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STATE OF MAHARASHTRA

v.

SIRAZ AHMED NISAR AHMED AND ORS.

MAY 7, 2007

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[S.B. SINHA AND P.P. NAOLEKAR, JJ.]

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Penal Code, 1860 : Sections 120-B, 143, 147, 148, 149, 302, 307, 370, 392, 397, 468 & 471—Arms Act, 1959—Sections 3, 7, 25, & 27 read with Arms Rules, 1962—Terrorist and Disruptive Activities (Prevention) Act, 1987—Rule 15—Criminal conspiracy and murder of deceased by firing upon them with firearms—Firearms ceased from certain accused—Confession made by one of the accused before police officer under TADA Rules—Charge-sheet filed against the accused for various offences before Designated Court—Designated Courts acquitted the accused of all the charges except some of them under the Arms Act for possession of arms—Correctness of—Held, on evidence on record, the prosecution failed to connect the accused with criminal conspiracy and commission of murder of the deceased—Safeguards provided for recording the confession under the TADA Rules has not been followed and hence, confession statement of the accused, is inadmissible in evidence—Conviction of some accused under the Arms Act for possession of arms upheld.

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According to the prosecution, respondents and five others hatched a criminal conspiracy to murder the deceased, a politician, under the instructions of their leader residing outside the country. The accused persons arranged vehicles, firearms, ammunitions etc. to execute the plan. On the day of the incident, the accused waited outside the house of the deceased with their weapons in their car. As soon as the deceased came out of his house in his car with his bodyguard, the accused fired at the car of the deceased resulting in death of the deceased along with his bodyguard. Two passersby also got injured in the incident. All the accused were arrested by the police. The vehicles and weapons used in the crime were seized. According to the prosecution, arms were seized from the possession of respondents 1, 2 and 3 which were brought for the commission of the crime; respondent no. 4 was alleged to have harboured one of the assailants after the commission of the murder of the deceased; respondent no. 5 was alleged to have been present at

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the spot with the car to help the assailants to commit the crime; respondent no. 6 was alleged to have driven the car carrying the assailants and weapons to the place of murder; and respondent no. 7 helped to purchase the car for the crime. A Test Identification Parade was conducted and six prosecution witnesses identified two accused who were present at the scene of the crime. A

The prosecution filed a charge-sheet for commission of the offences punishable under Sections 120-B, 143, 147, 148, 149, 302, 302 r/w 120-B, 302 r/w 149, 307 r/w 120-B, 307 r/w 149, 392, 392 r/w 120-B, 392 r/w 149, 397 r/w 120-B, 397 r/w 149, 379, 379 r/w 149, 379 r/w 120-B, 468, 468 r/w 120-B, 468 r/w 149, 471, 471 r/w 120-B, 471 r/w 149 IPC and under Section 3 r/w 25, 7 r/w 27 (2 and 3) of the Arms Act, 1959 and under Sections 3 (2) (i) (ii), 3(3), 3(5), 5 and 6 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA Act) before a Designated Court. The Designated Court acquitted all the accused including the respondents from all the charges. The Designated Court convicted respondent nos. 1, 2 and 3 for possession of arms specified in Schedule 1 to the Arms Rules, 1962 in a notified area under section 5 of the TADA Act and under section 3 r/w section 25 and section 7 r/w section 27 of the Arms Act. B C D

Disposing of the appeal, the Court

HELD: 1.1. Apart from the evidence of respondent nos. 1, 2 and 3 having been in possession of the firearms, there is no other evidence on record to connect these accused with the conspiracy of committing the murder of the deceased. There is no evidence brought on record by the prosecution to prove that these very arms had been brought from outside the city. There is no evidence to show that any of the arms found in possession of these accused was used in commission of the crime. [Para 25] [51-E-F] E F

1.2. Identification of respondent no. 6 by PW 7 in a test identification parade would not carry the prosecution case any further because at the time of the incident, the witness had not seen the respondent at the place of the incident. Neither any firearm was recovered from the respondent nor was any evidence led to prove the fact that he was engaged for driving the vehicle to carry the assailants and the firearms for committing the murder as per the conspiracy hatched by the accused persons. There is no evidence on record to establish that on the relevant date he was seen driving the car. There is lack of link evidence connecting this accused with the other accused persons. Finding the accused at the place of incident might have raised strong suspicion, H

A but there is no evidence on the record to convert the suspicion into a proof about the involvement of respondent no. 6 in committing the murder of the deceased. [Para 28] [53-D-G]

B 1.3. While appreciating evidence, the Court must keep in mind that the powers of observation differ from person to person. An object or thing happened might reflect in the image of a person's mind, whereas it may go unnoticed on the part of another. While appreciating the evidence of witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence, more particularly keeping in view of deficiencies, drawbacks and infirmities pointed out in the evidence, as a whole, and evaluate them to find out whether it is against the general tenor of the evidence given by the witnesses and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matter not touching the core of matter in issue, hyper-technical approach by taking sentence out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter, would not ordinarily permit rejection of the evidence as a whole.

[Para 33] [57-F-H; 58-A-B]

E 1.4. On an overall reading of the statements made by the witnesses, the evidence of recovery of a revolver and live cartridges from respondent no. 5 was not in any way shaken by some of the infirmities pointed out by the Designated Court. The discrepancies in the statements of the witnesses are not infirmities, but those statements are consistent with the general tenor of evidence. When the prosecution has proved conscious and exclusive possession of the house by respondent no. 5, the statements made by the witnesses cannot be brushed aside on the ground that the prosecution has not proved the title or ownership of the flat. The prosecution has proved the seizure of the revolver and the live cartridges from respondent no. 5. Respondent no. 5, having been found in possession of a revolver, is guilty of the offence under Section 5 of the TADA Act. As regards respondent no. 4, there is no substantive evidence to connect him with the commission of the crime.

[Paras 34, 35, 36, 37 and 38] [58-C-F; 59-A]

H 1.5. A confession statement to police is not admissible under the general law connected with administration of criminal justice. Under Section 15 of the TADA Act, if a confession made by the accused to a police officer not

lower than the rank of Superintendent of Police is made admissible, it would still be a confession made to the police officer, and thus inbuilt safeguards have been provided under Section 15 of the TADA Act read with Rule 15 of the TADA Rules so as to lend credence to the confession made to the police officer, it being voluntarily and without any force or pressure and allurement or inducement. Any confession made in defiance of the safeguards provided therein, would not be relied upon by a court. [Para 49] [66-B, E, F, C]

1.6. From a bare reading of the certificate given under Rule 15(3) (b) of the TADA Rules, it is clear that it is necessary for a police officer to certify that he has explained to the accused that the accused is not bound to make a confession and if he does so, such confession may be used as evidence against him. It is further required to be recorded that he believed that the confession was voluntarily made. He has to record that the confessional statement has been taken in his presence and hearing and recorded by him. The confessional statement should be read over to the person making it and admitted by him to be correct and it should be certified that it contains a full and true account of the statement made by the accused. The certificate, which is required to be given by the police officer is not a mere formality, but it is for the purposes of ascertaining that the police officer has recorded the confession keeping in mind and being fully aware of the fact that the confession recorded by him is a voluntary confession and with the information available to the accused that he is not bound to make such confession and if he does so it will be used as evidence against him. A duty is cast on the police officer who is to record the confession to bring at the relevant time these facts to the notice of the person whose confession is going to be recorded. [Para 50] [67-B-D]

1.7. In the present case, on reading the certificate, it does appear that compliance of Rule 15 (3) (b) of the TADA Rules has been done in a mechanical manner. It does only certify that it is the satisfaction of the recording officer that the facts that the accused is not bound to make the confession and if he does so it shall be used as evidence against him, were known to the accused. However, there is no certification that the statement was recorded in the presence and hearing of the police officer; nor the statement has been admitted to be correct by the accused; and that the statement contained a full and true account of what was stated by the accused. [Para 51] [67-E-H; 68-A]

Kartar Singh v. State of Punjab, [1994] 3 SCC 569 (CB); *Ayub v. State of Uttar Pradesh*, [2002] 3 SCC 510; *Simon & Ors. v. State of Karnataka*, [2004] 1 SCC 74; *S. N. Dube v. N. B. Bhoir & Ors.*, [2000] 2 SCC 254; *Hardeep*

- A *Singh Sohal & Ors. v. State of Punjab through CBI*, [2004] 11 SCC 612 and *Lal Singh v. State of Gujarat & Anr.*, [2001] 3 SCC 221, referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 166 of 1999.

- B From the Final Judgment and Order dated 5.10.1998 of the Addl Judge. Designated Court for Greater Bombay in TADA Special Case No. 10 of 1995.

V.N. Raghupathy (for Ravindra Keshavrao Adsure) for the Appellant.

- C Chinmoy Khaladkar (for Vishwajit Singh and S.K. Nandy) for the Respondents.

The Judgment of the Court was delivered by

- D P.P. NAOLEKAR, J. 1. The State of Maharashtra has preferred this appeal under the provisions of Section 19 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as "TADA Act") challenging the judgment and order dated 5.10.1995 passed by the Additional Judge, Designated Court for Greater Bombay in TADA Special Case No.10 of 1995.

- E 2. Twelve persons, as accused nos. 1-12, were charged and prosecuted for the offences punishable under Sections 120-B, 143, 147, 148, 149, 302, 302 r/w 120-B, 302 r/w 149, 307 r/w 120-B, 307 r/w 149, 392, 392 r/w 120-B, 392 r/w 149, 397 r/w 120-B, 397 r/w 149, 379, 379 r/w 149, 379 r/w 120-B, 468, 468 r/w 120-B, 468 r/w 149, 471, 471 r/w 120-B, 471 r/w 149 of the Indian Penal Code, 1860 (for short "IPC") and under Section 3 r/w 25, 7 r/w 27 (2 and 3) of the Arms Act, 1959 and under Sections 3(2) (i) (ii), 3(3), 3(5), 5 and 6 of the TADA Act by the Designated Court. During the trial before the Designated Court, accused no. 2, viz., Feroz Abdullah Sarguru *alias* Feroz Konkani escaped from the lawful authority of the police while the trial was still in process and as he was not arrested thereafter the Designated Court neither considered any evidence nor recorded any finding against the absconding accused. The Designated Court held that there was insufficient evidence against the 11 accused persons for the offences they were charged with and they were acquitted, except accused no. 3 Rizwan Mohammad and accused nos. 4-6/originally respondent nos. 3-5/respondent Nos. 1-3 (in the amended cause title) for the offences punishable under Section 5 of the TADA Act and sentenced them to rigorous imprisonment for five years with a fine of Rs.
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2,000/- each, in default of which rigorous imprisonment for another six months was imposed. All these four accused persons were also found guilty for the offences punishable under Section 3 r/w Section 25 and Section 7 r/w Section 27 of the Arms Act. But, in view of the sentence awarded, separate sentence was not awarded under these Sections. The State has challenged the acquittal of 11 persons of the charges not found proved by the Designated Court. During the pendency of the proceedings before this Court, the appeal as regards accused Abdullah Rahman *alias* Hamza, Mohd. Harun and Azim Sardar Khan, who were originally respondent nos. 1, 9 and 10 before us, was dismissed for non-compliance of this Court's order dated 23.8.2002, with respect to furnishing the correct and complete addresses of these respondents for issuance of bailable warrants. Similarly, the appeal as regards Rizwan Mohd., who was originally respondent no.2, was dismissed on 27.2.2004 for non-compliance of this Court's Order dated 8.2.1999 regarding issuance of bailable warrants. Hence, we have before us respondent nos. 1, 2, 3, 4, 5, 6 and 7 who were originally respondent nos. 3, 4, 5, 6, 7, 8 and 11 whose names are : Siraj Ahmed Nisar Ahmed Khan, Mohamed Firoz Ayub Khan, Rafiq Latif Sheikh, Shafiq Latif Sheikh, Gurnamsingh *alias* Chotu, Salim Karim Dingaonkar, Mohamed Mushraf Hussain Shiekh.

Factual Matrix

3. The factual matrix as per the prosecution's version and the evidence led by the prosecution in the relevant background to prove the alleged conspiracy and the commission of the offences the accused charged for, is as follows: That all the accused persons were members of the criminal gang led by Chota Shakeel who was residing in Dubai and was controlling the activities of the gang members from that place. In or around 1994, a decision was taken by Chota Shakeel to eliminate one Ramdas Nayak who was the member of Mumbai Municipal Council. Accordingly, he disclosed his plan and directed Sajid to make necessary arrangements to give effect to the plan. Sajid approached these 12 accused persons and explained to them the directions of their leader and assigned each one of them specific duties. It is alleged that Sajid approached Feroz Konkani (absconding accused) and informed him about the daily routine of Ramdas Nayak. He informed him that Ramdas Nayak leaves his residence in a white colour Ambassador car at about 9 or 10 A.M. and Ramdas Nayak is provided with police protection of one armed constable. Sajid made firearms and ammunitions available to the accused persons and the directions had been issued to Rizwan to make necessary arrangements for the shelter of the accused persons. Sajid had

A provided a .38 revolver to Feroz Konkani, a 9 mm pistol to one Soni and revolvers to John and Akhtar. A few days before the fateful day on which the gruesome murder of the deceased Ramdas Nayak along with the police constable took place, the absconding-accused Feroz with .38 revolver, Soni with 9mm pistol, John and Akhtar with revolvers, waited outside the house of the deceased to implement their plan. However, they failed that day because

B the deceased had not come out of his residence till 11 A.M. Moreover, they had some apprehension of the arms possessed by bodyguard of the deceased and they thought that they were not adequately armed to bring into action the plan set up by them.

C 4. Sajid conveyed his apprehension to Chota Shakeel, leader of the gang at Dubai who in turn asked him to collect sophisticated firearms from Bharauach. They required a vehicle so as to collect those firearms at Bharauach and finally transport them to Mumbai. Azim took Sajid to respondent no.7-Mohd. Mushraf Hussain Shaikh who had a motor garage and asked him to arrange for the vehicle. Mushraf was aware of the activities of Chota Shakeel

D and the accused Azim and Sajid told him that they wanted to purchase a motor car to be used in executing the murder plan of Ramdas Nayak. By way of caution, they decided to purchase the vehicle in the name of a person who had come to Mumbai from Kerala; accused no.1-Abdul Hamza, who hailed from Kerala, was also informed about the purpose for which the car was to be purchased. He agreed to let them buy the car on his name. A Fiat car,

E bearing no. MMU-8373, was then purchased for Rs.60,000/- from Super Motor Company. This purchase was made by Mushraf in the name of Hamza. On the direction of Sajid, Mushraf got prepared a secret chamber in the car to carry the weapons in the car from Bharauach and further to the place where the plan was to be executed. A compartment was got prepared in the car so as to keep

F the arms concealed in it.

5. As per the conspiracy between the accused persons, Gurnamsingh *alias* Chotu-respondent no.5 was entrusted with the work of bringing the arms from Bharauach. Gurnamsingh along with absconding accused Feroz Konkani took the car to Bharauach to collect the firearms from there. They

G collected various firearms including AK-56 and AK-47 rifles, ammunitions, revolvers, pistols, etc. Since all the firearms provided to them at Bharauach could not be concealed in the secret chamber prepared in the car, they left some of them with the intent to collect it later on from their man in Bharauach. The absconding accused, Feroz Konkani, distributed those arms among Rizwan

H and respondent nos. 1-5. Thereafter, Gurnamsingh-respondent no.5, along

with Feroz Konkani again went to Bhabra and collected the remaining firearms. Sajid stole a Hero Honda motorcycle, bearing no. BLC 5288, owned by one Pareira, who had filed a complaint of theft of his vehicle in MIDC Police Station. A

6. After all the preparations, the accused persons arranged the vehicle, firearms, ammunitions, etc. for the commission of murder of Ramnaya. On August 24, 1994 they gathered near the house of accused Rizwan. Accused Rizwan changed the number plate of the Fiat car from MMU-8373 to 8879 by using cello-tape. They also changed the motorcycle number. Feroz Konkani, the absconding accused, Soni, Gurnamsingh-respondent no.5 and John kept the firearms in the Fiat car and decided to execute the plan on the next day morning. It was decided that Salim Karim Dingaonkar respondent no.6 would drive the car to the place and they asked him to take away the car to Bandra. They also disclosed to him that the firearms were kept in the Fiat car. B C

7. On the fateful day, i.e., 25.8.1994, the absconding accused Feroz Konkani along with Salim Karim Dingaonkar-respondent no.6 drove the Fiat car towards the house of Ramdas Nayak at Hill Road. Sajid, Soni, Akhtar and Hazir - all absconding persons, had also reached there and they were waiting in the adjoining hotel. Salim Karim Dingaonkar-respondent no.6 was standing outside the Fiat car and Feroz Konkani and Soni were waiting inside the car with their weapons ready. When the car of Ramdas Nayak came out of his house on the road, the absconding accused - Feroz Konkani and the other person Soni came out of their Fiat car with their AK-47 rifles and went towards the car of Ramdas Nayak. Soni fired at the car of Ramdas Nayak and Feroz Konkani followed firing, thereafter. The driver of the Ambassador car of Ramdas Nayak came out of the car and Feroz Konkani fired bullets on the driver. The bodyguard-police constable Tadvii opened the front side door of the Ambassador car and came out with a machine gun and returned the fire. Feroz Konkani rushed towards the bodyguard and pumped several bullets on the bodyguard. Since the firing took place during the busy hours, commotion took place and the persons on the street started running here and there. Feroz Konkani asked Gurnamsingh-respondent no.5 who was present at the spot and accused John to run away. Konkani and Soni, along with their firearms, sped away from the place of incident on the motorcycle. As Soni sustained injuries, they decided to abandon the motorcycle. Thereafter, they forced a rickshaw puller, who was passing by the road, to leave the rickshaw by frightening him with the firearms and they took it away. Both of them kept the rifles at the backside of the rickshaw, which were later on recovered along H

A with the rickshaw. The case of prosecution is that the eye-witnesses saw the absconding accused persons Konkani and Soni when they started firing bullets and they also saw Salim Karim Dingaonkar-respondent no.6 standing near the Fiat car.

B 8. During the investigation, the police found that one retired person, who was passing by Bandra Medical Store, received bullet injuries on his abdomen and he was treated at Bhabha Hospital. One salesman, namely, Rizwan, who was also walking nearby Balaji Hotel, sustained bullet injuries on his abdomen and was admitted in Babha Hospital. Ramdas Nayak and his bodyguard-police constable were immediately rushed to Bhabha Hospital
C where the doctor on duty found them dead and declared them as such. The police received information that a motorcycle, bearing no. BLC 5882, is lying on the road at the junction of road nos. 24 and 33 at Bandra (West) and later on they found that its original number was changed.

Investigation and arrest

D 9. FIR was lodged by a police constable Gawli at the nearby Bandra Police Station and the police had registered a case for the offences charged against the accused persons. During the course of investigation, the police found the abandoned Fiat car near the place of incident and they traced out that it belonged to accused Hamza. Thereafter, the police also seized the
E motorcycle and the rickshaw along with the weapons.

10. On 17.10.1994, Feroz Konkani was arrested at Bangalore. At his instance, Rizwan was arrested with firearms on the same day. At the instance of Rizwan, Gurnamsingh-respondent no.5 was arrested on 19.10.1994. Rafiq Latif Sheikh-respondent no.3 and Shafiq Latif Sheikh-respondent no.4 were
F arrested on 19.10.1994. Salim Karim Dingaonkar-respondent no.6 was arrested on 19.10.1994. Mohd. Mushraf-respondent no.7 was arrested on 28.4.1995 at Hyderabad.

G 11. On 20.10.1994, the police requested Special Executive Magistrate (SEM) Mr. Kamath to arrange for Test Identification (TI) parade and introduced Feroz Konkani-absconding accused and Salim Karim Dingaonkar-respondent no. 6 on TI parade. Konkani was identified by six witnesses, whereas five witnesses identified Salim Karim Dingaonkar to be a person standing near the Fiat car at the time of incident. Thereafter on 29.10.1994, these accused persons were again put for TI parade and two witnesses identified them. On

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2.5.1995, again TI parade was organized wherein Harun Mohd. Hanif Shiekh was identified. A

12. On 14.11.1994, a preliminary statement of Rizwan was recorded by S. Mohd. Syyad, Dy. Commissioner of Police, Special Branch-1, Crime Investigation Department, Mumbai and he was remanded to police custody. He was again produced for recording his confessional statement under Section 15 of the TADA Act on 16.11.1994 and his confession was recorded by S. Mohd. Syyad. B

13. On 5.5.1995, a preliminary statement of Harun Mohd. Hanif Sheikh was recorded by T.A. Chauhan, Dy. Commissioner of Police, Parimandal-6, Mumbai and he was again produced before him on 7.5.1995 and on that day his confession was recorded under Section 15 of the TADA Act. C

14. On 5.5.1995 Mohd. Mushraf-respondent no.7 was produced before T.A. Chauhan, Dy. Commissioner of Mumbai Parimandal-6 and his preliminary statement was recorded. Thereafter, he was again produced before him for recording his confessional statement on 8.5.1995 under Section 15 of the TADA Act. D

15. As per the prosecution's version, the motive to eliminate Ramdas Nayak was that he was a leader of the BJP and was an elected Councillor of BMC. Chota Shakeel informed accused persons that activities of Ramdas Nayak were causing harm to Muslim community and in the interest of Muslim community, it was necessary to kill Ramdas Nayak. As per the instructions and directions issued by the gang leader, a plan was hatched and successfully executed. The accused-respondents were active participants in the conspiracy of eliminating Ramdas Nayak and had actively taken part to execute the plan set up by them by committing various acts in furtherance of their object to commit murder. E F

16. As only seven respondents are before us in the present appeal, we shall consider the part played, as alleged by the prosecution, by these accused persons in committing the offence(s) of which they have been charged. G

17. As per the prosecution, Siraj Ahmed Nisar Ahmed-respondent no.1 possessed arms which were brought from Gujarat for nefarious design to commit the murder of Ramdas Nayak.

18. Mohd. Firoz Ayub Khan-respondent no.2 possessed arms which H

A were brought from Gujarat for committing the murder of the deceased Ramdas Nayak. He also allowed his STD booth to be used for conveying the message to the gang leader, Chota Shakeel by the assailants just after the act of murder.

19. Rafiq Latif Sheikh-respondent no.3 possessed arms which were brought from Gujarat for committing the murder of deceased Ramdas Nayak.

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20. Shafiq Latif Sheikh-respondent no.4 harboured absconding accused Feroz Konkani after the commission of the murder of the accused.

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21. Gurnamsingh-respondent no.5 drove the Fiat car which was used to bring arms from Bharauach and kept some of the arms which had been brought from Bharauach. He was present at the spot to help the assailants in order to commit the crime.

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22. Salim Karim Dingaonkar-respondent no.6, was the driver of the car on the fateful day who took the car carrying the assailants and the arms to the place of murder. He was present at the spot to help the assailants in commission of crime.

23. Mohd. Mushraf-respondent no. 7 helped to purchase the Fiat car in the name of Hamza. He also got a secret compartment prepared for carrying arms.

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24. As already mentioned, the Designated Court has convicted respondent nos.1, 2 and 3 only for possessing arms specified in Columns 2 and 3 of Category I or Category III (a) of Schedule I to the Arms Rules, 1962 in a notified area under Section 5 of the TADA Act and under Arms Act, and acquitted respondent nos. 4, 5, 6 and 7 from all charges.

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25. The prosecution case is that accused-respondent no. 1 Siraj Ahmed Nisar Ahmed Khan, accused-respondent no. 2 Mohd. Firoz Ayub Khan and accused-respondent no. 3 Rafiq Latif Sheikh were aware of the conspiracy hatched to kill Ramdas Nayak and they were asked to keep the weapons brought from Bharauach. The weapons were seized from their possession. As per prosecution, accused Feroz Konkani gave information that some firearms had been kept with these accused persons and on that information the police party proceeded to recover the firearms from them. The police was accompanied by a Panch witness, PW-22, whose name was not disclosed as he had asked for protection to keep his name and address concealed. The Police Sub-Inspector (PW-51) deposed that on 19.10.1994 at the instance of Feroz Konkani

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they approached at a room at the first floor of a building where one garment A
 factory was located in Ekta Nagar at Andheri. Feroz Konkani knocked at the
 door and respondent no. 1 Siraj Ahmed Nisar Ahmed opened the door. On
 being asked, he took out a gunny bag from beneath a cot and produced it
 before the witnesses. They opened it and found one AK-47 rifle, 17 bullets
 and one magazine. Panchnama was prepared and the weapons were seized. B
 Thereafter, Feroz Konkani took police party and the panch to a hut at the back
 side of Onkar Communication Centre in front of Copper Hospital. When
 Konkani knocked at the door, respondent no. 2 Mohd. Firoz Ayub Khan
 opened the door. Konkani asked him to produce the weapons and he took out
 a gunny bag from beneath a cot. The police opened the gunny bag and found C
 two revolvers, two swords, three sharp edged weapons like knife or gupti and
 25 bullets, which were seized. Thereafter, Konkani took the police and the
 panch to a room in a slum area at the back side of building no. 15, Park Site
 at Vikhroli. Konkani got the door opened. Respondent no. 3 Rafiq Latif Sheikh
 opened the door. On being asked by Konkani, he produced the weapons in
 a plastic bag from the top of a cupboard. It contained one revolver and 13 D
 bullets. A panchnama was prepared. The Designated Court has accepted the
 case set up by the prosecution as regards these accused for seizure of the
 firearms and other arms from the accused-respondents and consequently
 convicted them as mentioned hereinabove. Apart from this evidence of accused
 having been found in possession of the firearms, the learned counsel for the
 appellant did not point out any other evidence on record to connect these E
 accused with the conspiracy of committing murder of Ramdas Nayak. There
 is no evidence brought on record by the prosecution to prove that these very
 arms had been brought from Bharauach. There is no evidence to connect the
 arms found in possession of the accused with the arms which had been
 alleged to have been brought from Bharauach. There is also no evidence to
 show that any of the arms found in possession of these accused was used F
 in commission of the crime.

26. As regards respondent no. 6-Salim Karim Dingaonkar, the case of
 the prosecution is that he was engaged on the fateful day to drive the vehicle
 along with the two absconding assailants; that he took them to the place of G
 incident on that day; and that he was present at the time of the incident. It
 is further the case of the prosecution that he left the place of incident along
 with the two assailants immediately after the firing took place. To prove this
 fact, the prosecution examined PW-7 whose name and address was kept
 concealed. PW-7 stated that he was working as a licensee in a stall which was
 situated on Hill Road in Bandra (West). On 25.8.1994 at about 9.15 a.m. he H

A opened the stall. The owner of the stall was also present in the stall since 9.15 a.m. At about 10.00 a.m., he heard sound like bursting of crackers and the persons were running helter-skelter and the adjoining shops were being closed down. On hearing the sound, he came immediately out of his stall and saw that the car of Ramdas Nayak was coming from the road near a mango tree which was on the right side of the stall and the car was not moving properly. He saw Ramdas Nayak inside the car and two persons were firing at the car. After the firing, he saw the two assailants walking towards Bandra railway station. He also saw firing by these two assailants towards the bodyguard and the driver of the vehicle. The driver fell down on the back side of the car and the bodyguard of Ramdas Nayak fell down near the driver.

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C Thereafter, the two assailants started walking towards the railway station and two more persons followed the two assailants and the persons following the assailants were having small firearms. He described one of the persons who followed to be in the age group of 25 to 28 years, having medium built, height of 5 to 5^{1/2} ft. and small hair on his head. He was carrying a black colour small firearm which had a wooden colour handle. The said witness (PW-7) identified

D respondent no. 6 to be a person who had followed the assailants immediately after the incident. This witness further stated that he was standing near a car which was parked in front of the Union Bank. He identified the accused in the identification parade as well as in the dock.

E 27. This witness was disbelieved for the identification of the accused to be a person standing near the car or present at the time of the incident by the Designated Court on the reasoning that in connection with paragraph 8 of his deposition about the identification parade dated 20.10.1994, the SEM Kamat (PW-33) had deposed that on 20.10.1994 Feroz Konkani and Salim Karim Dingaonkar were identified by the witnesses and this witness for the

F first time stated that he identified one of the assailants and also the other person because the said person was standing near a Fiat car which was stationary in front of the office of Union Bank and that this person had gone along with the assailants. When the attention of this witness was drawn to respondent no. 6 during his cross-examination, he replied that during the

G identification parade he identified respondent no. 6-Salim Karim Dingaonkar as he was standing near the Fiat car. When this witness stated that two persons had followed the assailants, in his examination-in-chief he did not say that one of them was standing near the Fiat car.

H 28. The Designated Court further found discrepancy in the evidence of PW-7 with regard to Fiat car and concluded that the witness claimed that

when he returned from Bhabha Hospital and changed his clothes at his house and came to his shop, while he was on his way he saw the Fiat car. He further stated that he did not see the Fiat car prior to recording of his statement in Bandra Police Station. After the incident, the witness took Ramdas Nayak to hospital and after return from hospital his statement was recorded by Bandra Police and according to him prior to recording of his statement he had not seen the Fiat car. That shows that prior to recording of his statement, he had not seen the accused near the Fiat car. It is, therefore, doubtful whether the accused was present near the Fiat car at the time of commission of the crime. There is a possibility that after the incident several persons had gathered and PW-7 might have seen accused near the Fiat car, but at that time none of the assailants was present at the place of incident and thus it cannot be said that PW-7 had seen the accused-respondent no. 6 Salim Karim Dingaonkar at the time of the incident near the Fiat car. The Designated Court also recorded a finding that as per this witness he had disclosed all the facts which he had seen at the time of incident, but in his statement before the police he had not mentioned the presence of Fiat car or the accused standing near the Fiat car. The witness further stated that for the first time in the identification parade he remembered that he had seen the accused standing near the Fiat car. Therefore, identification of accused-respondent no. 6 by this witness would not carry the prosecution case any further because at the time of the incident the witness had not seen the accused at the place of incident. On the basis of the statement of this witness, the Designated Court has reached the conclusion that it might be that the accused was seen by this witness at the place of incident as so many other persons who had gathered there, but the witness could not establish his presence near the Fiat car at the time of incident. Neither any firearm was recovered from this accused nor any evidence was led to prove the fact that he was engaged for driving the vehicle to carry the assailants and the firearms for committing the murder of Ramdas Nayak as per the conspiracy hatched by the accused persons. There is no evidence on record to establish that on the relevant date he was seen driving the Fiat Car. There is lack of link evidence connecting this accused with the other accused persons. Finding the accused at the place of incident might have raised the strong suspicion, but there is no evidence on record to convert the suspicion into a proof about the involvement of the accused-respondent no. 6 in committing the murder of Ramdas Nayak.

29. It is alleged by the prosecution that during the interrogation of Rizwan, he gave information to the police that out of the weapons transported from Bharaucah to Maharashtra some of them were handed over to

- A Gurnamsingh-respondent no.5 and, accordingly, he took the police party to the place where respondent no.5 was residing. When they reached the house of Gurnamsingh, Rizwan asked him to produce the weapons and Gurnamsingh took out a bundle wrapped with paper from the backside of the cupboard in his room and produced the bundle before the police. When the bundle was opened by the police, they found a revolver and some cartridges and the same were seized. Recovery of revolver and cartridges was disbelieved by the Designated Court on the ground that no independent witness had supported the recovery. The prosecution has not led any evidence to prove that the house in question, from where the recovery was made, was owned or possessed by Gurnamsingh-respondent no.5. It has come in evidence that
- B one lady was present at the time of recovery of weapons inside the house and Gurnamsingh introduced her as his wife, but there is no evidence to prove the fact that the lady present in the house was the wife of Gurnamsingh. The house was situated in a multi-storeyed building and there were several multi-storeyed buildings nearby from where the revolver and cartridges were recovered. The recovery was made during the broad daylight. Police did not
- C produce any evidence to prove the fact of visit of police to the place from where the recovery was alleged, apart from absence of independent panch witnesses. Shivajirao Dattatray Kalekar (PW-50), a police officer deposed that prior to completion of panchnama he had made a search of the house but could not find any incriminating articles. When the police had recovered the revolver and ammunition from Gurnamsingh on disclosure statement of Rizwan
- D that one revolver was kept with Gurnamsingh, then there was no reason for the police to conduct the house search and, therefore, it would indicate that the police were not relying on the information given by the accused Rizwan but they were trying to find out the accused on their own. That apart, when the police had conducted the house search then there was every possibility
- E that they had recovered the bundle from the back side of the cupboard. To avoid these difficulties, Vinayak Pandurang Kadam (PW-55) deposed differently from Shivajirao Dattatray Kalekar (PW-50) and replied that they did not search the house at all and thus evidence about the recovery was suspicious. The Court further held that there should have been a concrete evidence that it was
- F accused Gurnamsingh who was in possession of the house and the lady who was present in the house was the wife of Gurnamsingh, then it would have been reasonable to accept the recovery. But, the absence of such concrete evidence, and the fact that the police have not examined any person available nearby the vicinity, sufficiently create doubts about this recovery. Apart from this, the weapon recovered from Gurnamsingh was not used for committing
- G the murder of Ramdas Nayak. There was no evidence that this accused had
- H

any common agreement with the rest of the accused to commit the murder of Ramdas Nayak. On these findings, the Designated Court has acquitted Gurnamsingh from all charges.

30. We are not satisfied with the manner in which the evidence of the witnesses has been dealt with and appreciated in regard to possession of firearms by accused Gurnamsingh by the Designated Court. It appears that in arriving at the findings that Gurnamsingh was not in possession of the revolver and the bullets, the Designated Court has mixed up the issue with that of Rizwan's disclosure statement for recovery of revolver from Gurnamsingh.

31. To prove the recovery of firearm from the accused Gurnamsingh, the prosecution examined the police officials and panch witnesses of the seizure memorandum. PW-50 Shivajirao Dattatray Kalekar, who was posted at the relevant time in the Office of DCB CID Unit VII, in his deposition stated that after the arrest of Rizwan, he wanted to make a disclosure statement and accordingly Constable Mahadik was asked to bring the panch witnesses who were brought by him. Rizwan told that for the purposes of committing the murder of Ramdas Nayak, they had transported some firearms from Bharauch and one of the .38 revolvers was kept with the accused Gurnamsingh and now he was ready to show the house of Gurnamsingh. Rizwan was accompanied by the witnesses and other police officials in an Ambassador car. Panchas and the rest of the police staff followed them in other two jeeps. Rizwan asked the driver to take the car to the Lokhandwala Complex at Andheri (West). When they reached Lokhandwala Complex, the driver was asked to take the car near Gimnar Building inside the complex. The witness, accused Rizwan, police officials and panch witnesses proceeded towards the 4th floor of the Gimnar Building at block no. 402, as directed by Rizwan. The entrance door of block no. 402 was closed. Then Rizwan knocked at the door and one person opened the door from inside and came out. Accused Rizwan identified the said person and told the witnesses that he was Gurnamsingh. The police party entered block no. 402. There they saw a lady inside the house. Gurnamsingh told them that the lady was his wife. Thereafter, Rizwan asked Gurnamsingh to give the firearms and the ammunition which were given to him. Gurnamsingh went near a cupboard and took out a firearm from the backside of the cupboard without opening the cupboard. The firearm was wrapped in a paper. The witness collected the bundle from Gurnamsingh, removed the paper-wrapper and found that it contained .38 revolver. He also saw nine live cartridges in the bundle with the revolver. The revolver engraved

A the name "Smith & Wesson" . The witness asked Gurnamsingh whether he was having any licence to possess the revolver and the cartridges. Accused Gurnamsingh informed the witness that he did not have any licence to possess either the revolver or the cartridges. The revolver and the live cartridges were seized and taken possession of. Thereafter, he continued writing panchanama below the memorandum and completed the same. Prior to the completion of

B panchanama, the police party also searched the house of Gurnamsingh, but they could not find any other incriminating article. The witness stated that the panchanama was written by him below the memorandum and he had read over the contents of the panchanama to both the panchas and obtained the signatures of the panchas below the panchanama. Memorandum and

C panchanama were Exhibit 137. The witness also identified in the court the revolver seized from accused Gurnamsingh vide Exhibit 137 (Article No. 9). During cross-examination, the witness admitted that he did not enquire with anybody about the title or occupation of block no. 402 but the accused Gurnamsingh and his wife were present in the block.

D 32. The other witness examined by the prosecution is another Police Inspector-Vinayak Pandurang Kadam (PW-55) attached to DCB CID. He fully supported the statement of PW-50 regarding the disclosure statement made by Rizwan and the police party proceeding towards block no. 402, Gimrar Building on the information supplied by the accused Rizwan, the seizure of the revolver and the cartridges, preparation of the panchanama and also the

E fact that accused Gurnamsingh had introduced the lady who was present in the flat to be his wife. In the cross-examination, however, this witness stated that after the accused Gurnamsingh had produced the revolver and the live cartridges no search was made of block no. 402 by the police party. The statement of these witnesses about the recovery of .38 revolver and the live

F cartridges was not connected with the accused by the Designated Court on the ground that the exclusive possession by the accused of block no. 402 was not proved by the prosecution. It was held by the Designated Court that prosecution had not proved that the lady found in block no. 402 was the wife of the accused Gurnamsingh and, therefore, it could not be said that the accused Gurnamsingh was in exclusive possession of block no. 402 at the

G relevant time when the seizure of the firearm and the live cartridges was effected by the police party. The Designated Court has completely overlooked the fact that both the witnesses (PW-50 and PW-55) have specifically stated that when the door of block no. 402 was opened and they entered the flat a lady was standing there along with the accused Gurnamsingh and the

H accused Gurnamsingh introduced that lady as his wife. However, there was

no cross-examination of these witnesses on this point. That apart, it was within the exclusive knowledge of the accused Gurnamsingh of his relationship with the lady found in the flat when the seizure was made and it would have been for the accused to put the question in cross-examination of the witnesses to bring out the fact that the lady had no relationship with the accused Gurnamsingh. Other factor which was taken into consideration by the Designated Court is that why the police officials would make a search of the flat when the accused Gurnamsingh himself had produced the revolver and the live cartridges, by overlooking the fact that the investigation was in progress with respect to a day-light murder, committed, of a political leader, a sensational case and, as such, the police party would not have felt complacent only on production of one firearm by the accused Gurnamsingh. It was quite natural that they had been suspecting that block no. 402 might have other arms and considering that factor they had made the search of the flat. There is misreading of the evidence by the Designated Court that the search was effected prior to the completion of process of seizure of the revolver. PW-50 had categorically stated in his evidence that after the seizure of the revolver and the live cartridges he had started writing panchanama and prior to the completion of panchanama they also searched the house of the accused Gurnamsingh, but they could not find any other incriminating articles. It is natural for the police party to search for other arms while investigating a serious crime so that if any other arms are found those can also be included in the document prepared by them.

33. The Designated Court has rejected the evidence of both the witnesses on consideration of other aspect that PW- 55 had stated that no search of the flat was made by the police party. While appreciating the evidence, the court must keep in mind that the powers of observation differ from person to person. What one may notice, other may not. An object or thing happened might reflect in the image of a person's mind, whereas it may go unnoticed on the part of another. It has not come out in the evidence or in the cross-examination that PW-55 was also a party to the search of the flat along with PW-50 after the arms were produced by the accused who had made a categorical statement that he had made a search of block no. 402 before the completion of the panchnama. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence, more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence, as a whole, and evaluate them to find out whether it is against the general tenor

A of the evidence given by the witnesses and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matter not touching the core of matter in issue, hyper-technical approach by taking sentence out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter, would not ordinarily permit rejection
B of the evidence as a whole.

34. On an overall reading of the statements made by PW-50 and PW-55, we do not find that the evidence of recovery of .38 revolver and the live cartridges from the accused Gurnamsingh was in any way shaken by some
C of the infirmities pointed out by the Designated Court. In fact, in our opinion, those discrepancies in the statements of PW-50 and PW-55 were not infirmities, but those statements are consistent with the general tenor of evidence.

35. When the accused Rizwan was arrested and made disclosure statement that he would point out the house of accused Gurnamsingh to
D whom he had handed over a revolver, it is natural for the police party to take accused Rizwan for seizure of the arms which, according to them, has a connection with the crime committed. When the prosecution has proved conscious and exclusive possession of block no. 402 by the accused Gurnamsingh, the statements of the witnesses cannot be brushed aside on
E the ground that the prosecution has not proved the title or ownership of the flat.

36. It is not necessary at all for the prosecution to prove the ownership of block no. 402, Girmar Building from where the firearm and the live cartridges were recovered. It is sufficient for the prosecution to prove that the accused
F Gurnamsingh and his close relations were occupants of block no. 402 so as to exclude the possibility of other persons concealing and keeping firearms in the premises of the flat. According to us, the prosecution has proved the seizure of the revolver and the live cartridges from the accused Gurnamsingh.

37. Under Section 5 of the TADA Act, any person found in possession
G of any arms and ammunition specified in Columns 2 and 3 of Category I or Category III(a) of Schedule I to the Arms Rules, 1962 in the notified area, then notwithstanding anything contained in any other law, would be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine. As per
H the Arms Rules, 1962, Schedule I Category III(a), "revolver and pistols" are prohibited arms in the notified area. It is not in dispute that Mumbai is a

notified area. The accused Gurnamsingh having been found in possession of A
.38 revolver, is guilty of offence under Section 5 of the TADA Act.

38. As regards respondent no.4-Shafiq Latif Sheikh, we do not find any
substantive evidence to connect this accused with the commission of crime.

39. Now, we shall take up the case of respondent no.7- Mohd. Mushraf B
Hussain Shaikh who was acquitted by the Designated Court.

40. It is the prosecution case against accused Mushraf that when all the
accused entered into conspiracy to kill Ramdas Nayak, they felt need to
collect arms, ammunitions and vehicles to transport the requisite arms and
ammunitions from Bharauch to Mumbai and thereafter to use the vehicle for C
transportation to the residence of Ramdas Nayak. Accused Mushraf was
conducting a motor garage and, therefore, accused Feroz Konkani and Rizwan
Mohd. approached Mushraf for making arrangement of car. They informed
him their plan of killing Ramdas Nayak and requested him to find out some
vehicle to be purchased. On he being approached, Mushraf started search for D
a suitable vehicle and he found that the owner of Super Motors had a car
for sale and accordingly purchased Fiat car No. MMU8373 from the employee
of Super Motors. The said car was used for transportation of weapons from
Bharauch to Mumbai and later on for the purposes of transport of the
accused assailants to the place of Ramdas Nayak. The police had seized the
same car from the place of incident. The Investigating Officer traced the E
owner of the car PW-11 Vijay Shah. In his statement before the Court, he has
admitted that he had sold the car to one Abbasbhai Saluji for the consideration
of Rs. 32,000/-. Abbasbhai Saluji was examined as PW-12 who identified
witness no. 11, the owner and transferor of the Fiat car. He further stated that
he sold the same car to one Abdul Salija. Abdul Salija was also examined as F
PW-13 who had accepted that he had purchased the Fiat car from Abbasbhai
Saluji. Thereafter he wanted to sell it; therefore, he approached the vehicle
dealer Hanifbhai and Hanifbhai sold the car to a person from Kerala and paid
to him Rs. 50,000/-. When Hanifbhai was examined by the prosecution as PW-
6, he deposed that he was carrying on business in the name and style of G
'Super Motors' at 107, Morland Road, near BEST Depot, Mumbai Central,
Mumbai. He used to purchase old vehicles and sell the same. He further
deposed that in the month of April, 1994, one Abbasbhai had brought a Fiat
car and requested him to sell it. On 10.5.1994, he went to pilgrimage at Makka
and returned to Mumbai on 19.6.1994. On his return, he came to know from
his employee that the car of Abbasbhai had already been sold but he could H
not tell the police the name of the purchaser. We are unable to find any

A effective help from the previous owners of the Fiat Car to link the accused persons with it. Prosecution was finally able to bring the employee of the shop from where the Fiat car, alleged to be used by the accused persons, was bought. However, no link could be established with the accused persons which is clear as per the observations of the Designated Court that the prosecution brought the employee in the witness box, but the employee was so afraid that he started shivering and before any question was asked to him with regard to his name etc. the said employee collapsed in the witness box. On 24.3.1998 when the matter was listed for evidence, prosecution could not bring the witness in the witness-box.

C 41. In spite of the best efforts made by the prosecution, the prosecution has failed to prove that the Fiat Car which was found standing at the place of incident was purchased by accused Mushraf to link him with the other accused persons and with the conspiracy which is alleged to have been hatched by the accused.

D 42. Another piece of evidence was brought on record by the prosecution to link Mushraf with the commission of the crime is that he was arrested from a hotel at Hyderabad, and to prove this fact the prosecution has examined PW-48 Deepak Deshpandey, the owner of Vaibhav Lodge, Hyderabad, who claimed that the accused Mushraf was residing in his lodge since 21.3.1995 and that he was arrested from this lodge by the police. The evidence of PW-48 shows that the accused Mushraf was residing in his lodge from 21.3.1995 to 28.4.1995. The incident took place at Mumbai on 25.8.1994 but the prosecution has not produced any evidence to indicate that during August, 1994 to March, 1995 the accused Mushraf was not present at Mumbai. The absence of the accused from the place immediately after the incident could not be established by the prosecution to draw any inference that the accused was absconding as he was connected with the commission of the crime.

G 43. It is urged by the learned counsel for the appellate-State that the accused Mushraf has made a confession before a police officer authorized to record the confession under Section 15 of the TADA Act, wherein the accused has admitted his guilt and his active participation in the commission of crime, which is a substantive piece of evidence; and that the Designated Court has committed an error in rejecting the confessional statement of the accused Mushraf.

H 44. Under Section 15 of the TADA Act, notwithstanding anything contained in the Indian Evidence Act, a confession made by an accused

before a police officer not lower in rank than a Superintendent of Police which is recorded by such police officer in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person. By Act No. 43 of 1993, such confessional statement was made admissible against the co-accused, abettor or conspirator for an offence committed under the TADA provisions or Rules made thereunder, provided that the co-accused, abettor or conspirator is charged and tried in the same case together with the accused. Sub-section (2) of Section 15 casts an obligation on the part of the police officer to explain to the person making the confession that he is not bound to make a confession and further to give a statutory warning that if he does so it may be used as evidence against him. Rule 15 of the Terrorist and Disruptive Activities (Prevention) Rules, 1987 (for short "the TADA Rules") lays down the mode of recording the confession and Rule 15(3)(b) requires the police officer to make a memorandum at the end of the confession to the effect that he has explained to the maker that he is not bound to make the confession and that the confession, if made by him, may be used against him; and that he has recorded the confession only on being satisfied that it was voluntarily made. Rule 15(5) requires that every confession recorded under Section 15 shall be sent forthwith to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate having jurisdiction over the area and the Magistrate shall forthwith forward the recorded confession received by him to the Designated Court taking cognizance of the offence.

45. A Constitution Bench of this Court vide judgment delivered on 11th March, 1994 in the matter of *Kartar Singh v. State of Punjab*, reported in [1994] 3 SCC 569, while upholding the constitutional validity of the TADA Act, 1987, has laid down certain guidelines so as to ensure that the confession obtained by the police officer not lower than the rank of Superintendent of Police is not tainted with any vice, but is in strict conformity with the well-recognised principles and fundamental fairness. The said guidelines are as under:

- (1) The confession should be recorded in a free atmosphere in the same language in which the person is examined and as narrated by him;
- (2) The person from whom a confession has been recorded under Section 15(1) of the Act, should be produced before the Chief Metropolitan Magistrate or the Chief Judicial Magistrate to whom the confession is required to be sent under Rule 15(5) along with

- A the original statement of confession, written or recorded on mechanical device without unreasonable delay;
- (3) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate should scrupulously record the statement, if any, made by the accused so produced and get his signature and in case of any complaint of torture, the person should be directed to be produced for medical examination before a Medical Officer not lower in rank than of an Assistant Civil Surgeon;
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- (4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no police officer below the rank of an Assistant Commissioner of Police in the Metropolitan cities and elsewhere of a Deputy Superintendent of Police or a police officer of equivalent rank, should investigate any offence punishable under this Act of 1987. This is necessary in view of the drastic provisions of this Act, more so when the Prevention of Corruption Act, 1988 under Section 17 and the Immoral Traffic Prevention Act, 1956 under Section 13, authorise only a police officer of a specified rank to investigate the offences under those specified Acts.
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- (5) The police officer if he is seeking the custody of any person for pre-indictment or pre-trial interrogation from the judicial custody, must file an affidavit sworn by him explaining the reason not only for such custody but also for the delay, if any, in seeking the police custody;
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- (6) In case, the person, taken for interrogation, on receipt of the statutory warning that he is not bound to make a confession and that if he does so, the said statement may be used against him as evidence, asserts his right to silence, the police officer must respect his right of assertion without making any compulsion to give a statement of disclosure.
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G 46. On the other hand, it is urged by the counsel for the respondent-accused that although the confessional statement was recorded by the police officer after the judgment of the Constitution Bench was delivered, yet the guidelines provided by the Court to safeguard and ensure the voluntary nature of the confessional statement made to the police officer were not complied with, apart from the fact that the evidence led by the prosecution does not indicate that the confession was made by the accused to the police officer voluntarily; and, therefore, the Designated Court has not committed

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any error in rejecting the so-called confessional statement given by the accused Mushraf. A

47. The confessional statement of the accused Mushraf was recorded by PW-42 T.A. Chavan. The confession was recorded on two dates. The accused Mushraf was first produced before PW-42 on 5.5.1995 and after asking certain preliminary questions and ascertaining the voluntary nature of the statement he was going to make, he was sent back in the police custody and was produced again on 8.5.1995 for recording his confessional statement from the police custody. PW-42, in his statement, stated that at the relevant time he was posted as Deputy Commissioner of Police, Zone-VI in Mumbai. His office was situated at Mulund Police Station. On 5.5.1995, he received a letter from the Additional Commissioner of Police, Mumbai directing him that the accused Mushraf had disclosed his intention to give a confessional statement and he should, therefore, do the needful. On receipt of the communication, he contacted PI Kadam who was the Investigating Officer and directed him to produce the accused before him. The accused was produced before him on 5.5.1995 at about 6.30 p.m. along with another accused Mohd. Harun. He recorded the statement of Harun first and immediately thereafter he called the accused Mushraf in his chamber and after asking the preliminary questions for ascertaining the wish of the accused to make voluntary confession, he sent them back on 5.5.1995 to P.I. Crime of Mulund Police Station to be kept in custody. The accused was recalled on 8.5.1995 for the purpose of recording his confession to PW-42's chamber and thereafter questions were asked to ascertain whether he was still willing to give the confession and on ascertaining that he was so willing his statement was recorded in a typed format by the typist. The contents of the confession were explained to the accused who accepted the same and his signature was obtained on the confessional statement. The confessional statement recorded on 8.5.1995 is Exhibit no. 120. However, we have noticed that in his cross-examination, PW-42 admitted that he neither cared to ascertain the date of the arrest of the accused nor confirmed as to where the accused had been kept in custody from the time of his arrest till he was produced for recording of his confessional statement. The witness also admitted that he had not read the procedure given by the High Court for recording the confessional statement, which was a part of the criminal manual. In the cross-examination, when provisions of Rule 15(3)(b) of the TADA Rules were brought to his notice, he fairly admitted that the required certificate was not with the same words and language provided in the provisions. As per the officer, he had embodied the gist of the requirements provided under the Rule for certificate to be given H

A by the officer recording the confessional statement. We have noticed that the certificate does not mention that he had told the accused that it was not binding on him to give the confessional statement. The officer also admitted that he never asked the accused as to why he felt the necessity to give the confessional statement. Admittedly, the accused was also not produced before the Magistrate as laid down in the judgment of the Constitution Bench.

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48. On recording of confessional statement under Section 15 of the TADA Act, a 2-Judge Bench of this Court in *Ayyub v. State of Uttar Pradesh*, [2002] 3 SCC 510 has held as under :

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“18. Section 15 of the TADA Act altered the fundamental rules of evidence given in the Evidence Act, which stood the test of time for over a century. Under Section 25 of the Evidence Act, a confession made to a police officer by a person accused of an offence shall not be proved against him. The power to record judicial confession is given to the Magistrate and strict and rigorous guidelines have been laid down in Section 164 Cr.P.C. That apart, many High Courts also have framed rules giving detailed procedure for recording confession. Confession is an admission of guilt. Normally, nobody would like to admit his guilt as he is fully aware that the same would be used against him. That apart, there is constitutional right for the accused that he shall not be subjected to any ‘testimonial compulsion’. Under Article 20(3) of the Constitution, the accused person has a protection from being compelled to be a witness against himself. As the confession made under Section 15 of the TADA Act is made admissible in evidence, the strict procedure laid down therein for recording confession is to be followed. Any confession made in defiance of these safeguards cannot be accepted by the court as reliable evidence. The confession should appear to have been made voluntarily and the police officer who records the confession should satisfy himself that the same had been made voluntarily by the maker of that statement. The recorded confession must indicate that these safeguards have been fully complied with.”

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Further, in *Simon and Ors. v. State of Karnataka*, [2004] 1 SCC 74 this Court has held as under:

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“22. It is the duty of the recording officer to ensure that the confession is made voluntarily and out of free will by the accused without any pressure. Recording of confessional statement is not a

mechanical exercise. A duty has been cast and considerable amount of confidence has been reposed in a senior officer under Section 15 of the TADA Act in giving him the duty to record the confession and making such a confession before a police officer admissible in evidence.” A

In *S.N. Dube v. N. B. Bhoir and Others*, [2000] 2 SCC 254, a 2-Judge Bench observed as follows: B

“31.... Though giving of the statutory warning, ascertaining voluntariness of the confession and preparation of a contemporaneous record in the 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 the mandatory requirements of a provision are 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 with 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 the sanctity of the confession would get adversely affected merely because the certificate and the memorandum are not separately written but are mixed up or because different words conveying the same thing as is required are used by the recording officer.” C
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Also, in *Hardeep Singh Sohal and Ors v. State of Punjab through C.B.I.*, [2004] 11 SCC 612, this Court has held as under:

“17... The certificate should have specifically stated that he had explained to the person making the confession that he was not bound to make the confession and, if he does so, the confession he may make may be used against him and that he believed that this confession was voluntarily made and it was taken in his presence and recorded by him and was read over to the person making it and admitted by H

A him to be correct, and it contained a full and true account of the statement made by him.”

49. From the aforementioned statements of law enunciated by this Court, it is apparent that considerable amount of confidence has been reposed on the senior police officials for recording the confessional statement. A confession statement to police is not admissible under the general law connected with administration of criminal justice, which is made admissible under the TADA Act, and, therefore, the strict compliance of the procedure prescribed under Section 15 of the TADA Act read with Rule 15 of the TADA Rules is expected to be followed. Any confession made in defiance of the safeguards provided therein, would not be relied upon by a court. The confession should be made voluntarily without there being any force or pressure put on, or allurement or inducement given to, a person who is voluntarily admitting his guilt. Under Section 25 of the Indian Evidence Act, a confession made to the police officer is not admissible in evidence to be considered by a court. Although there are certain exceptions in the preceding provisions, but the fact remains that as a rule a confession made to the police officer is not made admissible under the Evidence Act. The idea appears to be that any statement made to a police officer who is connected with the investigation and prosecution of a person, would not be taken as evidence. Under Section 15 of the TADA Act, if a confession made by the accused to a police officer not lower than the rank of Superintendent of Police is made admissible, it would still be a confession made to the police officer, and thus inbuilt safeguards have been provided under Section 15 of the TADA Act read with Rule 15 of the TADA Rules so as to lend credence to the confession made to the police officer, it being voluntarily and without any force or pressure and allurement or inducement. The Constitution Bench of this Court in *Kartar Singh* (supra) has also laid down the condition to establish the voluntary nature of the confession.

50. Under sub-rule (3)(b) of Rule 15 of the Rules, the certificate which is required to be given by the police officer should be as under:

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

Sd/- Police Officer" A

.From a bare reading of the above certificate, it is clear that it is necessary for the police officer to certify that he has explained to the accused that the accused is not bound to make a confession and if he does so such confession may be used as evidence against him. It is further required to be recorded that he believes that the confession was voluntarily made. He has to record that the confessional statement has been taken in his presence and hearing and recorded by him. The confessional statement should be read over to the person making it and admitted by him to be correct and it should be certified that it contains a full and true account of the statement made by the accused. The certificate which is required to be given by the police officer is not a mere formality, but it is for the purposes of ascertaining that the police officer has recorded the confession keeping in mind and being fully aware of the fact that the confession recorded by him is a voluntary confession and with the information available to the accused that he is not bound to make such confession and if he does so it will be used as evidence against him. A duty is cast on the police officer who is to record the confession to bring at the relevant time these facts to the notice of the person whose confession is going to be recorded. B C D

51. In the present case, we have gone through the certificate given by the police officer (PW-42) at the bottom of the confessional statement, translated version of which is to the following effect:- E

"I am satisfied that the aforementioned confession has been given by the accused voluntarily and that no pressure or threat has been given to him. I believe that the accused knows that the statement will be used as evidence in the Court and he also knows that he is not compelled to give such statement. He has signed the statement after he has been explained the statement in Hindi. The statement commenced at 9.00 and completed at 10.25." F

From the aforesaid certificate, it does appear that compliance of Rule 15(3) (b) of the TADA Rules has been done in a mechanical manner. It does only certify that it is the satisfaction of the recording officer that the facts that the accused is not bound to make the confession and if he does so it shall be used as evidence against him, were known to the accused. However, there is no certification that the statement was recorded in the presence and hearing of the police officer; nor the statement has been admitted to be correct by the accused; and that the statement contained a full and true account of what G H

A was stated by the accused.

52. We have also noticed the fact that in spite of the directions issued by this Court in *Kartar Singh* (supra), the accused whose statement was recorded under Section 15 of the TADA Act on 5.5.1995 and 8.5.1995 was not produced before the Chief Metropolitan Magistrate or Chief Judicial Magistrate to whom the statement is required to be sent under Rule 15(5) along with original statement of confession. Instead, the accused was sent back to the police custody after recording of his confessional statement. Though this Court in later cases like *S.N. Dube's case* (supra) and *Lal Singh v. State of Gujarat and Anr.*, [2001] 3 SCC 221 has held that compliance of the guidelines issued in *Kartar Singh* (supra) was not mandatory as they were not incorporated in the Act or in the Rules, nevertheless, if proved to be followed they would have added a ring of credibility to the prosecution story, particularly when he was arrested on 28.4.1995 and there was ample opportunity to do so.

53. The Designated Court on overall consideration of the evidence brought on record in regard to the confessional statement recorded of the accused Mushraf has not found it voluntary. We have been taken through the reasoning given by the Designated Court. On considering the evidence independently and legal provisions, we are of the view that the Designated Court has not committed any error in rejecting the confessional statement of accused Mushraf. We do not find that the acquittal of Mushraf is contrary to the established principles of law or that the evidence which has come on record proves the case against Mushraf beyond reasonable doubt for his involvement in the commission of crime.

54. For the aforesaid reasons, the order of acquittal recorded by the Designated Court in respect of all accused persons except accused no. 8/ respondent no. 5 herein-Gurnamsingh, is confirmed. We find respondent no. 5-Gurnamsingh guilty for the offence punishable under Section 5 of the TADA Act and accordingly convict him. He is sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.2,000/- only and in default to suffer rigorous imprisonment for six months. The said accused is on bail. He shall be immediately taken into custody to serve the sentence.

55. The appeal stands disposed of.

B.S.

Appeal disposed of.

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