RAVINDRA SHANTARAM SAWANT

v.

STATE OF MAHARASHTRA

MAY 8, 2002

[R.P. SETHI AND BISHESHWAR PRASAD SINGH, JJ.]

Penal Code, 1860/Terrorist and Disruptive Activities (Prevention) Act, 1987/Arms Act, 1959—Sections 120-B, 307 and 333/Sections 3(2)(ii), 3(5), 5 and 6/25(1-B)(a) and 27—Prosecution under—Accused identified by injured eye-witnesses who were police officials—Conviction of appellant-accused under the provisions except Sections 120-B IPC and 3(5) TADA—Acquittal of co-accused of all the charges—On appeal conviction upheld, since the evidence led by prosecution is consistent and trustworthy—The offence under TADA is established since the intention of the accused was not only to kill the victim but also to strike terror.

Criminal Trial : .

Evidence of police officials who were injured eye witnesses—Non-corroboration by independent witnesses—Effect of—Held, evidence of such witnesses does not require independent corroboration if otherwise their evidence is found to be truthful and reliable.

Terrorist and Disruptive Activities (Prevention) Act, 1987—Applicability of—Held, the provisions of the Act need not be resorted to if the nature of the activities of the accused can be checked and controlled under ordinary law.

Appellant-accused No. 1 was tried for various offences under Terrorist and Disruptive Activities (Prevention) Act, 1985, Arms Act, 1959 and IPC. Prosecution case was that appellant-accused No. 1 alongwith other co-accused entered into a conspiracy to commit terrorist act with a view to eliminate the victim and hence the appellant attempted to commit his murder and injured him in the premises of Sessions Court. At the time of committing the offence, appellant-accused was dressed in the attire of an advocate. He also fired at police officials and some of them i.e. PWs 3, 4, and 6 who were escorting the victim were injured. Appellant-accused also got injured during the incident,

A when police retaliated. The weapon of offence i.e. revolver was seized from him. The report of the ballastic expert was that some of the bullets were fired from the revolver seized from him. Appellant-accused made confessional statement and before making such statement he was duly informed that he was not bound to confess and that the statements might be used against him. During trial, the police officials i.e. the injured eye-witnesses categorically stated to have B seen the accused firing at them from his revolver and that he was dressed in the attire of an advocate. All the independent Panch witnesses turned hostile. Defence of appellant-accused was that he was falsely implicated in the case and though such an occurrence did take place, it was another person who after firing a few shots from his revolver ran away throwing his revolver which was C planted on him; that the injury on him was the result of a stray bullet hitting him in the course of the incident; and that the actual culprit was not seen by the eye-witnesses.

The trial court convicted appellant-accused for the offences under Sections 3(2)(ii), 5 and 6 of Terrorist and Disruptive Activities (Prevention) D Act, 1985; under Sections 25(1-B)(a) and 27 of Arms Act, 1959 and Sections 307 and 333 IPC. However, he was acquitted under Sections 120-B IPC and Section 3(5) of TADA. The co-accused were acquitted of all the charges on the ground that prosecution failed to prove its case of conspiracy of which all the accused were members.

E

In appeal to this Court the appellant contended that prosecution case cannot be relied upon in the absence of independent corroboration of the evidence of police witnesses; that since after removal of the bullet from the wound of PW3 neither the investigating officer was informed about it nor was the bullet sent for further action; prosecution had failed to give account of F bullet shots fired in the course of the incident and had not explained as to how one bullet got tucked in the collar of the coat of the accused; that in view of the finding of the trial court that there was no conspiracy to commit the offence and that it was not established that the co-accused belonged to a terrorist gang and that accused did not share common intention to commit the offence, the G substratum of the prosecution case vanished and nothing remained on the basis of which the appellant could be convicted; and that the facts proved did not answer the description of a terrorist act under Section 3 of TADA.

Dismissing the appeal, the Court

H HELD: 1.1. Evidence led by the prosecution about the occurrence that

took place on that date is consistent and trust-worthy. It leaves no manner of doubt that appellant-accused fired at 'A' and in the process injured two police constables as well. In retaliation PW2 fired from his carbine causing injury to appellant-accused. The witnesses are clear and categoric that they had seen the accused firing at them. There appears to be no reason why the witnesses would falsely implicate appellant-accused. Moreover one fails to understand why appellant-accused was there in the attire of an advocate. There appears to be no other reason for him to put on the dress of an advocate but for he fact that his movement in the Court was facilitated by his wearing the attire of an advocate. Witnesses have stated that he was wearing the dress of an advocate. Even PW.11 who reached the scene of occurrence on hearing the report of gun shots, stated that he saw PW.2 struggling, with a person who was dressed as an advocate. [900-E-F; 901-B, D-E]

1.2. Evidence of the police witnesses, who are also the eye witnesses, some of them injured, is worthy of credence and can be acted upon. The failure to examine independent witnesses in the facts and circumstances of this case would not reflect on the veracity of the prosecution witnesses. In the instant case three of the police witnesses, namely, PW3, PW4 and PW6 are also injured witnessess. The police party in the instant case was the victim of assault launched by appellant-accused. They cannot, therefore, be described as official witnesses interested in the success of the investigation or prosecution. They are eye witnesses who were injured in the course of the incident. In fact the testimony of such witnesses, does not require independent corroboration, if otherwise their evidence is found to be truthful and reliable. This is not a case where police witnessess have been introduced to bolster the case of the prosecution for its success. Therefore, independent corroboration of their testimony was not necessary in the facts and circumstances of this case. In a case of this nature, where two gangs are fighting for supremacy, it was hardly possible for the prosecution to secure independent witnesses being members of the public who had witnessed the incident. In fact the evidence is to the effect that though many persons must have seen the occurrence, they were not willing to speak as they were totally terrorized. Moreover, all the independent witnesses who were associated with the investigation as panch witnesses, turned hostile and did not support the prosecution case. Whatever may be the legal effect of their turning hostile, it is clear that they were afraid to depose against the accused. The defence of the appellant-accused that he was hit by a stray bullet must be rejected outright. [903-B; 902-D-G; 903-A-B, C]

1.3. In the facts and circumstances of the case the *Court is satisfied*

A that the weapon of offence, namely, the revolver was seized from appellant-accused. [904-C]

1.4. The fact that the occurrence took place cannot be disputed. In an incident of this nature it would be impossible for the prosecution witnesses to B account for each and every bullet fired in the course of the incident. The prosecution is not expected to account for all the empties and the bullets fired in the course of occurrence. It is also not possible for the prosecution in an incident of this nature to explain each and every injury suffered by the witnesses. It is not permitted to conjecture as to how injuries may have been caused in an incident of this nature where firing has taken place from both C directions. It was neither necessary nor was it possible for the prosecution to explain how the holes were caused in the coat of the accused, and by what process one bullet was tucked in the collar of the coat. Moreover these are hardly matters which will cast a reflection on the case of the prosecution. [904-G; 905-A, B; 906-D, E]

D

1.5. State is right in submitting that no fault can be found with the investigating agency when the evidence discloses that after removal of the bullet from the wound of PW.3, neither the Investigating Officer was informed about it nor was the bullet removed from the wound sent to him for further action. [906-B, C]

E

1.6. It is no doubt true that the prosecution has not been able to establish its case as against accused Nos. 2 and 3. The confessional statements which implicated accused Nos. 2 and 3 have not been accepted by the trial court as being voluntary. But even so there is nothing to discredit the evidence that F the incident took place within the precincts of the Sessions Court. The occurrence was witnessed by several witnesses. Though all of them belong to the police force, three witnesses are injured witnesses whose presence cannot be doubted and whose testimony has been found to be truthful. In these circumstances even if the prosecution has failed to establish its case as against accused Nos. 2 and 3 it has certainly proved its case as against appellant- G accused. The evidence which implicates appellant-accused has been found to be reliable and trustworthy and, therefore, even if accused Nos. 2 and 3 have been acquitted of the charges levelled against them, on the basis of the evidence on record the conviction of appellant-accused can be sustained. [906-G-H; [907-A, B]

H

2.1. It is no doubt true that even though the crime committed by a

"terrorist" and an ordinary criminal would be overlapping to an extent, it is not the intention of the legislature that every criminal should be tried under TADA, when the fall out of his activity does not extend beyond the normal frontiers of the ordinary criminal activity. The provisions of the Act, need not be resorted to if the nature of the activities of the accused can be checked and controlled under the ordinary law of the land. It is only in those cases where the law enforcing machinery finds the ordinary law to be inadequate or not sufficiently effective for tackling the menace of terrorism and disruptive activities that resort should be had to the drastic provisions of the Act. Some difficulties, however, arise when the intended activity of the offender results in striking terror or creating fear and panic amongst the people in general or a section thereof. It is in this situation that the Courts have to be cautious to draw a line between the crime punishable under the ordinary criminal law and the ones which are punishable under Section 3(1) of TADA. [907-D-F]

Hitendra Vishnu Thakur **v.** *State of Mharashtra and Ors.,* **[1994] 4 SCC 602 and** *Niranjan Singh Karam Singh Punjabi, Advocate* **v.** *Jitendra Bhimraj Bijaya and Ors.,* **[1998] 4 SCC 76, referred to.**

Jayawant Dattatray Suryarao **v.** *State of Maharashtra,* **JT (2001) 9 SC 605, relied on.**

2.2. The blatant manner in which the plan was executed in the instant case leaves no manner of doubt that the intention of the perpetrator was not merely to kill the victim, but also to send a terrorising message to the people in general, so that there was no defiance of their command in future. An attempt was also made on the lives of three policemen which reinforces the conclusion that the intention was to strike terror and the killing was attempted to achieve the objective. The facts proved to establish the commission of offences under TADA. [909-G, H; 910-A]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 230 of 1997.

From the Judgment and Order dated 7.9.96 of the Designated Court in TADA Special Case No. 31 of 1994.

Sushil Kumar, Makrand D. Adkar, Tripurari Ray, Rishi Agarwal, S.D. Singh and Vishwajit Singh for the Appellant.

H.W. Dhabe and S.V. Deshpande for the Respondent.

A The Judgment of the Court was delivered by

BISHESHWAR PRASAD SINGH, J. This appeal has been preferred by Ravindra Shantaram Sawant (hereinafter referred to as accused No. 1) against the judgment and order of the Designated Court at Brihan. Mumbai in TADA Special Case No. 31 of 1994.

B

Accused No. 1 was tried for various offences under the Indian Penal Code; Terrorist and Disruptive Activities (Prevention) Act. 1987 (hereinafter referred to as the "TADA") and under the Arms Act.

Accused No. 1 was put up for trial alongwith two others namely Nagesh C Vishnu Mohite (for short accused No. 2) and Arun Gulab Gavli (for short accused No. 3). The fourth accused, namely Sada Pawale could not be put up for trial, as he remained absconding. Accused No. 1 has been sentenced to life imprisonment under Section 3(2)(ii) of TADA and has also been directed to pay a fine of Rs. 5,000 in default of payment of fine, to undergo six months' D rigorous imprisonment. He has also been sentenced to life imprisonment and to pay a fine of Rs. 500 and in default to undergo one month' rigorous imprisonment each under Sections 5 and 6 of TADA. He has also been found guilty of the offence under Section 25(1-B)(a) of the Arms Act and sentenced to three years' rigorous imprisonment and a fine of Rs. 500, in default of payment of fine, to undergo rigorous imprisonment for one month. Similarly, E he has been found guilty of the offence under Section 27 of the Arms Act and sentenced to suffer rigorous imprisonment for seven years and a fine of Rs. 500 in default to undergo one month's rigorous imprisonment. He has also been found guilty of the offence under Section 307 IPC for attempting to commit the murder of the victim Ashwin Naik, ASI Gangadhar Bhau F Waghchaure. PW.4 and two other constables, namely - Dayanadeo Bhagyawan Nikam, PW.6 and Sanjay Shankar Bhingardive, PW. 3 and has been sentenced to suffer imprisonment for life and to pay a fine of Rs. 500, in default of payment of fine, to undergo rigorous imprisonment and to pay a fine of Rs. 500, in default to undergo rigorous imprisonment for one month. He has been also found guilty of the offence under Section 333 IPC and sentenced to ten G years rigorous imprisonment for one month. All the substantive sentences have been directed to run concurrently. Accused No. 1 has however, been acquitted of the charges under Section 120-B IPC and 3(5) of TADA. The ramaining two accused had been acquitted of all the charges levelled against them.

H Briefly stated the case of the prosecution is that with a view to eliminate

Ashwin Naik, all the three accused herein together with Sada Pawale (absconder) entered into a conspiracy with a view to commit a terrorist act within the meaning of Section 3(1) of TADA and in pursuance thereof accused No. 1 attempted to commit the murder of Ashwin Naik within the precinents of the Sessions Court, Brihan, Mumbai. The said Ashwin Naik, who was facing trial before the Sessions Court had been produced before the Sessions Court on the date of occurrence under police escort. Accused No. 1 fired at Ashwin Naik and injured him. In the process he also fired at the police officials escorting Ashwin Naik and injured them as well. He was, however, over-powered by the police and apprehended on the spot. His revolver was seized and thereafter the case was registered against them. As earlier noticed, accused Nos. 2 and 3 have been acquitted of the charges levelled against them primarily on the ground that the prosecution failed to prove that the various acts were committed pursuant to a conspiracy of which all the three accused were members.

The case of the prosecution is that accused No. 3 is the leader of a gang of criminals which indulges in criminal activities such as murder, extortion etc. It is the case of the prosecution that Ashwin Naik, the injured is also a leader of a similar gang. Accused No. 2 is a member of the gang of accused No. 3. Accused No. 1 had come in contact with accused No. 3 with a view to join his gang and this was the first assignment given to him by the leader of the gang. On account of gang rivalry as well as personal enmity between Ashwin Naik and accused No. 3, accused No. 3 decided to eliminate him and with that in view, conspired with the remaining three accused to get him murdered on the date of occurrence. According to the prosecution, the conspiracy was hatched while accused No. 3, was in the Yerwada Central Prison as an under-trial prisoner. Sada Pawale (absconder) was also detained in the same prison. It is the prosecution's case that in December, 1993, accused No. 1 alongwith PW.18 Anil Gavkar went to the Yerwada Central Prison and after making a ficitious entry met accused No. 3 and expressed his desire to join his gang. He was asked to wait and was assured that in due time, he will get a message. A few days late, he got a message from accused No. 3 to meet Sada pawale (absconder) who had since been released from ajil. He met him, and thereafter they continued to meet over the next two months. Small payments were made to accused No. 1 by Sada Pawale to meet his daily expenses. Sada Pawale (absconder) took into confidence accused No. 2 and assigned to him the duty to keep a watch on Ashwin Naik and the proceedings pending against him in Court. He was directed to keep a watch on the dates on which Ashwin Naik was required to be produced in Court. He was told that Ashwin Naik was to

A be murdered and this was being done with a view to facilitate his murder. Accordingly accused No. 2 kept a watch on the proceedings pending in the Courts and kept himself informed of the dates on which Ashwin Naik was required to be produced before the Court in cases in which he was involved. It is also the case of the prosecution that accused No. 2 alongwith Sada Pawale visited the Court on one occasion and saw the elaborate police B arrangements made for protecting Ashwin Naik. It was, therefore, decided that the person deputed for the job should put on the attire of an Advocate so as to facilitate his movement in the Court premises. Accordingly accused No. 2 is alleged to have purchased a black coat from PW.5 and a pair of bands which he handed over to Sada Pawale.

C

Ashwin Naik and five others were the accused in TADA Special Case No. 76 of 1992 which was pending in the Court of the Additional Sessions Judge (Designated Court under TADA. It was fixed for hearing on 18th April, 1994 in Court No. 33 of the Sessions Court which is on the 5th floor of the new building. Ashwin Naik was to be brought from Adharwadi Jail from D Kalyan and for that purpose a police van had been provided. An escort party led by PW.1 Laxman Bhau Thorawat, ASI and consisting of Bhagwat Saundane, PW.2, a commando armed with Carbine, Sanjay Bhingardive. PW.3 and Bhagywan Nikam. PW.6 was deputed to Escort Ashwin Naik from the jail at Kalyan to the Sessions Court. The remaining five co-accused were similarly E brought in a separate van escorted by another police party headed by PW.4 Gangadhar Waghchaure. Ashwin Naik as also the other five accused were brought before the TADA Court in the morning session but were told by the Sheristedar of the Court that the case will be taken up in the afternoon session. PW.6 Gangadhar Waghchaure took the five accused persons under his charge to the ground floor of the building where a provisional lock-up has F been provided in the barracks to the South of the new court building. However, Ashwin Naik was made to sit in the passage in front of the court hall. All this was being watched by accused No. 2. When he found that Ashwin Naik had been brought to the Court at about 12.30 p.m. he went to Dagdi Chawl and met Sada Pawale whom he found talking to accused No. 1 near a temple. He G informed them about the arrival of Ashwin Naik in the court premises. Sada Pawale asked him to get a taxi. Accused No. 2 then told accused No. 1 that Ashwin Naik was to be finished on the same day. He loaded three rounds in a .38 caliber revolver and took accused No. 1 to an uninhabited room in the Chawl and asked him to fire the shots. This he did with a view to satisfy himself that accused No. 1 was in a position to execute the job entrusted to H him. It is the case of the prosecution that in the said room, accused No. 1 used

to do target practice so as to equip himself with sufficient accuracy to execute the job. Thereafter he loaded six live cartridges in the revolver which he handed over to accused No. 1 and instructed him to murder Ashwin Naik in the TADA Court itself, and if that was not possible, within the precincts of the Sessions Court. He also instructed him to run away immediately after the completion of the job, but in case that was not possible, to raise his hands and surrender so as to avoid retaliation by the police. He also gave him the black coat, white shirt etc. so that he could dress himself up as an Advocate. In the meantime accused No. 2 brought a taxi. Sada Pawale instructed accused No. 2 to point out Ashwin Naik to accused No. 1 so that he could do the job. Accused Nos. 1 and 2 thereafter came to the old Sessions Court building.

Accused No. 2 alongwith accused No. 1 entered the Sessions Court building. Accused No. 1 was shown by accused No. 2 the connecting bridge leading to the new Court building. He also described to accused No. 1, the clothes being worn by Ashwin Naik and assured him that he will be watching the happenings from the old Court building. Accused No. 1 entered the TADA Court and saw that Aswin Naik was sitting on a bench in the passage. He sat in the Court room for a while, but when he noticed that a number of policemen were guarding Ashwin Naik, he decided not to take a chance in the TADA Court as that may not be wise. He therefore, returned to the old Court building and met accused No. 2 and told him that he will do the job when Ashwin Naik comes down.

At about 3.00 p.m. Ashwin Naik as well as other five co-accused were produced before the TADA Court but the case was adjourned to 22nd April, 1994. The police parties thereafter proceeded to the ground floor with a view to take the accused to the waiting police vans for being taken to jail. The case of the prosecution is that PW.4 was ahead of the police party escorting Ashwin Naik. While Ashwin Naik was proceeding towards the police van, accused No. 2 again identified Ashwin Naik for the benefit of accused No. 1 and thereafter hide himself behind a pillar. PW.4 Gangadhar Waghchaure was a few steps ahead of Ashwin Naik. Ashwin Naik was handcuffed and the rope was held by PW.3 Sanjay Bingardive who was to the left of Ashwin Naik while PW.6 Dayanade Bhagyanwan Nikam was to his right. PW.1 laxman Bhan Thorawat was just behind Ashwin Naik and to his right was PW.2 Bhagwat Saundane armed with a carbine. While they were so proceeding, accused No. 1 aimed at Ashwin Naik when he came within his range and fired at him. The shot hit Ashwin Naik on the back of his head and he fell down on the ground.

A PW.1 Thorawat as well as other members of the escorting party noticed that accused No. 1 had fired at him. Accused No. 1 fired two more shots which injured police constables, PW.3. Sanjay Bhingardive and PW.6 Dayanade Bhagyawan Nikam. On account of the injuries suffered on their legs, they fell down. PW.4 Gangadhar Waghchaure rushed towards accused No. 1. In the B meantime PW.2. Bhagwat Saundane, who was armed with a carbine, fired 25 rounds from his carbine. While PWs. 1, 2 and 4 rushed towards accused No. 1, one of the shots fired by accused No. 1, injured PW.4, Waghchaure on his left thumb and index finger. However, PW. 4 pounced upon accused No. 1 and over-powered him with the help of PW.2. One of the shots fired by PW.2 caused injury to accused No. 1 on the right side of this neck. PW.1 who C had also rushed to the aid of other police officials snatched from the hands of accused No. 1 the revolver. While all this was happening, the case of prosecution is, that accused No. 2 fled away from the Court premises and reported the matter to Sada Pawale who advised him to leave Mumbai immediately and to go to his native place in the District of Satara.

D PW.11, Police Inspector Ratansingh Rathod and Police Inspector Bhgwat had also come to attend the TADA Court in connection with some other case. When they heard shots being fired, they rushed to the scene of occurrence and saw the scuffle between accused No. 1 and PW.2 . Accused No. 1 was wearing the attire of an Advocate. They took into custody the accused No. E 1 and also asked PW.2 to sit in the jeep. They came to the Cuff Parade Police Station but there they were told that the Sessions Court fell within the jurisdiction of Colaba Police Station. They, therefore went to the Colaba Police Station and handed over accused No. 1 and his revolver to Police Inspector Issaq Bhagwan.

F The further case of the prosecution is that on 18th April, 1994, since the police inspector of Colaba Police Station was on leave, PW-19 Police Inspector A.R. Gaikwad was holding charge in his absence. At about 3.15 p.m. he received a wireless message from the control room reporting the incident which had taken place in the precincts of the Sessions Court. He along with G API Jadhav and API Pathan, PW.14 and other officers and staff left for the scene of occurrence and reached the Sessions Court, which was hardly two minutes drive from the police station. By the time they reached the court premises, the injured namely, Ashwin Naik, PW.3, PW.6 and PW.4 had been removed to the St. Georges Hospital for medical aid. At the St. Georges Hospital they were examined by Dr. Bakshi, the casualty medical officer. Since H the injury of Ashwin Naik was found to be serious in nature, he was shifted

to JJ. Hospital for further treatment. PW.19 Inspector Gaikwad after directing PW.14 API Pathan to guard the scene of occurrence also rushed to the St. Georges Hospital. In the meantime PW.20 ACP Vasant Gosavi of Colaba Division, on receiving the message from the control room, rushed to the scene of offence. The Deputy Commissioner of Police, Incharge of Colaba Zone, and the Additional Commissioner of Police had also reached the scene of occurrence and made necessary enquiries. All of them went to St. Georges Hospital where PW.1 ASI Thorawat and PW.19 Police Inspector Gaikwad were also present. After some discussion, DCP Mr. Verma directed PW.19, Inspector Gaikwad to record the F.I.R. under TADA, since he was the competent authority to grant such approval under TADA. Accordingly, PW.19 Inspector Gaikwad recorded the statement of PW.1 Thorawat. Ext. 10, on the basis of which First Information Report was drawn up. He rang up the Colaba Police Station and secured the running crime number. After deputing API Jadhav at the St. Georges Hospital he came to the place of occurrence and then proceeded to the Colaba Police Station.

In the meantime at the Colaba Police Station, PW.12 Samson Barse on the instruction of Duty Police Inspector Issaq Bhagwan drew up the panchnama relating to the seizure of the revolver and the clothes of accused No. 1. He also noticed 5 empties and one live cartridge in the chamber of the revolver and that the clothes of the accused were blood stained. He also noticed two holes in the coat of the accused near the right shoulder and two holes on the rear side of the coat on the right side below the shoulder. One cupro jacketed bullet (article 7) was tucked in a hole by the side of the collar of the coat. There were also two holes in the shirt. He also noticed that accused No. 1 had an injury on the chin and an injury on the index finger of the right hand, apart from the injury on the neck near the shoulder joint. There were also some abrasions near the right knee. It appears that panch witness PW.7 Raju Vaze, in whose presence the seizure was made, was declared hostile and did not support the case of the prosecution. The other panch witness was already dead.

At the Colaba Police Station, PW.19 recorded the statement of PW.1 Thorawat. PW.11 Ratansingh Rathod and PW.2 Bhagwat Saundane. He again came to the St. Georges Hospital and recorded the statements of PW.3 Bhingardive, PW.4 Waghchaure and PW.6 Bhagyawan Nikam and the driver of the escort vehicle.

API Jadhav, after preparing the panchnama relating to seizure of clothes of the injured went to the Sessions Court and prepared the panchnama

A relating to the scene of offence witnessed by PW.10. Here again PW.10. Vijay Kaleshwar Rauth, panch witness, was declared hostile while the other panch witness could not be found.

The clothes of victim Ashwin Naik were seized under panchnama Ex.24.

B Since the accused No. 1 had also suffered injury, PW.12 brought him to the St. Georges Hospital for medical treatment where he was examined by Dr. Bakshi, PW.11 at 5.45 p.m. At the hospital, PWs. 4, 3 and 5 again continued that he was the same person who had fired at Ashwin Naik and the police party. PW.19 therefore recorded their supplementary statements. C Accused No. 1, who was admitted in the hospital was discharged on the next day i.e. 19th April, 1994.

PW.19 made several attempts to record the statement of Ashwin Naik but the hospital authorities certified that he was not in a position to make the statement. Certificates to this effect were issued between 19th April, 1994 to D 13th May, 1994. In fact the statement of Ashwin Naik was recorded long after his discharge from the hospital with the permission of the Court on 25th January, 1996, even after the charge sheet was filed. Having regard to antecedents of Ashwin Naik, it is not surprising that he was not traceable and therefore not available for examination as a witness in the trial.

E PW.19 the Investigating Officer took charge of all the seized articles. He also requested the Thane Police Head Quarters to send the carbine which was used in the occurrence by PW.2 and on his request the same was sent to him which was seized under panchnama Ext. 16. The weapon was kept in safe custody. The muddemal properties were sent to the Forensic Science Laboratory F through Hawaldar Uma Kant, PW.17. This was done on 28th April, 1994.

Accused No. 2 was arrested on 18th May, 1994 at the Mumbai Central Railway Station. In the test identification parade on 31st May, 1994, he was identified by PWs. 1, 2, 3, 4 and 6.

G The reports submitted by the Chemical Analyser were produced at the trial as Exts. 27, 28, 29 and 30. The clothes were found stained with human blood. The .38 caliber revolver was found to be in working order. Similarly the carbine was also found to be in working order and the residue of the fire ammunition nitrite was detected in the barrel washings which showed that the weapons had been used. The bullets, on examination, were also found to have H been fired from .38 caliber revolver and that they had been fired from revolver,

article 1. The empties which were seized from the scene of occurrence had been fired from the carbine, article 14.

On 23rd July, 1994, ACP Gosavi took over the investigation of the case. Efforts were made to arrest accused No. 3 and he was ultimately arrested on 9th August, 1994 when he was released from jail.

It is the case of prosecution that in the course of interrogation on 14th August, 1994 accused No. 1 had expressed his desire to make a truthful statement. He was again interrogated on 16th August, 1994 and he again expressed his desire to make a clean breast of the matter. PW.20 ACP Gosavi got in touch with DCP, PW.16 Mr. Yadav and met him in his office and requested him to record the statement of accused No. 1. PW.19, Inspector Gaikwad was directed to produce accused No. 1 before the Deputy Commissioner of Police, PW.16. Accordingly at about 6.00 p.m. PW.19 Inspector Gaikwad produced accused No. 1 before DCP Yadav, PW.16. Several questions were put to the accused No. 1 by the DCP to ascertain whether he wanted to make a voluntary statement. He was told that he was not bound to confess and was further warned that if he makes a confessional statement, that may be used against him. Despite all this, accused No. 1 insisted on making the confessional statement. DCP, PW.16 Mr. Yadav then directed him to be detained in Azad Maidan Police Station and to be produced before him on 18th August, 1994 at 4.00 p.m. This, according to the prosecution, was done with a view to give him enough time to reconsider his decision as also to ensure that he was not in any manner influenced or pressurised by the officers of the Colaba Police Station. Thereafter on 18th August, 1994, the accused No. 1 was produced before the D.C.P. He made a confessional statement which was recorded by PW.16 marked, Ex.46. Similarly the voluntary statement of accused No. 2 was recorded on 30th August , 1994. The charge sheet in the case was filed on 14th October, 1994 but without sanction, since the prescribed 180 days were about to lapse. On the very next date i.e. 15th October, 1994 the sanction was obtained and filed in Court even before the Court took cognizance on the basis of the charge sheet submitted by the investigating officer.

The appellant alongwith two others (since acquitted) was put up for trial before the Designated Court at Mumbai in TADA Special Case No. 31 of 1994 variously charged as earlier noticed.

The prosecution examined as many as 21 witnesses in support of its case. PW. 1, 2, 3, 4, 6, 11, 12, 14, 16, 19 and 20 are witnesses who belong to

A the police force. Of them PW.1 ASI Thorawat, PW.2. Bhagwat Saundane, PW.3, Sanjay Bhingardive and PW.4 ASI Waghchature and PW.6 Bhagyawan Nikam are eye witnesses who witnessed accused No. 1 firing at Ashwin Naik. PW.11 Inspector Ratansingh Rathod appeared on the scene of occurrence when PW.2 was struggling with accused No. 1 trying to over-power him. Moreover PWs. 3, 4 and 6 are injured witnesses who suffered gun shot B injuries in the course of the incident. PW.19 and 20 are the investigating officers. PW.11 is a Police Inspector who apprehended accused No. 1 at the place of occurrence and took him to Colaba Police Station. PW12 was the police officer at Colaba Police Station who recorded the panchnama regarding seizure of the revolver and the clothes worn by accused No. 1. PW. 14, API C Pathan is a police officer who was asked to guard the scene of occurrence and in whose presence the scene occurrence panchnama was drawn by API Jadhav, PW.21. Dr. Bakshi examined the injured witnesses as well as accused No. 1 at the St. Georges Hospital. PW. 15 is the Magistrate who conducted the Test Identification Parade. PW. 16 Sharda Prashad Yadav is the Deputy D Commissioner of Police who recorded the confessions of accused Nos. 1 and 2.

Apart from the police witnesses, some of them eye witnesses, and some of them injured in the course of the incident, the prosecution also examined as panch witnesses several persons who were the members of the public and E who were associated with the investigation to witness the recording of panchnamas. Unfortunately almost all of them had to be declared hostile as they did not support the case of the prosecution. Such witnesses are PW.7 Raju Vaze who signed the panchnama relating to seizure of revolver of accused No. 1 and his clothes at the Colaba Police Station. PW.10 Vijay Rauth was the panch witness to the preparation of the panchnama relating to the scene of F occurrence. PW.9 Safraj Ali was the panch witness who had accompanied the police party to a place in Byculla from where certain items were recovered. All the panch witnesses were declared hostile. PW.5 is the person from whom the black coat had been purchased but he also did not support the case of the prosecution. PW.8 Anil Mahendradkar the proprietor of Anil Tailors from G where the shirt had been purchased, which was worn by accused No. 1 at the time of occurrence, was not declared hostile, though he also did no fully support the prosecution case. PW.13 Dattaram Kadam who is said to have introduced accused No. 1 to PW.18 Anil Gavkar, also turned hostile and denied having introduced accused No. 1 to anyone. PW.18 Anil Gavkar also denied having introduced accused No. 1 to accused No. 3 in Yerwada Central H Prison. In fact he even denied that he knew accused No. 1 or accused No.

3. Both these witnesses were declared hostile.

The trial court on a careful scrutiny of the evidence on record, in a rather detailed judgment, held that the evidence produced by the prosecution consisting of the evidence of PWs.13 and 18 to the effect that PW.13 had introduced accused No. 1 to accused No.3, who was his childhood friend, did not prove the fact that accused No. 1 was introduced to Accused No. 3 in the Yerwada Jail. PW.13 and PW.18 did not support the prosecution case and, therefore, their evidence was of no assistance to the prosecution. Referring to the two confessional statements said to have been made by accused Nos. 1 and 2, after examining the evidence on record, it came to the conclusion that those confessions could not be relied upon as they did not appear to be voluntary. He further found that there was no evidence whatsoever to connect accused No. 3 with the offence and, therefore, even if the confessional statements were found to be voluntary and reliable, they could be of no avail to the prosecution as the confessional statement of co-accused could be used only to lend assurance to the conclusion reached on the basis of other evidence on record which was completely lacking. On these findings, it was held that there was no evidence to connect accused No. 3 with the crime and therefore, the prosecution had failed to prove that the accused had entered into a conspiracy with accused No. 2 and 3 to commit the offence.

The trial court, however, accepting the prosecution evidence held that so far as accused No. 1 is concerned, he had attempted to commit the murder of Ashwin Naik as well as the policemen who were escorting him, by firing at them with his revolver. In this connection the trial court has placed considerable reliance on the evidence of PW.4 Waghchaure who was fully corroborated by PWs. 1, 2, 3, and 6. As earlier noticed PWs. 3, 4 and 6 are injured witnesses and their presence cannot be doubted. It further found that the FIR was fully consistent with the case of the prosecution. The recoveries made and the Chemical Analyser's Reports supported and corroborated the prosecution case. The report of the Ballistic Expert also established that some of the bullets were fired from the revolver seized from accused No. 1. On consideration of the material on record the trial court held that so far as accused No. 1 is concerned the prosecution had succeeded in proving his guilt.

The trial court rejected the defence of accused No. 1 that while he was going to the Employment Exchange, he was hit by a stray bullet on his head and, therefore, he became unconscious and regained consciousness only when he was admitted in the St. Georges Hospital. The evidence on record

A clearly established that he was conscious all along and that he had not become unconscious at any stage. The defence raised by accused No. 1 that someone fired a few shots from a revolver and ran away after throwing away the revolver which was planted on him, was not convincing. Moreover there was no reason for the witnesses to falsely implicate accused No. 1 with whom they had no enmity.

B

The trial court further held that the manner, place and circumstances in which the offence was committed, clearly established that an offence under TADA had been committed. He, therefore, found accused No. 1 guilty of the offences under Sections 3(2)(ii), 5 and 6 of TADA, under Sections 25(1-B)(a) C and 27 of the Arms Act as also under Sections 307 and 333 of the Indian Penal Code.

The Court, however, did not accept the prosecution case in so far as it related to accused Nos. 2 and 3 abetting the commission of the terrorists Act, or the attempt to commit murder by accused No. 1.

D

The trial court was also not impressed with the evidence relating to the identification of accused No. 2 in the Test Identification Parade by the five members of the escorting team. It, therefore, discarded the evidence of identification the Test Identification Parade. The Court was of the view that having regard to the facts and circumstances of the case, the witnesses might E not have had sufficient opportunity to notice the features of accused No. 2 who is said to have run away when the police party retaliated. It, therefore, gave to accused No. 2 the benefit of doubt.

The trial court held that there was no material to establish that accused Nos. 1 and 2 were members of a terrorists gang because even though cases F had been instituted against accused No. 3, he had not been convicted even in a single case. On such findings the trial court acquitted the accused Nos. 2 and 3 of all the charges levelled against them convicted and sentenced accused No. 1. as earlier noticed.

G The State has not preferred an appeal against acquittal of respondent Nos. 2 and 3 and, therefore, it is not necessary for us to deal with the evidence which relates to their complicity in the commission of the offence. We shall, therefore, not refer to the evidence led by the prosecution to establish the existence of the conspiracy or to establish the abetment of the offences by accused Nos. 2 and 3. We shall confine ourselves to the evidence H on record which implicates accused No. 1 alone.

Before adverting to the evidence of the prosecution, it may be useful to notice the defence of accused No. 1 as is apparent from his statement recorded under Section 313 Cr. P.C. In answer to question No. 155, accused No. 1 stated thus :-

> "On 18.4.94 at about 3 pm, I was going towards the Employment Exchange. My certificates were with me. I entered the precincts of the court, from the Southern side gate of the New Court building. All of a sudden I noticed the shots being fired through the fire arm. Before, I could guess as to what was going on, one bullet hit me on my neck and so I fell down because I felt giddiness. I became unconscious. When I regained the consciousness, I came to know that I was in the St. George's Hospital. I enquired with the policemen there about my file containing the certificates. The policemen did not tell me anything then. Police have want only involved me in a false case, and I have been in the jail from last three years."

The defence had made suggestions to the prosecution witnesses from which it appears that it was the case of the defence that the so called eye witnesses had not seen the person who had fired the shots at Ashwin Naik, and that the person who had fired the shots dropped the weapon and ran away.

Accused Nos. 2 and 3 have also denied their complicity and while accused No. 3 stated that he was not in any manner connected with the crime, accused No. 2 denied that he had ever visited the Court premises or made a confessional statement. In fact his signatures were obtained on blank papers by use of force which were later utilized to record the so called confessional statement.

PW.1, ASI Thorawat is the first informant. He has deposed to the effect that on 18th April, 1994 at 7.30 a.m. he had gone to the Police Head Quarters, Thane. The duty distribution officer allotted to him the duty to take the prisoner Ashwin Naik from Kalyan Jail to the TADA Court at Mumbai. He was incharge of the escort party which included PW.2, PW.3 and PW.6. The escort team was provided with a police van, driven by driver Bhingale. He went to Kalyan Jail where prisoner Ashwin Naik was handed over to him alongwith the production warrant at about 10.20 a.m. The accused was handcuffed and was made to sit in the police van. Another police van carried five other co-accused and some other prisoners to the Sessions Court escorted by another police team. Both the vehicles reached the Sessions Court at Mumbai at about

A 12.30 p.m. Eleven accused were brought in the second van out of whom five were facing trial alongwith Ashwin Naik and the remaining six were required in connection with some other case. ASI Waghchaure, PW.4 was incharge of the escorting party of the five accused who had to face trial with Ashwin Naik. He then described the location of the TADA Court in Session Court premises. He claimed to have produced the accused Ashwin Naik before the B TADA Court. So did ASI Waghchaure. They were told by Sheristedar of the Court that the case would come up at about 2.45 p.m. in the afternoon session. The concerned TADA Court was located on the 5th floor of the new building. The escort team escorting the five co-accused went down the stairs but he stayed with prisoner Ashwin Naik and the escort party in the improvised C room near the Court. Thereafter he again produced Ashwin Naik before the Court at about 2.45 p.m. The other five co-accused were also brought to the Court hall. Since the case was adjourned to 22nd April, 1994, after collecting the warrants from the Court Sheristedar, they proceeded to the police van which was parked in the premises of the Sessions Court. The escort team headed by ASI Waghchaure, PW.4, escorting the five co-accused went down D by the stair case. He and other members of the escort team escorting Ashwin Naik followed them. After coming to the ground floor they all proceeded to the police van which was parked in the Court compound on the Southern side of the building. When he came out of the Court building and was proceeding towards the police van, he looked behind and noticed a young boy wearing E the attire of an advocate with revolver in his hands. He fired two/four rounds from his revolver. One of the bullets hit the lower part of the head of Ashwin Naik from the back. At that time Constable Nikam, PW.6 was walking alongwith the prisoner and was on his right side. Constable Bhingardive, PW.3 was on the left side of Ashwin Naik. The escort team of ASI Waghchaure, PW.4 was F in front of Ashwin Naik. The witness was walking behind Ashwin naik. The distance between him and Ashwin Naik was about 10 feet. When the shots were fired accused No. 1 was at a distance of about 20 feet from him. Two of the bullets fired by him hit the two constables, PW.3 and PW.6. All the three injured persons fell down. PW.2, Saundane, a trained commando armed with a carbine started firing in the direction from which the bullets were fired. G One of the bullets fired from the carbine also hit accused No. 1. PW.2 pounched upon accused No. 1 and over powered him. The witness (PW.1) snatched the revolver from the grip of accused No. 1 who was holding the revolver with both his hands. At about that time Police Inspector Bhagwat and Police Inspector Rathod, PW.11 also reached the place of occurrence. H Police Inspector Rathod, PW.11 took accused No. 1 in his custody after enquiring about his name etc. and thereafter took him to the Colaba Police

Station. When accused No. 1 was apprehended there were number of persons who had gathered but one person ran away from that crowd, whom he could identify, if shown. He, thereafter took the three injured persons, namely prisoner Ashwin Naik, PW.3 and PW.6 to the St. Georges Hospital. This witness has further stated that after relieving accused No. 1 of the revolver, he handed over the same to Police Inspector Rathod, PW.11. ASI Waghchaure. PW.4 also accompanied the injured witnesses to the St. Georges Hospital. At the hospital his statement was recorded by Police Inspector Gaikwad, PW.19. He proved the said statement which was marked as Ext. 10. By the time his statement was recorded accused No. 1 was also brought to the St. Georges Hospital. On seeing him he told Police Inspector Gaikwad, PW. 19 that he was the same person who had fired at Ashwin Naik. PW.19 recorded his further statement. The witness has deposed about the identification parade in which he identified accused No. 2. The witness also identified the revolver and the carbine which were seized in the course of investigation. In the course of his cross-examination this witness stated that he remained at the St. Georges Hospital till about 11.30 p.m. Inspector Gaikwad, PW.19 had met him in the hospital at about 3.20 p.m. and he must have taken about 1 hour or 1½ hours to record the statement.

The witness stood the test of cross-examination and answered all questions in a forthright manner. Small discrepancies were sought to be highlighted such as that he had not stated before PW.19, the Investigating Officer that the Commando had encircled the body of accused No. 1 with both his hands when he caught him. It was also sought to be highlighted that the witness had not stated before the investigating officer that after being injured, the two constables fell down. He denied the suggestion that he had not seen the person who had fired at Ashwin Naik. He further clarified that only two persons had used fire arms, namely-accused No. 1 and the Commandor, PW.2. PW.2 was the only member of the escorting party who was armed. There is hardly anything in the cross-examination of this witness which may impeach his credibility.

The next important witness is PW.4 ASI Waghchaure. He has deposed on the same lines as PW. 1. He has corroborated PW.1 by saying that he was walking ahead of Ashwin Naik and that when he had walked a distance of about 15 paces after coming out from the Court building the escort party escorting Ashwin Naik, which was following him and Ashwin Naik was hardly 2-3 feet behind him. All of a sudden, he heard a gun shot being fired and, therefore, he looked back. He saw Ashwin Naik falling on the ground and

A he also noticed a person in a lawyer's attire firing the shots from his revolver. Constable Nikam, PW.6 and Constable Bhingardrive, PW.3 also sustained bullet injuries who were on the right and left side of Ashwin Naik. PW.2 Saundane opened fire and one of the bullets hit the person who was firing from his revolver. He also rushed to catch hold of that person but in the meantime that person fired at him and he received two injuries on his left B hand. However, he pounched upon that person and he was also helped by PW.2. PW.1, ASI Thorawat also came there and snatched the revolver from the hands of accused No. 1. At about that time two Inspectors came there to their aid and they took the accused in their jeep towards Colaba Police Station. He placed injured Ashwin Naik alongwith injured constables and ASI C Thorawat in the van and proceeded to St. Georges Hospital. This witness further clarified that on that date service revolver was not issued to him because there was shortage of service revolvers. Normally an ASI is issued a service revolver when he goes on escorting assignment. ASI Thorawat was also not issued a service revolver on that date. Though cross-examined at length, there is hardly anything in his cross-examination which may cast a D reflection on the truthfulness of this witness.

The testimony of the other injured witnesses, namely PW.3 Bhingardive and PW.6 Nikam are wholly consistent with the testimony or PW.1 and PW.4. PW.2 has also fully supported the prosecution case and his evidence fully corroborates the evidence of other eye witnesses.

E

It will thus appear that the evidence led by the prosecution about the occurrence that took place on that date is consistent and trust worthy. It leaves no manner of doubt that accused No. 1 fired at Ashwin Naik and in the process injured two police constables as well as ASI Waghchaure, PW.4. F In retaliation PW.2 fired from his carbine causing injury to accused No. 1. The witnesses are clear and categoric that they had seen the accused firing at them.

That the occurrence took place in the manner alleged is not even disputed by accused No. 1. According to accused No. 1, as is evident from G his statement recorded under section 313 Cr.P.C., the occurrence did take place on the date and place as specified by the prosecution. His defence is that he was proceeding to the Employing Exchange and unfortunately he was struck by a stray bullet. The person who had actually fired at Ashwini Naik threw away his revolver and ran away. That revolver was planted on him and the prosecution made out a false case implicating him in the crime. He was

H

an innocent passer by and was caught in the cross-fire. Having regard to the defence of accused No. 1, there can be no reason to doubt that such an incident took place at the time and place alleged by the prosecution. The only question that deserves consideration is whether it was accused No. 1 who fired at Ashwin Naik or whether some one else fired at Ashwin Naik and fled after throwing away the revolver.

The direct testimony of the eye witnesses is unambiguous and each one of them has clearly stated that it was accused No. 1 who was seen firing from his revolver. There appears to be no reason why the witnesses would falsely implicate Accused No. 1. It is not as if accused No. 1 is a seasoned criminal sought after by the police, and taking advantage of the situation the police caught him and falsely implicated him. In fact, it appears from the record, that this was the first assignment of accused No. 1. We are, therefore, satisfied that the witnesses have truthfully stated that they had seen accused No. 1 firing at Ashwin Naik and it was he who fired at members of the police party escorting Ashwin Naik. Moreover one fails to understand why accused No. 1 was there in the attire of an advocate. Admittedly he is not an advocate, and there appears to be no other reason for him to put on the dress of an advocate but for the fact that his movement in the Court was facilitated by his wearing the attire of an advocate. Witnesses have stated that he was wearing the dress of an advocate. Even PW.11, Police Inspector Rathod, who reached the scene of occurrence on hearing the report of gun shots, stated that he saw PW.2 struggling with a person who was dressed as an advocate.

Before us Mr. Sushil Kumar, Senior Advocate, appearing on behalf of the appellant advanced five submissions. Firstly, it was submitted that the appellant was not arrested in the manner alleged nor was he involved in the shoot out. He was himself a victim who was hit by a stray bullet. Secondly, there is no reliable evidence regarding recovery of the weapon of offence from the appellant as also regarding seizure of the clothes worn by him. This submission was apparently advanced because the seizure witness on the point was declared hostile. Thirdly, it was submitted that weapon allegedly seized was not connected with the offence. Fourthly, it was submitted that in any event no offence under TADA had been made out. Lastly, he made his submission on the nature of offence and the proper sentence to be passed.

Conscious of the consistent testimony of Pws. 1, 2, 3, 4, and 6, learned counsel submitted that all these witnesses are police personnel. Not a single witness had been examined by the prosecution from amongst the members of

A the public, even though many persons must have witnessed the occurrence. Reliance was placed on the judgment of this Court in *Pradeep Narayan Madgaonkar and Ors.* v. *State of Maharashtra,* [1995] 4 SCC 255 and it was submitted that in the absence of independent witnesses, meaning thereby non police witnesses the case of the prosecution should not be accepted in the absence of independent corroboration of their testimony. We have carefully B perused the judgment of this Court and we find that the aforesaid judgment does not assist the defence. It was held that the evidence of official (police) witnesses cannot be discarded merely on the ground that they belong to the police force and are either interested in the investigating or the prosecuting agency. But prudence dictates that their evidence needs to be subjected to C strict scrutiny and as far as possible corroboration of their evidence in material particulars should be sought. Their desire to see the success of the case based on their investigation requires greater care to appreciate their testimony.

One cannot loose sight of the fact that in the instant case three of the D police witnesses, namely, PW.3, PW.4 and PW.6 are also injured witnesses. The police party in the instant case was the victim of assault launched by accused No. 1. They cannot, therefore, be described as official witnesses interested in the success of the investigation or prosecution. They are eye witnesses who were injured in the course of the incident. In fact the testimony E of such witnesses, does not require independent corroboration, if otherwise their evidence is found to be truthful and reliable. This is not a case where police witnesses have been introduced to bolster the case of the prosecution with a view to its success. The injured police witnesses as well as other police witnesses are eye witnesses being members of the escorting party escorting Ashwin Naik to the police van. In our view, therefore, independent F corroboration of their testimony was not necessary in the facts and circumstances of this case. Moreover one cannot loose sight of the realities of the situation. In a case of this nature, where two gangs are fighting for supremacy, it was hardly possible for the prosecution to secure independent witnesses being members of the public who had witnessed the incident. In G fact the evidence is to the effect that though many persons must have seen the occurrence, they were not willing to speak as they were totally terrorized. PW.19, Investigating officer, stated that he could see a number of persons watching from the galery of the two buildings. He enquired of those persons as well as some advocates on the first floor of the new Sessions Court building, if they knew anything about the occurrence, but none of them came H forward to tell him anything about the incident. The manner in which they

talked to him, gave him the impression that they were afraid to speak. Moreover, as was noticed earlier, all the independent witnesses who were associated with the investigation as panch witnesses, turned hostile and did not support the prosecution case. Whatever may be legal effect of their turning hostile, it is clear that they were afraid to depose against the accused.

We are, therefore, satisfied that the evidence of the police witnesses, who are also the eye witnesses, some of them injured, is worthy of credence and can be acted upon. The failure to examine independent witnesses in the facts and circumstances of this case would not reflect on the veracity of the prosecution witnesses.

The defence of accused No. 1 that he was hit by a stray bullet must be rejected outright. There appears to be a ring of truth in the case of the prosecution that accused No. 1 put on the attire of an advocate so that his movement in the Sessions Court was facilitated. The eye witnesses are clear and categoric that they had seen him firing from his revolver at Ashwin Naik and later at them. Defence of accused No. 1. therefore, cannot be accepted.

The second submission of learned counsel for the appellant is also devoid of merit. The consistent case of the prosecution is that PW. 1 and PW.2 pounded upon accused No. 1 and pressed him to the ground. PW4. also came to their aid and in the meantime two other police inspectors including PW.11 reached the spot. PW.1, ASI Thorawat has categorically stated that after PW.2. Commando Saundane caught hold of accused No. 1 and pressed him to the ground, he snatched the revolver from accused No. 1 who was holding the revolver in both his hands. The revolver was handed over to Police Inspector Rathod, PW.11 who had already come there and apprehended the accused and who took him in his vehicle to Colaba Police Station. On this aspect of the matter the evidence of the prosecution is consistent. At the Colaba Police Station Duty Inspector Issaq Bagwan and PW.12 ASI Barse were present. The matter was reported to Inspector Issaq Bagwan who directed ASI Barse to draw up the Panchnama relating to the seizure of the revolver and the clothes of accused No. 1. PW.12 noticed the injuries on the neck of accused No. 1. The panch witness associated with the preparation of the panchnama, namely PW.7 Raju Vaze was declared hostile. The other panch witness who was associated could not be examined as he was dead. There is evidence to support the prosecution case that all the seized articles were kept in the safe and the store under the custody of PW.19. Those articles were sent to the Forensic Science Laboratory and the person who took them to the

A Forensic Science Laboratory was Hawaldar Uma Kant, PW, 17. The report of the Chemical Analyst as well as the report of the Ballistic Expert Fully establish the fact that the aforesaid revolver was used and the empties were fired from the said revolver. The said reports fully corroborate the case of the prosecution. It is true that the seizure panchnama could not be proved on account of the fact that the panch witness turned hostile, but there is over B whelming credible evidence on record to establish that accused No. 1 was firing from his revolver and after he was over-powered, PW. 1 relieved him of his revolver and handed over the same of PW.12, Police Inspector Rathod, who in turn handed over the revolver to PW.12 ASI Barse. Later all the seized articles were taken charge of by PW.19, the investigating officer.

C

In the facts and circumstances of the case we are satisfied that the weapon of offence, namely the revolver was seized from accused No. 1.

The third submission in inter-connected with the second submission. We have already referred to the report of the Ballistic Expert and the report D of the Chemical Analyst. Read with the ocular testimony of the witnesses, the evidence on record leaves no room for doubt that the said weapon was used in the commission of the offence.

Much was sought to be made of the fact that the medical evidence on record falsities the prosecution case that only five shots were fired whereas E there were as many as 8 gun shot injuries on Ashwin Naik and the injured policemen, as deposed by Dr. Bakshi, PW.21. It was also argued before us that if PW.2 had fired 25 shots from his carbine, and the accused has also fired five shots from his revolver, many more injures should have been caused. It was, therefore, submitted that the prosecution has not come forward with the truthful version of the occurrence. It was submitted that the prosecution had F not explained how one bullet was found tucked in the collar of the coat. Moreover one bullet was recovered after a surgery was performed on PW.3 at the hospital. That bullet was not sent for examination by the Ballistic Expert.

G As we have observed earlier, the fact that the occurrence took place cannot be disputed. In an incident of this nature it would be impossible for the prosecution witnesses to account for each and every bullet fired in the course of the incident. The prosecution is not expected to account for all the *empties* and the bullets fired in the course of occurrence, because apart from bullets which are found embedded in the wounds of the injured witnesses, H the other bullets may be lost or destroyed after hitting some hard surface. It

is, therefore, not possible for the prosecution to collect and account for all the bullets and empties with mathematical precision. It is also not possible for the prosecution in an incident of this nature to explain each and every injury suffered by the witnesses. We are not permitted to conjecture as to how injuries may have been caused in an incident of this nature where firing has taken packs from both directions. According to the doctor, there are as many as 8 gun shots injuries. So far as injuries on PW.4 is concerned, Dr. Bakshi, PW.1 has not ruled out the possibility of the same shot causing both the injuries. It may be possible that one bullet may have caused more than one injury. It is difficult for us to speculate because it may be that some of the shots fired by accused No. 1 may have injured more than one witness, because apart from PW.3 no bullet was found stuck in any of the injuries suffered by other witnesses.

It was then submitted that there is no evidence to prove where the revolver was kept after its seizure. Evidence on record discloses that PW.12 ASI Barse had prepared the seizure panchnama relating to the revolver. PW.19 has stated that he took charge of all the articles which were seized by API Jadhav and API Barse, PW.12. He saw to it that all the articles were properly labelled and sealed. He kept all those articles in his custody in the safe. The clothes and other articles were kept in the store. Relevant entries were made by the officers concerned in the muddamal register and the register maintained by the Store Hawaldar. The evidence of PW.17, Uma Kant, the Store Hawaldar is to the effect that on 26th April, 1994 a forwarding letter was prepared in the prescribed proforma and the muddamal property in this case which was in the custody of PW.19, Investigating Officer, was handed over to him. He ascertained that the seals of all the articles were intact. He also found that the clothes and the other articles, which were stored in the store room, were also duly sealed and labelled. He was directed to carry those articles to the Chemical Analyser on the same date but since he was deployed on bandobast duty on 26th and 27th April, 1994, he carried the muddamal properties to the Chemical Analyst on 28th April, 1994.

It thus appears from the evidence on record that after PW.19 took charge of the muddamal properties he got the articles kept in the safe and the clothes etc. were kept in the store. They were all duly packed, labelled and sealed and were handed over to the Store Hawaldar for being taken to the Chemical Analyst on 26th April, 1994. We are, therefore, satisfied that the revolver after its seizure was properly kept in safe custody under the charge of PW.19 and was thereafter sent to the Chemical Analyser (Forensic Science

A Laboratory) where they were received on 28th April, 1994.

It was submitted that one bullet was recovered from the wound of PW.3 when he was operated upon. It appears that the operation took place on the following day. There is nothing on record to suggest that the doctor either informed the Investigating Officer about the recovery of the bullet or handed B over the same to him. In fact no question was put to the doctor on this aspect of the matter when he was in the witness box. Learned counsel for the State is therefore, right in submitting that no fault can be found with the investigating agency when the evidence discloses that after removal of the bullet from the wound of PW.3, neither the Investigating Officer was informed about it nor C was the bullet removed from the wound sent to him for further action.

Counsel for the appellant further submitted that in the coat, which is said to have been seized from accused No. 1 four holes were found and in addition one bullet was found tucked in the collar of the coat. This bullet was found to have been fired from a .38 caliber revolver. He submitted that it has D not been explained by the prosecution as to how this bullet got tucked in the coat of the accused. In our view it was neither necessary nor was it possible for the prosecution to explain how the holes were caused in the coat of the accused, and by what process one bullet was tucked in the collar of the coat.

More over these are hardly matters which will cast a reflection on the E case of the prosecution. As we have observed when firing took place from both directions, it was not possible for the witnesses to notice in which direction the bullets were flying.

Lastly it was submitted that in view of the findings recorded by the trial court, namely that there was no conspiracy to commit the offence, that it was F not established that accused Nos. 2 and 3 belonged to a terrorist gang and that the accused did not share a common intention to commit the offence, the sub stratum of the prosecution case vanished and nothing remained on the basis on which the appellant could be convicted. The submission has no force. It is no doubt true that the prosecution has not been able to establish G its case as against accused Nos. 2 and 3. The confessional statements which implicated accused Nos. 2 and 3 have not been accepted by the trial court as being voluntary. But even so there is nothing to discredit the evidence adduced by the prosecution in regard to the occurrence that took place within the precincts of the Sessions Court. The occurrence was witnessed by several witnesses. Though all of them belong to the police force, three witnesses are H injured witnesses whose presence cannot be doubted and whose testimony

has been found to be truthful. In these circumstances even if the prosecution has failed to establish its case as against accused Nos. 2 and 3, it has certainly proved its case as against accused No. 1. The evidence which implicates accused No. 1 has been found to be reliable and trust worthy and, therefore, even if accused Nos. 2 and 3 have been acquitted of all the charges levelled against them, on the basis of the evidence on record, the conviction of accused No. 1 can be sustained.

It was lastly submitted that even on the basis of the facts proved at the trial, no offence under TADA was made out. This was a simple case in which at best accused No. 1 attempted to commit the murder of Ashwin Naik, which was an ordinary criminal activity which could be dealt with under the ordinary penal law. This was, therefore, not a case of an offence which answered the description of a terrorist act under Section 3 of TADA.

It is no doubt true that even though the crime committed by a "terrorist" and an ordinary criminal would be overlapping to an extent, it is not the intention of the legislature that every criminal should be tried under TADA, when the fall out of his activity does not extend beyond the normal frontiers of the ordinary criminal activity. The provision of the Act need not be resorted to if the nature of the activities of the accused can be checked and controlled under the ordinary law of the land. It is only in those cases where the law enforcing machinery finds the ordinary law to be inadequate or not sufficiently effective for tackling the menace of terrorism and disruptive activities that resort should be had to the drastic provisions of the Act. Some difficulties, however, arise when the intended activity of the offender results in striking terror or creating fear and panic amongst the people in general or a section thereof. It is in this situation that the Courts have to be cautious to draw a line between the crime punishable under the ordinary criminal law and the ones which are punishable under Section 3(1) of TADA. (See *Hitendra Vishnu Thakur* v. *State of Maharashtra and Ors.*, [1994] 4 SCC 602 and *Niranjan Singh Karam Singh Punjabi, Advocate* v. *Jitendra Bhimraj Bijjaya and Ors.*, [1998] 4 SCC 76.

In Javawant Dattatray Suryarao v. *State of Maharashtra,* JT [2001] 9 SC 605 after an exhaustive consideration of the authorities on the subject, this Court observed:

> "In our view, it is not possible to define 'terrorism' by precise words. Whether the act was committed with intent to strike terror in the people or a section of the people would depend upon facts of each

A case, further, for finding out intention of the accused, there would hardly be a few cases where there could be evidence. Mainly it is to be inferred from the circumstances of each case. In appropriate cases, from the nature of violent act, inference can be culled out. There can also be no doubt that fall out of violent act vary from person to person and society to society but is well understood by a prudent B person and by those who are affected.

That was a case in which the accused armed themselves with sophisticated weapons and attacked their victim in the J.J. Hospital, despite the fact that police guards had been posted to give protection. In the process C they shot dead one member of the rival gang and two policemen on duty. Considering the facts of that case, this Court observed :

"As confessed by A-2 Suryarao, President of Bhiwandi municipal corporation, he sought assistance from A-7 and others and thereafter it is his say that he was required to comply with the illegal demand D of A-7 of rendering assistance to A-6 and A-7 after commission of the offence. Further, the intention of the accused could be gathered from their act of shooting the police guards who were on duty and causing injury to others whosoever came in their way. In such a situation, it could be inferred that the dastardly act was to administer a terror or a shockwave in the people at large and convey that the fate of all E those who did not obey their dictates or oppose them would be the same as that of Shailesh Haldankar. It further conveys that police guard on duty cannot save the victim, but they also may meet the same fate. Not only this, the crime was perpetuated in a protected place i.e. J.J. Hospital by master-minding the operation of the achieving F the target. Necessary information was collected and after equipping themselves with sophisticated weapons they went to the hospital where patients and staff on duty went helter-skelter, witnesses turned hostile, PW42 PSI Thakur who was police officer on duty could not do any thing to protect anyone and after giving detailed FIR failed to support the same before the court."

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"Hence, there is no substance in the contention of the learned counsel for the accused that there was no intention on the part of the accused to strike terror and that the crime would not be covered by the H terrorist activity as provided under section 3(1) of TADA. We would

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again reiterate that whether the crime committed creates terror or not, depends upon the facts and circumstances of each case and cannot be defined by precise words."

Keeping these principles in mind, let us advert to the facts of this case. An attempt was made on the life of a gang leader in broad day light within the precincts of the Sessions Court premises. The victim was an alleged leader of a criminal gang. The accused did not have any personal animosity with him, and even though the prosecution case regarding conspiracy failed, obviously the accused was set up by someone to accomplish the job. The plan was sought to be executed within the view of large number of persons present in the Court premises. The victim was being escorted under the protection of a police party and at least one member of the escorting party was armed with a carbine. In the incident, the victim was injured, and so were three members of the police party. They were lucky that the injuries did not prove fatal. None from amongst the members of the public was willing to give evidence in the case.

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When a dastardly act is sought to be executed in such a bold and daring manner, what is the message which the accused intents to convey to the ordinary people of this country? The message is that obedience to Law is irrelevant. People must obey the dictates of the law breakers. Neither the Courts not the police force can give them any protection for it is the right of the criminals to command habitual obedience from the citizens of this country. The State has lost is supremacy, in any event, its subjects must disregard the code of conduct established by law and must obey the dictates of those for whom law is meaningless. If they fail to do so they shall be dealt with in the same manner as the victim in the instant case, notwithstanding the fact that he was under police protection, and the incident was being witnessed by a large number of persons within the Court premises. Such activities have the effect of undermining the very authority of the State and have a terrorizing effect on those who witness such an incident, and those who come to know of it. The terror, fear and panic which they suffer is unfathomable and tend to completely demoralize the ordinary man in the street. The blatant manner in which the plan was executed in the instant case leaves no manner of doubt that the intention of the perpetrator was not merely to kill the victim, but also to send a terrorising message to the people in general, so that there was no defiance of their command in future. An attempt was also made on the lives of three policeman which reinforces the conclusion that the intention was to strike terror and the killing was attempted

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A to achieve that objective. We have therefore no doubt, that the facts proved to establish the commission of offences under TADA. No interference with the sentence passed will be justified in the facts of this case.

We, therefore, find no merit in this appeal. Accordingly the appeal is dismissed.

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K.K.T. Appeal dismissed.