4 and Narain (A-10) as the real assailants of Suresh. We have already pointed out that the earlier investigation was not honest. This witness has denied to have made any statement on 11.10.1989 or 13.10.1989. We will later on point out that naming of A-4 and A-11 as the murderers of Suresh was a manipulation done by the gangs of Bhai Thakur and Manik Patil with the help of A-14 to A-17. It is also not factually correct to say that the witness had on 20.10.1989 identified A-4 and A-11 as the assailants of Suresh. According to the police statement this witness had only confirmed that the persons A-4 and A-11 who were in the police custody were the persons who had attacked Suresh. Therefore, the learned Trial Judge was not right in rejecting his evidence on these two grounds. The Trial Court also disbelieved his evidence on the ground that if he really knew the names of the accused then he should have disclosed the same not only to the police but to other persons with whom he had a talk. He had neither disclosed the names to the police nor to his father with whom he had a talk about the incident. The evidence on this point is also not correctly read by the Trial Court. What this witness had stated in his evidence is that he knew A-1 by name and others by their faces. According to this witness he did not have any talk with anyone with respect to the incident except with his father. It

A may be that he was afraid of naming any person belonging to the gang of Manik Patil as the murderer and therefore had not disclosed the name of A-1 as the murderer of Suresh. A-1, A-3 and A-4 were all known to him and, therefore, there was no point in holding a test identification parade after this witness had returned from Haryana. Therefore, the learned Trial Judge was not right in rejecting his evidence on the ground that he had not disclosed names of the accused to anyone and that no test identification parade was held to test the identity of the real culprits. We are of the opinion that the Trial Court was not justified in discarding the evidence of this witness on the ground that it was not believable. His evidence deserved to be accepted without any independent corroboration.

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25. The prosecution has also relied upon the circumstance of discovery of a pistol by A-1 as an independent circumstance corroborating the evidence of eye-witnesses. The Panch witness did not support the prosecution and it is also difficult to hold that it was really a case of discovery of pistol by A-1 as contemplated by Section 27 of the Indian Evidence Act. The learned Trial Judge has not relied upon the evidence relating to this circumstance and we are also of the opinion that the evidence relating to discovery of pistol is not worthy of acceptance.

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26. The next important piece of evidence relied upon by the prosecution is the confessions made by some of the accused. It was urged by the learned counsel appearing for the appellants that the learned Trial Judge has committed a grave error in holding them inadmissible and not voluntary. During the course of reinvestigation confessions of A-1 to A-8 and A-11 were recorded by Shinde (P.W. 76), who was then working as Superintendent of Police (Railway), Mumbai. The said confessions were recorded between 29.9.1992 and 1.3.1993. A-9 and A-10 had also shown their willingness to make confessions to PI Deshmukh (P.W. 71), but after they were taken to Shinde they declined to make any confession. The confessions were recorded by Shinde under Section 15 of the TADA Act. All those accused were forwarded by PI Deshmukh with his reports to Shinde as they had expressed willingness to make confessions before him. All those forwarding reports have been brought on record and have been proved by these two witnesses. The fact that these witnesses were taken to Shinde for recording their confessions was not disputed. What was stated by these accused while retracting their confessions was that they were H obtained by giving threats or under undue influence. It was generally

suggested to Shinde in his cross-examination that he had obtained signatures of the accused on those confessions under undue influence, coercion, fraud and mental and physical torture. It was not stated by the accused nor even suggested in the cross-examination of Shinde that particular type of physical or mental torture or coercion was caused to the accused or in which manner they were defrauded or what undue influence was exercised upon them. Only suggestion that was made to the witnesses was that while recording that confessions he told them that he was Superintendent of Police and he had stated so in order to impress the accused. In our opinion Shinde had done nothing wrong in disclosing his identity as he was really required to do so before recording the confessions. At this stage we will refer to some of the admissions and statements made by Shinde in his cross-examination. He admitted that he had felt that it was unfair on his part to record the confessions as he was supervising the investigation. He also admitted that he was not aware of the statutory requirements of Section 15 of the TADA Act and Rule 15 of the TADA Rules till he recorded the first confession. He also admitted that he had inadvertently committed a breach of the TADA Rules while recording those confessions. He also admitted that while recording the confessions he was not aware of the procedure prescribed under Section 164 of the Criminal Procedure Code for recording confessions and also the provisions made by the Bombay High Court in its Criminal Manual. He also admitted that he had put some more questions to the accused before recording their confessions in order to find out that they were willingly making those confessions, but all those questions have not been recorded by him in the confessions. It was really on the basis of these admissions and some other reasons to be dealt with hereinafter that the Trial Court held the confessions not admissible, not voluntary and not reliable.

27. Section 15 of the TADA Act makes certain confessions made to police officers admissible in the trial of such person or co-accused, abettor or conspirator for an offence under the Act or Rules made thereunder. This Court considering its constitutionality in *Kartar Singh v. State of Punjab*, [1994] 3 SCC 569, observed that "having regard to the legal competence of the legislature to make the law prescribing a different mode of proof, the meaningful purpose and object of the legislation, the gravity of terrorism unleashed by the terrorists and disruptionists endangering not only the sovereignty and integrity of the country but also the normal life of the citizens, and the reluctance of even the victims as well as the public in

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A coming forward, at the risk of their life, to give evidence" - held that the impugned section cannot be said to be suffering from any vice of unconstitutionality. Section 15 is thus an important departure from the ordinary law and must receive that interpretation which would achieve the object of that provision and not frustrate or truncate it. Interpreting the said provision this Court in *State through Superintendent of Police, CBI/SIT Etc. v. Nalini and Ors.*, (popularly known as Rajiv Gandhi Murder case), this Court has held that a confession recorded under Section 15 of the TADA Act is to be considered as a substantive piece of evidence not only against the maker of it but also against its co-accused. There was difference of opinion amongst the three learned Judges who decided that case regarding the evidentiary value of such a confession against the co-accused is tried in the same case. Wadhwa, J. observed that what weight should be attached to such a confession is a matter of discretion of the Court and as a matter of prudence the Court may look for some corroboration before relying upon such confession against the co-accused. Quadri, J. held that the rule of prudence would require that the Court should examine the same with great care and should not be relied upon unless it is corroborated generally by other evidence on record. Thomas, J. held that "Thus the established position which gained ground for a very long time is that while a confession is substantive evidence against its maker it cannot be used as substantive evidence against another person even if the latter is a co-accused, but it can be used as a piece of corroborative material to support other substantive evidence." Relying upon the decision of this Court in *Kalpnath Rai v. State*, [1997] 8 SCC 732, it was submitted by the learned counsel for the respondents that even a confession made admissible under Section 15 of the TADA Act can be used as against the co-accused only in the same manner and subject to the same conditions as stipulated under Section 30 of the Evidence Act. An observation to the same effect is to be found in paragraph 75 of the judgment. In fact no such point fell for decision in that case and it appears to be a passing observation only. In view of the decision of this Court in *Nalini's* case the said observation can now be regarded as correct position of law. The correct legal position is that the confession recorded under Section 15 of the TADA Act is a substantive piece of evidence and can be used against a co-accused also otherwise held to be admissible, voluntary and believable.

28. The confessions have been held inadmissible mainly on two grounds. The first ground given by the learned trial Judge is that the

powers under Section 15 of the TADA Act was exercised either *malafide* A
 or without proper application of mind. The second ground on which they
 are held inadmissible is that they were recorded in breach of Rules 15(2)
 and 15(3) of the TADA Rules and also in breach of the requirements of
 Section 164 and the High Court Criminal Manual. The learned trial Judge
 held that the TADA Act was applied in this case without any justification. B
 The permission was granted in that behalf without any application of mind.
 According to the Trial Court there was material on the basis of which
 TADA Act could have been invoked of that stage and that most probably
 the said Act was invoked in order to defeat the bail application filed by
 two accused in the High Court. In our opinion the Trial Court was wrong
 in taking this view. We have already pointed out earlier that Deshmukh C
 had collected enough material on the basis of which reasonable satisfaction
 could have been arrived at that the acts committed by the two gangs were
 terrorist acts. It is no doubt true that it was wrongly reported by Desh-
 mukh that Section 5 was also applicable in this case and that without
 proper verification sanction was granted to proceed under that section also. D
 The applicability of section 5 depended upon existence of a requisite
 notification by the State Government. It was wrongly reported by PI
 Deshmukh in his report that such a notification was issued and relying
 upon his statement the higher officer had given the sanction. Merely on
 this ground it cannot be said that Shinde has exercised the power under
 Section 15 of the TADA Act *mala fide*. The learned trial Judge has also E
 held that it was not fair on the part of Shinde to record the confessions as
 he was also supervising the investigation. Shinde has clearly stated in his
 evidence that he had made attempts to find out if any other Superintendent
 of Police was available for recording the confessions and as others had
 declined to oblige him he had no other option but to record them. We see F
 no illegality or impropriety in Shinde recording the confessions even
 though he was supervising the investigation. One more flimsy reason given
 by the Trial Court for holding that the power under Section 15 was
 exercised *mala fide* is that the accused making the confessions were not told
 that they have been recorded under the TADA Act. No such grievance was G
 made by the accused in their statement under Section 313. On the other hand,
 it appears from the confessions themselves that the accused were made aware
 of the fact that those confessions were recorded under the TADA Act.

29 The learned trial Judge has held the confessions inadmissible on H
 the ground that they have been recorded in breach of Rules 15(2) and 15(3)

A of the TADA Rules. The rules read as under :

"S.15(2). 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 has reason to believe that it is being made voluntarily."

"R.15(3). The confession shall, if it is in writing, be -

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

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

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

Sd/- Police Officer."

F Relying on sub-rule 2 of Rule 15 it was contended on behalf of the respondents that the police officer is required to explain to the person making confession that he is not bound to make it and that if he makes it, it can be used against him as evidence. The said provision also requires that he should question the person making it in order to assure him that he is making it voluntarily. It was submitted by Mr. Kotwal, learned counsel appearing for some of the respondents that both these things are required to be done 'before recording' any confession. When a confession is recorded in two parts - the preliminary part containing record of how and for what the person was forwarded and the questions and answers put to him for ascertaining his voluntary willingness to make a confession even

after being told that the confession may be used against him as evidence and the second part which contains the actual confessional statement - it is the second part which has to be regarded the confessional statement and not the preliminary part. Therefore, the obligation to explain and ascertain is to be performed while recording the real confessional part and doing so earlier when the preliminary part is recorded cannot be regarded proper compliance of the requirement of Rule 15(2). The police officer must explain and give the statutory warning before recording the actual confessional part and it is at that point of time that he has to ascertain by questioning the person making it that he is making the confession voluntarily. He submitted that the confessional statements were recorded in this case in two parts and while recording the second part no questions were asked from the accused to ascertain whether he was making the confession voluntarily. He also submitted that while recording the second part no warning was given to the accused that he was not bound to make the confession and that if he made it, then it can be used against him.

30. Neither Section 15 nor Rule 15 contemplates recording of confessional statement in two parts or giving time to the person making a confession to think over and reconsider whether he still wants to make it in spite of being told that he is not bound to make it and that it can be used against him. If in order to be assured that the person concerned makes the confession willing and voluntarily the recording officer gives him some time to think over and for that reason records the confessional statement in two parts, then they cannot be regarded as two independent and separate statements. The second part being in continuation of the first part both the parts have to be treated as one confessional statement. If the recording police officer feels assured after giving the statutory warning that the person who wants to make a confession is doing so voluntarily he may not give any time for reconsideration and in that case there would be only one continuous statement. Therefore, the contention that when the confession is recorded in two parts, only the second part can be regarded as the confession and while recording the second part the police officer should give the statutory warning and then ascertain if the person concerned is making it voluntarily, cannot be accepted. The requirement of law is that before recording the confession the police officer should ascertain by putting questions to the maker of it that he is making the confession voluntarily and he should also explain to him that he is not bound to make the confession and that if he makes it that can be used against him as

A evidence. In this case DSP Shinde had put questions to each of the accused who was brought before him to ascertain if he was willing to make a confession voluntarily and had also given the statutory warning to him on that day. Even after the accused had shown his willingness to make a confession Shinde had given him time not exceeding 48 hours to think over his readiness to make the confession. When the accused was brought to B him again he had again ascertained if he was still ready and willing to give a statement. He had also asked him if he was making it under any pressure or coercion or threat. Only after the accused had replied in negative he had told the accused to say whatever he wanted to state about Suresh C Dube's murder. In view of these facts and circumstances it is not possible to uphold the finding recorded by the Trial Court and to accept the contention raised on behalf of the respondents that while recording the confessions of the accused Shinde had committed a breach of Rule 15(2).

D 31. As regards the breach of Rule 15(3) it has been held that Shinde did not write the certificates and the memorandums in the same form and terms as are prescribed by that rule. It was submitted by the learned counsel for the respondents that the certificates and memorandums have not been recorded by Shinde in identical terms and as Rule 15 is held E mandatory the Trial Court was right in holding them inadmissible for non-compliance with that mandatory requirement. Therefore, the question to be considered is whether the certificate and memorandum are required to be written by that rule in the same form and terms. What Rule 15(3)(b) F requires is that the police officer should certify under his own hand that "such confession was taken in his presence and recorded by him and that the record contains a full and true account of the confession made by the person". According to that rule the memorandum should be to the following effect:

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

H Writing the certificate and making the memorandum are thus made mandatory to prove that the accused was explained that he was not bound to

make a confession and that if he made it, it can be used against him as evidence, that the confession was voluntary and that it was taken down by the police officer fully and correctly. These matters are not left to be proved by oral evidence alone. The requirement of rule is preparation of contemporaneous record regarding the manner of recording the confession in presence of the person making it. Though giving of the statutory warning ascertaining voluntariness of the confession and preparation of a contemporaneous record in presence of the person making the confession are mandatory requirements of that rule, we see no good reason why the form and the words of the certificate and memorandum should also be held mandatory. What are the mandatory requirements of a provision cannot be decided by overlooking the object of that provision. they need not go beyond the purpose sought to be achieved. The purpose of the provision is to see that all formalities are performed by the recording officer himself and by others to ensure full compliance of the procedure and seriousness of recording a confession. We fail to appreciate how any departure from the form or the words can adversely affect the object of the provision or the person making the confession so long as the court is able to conclude that the requirements have been substantially complied with. No. public purpose is likely to be achieved by holding that the certificate and memorandum should be in the same form and also in the same terms as are to be found in Rule 15(3)(b). We fail to appreciate how sanctity of the confession would get adversely affected merely because the certificate and memorandum are not separately written but are mixed up or because different words conveying the something as is required are used by the recording officer. We hold that the Trial Court committed an error of law in holding that because the certificate and memorandums are not in the same form and words they must be regarded as inadmissible. Having gone through the certificates and the memorandums made by Shinde at the end of the confessions what we find is that he had mixed up what is required to be stated in the certificate and what is required to be stated in the memorandum. he has stated in each of the certificates and the memorandums that he had ascertained that the accused was making the confession willingly and voluntarily and that he was under no pressure or enticement. It is further stated therein that he had recorded the confession in his own hand-writing (except in case of A-7 whose confession was recorded with the help of a writer). He has also stated that it was recorded as per the say of the accused, that it was read over to the accused completely, that the accused had personally read it, that he had ascertained thereafter that it

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- A was recorded as per his say and that the confession was taken in his presence and recorded by him. It is true that he has not specifically stated therein that the record contains 'a full and true account of the confession made'. The very fact that he had recorded the confession in his own handwriting would imply that it was recorded in his presence and was recorded by him. So also when he stated in the certificates and memorandums that
- B the confession was recorded as per the say of the accused, that it was read over to him fully, that the accused himself personally read it and that he had ascertained that it was recorded as per his say, that would mean that it contains 'a full and true account of the confession' and that the contents were admitted by the accused. Thus, while writing the certificate and the
- C memorandum what Shinde has done is to mix up the two and use his own words to state what he had done. Only thing that we find missing therein is a statement to the effect that he had explained to the accused that he was not bound to make a confession and that if he did so the confession might be used as evidence against him. Such a statement instead of appearing at the end of the confession in the memorandum appears in the earlier
- D part of the confession in the question and answer form. Each of the accused making the confession was explained about his right not to make the confession and the danger of its being used against him as evidence. That statement appears in the body of the confession but not at the end of it. Can the confession be regarded as not in-conformity with Rule 15(3)(b)
- E only for that reason? We find no good reason to hold like that. We hold that the Trial Court was wrong in holding that there was a breach of Rule 15(3) and, therefore, the confessions were inadmissible and bad.

32. It was next submitted that though Section 164 Cr. P.C. does not strictly apply to confessions recorded under Section 15 of TADA Act, the
- F provisions contained in Sections 15(2) of TADA Act and 162(2) and 164(4) of Cr. P.C. are similar and that would imply that the requirements of law regarding the procedure for recording a confession are the same. Both the provisions require that before recording confessions the accused must be told that he is not bound to make a confession and that if he makes it then
- G it can be used as evidence against him. Both these provisions require that before recording the confession the recording officer has to question the accused in order to satisfy himself that he is making the confession voluntarily and after recording it to issue a certificate and memorandum to the effect that the accused was explained about his right to be informed that
- H he was not bound to make the confession and that it could be used against

him, that he believed that the confession was made voluntarily, that it was taken down in his presence and was read over to him, that it was admitted as corrected by him and that it contains a full and true account of the statement made by him. It was, therefore, submitted that the guidelines issued by the High Court for recording a confession under Section 164 Cr.P.C. are also required to be followed by the police officer recording a confession under TADA Act. Otherwise a situation may arise where in the same trial there may be a confession of an accused recorded by a Magistrate without following the guidelines contained in the High Court Manual and a confession made by another accused and recorded by a police officer under the TADA Act who has not followed those guidelines while the one recorded by the Magistrate may not be recorded as evidence the other one will be treated as evidence and can be used against him. In the alternative, it was submitted that even if it is held that the guidelines issued under Section 164 Cr.P.C. by the High Court are not required to be followed while recording a confession under Section 15 of TADA Act at least the well recognised principles pointed out by this Court in *Kartar Singh's* case (supra) are required to be followed. The said guidelines have been suggested by this Court as well recognised principles of fairness to be followed to ensure that the confession obtained in the pre-indictment interrogation by a police officer not lower in rank than a Superintendent of Police is not tainted with any vice. What is missed by the learned counsel is that while recommending those guidelines it was made clear by this Court that it is really for the Court trying the offence to decide the question of admissibility or reliability of a confession by using its judicial wisdom. From what has been observed in the said decision it does not follow that if the suggested guidelines are not followed then the confession must be discarded as inadmissible or bad on that score or on the ground that it is not in conformity with Section 15(2) of the TADA Act and Rule 15 of the TADA Rules. The police officer recording a confession under Section 15 is really not bound to follow any other procedure. The rules or the guidelines framed by the Bombay High Court for recording a confession by a Magistrate under Section 164 Cr.P.C. do not by themselves apply to recording of a confession under Section 15 of the TADA Act. Therefore, merely because some of those guidelines were not followed while recording the confessions it cannot for that reason be held that the said confessions have lost their evidentiary value. If while recording the confessions Shinde

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A had followed all those guidelines also then that would have been a circumstance helpful in inferring that the confessions were made after full understanding and voluntarily. In this case there is nothing on record to show, except that the confessions were recorded by Shinde in police station, that they were not recorded in free atmosphere. No other person was allowed to remain present at that time and all the accused were given time to reconsider their willingness. After they were produced again Shinde had ascertained whether they were still willing to make confessions. All the accused were previously told that they were not bound to make a confession. Each one of them was warned that if he made a confession then it could be used against him.

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33. Shinde had tried to ascertain if any threat or inducement was given to them or whether they were ill treated or pressurized. All the accused had categorically stated that no such thing had happened. From the answers given by the accused it can be said that Shinde had good reason to believe that the accused were making confessional statements voluntarily. In his evidence also he has stated so and nothing has been brought out in his cross examination from which it can be said that he was not so satisfied or that he did not really believe that the confessions were made by the accused voluntarily. The learned Trial Judge held the confessions not voluntary as he was of the view that A-1 to A-8 and A-11 were hardened criminals and it was not believable that they would have one after the other shown their willingness to make confessions. It was not even the case of the accused that they were not taken to Shinde for recording their confessions. The only suggestion that was made in his cross-examination was that he had obtained those confessions after exerting influence, coercion and physical and mental torture. We have already pointed out earlier that in absence of any specific act suggested by the defence it is not possible to accept the belated allegation made by those accused that their confessions were obtained in that manner. On careful consideration of the evidence of PI Deshmukh and DSP Shinde, we find that all those accused had made their confessions voluntarily. The confessions also receive independent corroboration on material points from the evidence of the two eye-witnesses and also from the evidence of P.Ws. 1 to 5. We have, therefore, no hesitation in holding that they are true and reliable and can form a safe basis for conviction of those respondents/accused who have admitted to have taken part in the murder of Suresh and in commission of terrorist acts.

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34. A-1 in his confession (Exts. 571 and 571-A) has admitted that he was a member of the gang of Manik Patil. He has further admitted therein that Manik Patil and his men were entrusted by Bhai Thakur the job of finishing Suresh and because they had not done their work quickly, Bhai Thakur was angry with them. So they were keeping a watch on Suresh Dube and on the day of the incident he was informed by one Kalidas Patil that Suresh was on platform No. 2. He immediately loaded his pistol and along with A-2 to A-5 and Narain Gouda went to the railway station. Suresh was seen reading a newspaper and another person with him was standing nearby and getting his shoes polished. He crossed him and went ahead and also did Namaskar. As there were many persons near the book-stall at that point of time he went ahead on the platform and again returned near that book-stall. He then took out the pistol from his pocket and fired seven shots at Suresh. He has also stated in his confession how he and others thereafter ran away and what he and others did thereafter. A-2, A-3 and A-4 in their confessional statements (Exts. 578 and 578-A, 563 and 563-A and 584 and 584-A respectively) have also stated that Manik Seth had given instructions to Narendra (A-1) to finish Suresh and they were told to accompany Narendra whenever Narendra called them for help. They have admitted that on being told by A-1 that "Suresh Dube has come at Nalasopara railway station. Let us all go", they went to the railway platform along with A-1. They have all stated that Narendra fired shots and after Suresh had collapsed on the platform they had run away. A-5 has also admitted in his confession that he had gone to the railway platform running along with A-1 to help him as decided earlier. All of them have clearly admitted that the murder of Suresh was committed on instructions of Manik Patil (A-6) and Bhai Thakur. A-6 also confessed that he was the leader of the gang and that as decided by Bhai Thakur, Don (Pendari) was to be finished by the men of Bhai Thakur and they were to finish Dube. Therefore, A-1 and his boys were keeping a watch upon movements of Suresh and he had instructed of A-1 and his boys to finish Suresh as soon as possible. So far as participation of A-1 to A-4 in the murder of Suresh is concerned the confessions stand corroborated by the evidence of the two eye-witnesses. The confessions of A-5 and A-6 being substantive evidence are sufficient for considering them and they also receive corroboration from the confessions of A-1 to A-4 and also receive general corroboration as regards the other illegal activities committed by them from the evidence of P.Ws. 1 to 5 and those witnesses examined by the prosecution to prove

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A that they were the victims of some of the terrorist acts committed by the gangs of Bhai Thakur and Manik Patil. Therefore, relying upon the commission of A-1 to A-6 and the evidence of the two eye-witnesses Amarnath and Om Prakash, we hold that Suresh was killed by A-1 by firing shots from his pistol and that was done in prosecution of the object of the larger conspiracy hatched by Bhai Thakur, Manik Patil and some members of their gangs and the unlawful assembly consisting of A-1 to A-6 and some others. We, therefore, hold A-1 guilty under Section 302 I.P.C. and A-2 to A-6 under Section 302 read with Sections 120 B and 149 I.P.C. We may state that the finding recorded by the Trial Court that the death of Suresh was homicidal and that he died of the injuries caused to him by the bullets with which he was hit has not been questioned before us.

35. To prove the terrorist acts committed by the gangs Bhai Thakur and Manik Patil, the prosecution had examined some police officers and some others who were the victims of the terrorist acts. The police officers examined by the prosecution were PI Tadavi (P.W. 68), ASI Paradkar (P.W. 69), PSI Ram Krishna (P.W. 70), SDPO Deshmukh (P.W. 71), DIG Suradakar (P.W. 75), DGP Baraokar (P.W. 77) and ACP Vasant Pagare (P.W. 90). PI Tadavi (P.W. 68) was attached to the Virar police station between 9.4.1985 and 24.1.1986. He has deposed that during that period he had found the three gangs operating in the area under the police station. They were the gangs of Bhai Thakur, Nizam and Kery. Bhai Thakur's gang was a strong one and had established supremacy over others. He has further stated that *modus operandi* of Bhai Thakur's gang was to create pre-planned alibi while committing offence. In his cross-examination he admitted that he had not made any report to any of his superior officers regarding the activities of these three gangs. He, however, stated that he had gathered all that information through the enquiries made by him. ASI Paradkar (P.W. 69) was attached to Virar police station as police Havaldar between 8.8.1988 and 31.7.1989. PI Kukdolkar (A-15) was Police Inspector of the police station at that time. He has deposed that Gajanan Patil and Manik Patil were residing in Nilemore village and had created fear in that locality by beating people and the people used to be afraid of them. He has further stated that from the police record he had come to know that three gangs of Bhai Thakur, Karu and Nizam were operating in that area and that those three gangs used to fight with one another for establishing supremacy. Manik Patil (A-6) and Gajanan Patil were members of the gang

of Bhai Thakur. He has also deposed that he had seen Bhai Thakur/ Hitendra Thakur (M.P.) and Prashant Tandel (A-8) coming to the police station to meet PI Kukdolkar. He has further deposed that PI Nimbalkar, who was attached to L.C.B. Thane then, often used to come to Virar and stay with PI Kukdolkar and both of them used to call Prashant Tandel (A-8) to see them. He admitted that he had not taken any action against any of these gangs nor he had suspected anything wrong or improper because of those meetings. He denied that he was deposing falsely against the accused at the instance of Deshmukh. Ram Krishna Rengunthawar (P.W. 70) was a senior PSI of Virar police station from 17.5.1981 to 15.8.1982. He has deposed that during that period he had registered three offences against Bhai Thakur. In 1984 he was attached to CID Crime. Out of those three cases two cases were transferred to CID branch and in the third case the accused were acquitted. He stated that the said two cases were compounded out of fear. But he admitted in his cross-examination that he had not made any report to any higher officer in that behalf. Deshmukh (P.W. 71) was the SDPO of the Western Railway between 1.3.1992 and 30.6.1993. He had no personal knowledge with respect to the illegal activities of the two gangs of Bhai Thakur and Manik Patil. But during the investigation made between 18.5.1992 and 23.9.1992 and also thereafter he had come to know about their illegal activities and the terror created by them in the area. He admitted that he had not received any complaint against those two gangs for forcibly taking away any land or collection of 'haftas' or beating any member of the public. DIG Suradakar (P.W. 75) has deposed that though he had come to know about the existence of the gangs of Bhai Thakur and Manik Patil and acts of violence committed by them and creation of an atmosphere of terror in that area, he had no personal knowledge about the same. PI Pagare (P.W. 90) was examined to prove the involvement of Bhai Thakur's gang in CR No. 43/84 under Sections 302, 147, 148 and 149 of IPC and 25(c) of the Arms Act at Virar police station. He had investigated that offence and submitted his report (Ext. 618). In his cross-examination he admitted that he did not know if A-9, Hitendra Thakur was discharged in that case. He also stated that the said case was still pending in the Thane court. As rightly held by the learned trial Judge, the evidence of the police officers as regards the terrorist acts stated to have been committed by the gangs of Bhai Thakur and Manik Patil is of general nature and vogue they have referred to some cases filed against Bhai Thakur and members of his gang. Even if the

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A allegations made in those cases are believed as correct they fall short of establishing terrorist acts' as contemplated by the TADA Act.

B 36. The prosecution also examined Pushpa Pendhari (P.W. 19),
 Balram (P.W. 34), Kanhaya (P.W. 35), Jaffar (P.W. 40), Waman (P.W. 41),
 Sakharam (P.W. 42), Jajannath (P.W. 45), Subhash (P.W. 67) and Naaz
 (P.W. 97) to prove that the gangs of Bhai Thakur and Manik Patil were
 engaged in committing terrorist acts. Out of these witnesses P.Ws. 34, 41,
 42 and 45 have not referred to any specific terrorist act committed by those
 two gangs. P.W. 97 has deposed about an incident which is beyond the
 charge period and, therefore, her evidence was rightly not considered by
 C the Trial Court. P.W. 19 has deposed about some acts of the gangs of Bhai
 Thakur and Manik Patil, the rivalry between Bharat Pendhari and those
 two gangs and the murder of Bharat Pendhari on 14.9.1989 but they at the
 most suggest that there were gang wars. P.W. 25 has deposed that his
 D property was demanded and threats were given to him by Bhai Thakur and
 therefore he had to leave Virar. P.W. 26 has also stated that he was
 required to sell his land because of threats and terror of Bhai Thakur. P.W.
 35 was staying in Virar since 1966. He has deposed that he was assaulted
 by the men of Bhai Thakur in 1984 and, therefore, he shifted to Vasai in
 January 1985 and for some time had gone to his native place in U.P. What
 was submitted by the learned counsel for the respondents was that the
 E evidence of these witnesses even if it is believed it proves commission of
 illegal acts involving violence but falls short of constituting 'terrorist acts'
 as contemplated by Section 3 of the TADA Act. It is no doubt true that
 the evidence of these witnesses, except that of P.W.19, is not specific and
 by itself may not be regarded as sufficient to prove terrorist acts but they
 F provide sufficient corroboration to the admissions made by A-1 to A-6 in
 their confessional statements that the gangs of Bhai Thakur and Manik
 Patil had created terror in the areas of their operation. We, therefore see
 no reason why relying upon those confessions and the evidence of these
 witnesses a finding that A-1 to A-6 were engaged in committing terrorist
 G acts, cannot be recorded. A-7 has not confessed in clear terms his involve-
 ment in commission of terrorist acts or in the murder of Suresh. A-8 and
 A-11 have also not admitted to have played any role in the murder of
 Suresh or in commission of terrorist acts by Bhai Thakur and Manik Patil,
 though both these accused have generally stated in their confessional
 statements about the illegal activities committed by those two gangs. We,
 H therefore, hold A-1 to A-6 guilty under Section 3(3) of the TADA Act also.

37. The charge against the police officers A-14 to A-17 was that as a part of the criminal conspiracy with Bhai Thakur and his men, they had caused evidence of commission of the offence to disappear and by that dishonest investigation have tried to screen the real offenders from legal punishment and thereby they have committed offences punishable under Sections 201, 217 and 218 read with 120-B I.P.C. They are also charged for the offences punishable under Sections 3(3) and 3(4) of the TADA Act read with 120-B I.P.C. Except the confessional statements of the co-accused there is no other independent evidence to show the involvement of A-14 to A-17 as alleged. The confessions no doubt create a strong suspicion that A-14 to A-17 were maintaining good relations with Bhai Thakur and A-8 (Prashant) and that they had possibly helped Bhai Thakur and Manik Patil in screening the real offenders. The role which they played creates a strong suspicion regarding their connection with the gangs of Bhai Thakur and Manik Patil. However, we do not think it safe to convict them only on the basis of the confessions of the co-accused.

38. In the result, these appeals are partly allowed. The judgment and the order of acquittal passed by the learned Judge, Designated Court, Pune in Terrorist Sessions Case No. 32 of 1993 in favour of respondent Nos. 1 to 6 (A-1 to A-6) are set aside. Respondent No. 1 Narendera Bhoir is convicted under Section 302 I.P.C. and sentenced to suffer imprisonment for life. He is also convicted under Section 25(1)(a) of the Arms Act and sentenced to suffer rigorous imprisonment for six months. Respondent Nos. 2 to 6 are convicted under Section 302 read with Section 120-B and Section 149 I.P.C. and sentenced to suffer imprisonment for life. Respondent Nos. 1 to 6 are also convicted under Section 3(3) of the TADA Act and sentenced to suffer imprisonment for 10 years. All of them are acquitted of other charges. Acquittal of the rest of the respondents is confirmed and appeals against them are dismissed.

S.M.

Appeals dismissed.