ASIAN CENTRE FOR HUMAN RIGHTS

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DEATH PENALTY THROUGH SELF INCRIMINATION IN INDIA

1. Executive summary

Death penalty is the harshest punishment. It extinguishes life and provides no scope for correction in case of an error of judgement. Therefore, the proof for awarding capital punishment must be of the highest standards.

One of the cardinal principles of criminal jurisprudence to ensure the highest standard of proof is the prohibition of self incrimination i.e. no person be compelled to testify against himself or to confess guilt. It is derived from the very notion that everyone must be presumed innocent until proven guilty. This implies that it is for the prosecution to probe the guilt through evidence and not through confessional statements which are taken under duress, torture, intimidation, inducements etc.

Prohibition on self-incrimination is guaranteed under Article 20(3) of the Constitution of India and further codified under Section 25 of the Indian Evidence Act, 1872 and Sections 161, 162 and 164 of the Code of Criminal Procedure (CrPC), 1973. India further accepted this obligation by ratifying the International Covenant on Civil and Political Rights in 1979 without any reservation to Article 14(3)(g) which prohibits self-incrimination.

Yet, India's failure to comply with this cardinal principle of criminal jurisprudence has once again come to the fore following the rejection of mercy plea of death row convict Surinder Koli.[1] Koli had effectively been convicted solely based on his confession made before the police and confirmed in his statement before the Magistrate under Section 164 of the CrPC. However, Koli in his letter to the Supreme Court had alleged that he was subjected

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to torture in police custody for extracting the confession; and that the Magistrate had failed to notice the telltale signs of torture such as missing fingernails and toenails of himself.[2]

In fact, India had legalised self-incrimination under Section 15 of the Terrorist and Disruptive Activities (Prevention) Act (TADA)[3] by making confessions made to a police officer admissible as evidence. Section 15 of the TADA excluded the application of the relevant provisions of the Code of Criminal Procedure Act, 1973 or the Indian Evidence Act, 1872 to make confessional statement made by an accused before a police officer not below the rank of Superintendent of Police admissible in the trial of such person or co-accused, abettor or conspirator, for an offence under the TADA or rules made thereunder.

The TADA was allowed to lapse in 1995 in the light of the massive national protests against its abuse especially against the minorities. However, it was replaced by the Prevention of Terrorism Ordinance (POTO), 2001 which was subsequently enacted as the Prevention of Terrorism Act (POTA) in 2002.[4] With some modifications, Section 32 of the POTA preserved the same provision contained in Section 15 of the TADA.

Once again, in the light of the massive protest against the POTA because of its sheer abuse, in 2004, the Government of India repealed the POTA, 2002 through an ordinance[18] and effected amendments to the Unlawful Activities (Prevention) Act, 1967 (UAPA) to deal with terrorist offences. A number of provisions of the repealed POTA were incorporated in the UAPA but the Government did not retain Section 32 of the POTA given its history of abuse.

However, the damage had already been done as torture has been an integral part of investigation and administration of criminal justice to extract confessions. Section 15 of the TADA and Section 32 of the POTA essentially allowed extraction of confession and manipulation of evidence by the police. In a documentary on Perarivalan @ Arivu released in November 2013 former Superintendent of Police of the Central Bureau of Investigation (CBI) Mr P V Thiagarajan admitted that he had manipulated the confessional statements of A.G. Perarivalan @ Arivu, one of the accused in the assassination of former Prime Minister Rajiv Gandhi to join the missing links in respect of charge of bomb making in order to secure convictions. Thiagarajan said that Perarivalan, in his confession before him, admitted that he purchased the battery. In the words of Thiagarajan who stated "*But he (Arivu) said he did not know the battery he bought would be used to make the bomb. As an investigator, it put me in a dilemma. It wouldn't have qualified as a confession statement without his admission of being part of the conspiracy. There I omitted a part of his statement and added my interpretation. I regret it*."[5] Perarivalan is one of the three accused whose death sentence was confirmed by the Supreme Court in *State through Superintendent of Police, CBI/SIT vs. Nalini and Ors*.[6]

Out of 76,000 arrests made under the TADA, the government secured conviction in just 0.41 per cent cases[16] and a large majority of these convictions were secured solely based on confessions made under Section 15 of the Act. The same was repeated with respect to convictions under the POTA by abusing Section 32. In a number of cases as discussed in this paper, the Supreme Court had confirmed death penalty on those who had been convicted solely based on their confessional statements under the TADA and the POTA. Many of these convicted prisoners would have been acquitted without their confessional statements. The damage done to criminal justice system cannot be rectified by police officers like Mr P V Thiagrajan confessing their own illegal acts that impaired the right to life.

Many of the cases under the TADA and the POTA are still being adjudicated given the judicial delay in India. There is a need to reinforce the supremacy of the cardinal principles of administration of justice to prohibit award of death sentences solely based on self- incrimination.

2. Constitutional and other legal guarantees against self-incrimination and their violations by India

i. Legal guarantees against self-incrimination

The legal guarantees against self-incrimination are unambiguous and clear.

Article 20(3) of the Constitution provides that "*No person accused of any offence shall be compelled to be a witness against himself*". This provision embodies the principle of protection against compulsion of self-incrimination which is one of the fundamental canons of the administration of criminal justice. The Supreme Court in a number of decisions explained the intendment of Article 20(3).[7]

> Despite the diabolical nature of the murders at Nithihari, the conviction of Surinder Koli solely based on his confession made before the police and confirmed in his statement before the Magistrate under Section 164 of the CrPC shall continue to haunt the Indian judiciary, more so if Koli is hanged before the conclusion of the trial of other pending cases; and co-accused Maninder Singh Pandher is acquitted.

This guarantee has further been codified under the Indian Evidence Act, 1872.

Under section 25 of the Evidence Act of 1872 there is a clear bar in making use of the statement of an accused given to a police officer.[8] This section provides that no confession made to a police officer shall be proved as against a person accused of any offence. Section 26 also provides that no confession made by any person whilst he is in custody of a police officer shall be proved as against such person unless such confession is made in the immediate presence of a Magistrate.[9]

The only exception is provided under section 27 which serves as a proviso to Section 26. Section 27 provides that only so much of information whether amounts to confession or not, as relates distinctly to the fact thereby discovered, in consequence of that information received from a person accused of any offence while in custody of the police can be proved as against the accused.[10]

The Code of Criminal Procedure under which trials are conducted also bars the use of self-confession. Section 161 of the CrPC empowers a police officer making an investigation to examine orally any person supposed to be acquainted with the facts and circumstances of the case and to reduce into writing any statement made to him in the course of such examination[11] while section 162 states that no statement recorded by a police officer, if reduced into writing, be signed by the person making it and that the statement shall not be used for any purpose save as provided in the Code and the provisions of the Evidence Act.[12] The ban imposed by Section 162 applies to all the statements whether confessional or otherwise, made to a police officer by any person whether accused of any offence or not during the course of the investigation under Chapter XII of the Code.

Section 164 of the Code of Criminal Procedure which provides for recording of confessions and statements by Magistrates by complying with the legal formalities and observing the statutory conditions also provides that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.[13]

Not surprisingly, India had no reservation to ratify the International Covenant on Civil and Political Rights which under Article 14(3)(g) provides that "*In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (g) Not to be compelled to testify against himself or to confess guilt.*"

In Indian context, the prohibition on the use of confessional statement as evidence against oneself must be seen in the context of use of torture as the key instruments for administration of justice and counter-terrorism measures. From 2001 to 2010, the National Human Rights Commission (NHRC) recorded 14,231 deaths in police and judicial custody in India i.e. 4.33 persons per day. This includes 1,504 deaths in police custody and 12,727 deaths in judicial custody from 2001-2002 to 2009-2010. These deaths reflect only a fraction of the problem with torture and custodial deaths in India. Not all the cases of deaths in police and prison custody are reported to the NHRC. The NHRC does not have jurisdiction over the army and para-military forces under Section 19 of the Human Rights Protection Act, 1993. The Asian Centre for Human Rights (ACHR) has consistently held that about 99.99% of deaths in police custody can be ascribed to torture, among others, to extract confessions and/or bribes, and occur within 48 hours of the victims being taken into custody.[14]

ii. Legalisation of self-incrimination

In clear violation of the constitutional and statutory bar against self-incrimination, the Government of India introduced the Terrorist and Disruptive Activities (Prevention) Act, 1985 incorporating a non-obstante clause under section 15 of the TADA to exclude the application of the relevant provisions of the Code of Criminal Procedure Act, 1973 and the Indian Evidence Act, 1872 to make confessional statement made by an accused before a police officer not below the rank of Superintendent of Police admissible in the trial of such person or co-accused, abettor or conspirator, for an offence under the TADA or rules made thereunder. Section 15 of the TADA provides,

> "15. Certain confessions made to police officers to be taken into consideration.-
>
> (1) Nothwithstanding anything in the Code or in the Indian Evidence Act, 1872, but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either 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 [or co-accused, abettor or conspirator] for an offence under this Act or rules made thereunder:
>
> [Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused].
>
> (2) The police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily."[15]

The TADA was grossly abused and mis-used. Out of 76,000 arrests under the TADA, the conviction rate was just 0.41 per cent[16] and many of these convictions were based on confession made under Section 15 of the Act.

The TADA was allowed to lapse in 1995[17] only to be replaced by the Prevention of Terrorism Ordinance (POTO), 2001 which was subsequently enacted as the Prevention

of Terrorism Act, 2002. However, Section 32 of the POTA preserved the same provision contained in Section 15 of the TADA as given below:

"32. Certain confessions made to police officers to be taken into consideration.-

1. Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical or electronic device like cassettes, tapes or sound tracks from out of which sound or images can be reproduced, s all be admissible in the trial of such person for an offence under this Act or the rules made thereunder.

2. A police officer shall, before recording any confession made by a person under sub-section (1), explain to such person in writing that he is not bound to make a confession and that if he does so, it may be used against him: Provided that where such person prefers to remain silent, the police officer shall not compel or induce him to make any confession.

3. The confession shall be recorded in an atmosphere free from threat or inducement and shall be in the same language in which the person makes it.

4. The person from whom a confession has been recorded under sub-section (1), shall be produced before the Court of a Chief Metropolitan Magistrate or the Court of a Chief Judicial Magistrate along with the original statement of confession, written or r corded on mechanical or electronic device within forty-eight hours.

5. The Chief Metropolitan Magistrate or the Chief Judicial Magistrate, shall, record the statement, if any, made by the person so produced and get his signature or thumb impression and if there is any complaint of torture, such person shall be directed o be produced for medical examination before a Medical Officer not lower in rank than an Assistant Civil Surgeon and thereafter, he shall be sent to judicial custody."

> India's fight against terrorism has been shamed by legalisation of self-incrimination under the TADA and Section 32 of the POTA. That out of 76,000 arrests made under the TADA, conviction could only be secured in only 0.41 per cent cases, that too mainly based on self-incrimination, shows the extent of use of torture in the administration of criminal justice.

In 2004, the Government of India repealed the POTA, 2002 through an ordinance[18] and effected amendments to the Unlawful Activities (Prevention) Act, 1967 (UAPA) to deal with terrorist offences.[19] A number of provisions of the repealed POTA were incorporated in the UAPA but the Government did not retain Section 32 of the POTA.

3. Death sentence awarded based on self-incriminatory confessions under the TADA and the POTA

The admissibility of confession made to police officers as evidence during the trial under the TADA and the POTA had resulted into a number of persons being convicted solely based on confessions made to the police officers allegedly under torture. It goes without saying that many of

those who were given death sentence would have actually been declared innocent had they been tried under the Indian Penal Code (IPC)/the Code of Criminal Procedure wherein self-incrimination would not have been admissible.

Case 1: Devender Pal Singh Bhullar, Delhi[20]

Brief facts of the case[21]

Condemned prisoner Devender Pal Singh Bhullar was charged with criminal conspiracy for alleged assassination bid on Mr. M.S. Bitta, the then President of Indian Youth Congress(I) at 5, Raisina Road, New Delhi on 11.09.1993. The prosecution accused Bhullar and co-accused viz. Kuldeep, Sukhdev Singh, Harnek and Daya Singh Lahoria of being members of a terrorist organization called Khalistan Liberation Force, and carrying out assassination attempt on the life of Mr. Bitta by causing bomb blasts in which 9 persons were killed.

During the night between 18th and 19th January 1995, the German authorities deported Bhullar from Frankfurt to New Delhi and handed him over to the police at the Indira Gandhi International Airport Airport, New Delhi and he was arrested. Prosecution alleged that immediately upon his arrest, Bhullar tried to swallow cyanide capsule. However, he was prevented.

Decision of the Designated TADA Court[22]

By judgment and order dated 25th August 2001, in Sessions Case No. 4 of 2000, the Designated Court-1, New Delhi convicted Bhullar for the offence punishable under Section 3(2)(i) of the TADA, 1987 and Section 120B read with Section 302, 307, 326 324, 323, 436 and 427 of the Indian Penal Code and sentenced him to death. He was also sentenced to suffer rigorous imprisonment for five years for the offence punishable under Section 4 and 5 of the TADA.

Other accused Daya Singh Lahoria, who was extradited from USA to India, was also arrested. He was also tried along with Bhullar but was acquitted by the Designated Court on the ground that there was no evidence against him and that he had not made any confessional statement. The Court also observed that there was not an iota of material on record to corroborate confessional statement made by accused Bhullar against co-accused Daya Singh Lahoria and in the absence of corroboration, Daya Singh Lahoria was acquitted on benefit of doubt.

Basis of conviction[23]

Bhullar's conviction was based solely on his confessional statements recorded by Deputy Commissioner of Police B.S. Bhola under Section 15 of the TADA. There was no corroborative evidence against Bhullar.

Judgement of the Supreme Court[24]

Against the judgment and order dated 25th August 2001, Bhullar had filed Criminal Appeal No. 993 of 2001 and for confirmation of death sentence, the State had filed Death Reference Case (Crl.) No. 2 of 2001 before the Supreme Court.

By majority of 2:1, the Supreme Court confirmed the conviction and death sentence passed by the trial Court and dismissed Bhullar's appeal.

One of the three judges, Justice M.B. Shah delivered a dissenting judgement. Justice Shah ruled that Bhullar's appeal be allowed, trial Court's judgement and order convicting him be set aside and he be released forthwith if not required in any other case.

Non-corroboration of confessional statement with evidence[25]

Per Justices Arijit Passayat and B.N. Agarwal (Majority view)

On the plea that Bhullar cannot be convicted solely on the basis of his alleged confessional statements, the majority view held that whenever an accused challenges that his confessional statement is not voluntary, the initial burden is on the prosecution for it has to prove that all requirements under Section 15 of the TADA and Rule 15 of the Terrorist and Disruptive Activities (Prevention) Rules, 1987, have been complied with. Once this is done, the prosecution discharges its burden and then it is for the accused to show and satisfy the Court that the confessional statement was not made voluntarily. The confessional statement of the accused can be relied upon for the purpose of conviction, and no further corroboration is necessary if it relates to the accused himself.

The majority view further stated that once it is held that the confessional statement is voluntary, it would not be proper to hold that the police had incorporated certain aspects in the confessional statement which were gathered in the investigation conducted earlier. It is to be noted further that the appellants' so called retraction was long after he was taken into judicial custody. While he was taken to judicial custody on 24.3.1995, after about a month, he made a grievance about the statement having been forcibly obtained. This is clearly a case of afterthought. Since the confessional statement was voluntary, no corroboration for the purpose of its acceptance is necessary.

On the plea that prosecution had failed to place any material to show as to why accused would make a confessional statement immediately on return to India, the majority view held that acceptance of such a plea would necessarily mean putting of an almost impossible burden on the prosecution to show something which is within exclusive knowledge of the accused. It can be equated with requiring the prosecution to show motive for a crime. One cannot normally see into the mind of another. What is the emotion which impels another to do a particular act is not expected to be known by another. It is quite possible that said impelling factors would remain undiscoverable. After all, the factors are psychological phenomenon. No proof can be expected in all cases as to how mind of the accused worked in a particular situation. Above being the position, trial Judge has rightly held the appellant to be guilty.

Per Justice M.B. Shah (Minority view)

On the question of conviction of the appellant solely on the basis of alleged confessional statement, the minority view held that before solely relying upon the confessional statement, the Court has to find out whether it is made voluntarily and truthfully by the accused. Even if it is made voluntarily, the Court has to decide whether it is made truthfully or not.

On the plea of non-corroboration of confessional statements with evidence, the minority view held that there was nothing on record to corroborate the aforesaid confessional statement. Police could have easily verified the hospital record to find out whether D. S. Lahoria went to the hospital and registered himself under the name of V. K. Sood on the date of incident and left the hospital after getting first aid. In any set of circumstances, none of the main accused, i.e. Harnek or Lahoria was convicted. In these set of circumstances, without there being corroborative evidence, it would be difficult to solely rely upon the so-called confessional statement and convict the accused and that too when the confessional statement is recorded by the Investigating Officer.

Case 2: Santhan, Murugan, Arivu and Nalini, Tamil Nadu

Brief facts of the case[26]

Rajiv Gandhi, a former Prime Minister of India was assassinated on 21-5-1991 at a place called Sriperumpudur in Tamil Nadu. The assassin was an

adolescent girl named Thanu who was made into a human bomb who got herself exploded from a very close proximity to the visiting former Prime Minister. In the explosion lives of 18 others were lost.

It was the case of the prosecution that a criminal conspiracy was hatched and developed by the hardcore cadre of the Liberation Tigers of Tamil Eelam (LTTE) cadre which spread over a long period of 6 years commencing from 6 July 1987 and stretching over till May 1992. The main objects of the conspiracy as described by the prosecution were: (1) to carry out acts of terrorism and disruptive activities in Tamil Nadu and other places in India during the course of which to assassinate Rajiv Gandhi and others, (2) to cause disappearance of evidence thereof, (3) to harbour all the conspirators living in India and (4) to escape from being apprehended and to screen all those who were involved in the conspiracy from legal consequences.

On completion of the investigation the CBI laid charge-sheet against all the 26 accused besides Veluppillai Piribhakaran (the Supremo of LTTE), Pottu Omman (the Chief of intelligence wing of LTTE) and Akila (Deputy Chief of intelligence) for various offences including the main offence under Section 302 read with Section 120-B and Sections 3 & 4 of the TADA.

Decision of the Designated TADA Court[27]

The Special Judge, after a marathon trial, convicted all the 26 accused for all the main offences charged against each of them. He sentenced all of them to the extreme penalty under law (i.e. death) for the principal offence under Section 302 read with Section 120-B IPC. In addition thereto Nalini (A-1) was again sentenced to death under Section 3(1)(ii) of the TADA. Ravichandran (A-16) and Suseendran (A-17) were further convicted under Section 5 of TADA and were sentenced to imprisonment for life. For other offences of which the accused were convicted the trial court awarded sentences of lesser terms of imprisonment.

Judgement of the Supreme Court[28]

The Supreme Court confirmed the conviction for the offence under Section 120B read with Section 302, IPC against Nalini, Santhan @ Raviraj, Murugan @ Thas, Robert Payas, Jayakumar, Ravichandran @ Ravi and Perarivlan @ Arivu while the Court set aside the conviction and sentence for the offences under Section 302 read with Section 120B passed by the trial court on the remaining accused.

The Court also confirmed the death sentence passed by the trial court on Nalini, Santhan, Murugan and Perarivalan @ Arivu whereas the death sentence imposed on Robert, Jayakumar and Ravichandran was altered to imprisonment for life. The death sentence of Nalini was later commuted to life imprisonment by the Governor of Tamil Nadu.

The Court also directed to release all the remaining accused persons forthwith except the convicted accused.

Major issues before the Supreme Court[29]

Issue no. 1: Whether the offences in the present cases constitute "Terrorist Act" as defined in Section 2(1) (h) or do the same fall under Sub-section (2) or Sub-section (3) of Section 3 of the Terrorists and Disruptive Activities Act.

Opinion of the Supreme Court: The Supreme Court held that the offences in the present case did not constitute terrorist act as defined in the TADA. The judgement reads,

> "64. In view of the paucity of materials to prove that the conspirators intended to overawe the Government of India or to strike terror in the people of India we are unable

to sustain the conviction of offences under Section 3of the TADA."

Issue no. 2: Whether the conspirators did any "disruptive activities" so as to be caught in the dragnet of Section 4(1) of the TADA

Opinion of the Supreme Court: The Court held that none of the conspirators can be caught in the dragnet of Sub-section (3) of Section 4 of the TADA.

Issue no. 3: Whether a confession made by an accused person under Section 15 of the TADA can be used as substantive evidence against co-accused

Opinion of the Supreme Court: The Court held that that confessional statement made by an accused after his arrest, if admissible and reliable, can be used against a confessor as substantive evidence, but its use against the other co-accused would be limited only for the purpose of corroboration of other evidence.

Issue no. 4: Whether the charges have been proved beyond reasonable doubts.

Opinion of the Supreme Court: The Court held that the prosecution had successfully established that Rajiv Gandhi was assassinated at 10.19 P.M. on 21.5.1991 at Sriperumpudur by a girl named Thanu who became a human bomb and got herself exploded in the same event; and that altogether 18 persons, including the above two, died in the said explosion. There is overwhelming evidence to show that assassination of Rajiv Gandhi was resulted from a conspiracy to finish him. It was further held that it is also established by the prosecution beyond doubt that Sivarasan @ Raghuvaran who was a top brass of LTTE was one of the kingpins of the said conspiracy.

Miscarriage of justice: Manipulation of confession statements by the Investigation Officer

As it is reported to be admitted by the investigation officer CBI SP V. Thiagarajan, serious miscarriage of justice occurred in this case because of manipulation of confessional statement of A.G. Perarivalan @ Arivu (Accused no.18) in the case. In a documentary on Perarivalan @ Arivu released in November 2013 former Superintendent of Police of the Central Bureau of Investigation (CBI) Mr P V Thiagarajan admitted that he had manipulated the confessional statements of A.G. Perarivalan @ Arivu, one of the accused in the assassination of former Prime Minister Rajiv Gandhi to join the missing links in respect of charge of bomb making in order to secure convictions. Thiagarajan said that Perarivalan, in his confession before him, admitted that he purchased the battery. He reportedly regretted having done that. In the words of Thiagarajan who stated, *"But he said he did not know the battery he bought would be used to make the bomb. As an investigator, it put me in a dilemma. It wouldn't have qualified as a confession statement without his admission of being part of the conspiracy. There I omitted a part of his statement and added my interpretation. I regret it."*[30] Perarivalan was one of the three accused whose death sentence had been confirmed by the Supreme Court.

> Former Superintendent of Police of the Central Bureau of Investigation Mr P V Thiagarajan admitted that he had manipulated the confessional statements of A.G. Perarivalan @ Arivu who was sentenced to death in the Rajiv Gandhi murder case. Can the belated regret expressed of Thiagarajan undo the award of death sentence to Arivu? Is not the time for the Court to take action for clear cut case of perjury?

It is imperative to point out the contradictory opinions of the Supreme Court in this case. The

apex court ruled that the offences committed by the accused constituted neither terrorist activities nor disruptive activities as defined in the TADA. The Supreme Court rightly dropped the charges under the TADA and awarded sentences under the IPC. But, contrarily the apex court upheld the consfessional statements of some of the accused extracted under Section 15 of the TADA as substantive evidence against the confessors despite the accused only being convicted and sentenced under the IPC. Even though Section 12 of the TADA provides for joint trial of offences under the TADA and IPC, there is no doubt that the use of the confessional statement taken under the TADA for conviction under the IPC offences does not meet the international standards on fair trial as the Supreme Court had already struck down the charges under the TADA. As stated above, the CBI investigator Mr. Thiagarajan also admitted having manipulated the confessional statements of one of the death row convicts to nail the accused and secure death penalty on the accused.

Case 3: Adambhai Sulemanbhai Ajmeri & others, Gujarat

Brief facts of the case[31]

On 24.09.2002 at about 4.30 p.m., two persons armed with AK-56 rifles, hand grenades etc. entered the precincts of the Swaminarayan Akshardham temple situated at Gandhinagar, Gujarat from gate No.3. They fired indiscriminately towards the children, games and rides and started throwing hand grenades. In the attack 33 people were killed and more than 85 people were injured. The two assailants, also known as *fidayeens* were killed in the operation by the security forces.

Among others, the accused were charged for offences under Sections 120B, 121, 123, 124A, 153A, 302, 307 IPC read with Sections 25(1AA) 27 and 29 of the Arms Act, Sections 3, 4 and 6 of the Explosive Substances Act and Sections 3(1)(a) and (b), 3(3), 4, 20 and 21(2) (b) of the Prevention of Terrorism Act (POTA) in the POTA case No. 16 of 2003.

Judgement of the Special Court (POTA)[32]

The Special Court (POTA) framed the aforesaid charges and sentenced the accused persons on conviction. By judgment dated 01.07.2006 the Special Court sentenced the accused as under:

Accused No.1 Altaf Malek was sentenced to rigorous imprisonment for 5 year for the offences under section 22 (1) of the POTA; Accused No.2 Adambhai Ajmeri was awarded various sentences ranging from 7 year rigorous imprisonment to death penalty for the offences under different provisions of a number of Acts including the POTA; Accused No.3 Mohammed Salim Hanif Sheikh was imposed sentences ranging from 5 years rigorous imprisonment to life imprisonment for the offences under different provisions of different Acts including the POTA; Accused No. 4 Abdul Qaiyum Muftisaab Mohmed Bhai was awarded various sentences ranging from 3 year rigorous imprisonment to death penalty for the offences under various provisions of the different penal laws including the POTA; Accused No.5 Abdullamiya Yasinmiya was awarded 10 years rigorous imprisonment; and Accused No.6 Chand Khan was awarded various sentences ranging from 10 year rigorous imprisonment to death penalty. The aforesaid sentences imposed upon each accused person were ordered to run concurrently.

Basis of conviction

Convictions were based on confessional statements allegedly extracted under torture and fabricated evidences.

Judgment of the High Court

By judgement and order dated 01.06.2010 in Criminal Confirmation Case No.2 of 2006 along with Criminal Appeal Nos. 1675 of 2006 and 1328

of 2006, the High Court of Gujarat at Ahmedabad confirmed their conviction and sentences awarded by the Special Court.

Judgement of the Supreme Court[33]

Aggrieved by the impugned judgment and order of the High Court of Gujarat, all the accused persons except A-1 had appealed before the Supreme Court challenging the correctness of their conviction and sentences imposed upon them, urging various legal and factual grounds in support of the questions of law raised by them. By judgement and order dated 16.05.2014, the Supreme Court set aside the conviction and sentence as imposed by the Special Court (POTA) and confirmed by the High Court of Gujarat and acquitted the accused appellants.

It is pertinent to reproduce the findings of the Supreme Court on the issues framed by it for purpose of adjudication of this case. The same are stated herein below:

Issue no.1: Whether sanction given by the Gujarat State Government dated 21.11.2003 in this case is in compliance with Section 50 of the POTA?

Opinion of the Supreme Court: "77. However, the present case does not show that the sanctioning authority had applied its mind to the satisfaction as to whether the present case required granting of sanction. The prosecution had failed to prove that the sanction was granted by the government either on the basis of an informed decision or on the basis of an independent analysis of fact on consultation with the Investigating Officer. This would go to show clear non-application of mind by the Home Minister in granting sanction. Therefore, the sanction is void on the ground of non- application of mind and is not a legal and valid sanction under Section 50 of the POTA."

Issue no. 2: Whether the confessional statements of the accused persons were recorded as per the procedure laid down in Section 32 of the POTA, CrPC and the principles laid down by this Court?

Opinion of the Supreme Court: "90. Therefore, we are of the opinion that neither the police officer recording the confessional statements nor the CJM followed the statutory mandates laid down in the POTA under Sections 32 and 52 while recording the confessional statements of the accused persons, and we hold that the confessional statements made by A-2, A-3, A-4 and A-6 under Section 32 of the POTA are not admissible in law in the present case. Therefore, we answer this point in favour of the appellants. We have to observe next therefore, whether the statements of the accomplices can be relied upon to determine the involvement of the accused persons in this case."

Issue No. 3: Whether the statements of the accomplices disclosing evidence of the offences, and the connection of the accused persons to the offence, can be relied upon to corroborate their confessional statements?

Opinion of the Supreme Court: "97. Therefore, we hold that the evidence of the accomplices cannot be used to corroborate the confessional statements of the accused persons in the absence of independent evidence and the delay of more than one year in recording their statements causes us to disregard their evidence. Therefore, we answer this point in favour of the appellants."

Issue no. 4: Whether the two letters in Urdu presented as Ex.658 which have been translated in English vide Ex.775, were found from the pockets of the trousers of the *fidayeens* who were killed in the attack?

Opinion of the Supreme Court: "103. Therefore, we cannot accept the recording of the High Court that the secret behind the crease-free unsoiled and unstained letter lies in the divine philosophy of

"Truth is stranger than fiction" for this renowned epithet by the author Mark Twain comes with a caveat that says, "Truth is stranger than fiction. Fiction must make sense". We accordingly accept the contentions of the learned senior counsel on behalf of the accused persons and hold that the two letters marked as Ex. 658 cannot be taken as evidence in order to implicate the accused persons in this crime. Hence, we answer this point in favour of the appellants."

Issue no. 5: Whether the letters allegedly found from the pockets of the trousers of the *fidayeens* were written by A-4?

Opinion of the Supreme Court: "107. After perusing the above mentioned evidence on record, we decipher that the prosecution had contended that the Urdu letters (Ex.658) were written by A-4 by only placing reliance upon the opinion of the handwriting expert, PW-89. However, the certificate of the senior most official of FSL, Hyderabad was not admitted on record till a much later stage, after the charge sheet was prepared and PW-89 gave his statement before the court. It was at this stage that his evidence was admitted with protest from the defence. PW-89 in his evidence had stated that he has basic knowledge of Urdu and cannot differentiate between Urdu, Arabic and Persian. He further stated that the opinion of handwriting experts is not conclusive. Therefore, we hold that the prosecution had failed to establish beyond reasonable doubt that the Urdu letters (Ex.658) were written by A-4. Accordingly, we answer this point in favour of the appellants."

Issue no. 6: Whether there is any evidence apart from the retracted confessional statement of A-6 which connects him to the offence?

Opinion of the Supreme Court: "111. It is also of the utmost importance for us to mention the statement of PW-125, Ibrahim Chauhan, Crime Branch, Ahmedabad regarding the seizure of the car since it is reflective of how casually and with what impunity the investigation has been conducted in the instant case by the investigating officer. PW-125, who was a part of the investigation of this case in Kashmir, and who was also responsible for escorting A- 2, A-4 and A-5 to Srinagar, Kashmir, states as under:-

> "After knowing the facts of seizing car in the case 130/ 2003, I had no occasion to ask for papers regarding vehicle seized, because I was engaged in other works. It is in my view that panchnama regarding seizure of car no. KMT-413 existed earlier to panchnama of Exhibit 671. I have not seen panchnama."

He again went on record to state that:

> "I do not believe that if any car is seized in one crime, seizure, panchnama and other papers should be possessed before seizing car in another crime. It is true that when the car is confiscated, its panchnama is made, that panchnama should be obtained while seizing car in another crime. As I was engaged in other work, I did not get panchnama. It is not true that panchnama of Cr. No. 130/ 2003 was not produced because its details were not in consonance with Panchnama Exhibit 671……."

"It is clear from the statement of PW-125 that neither the panchnama nor seizure memo of the car no. KMT 413, made during its alleged seizure in case no. 130 of 2003 was seen by PW-125 since, "he was engaged in other work". However, without verifying the contents of the panchnama and the seizure memo of the car in Case No.130 of 2003, the involvement of the car had been admitted in evidence on record by the courts below, merely on the basis of the subsequent panchnama drawn by the Gujarat police, which was only for the transfer of possession of the car from the police of Jammu and Kashmir to the Gujarat police.

In light of the evidence mentioned above, we are not inclined to give any weightage to the panchnama drawn by the Gujarat police at Jammu and Kashmir for the seizure of car already in the possession of the Jammu and Kashmir police at SOG Camp, in the absence of the original panchnama and seizure memo drawn by the police of Jammu and Kashmir. In view of the evidence on record, and the reasons recorded by us, we answer this point in favour of the appellants and hold that the prosecution had failed to prove that the car was used by A-6 to carry weapons from Jammu and Kashmir to Bareilly for carrying out the attack on Akshardham."

Issue no. 7: Whether there is any independent evidence on record apart from the confessional statements recorded by the police, of the accused persons and the accomplices, to hold them guilty of the crime?

Opinion of the Supreme Court: "121. Thus, for the above reason also, the confessional statements of the accused persons cannot be relied upon and the case of the prosecution fails. Accordingly, we hold that there is no independent evidence on record to prove the guilt of the accused persons beyond reasonable doubt in the face of the retractions and grave allegations of torture and violation of human rights of the accused persons against the police. We accordingly answer this point in favour of the appellants."

Issue no. 8: Whether A-2 to A-6 in this case are guilty of criminal conspiracy under Section 120-B IPC?

Opinion of the Supreme Court: "127. It is true that in order to establish criminal conspiracy, it is not required of every co-conspirator to know the entire sequence of the chain and events, and that they can still be said to be conspirators even if they are only aware of their limited roles and are not able to identify the role of any other conspirator. But that is not the case here. It is not the case here that the knowledge of the conspirators is limited to their role. Each accused claims to have complete knowledge of the conspiracy, while contradicting the other's version of the same events to constitute the act of criminal conspiracy.

128. Therefore, the confessional statements of the accused persons and the accomplices do not complement each other to form a chain of events leading to the offence. Rather, the depositions of the prosecution witnesses were contradictory and disrupt the chain of events and turn it into a confusing story with many discrepancies, defeating the roles of each of the accused persons which have been allegedly performed by them. Also, none of the events of the alleged criminal conspiracy was supported by independent evidence that inspires confidence in our minds to uphold the conviction and sentences meted out to the accused persons.

128. Hence, we hold that the prosecution has failed to prove beyond reasonable doubt, the guilt against the accused persons, for the offence of criminal conspiracy under Section 120-B of the IPC. We, therefore answer this point in favour of the appellants."

Issue no. 9: Whether the concurrent findings of the courts below on the guilt of the accused persons can be interfered with by this court in exercise of its appellate jurisdiction under Article 136 of the Constitution?

Opinion of the Supreme Court: "134. The courts below had ignored these basic legal principles while admitting the statement of witnesses while weighing the case against the accused persons. While the Judgement of the Special Court found mention of DW-1, DW-2, DW-4, DW-5 and DW-6, the evidence of DW-3 which indicated that some of the accused persons might have actually been detained in police custody much before the official date of arrest, had been completely overlooked.

However, FIR-ICR No. 3090 of 2003 (Ex.733) in the present case shows that DW-3 was arrested along with some other women under Section 188 IPC for protesting against detention of some persons from their area. This, read with the notification G.P.K./V.S./774/2003 by the Police Commissioner Ahmedabad City holding that from date 16.08.2003 00/00 hrs. to 31.08.2003 at 24.00 hrs., not more than four persons shall gather for holding or calling any meeting or shall take out any procession, indicates a story under the layers of truth which the police has managed to suppress and the courts below overlooked. Therefore, according to us, this is a fit case for interference by this Court under Article 136 of the Constitution, as we are of the firm view that the concurrent findings of fact of the Special Court (POTA) and the High Court are not only erroneous in fact but also suffers from error in law."

Issue no. 10: What order to pass?

Opinion of the Supreme Court: "135. On the basis of the issues we have already answered above based on the facts and evidence on record and on the basis of the legal principles laid down by this Court, we are convinced that accused persons are innocent with respect to the charges leveled against them. We are of the view that the judgment and order of the Special Court (POTA) in POTA case No. 16 of 2003 dated 01.07.2006 and the impugned judgment and order dated 01.06.2010 of the High Court of Gujarat at Ahmedabad in Criminal Confirmation Case No.2 of 2006 along with Criminal Appeal Nos. 1675 of 2006 and 1328 of 2006 are liable to be set aside. Consequently, the sentences of death awarded to A-2, A-4 and A-6, life imprisonment awarded to A-3, 10 years of Rigorous Imprisonment awarded to A-5 are set aside. Since we are acquitting all the accused in appeal before us for the reasons mentioned in this judgment and also, since A-1 was convicted and sentenced on the basis of the same evidence which we have already rejected, we also acquit A-1 who is not in appeal before us, of the conviction and sentence of 5 years Rigorous Imprisonment awarded to him by the courts below, exercising the power of this Court under Article 142 of the Constitution and hold him not guilty of the charges framed against him. We are aware that he has already served his sentence. However, we intend to absolve him of the stigma he is carrying of that of a convict, wrongly held guilty of offences of terror so that he is able to return to his family and society, free from any suspicion.

136. Before parting with the judgment, we intend to express our anguish about the incompetence with which the investigating agencies conducted the investigation of the case of such a grievous nature, involving the integrity and security of the Nation. Instead of booking the real culprits responsible for taking so many precious lives, the police caught innocent people and got imposed the grievous charges against them which resulted in their conviction and subsequent sentencing.

137. We allow the appeals accordingly by setting aside the judgment and order of Special Court (POTA) in POTA case No. 16 of 2003 dated 01.07.2006 and the impugned common judgment and orders dated 01.06.2010 of the High Court of Gujarat at Ahmedabad in Criminal Confirmation Case No.2 of 2006 along with Criminal Appeal Nos. 1675 of 2006 and 1328 of 2006. Accordingly, we acquit all the appellants in the present appeals, of all the charges framed against them. The appellants who are in custody shall be set at liberty forthwith, if they are not required in any other criminal case. We also set aside the conviction and sentence awarded to A-1, though he has already undergone the sentence served on him. All the applications filed in these appeals are accordingly disposed of."

Case 4: Jayawant Dattatray Suryarao & others, Maharashtra

Brief facts of the case[34]

It was the version of the prosecution that on 12.9.1992 at about 03:20 hours, a shoot-out took

place in J.J. Hospital Campus at Mumbai, which is a Government Hospital having occupancy of 1500 beds. It was alleged that having made preparation, such as procuring sophisticated weapons like AK-47 rifles, pistols, revolvers, dynamites and hand-grenades and by firing shots through the said weapons, accused have committed murder of (1) Prisoner Shailesh Shankar Haldankar, who was undergoing treatment in Ward No.18 in the said hospital; (2) Police Head Constable Chaintaman Gajanan Javsen; and (3) Police Constable Kawalsingh Baddu Bhanawat. The two policemen were on guard duty of prisoner Shailesh Shankar Haldankar. It was also alleged that they attempted to commit murder of six other persons including PW11 Shankar Ganapat Sawant - a patient undergoing treatment in ward no.18, Yunus Mohamed Dadarkar - a relative of a patient, PW54 Shankar Ramchandra Jadhav - watchman on duty, PW9 Constable on guard duty, Vijay Krishna Nagare, PW42 PSI Thakur, the Police Officer on duty to exercise the supervision over the guard and a staff nurse Smt. Chandrakala Vithal Vinde, who was on duty.

There is an inherent link between confessional statements and torture. From 2001 to 2010, the NHRC recorded 14,231 custodial deaths including 1,504 deaths in police custody and 12,727 deaths in judicial custody. About 99.99% of deaths in police custody can be ascribed to torture to extract confessions and/or bribes, and occur within 48 hours of the victims being taken into custody.

Decision of Designated TADA Court[35]

All together the prosecution charged 24 accused in the case. Only 10 accused faced trials as the rest were either shot dead in encounters or were absconding.

Out of the accused persons who faced trial, the trial court convicted 3 of them viz. A-6 Subhashsingh Shobhnathsingh Thakur, A-2 Jaywant Dattatraya Suryarao, and A-7 Shamkishor Shamsharma Garikapatti for various offences and acquitted the rest. In case of the acquitted accused, the trial court held that confessional statements without there being sufficient corroborative evidence would not be sufficient for convicting the accused for the offences for which they were charged.

The Designated Court imposed punishments as under-

i. On A-6 (Subhashsingh Shobhnathsingh Thakur): Death sentence under section 3(2)(i) of TADA , under Section 302 IPC on three counts and under section 27 of the Arms Act; life imprisonment under section 3(2)(ii), section 3(3), section 5 and section 6 of TADA.

ii. On A-2 (Jaywant Dattatraya Suryarao): Rigorous imprisonment for seven years under section 3(4) of TADA and rigorous imprisonment for two years under section 212 IPC

iii. On A-7 (Shamkishor Shamsharma Garikapatti): Rigorous imprisonment for ten years under section 3(4) of TADA and rigorous imprisonment for two years under section 212 IPC

Basis of conviction[36]

Conviction based on confessional statements supported by independent / corroborative evidences.

Judgement of the Supreme Court[37]

The Supreme Court upheld the conviction of the above named accused persons by the Designated Court and upheld the same.

The only interference from the Supreme Court was to alter the death sentence of A-6 Subhashsingh Shobhnathsingh Thakur to life imprisonment. While doing so, the court stated as under-

> "In our view, there is force in the aforesaid submission. Accused no.6. who has confessed his involvement in the crime including the crimes committed by him previously, has specifically stated that he asked Brijeshsingh to go back from the hospital without firing. He has not confessed that he has fired any shot during the incident. In this set of circumstances, even though we hold that it was an act of terrorism committed by the accused, this would not be a fit case for imposingdeath sentence. However, considering the confessional statement as a whole coupled with the other evidence and the terror created by the accused, we confirm the conviction but modify the sentence from death penalty to imprisonment for life -- till rest of life."

The apex court also observed that the Designated Court had rightly acquitted A-1 Jahur Ismail Faki, A-3 Smt. Mehboobi Azizkhan, A-4 Anil Amarnath Sharma, A-8, Ahmed Mohmed Yasin Mansoori and A-9 Jayprakash Shivcharansing @ Bacchisingh (since dead) A-10 Prasad Ramkant Khade.

Major issues before the Supreme Court[38]

Issue no.1: Whether provisions of TADA are applicable in this case?

Opinion of the Supreme Court: The Court held that there is no substance in the contention of the counsel for the accused that there was no intention on the part of the accused to strike terror and that the crime in this case would not be covered by the terrorist activity as provided under Section 3(1) of the TADA.

Issue no. 2: Admissibility of Confessional Statements

Opinion of the Supreme Court: On this issue, the court held that in view of settled legal position, confessional statement is admissible in evidence and is substantive evidence. It also could be relied upon for connecting the co-accused with the crime. Minor irregularity would not vitiate its evidentiary value.

Issue no.3: Evidentiary Value of such Confessional Statements

Opinion of the Supreme Court: On this issue, the judgement stated as under-

> "51. It is true that if the confessional statements are taken as they are, accused can be convicted for the offences for which they are charged as the said statements are admissible in evidence and are substantive piece of evidence. However, considering the facts of the case, particularly that the confessional statements were recorded by the police officer during investigation; said statements were not sent to the Judicial Magistrate forthwith; and that after recording the statements, accused were not sent to judicial custody, in our opinion, unless there is sufficient corroboration to the said statements, it is not safe to convict the accused solely on the basis of the confessions. Therefore, we have considered confessional statements with the other evidence connecting the accused with the crime. Learned senior counsel Mr. Sushil Kumar submitted that if we remove the evidence of PW26 from the scene then it is difficult to maintain the conviction of A-7. It is his contention that A-2 and A-6 were knowing each other as per their admission in confessional statement. He emphasized minor contradictions and submitted that evidence against A-7 is not sufficient to connect him with the crime. In our view other evidence as stated above fully corroborates the confessional statements and there is no reason to discard the evidence of PW26".

Issue no. 4: Validity of Sanction for prosecution under the TADA

Opinion of the Supreme Court: The senior counsel for accused no.7 submitted that sanction granted by the Commissioner of Police is without application of mind and thereby illegal. On this issue the Supreme Court observed that both the orders for prosecution of the accused persons were exhaustive and relevant material was referred to. The Court therefore ruled that it cannot be said that there was any illegality or irregularity in granting sanction to prosecute the accused under the provisions of the TADA.

Case 5: Krishna Mochi and others, Bihar

Brief facts of the case[39]

In the present case, in a gruesome carnage 35 persons were killed, some house/huts were burnt, a number of persons were injured and charge-sheet was submitted against 119 persons. Out of them, 13 including the appellants were tried by the Designated Court of Sessions Judge, Gaya in G.R. Case No. 430 of 1992, Tekari Police Station Case No. 19 of 1992 under the provisions of Terrorist and Disruptive Activities (Prevention) Act, 1987 and under Section 302/149 etc. of Indian Penal Code.

Decision of Designated TADA Court[40]

Vide judgment and order dated 8.6.2001, the Designated Court- (a) convicted A-5 Bir Kuer Pasan, A-8 Krishna Mochi, A-9 Dharmendra Singh @ Dharu Singh, A-13 Nanhe Lal Mochi and imposed death penalty; (b) convicted A-2 Bihari Manjhi, A-4 Ramautar Dusadh @ Lakhan Dusadh, A-6 Rajendra Paswan, A-7 Wakil Yadav and imposed life imprisonment and (c) acquitted A-1 Nanhe Yadav@ Dina Yadav, A-10 Nanhak Teli, A-11 Naresh Chamar and A-12 Ramashish Mahto.

Basis of conviction

Conviction based on confessional statements of co-accused and testimonies of unreliable eye-witnesses.

Judgement of the Supreme Court[41]

There was divergence in the opinion of the three judges' bench comprising Justice B.N. Agarwal, Justice Arijit Passayat and Justice M.B. Shah.

Per majority view: Justice B.N. Agarwal and Justice Arijit Passayat: The majority of 2:1 comprising Justice B.N. Agarwal and Justice Arijit Passayat allowed the appeals filed by A-2 Bihari Manjhi, A-4 Ramautar Dusadh @ Lakhan Dusadh, A-6 Rajendra Paswan, A-7 Wakil Yadav set aside their sentence of life imprisonment and acquitted them. In respect of A-5 Bir Kuer Pasan, A-8 Krishna Mochi, A-9 Dharmendra Singh @ Dharu Singh, A-13 Nanhe Lal Mochi, the majority view dismissed their appeals and confirmed the death sentence imposed by the Designated TADA Court.

Minority view: Per Justice M B Shah: On the other hand, Justice M B Shah allowed the appeal filed by Appellant No. 2 Dharmendra Singh alias Dharu Singh (A-9) and was in favour of acquitting him of the charges for which he was facing trial while in respect of Krishna Mochi (A-8), Nanhe Lal Mochi (A-13) and Bir Kaur Paswan (A-5) their appeals were partly allowed and the death penalty imposed upon them was altered to life imprisonment.

Major issues before the Court[42]

Per majority view: Justice B.N. Agarwal and Justice Arijit Passayat:

Issue no. 1: The prosecution had failed to prove the participation of the Appellants in the crime by credible evidence

On the point of participation of the Appellants the majority view concluded that out of the evidence of PW-8, PW-16, PW-I8, PW-19, PW-20, PW-21, PW-22 and PW-29, the evidence of PW-8, PW-16, PW-18, PW-21 and PW-22 was unimpeachable whereas no reliance can be placed upon the statements of PW-19, PW-20 and PW-29.

Issue no. 2: The participation of the Appellants in the crime becomes highly doubtful as their names had not been enumerated in the confessional statement of accused Bihari Manjhi wherein he was said to have named several accused persons

The majority view was that there may be various reasons for non-disclosure of names of these Appellants in the confessional statement of co-accused; they might not be fully known to the confessing accused or for reasons best known to him, with an oblique motive, to save the Appellants, their names might not had been disclosed.

Issue no. 3: The informant (who lodged the FIR) was not examined as such, First information Report cannot be used as substantive piece of evidence inasmuch as on this ground as well the Appellants are entitled to an order of acquittal

The majority view was that this submission is totally misconceived. Even if the first information report is not proved, it would not be a ground for acquittal, but the case would depend upon the evidence led by prosecution. Therefore, non-examination of the informant cannot in any manner affect the prosecution case

Issue no. 4: Nothing incriminating could be recovered from them which goes to show that they had no complicity with the crime

The majority view was that non-recovery of incriminating material from the accused cannot alone be taken as a ground to exonerate them from the charges, more so when their participation in the crime is unfolded in-ocular account of the occurrence given by the witnesses, whose evidence had been found by the to be unimpeachable.

Issue no. 5: The alleged occurrence was said to have taken place during the night, it was not possible to identify the accused persons, much less any of the Appellants

The majority view held that in view of the fact that the night was not dark and there was sufficient light by virtue of setting fire in the houses and heaps of straw, it cannot be said that it was not possible for the witnesses to identify the accused persons much less any of the Appellants.

Issue no. 6: Counsel for the Appellants further pointed out that according to the prosecution case and evidence, none of the Appellants were alleged to have assaulted either any of the 35 deceased or the injured persons and that from mere presence at the place of occurrence their participation in the crime cannot be inferred inasmuch as they may be even sight seers.

The majority view was that merely because the Appellants were not said to have assaulted either any of the deceased or injured persons, it cannot be inferred that they had no complicity with the crime, more so according to the evidence they were also armed with deadly weapons, like firearms, bombs, etc. but did not use the same.

The majority view observed that according to the prosecution case and the evidence, the accused persons arrived at the village of occurrence, pursuant to a conspiracy hatched up by them, they divided themselves into several groups, different groups went to the houses of different persons in the village, entered the houses by breaking open the door, forcibly took away inmates of the house after tying their hands, taken them first to the temple and thereafter near the canal where their legs were also tied and there some of them were done to death at the point of firearm, but a vast majority of them were massacred by slitting their throats with pasuli. One thing is clear that all these acts were done by the accused persons pursuant to a conspiracy hatched up by them to completely eliminate members of a particular community in the village and to achieve that object, they formed unlawful assembly and different members of that unlawful assembly had played different role.

Issue no. 7: Counsel appearing on behalf of the Appellants, in the alternative, submitted that the present case cannot be said to be rarest of the rare one so as to justify imposition of extreme penalty of death.

On the issue of sentence, the majority view was as under-

> "From the evidence adduced, it has been amply proved that the accused persons belonged to a militant group, being members of M.C.C. which is considered to be an organisation of militants, hatched up a conspiracy to massacre members of one particular community in the village in question and were raising slogans 'long live MC' and 'whoever comes in their way, would be destroyed'. Pursuant to the conspiracy hatched up, the militants formed different groups and went to different localities in the village in police uniforms armed with fire arms and explosive substances, broke open the doors of houses of members of that particular community, took out the entire family members after tying their hands, had taken some of them to the temple and thereafter to the canal whereas others were directly taken to the canal after tying their hands where their legs were also tied and after surrounding them from all sides, when they were in most helpless condition and could not take recourse to save their lives, some of them were done to death by fire arms but vast majority were massacred by slitting their throats with pasuli which resulted into 35 casualties and several persons were injured including prosecution witnesses. The number of accused persons was vast but upon completion of investigation, charge sheet was submitted against 119 persons and so many persons were shown as prosecution witnesses therein. The accused persons also set fire to the houses of the members of the said community in the village. As a result of this incident, there was great commotion in the locality. There cannot be any manner of doubt that the villagers were done to death in an extremely diabolic, revolting and dastardly manner and had affected the normal tempo of life of the community in the locality. The crime in the present case is not only ghastly, bus also enormous in proportion as 35 persons, all of whom belonged to one community, were massacred. Thus, after taking into consideration the balance sheet of aggravating and mitigating circumstances, in which 35 persons have been deprived of their lives by the accused persons who were thirsty of their blood, I have no doubt in holding that culpability of the accused persons assumes the proportion of extreme depravity that a special reason can legitimately be said to exist within the meaning of Section 354(3) of the Code of Criminal Procedure in the case on hand and it would be mockery of justice if extreme penalty of death is not imposed. Thus, I am clearly of the opinion that the Designated Court was quite justified in upholding convictions of the Appellants and awarding the extreme penalty of death which punishment alone was called for in the facts of the present case."

The case of Krishna Mochi and others reflect the state of death row convicts in India. Should death penalty, the harshest punishment, be awarded based on self-incrimination and unreliable witnesses? Unless mercy is granted to those where there were differing judgements by the same bench, the Damocles Sword of death penalty will continue to hang on the "Mochis".

Minority view: Per Justice M.B. Shah

Upon appreciation of the evidence, the minority view held that-

(1) It is apparent that the investigation in the present case is totally defective. The investigating officers have not taken any care and caution of recording the statement of witnesses immediately. No identification parade of accused was held. Investigating officer is not examined.

(2) It is also settled law that when accused are charged with heinous brutal murders punishable to the highest penalty prescribed by the Penal Code the judicial approach in dealing with such cases has to be cautions, circumspect and careful. In case of defective investigation, the Court can rely upon the evidence led by the prosecution and connect the accused with the crime if found reliable and trustworthy.

(3) In the present case, it can be said without any doubt that almost all witnesses have exaggerated to a large extent by naming number of persons as accused but they could identify only one or two accused. This would clearly reveal that for one or other reason, witnesses were naming number of person as accused who were not known to them or whom they had not seen at the time of incident. In that set of circumstances, their evidence to a large extent becomes doubtful and/or tutored.

(4) Nowhere the witnesses assign any specific role to the accused, except their presence in the mob at the time of offence.

(5) The witnesses nowhere state that identified accused were having any weapon of offence.

(6) Investigating officers have not recovered any weapon of offence or any incriminating article from the possession of any of the accused.

Finally, Justice MB Shah held as under-

> "In view of the shortcomings in the investigation and the evidence which only proves the presence of the accused at the scene of offence, this would not be a fit case for imposing the death penalty."

Case 6: Mohd. Afzal Guru, Delhi

Brief facts of the case[43]

On 13 December 2001, five heavily armed terrorists stormed the Parliament House complex and inflicted heavy casualties on the security men on duty. In the gun battle that lasted for 30 minutes or so, five terrorists who tried to gain entry into the Parliament when it was in session, were killed. Nine persons including eight security personnel and one gardener were killed and 16 persons including 13 security men received injuries. Extensive investigations spread over a short span of 17 days revealed the possible involvement of the four accused persons who were either appellants or respondents and some other proclaimed offenders said to be the leaders of the banned militant organization known as "Jaish-E-Mohammed". After the conclusion of investigation, the investigating agency filed charge sheets against the four accused persons, Mohd. Afzal Guru, Shaukat Hussain Guru, S.A.R. Gilani and Navjot Sandhu @ Afsan Guru.

Conviction by Designated POTA Court[44]

The designated Special Court framed charges against the accused persons under various sections of Indian Penal Code, the Prevention of Terrorism Act, 2002 and the Explosive Substances Act. The designated Special Court tried the accused on these charges and the three accused, namely, Mohd. Afzal, Shaukat Hussain Guru and S.A.R. Gilani were convicted for the offences under Sections 121, 121A, 122, Section 120B read with Sections 302 & 307 read with Section 120B IPC, sub-Sections (2), (3) & (5) of Section 3 and Section 4(b) of POTA and Sections 3 & 4 of Explosive Substances Act. The accused 1 & 2 were also convicted under Section 3(4) of POTA. Accused No.4 namely Navjot Sandhu @ Afsan Guru was acquitted of all the charges except the one under Section 123 IPC for which she was convicted and sentenced to undergo R.I. for five years and to

pay fine. Death sentences were imposed on the other three accused for the offence under Section 302 read with Section 120B IPC (it would be more appropriate to say- Section 120B read with Section302 IPC) and Section 3(2) of POTA. They were also sentenced to life imprisonment on as many as eight counts under the provisions of IPC, POTA and Explosive Substances Act in addition to varying amounts of fine. The amount of Rs.10 lakhs, which was recovered from the possession of two of the accused, namely, Mohd. Afzal and Shaukat Hussain, was forfeited to the State under Section 6 of the POTA.

Decision of the High Court

The designated Judge submitted the record of the case to the High Court of Delhi for confirmation of death sentence imposed on the three accused. Each of the four accused filed appeals against the verdict of the designated Judge. The State also filed an appeal against the judgment of the designated Judge of the Special Court seeking enhancement of life sentence to the sentence of death in relation to their convictions under Sections 121, 121A and 302 IPC. In addition, the State filed an appeal against the acquittal of the 4th accused on all the charges other than the one under Section 123 IPC. The Division Bench of High Court, by its judgment pronounced on 29.10.2003 dismissed the appeals of Mohd. Afzal and Shaukat Hussain Guru and confirmed the death sentence imposed on them. The High Court allowed the appeal of the State in regard to sentence under Section 121 IPC and awarded them death sentence under that Section also. The High Court allowed the appeals of S.A.R. Gilani and Navjot Sandhu @ Afsan Guru and acquitted them of all charges.

Judgement of the Supreme Court[45]

Aggrieved with the judgement dated 29.10.2003 of the Delhi High Court, Shaukat Hussain Guru preferred two appeals while Mohd. Afzal preferred one and the Government of National Capital Territory of Delhi preferred four appeals against the acquittal of S.A.R. Gilani and Navjot Sandhu.

The Supreme Court dismissed the appeal filed by Mohd. Afzal and confirmed the death sentence imposed upon him. The appeal of Shaukat was allowed partly and convicted under Section 123 IPC and sentenced to undergo Rigorous Imprisonment for 10 years and to pay a fine of Rs. 25,000/- and in default of payment of fine he should suffer RI for a further period of one year. His conviction on other charges was set aside. The appeals filed by the State against the acquittal of S.A.R. Gilani and Afsan Guru were dismissed.

Major issues before the court

Issue no. 1: Confessions were not true and voluntary. Afzal Guru and Shaukat were reluctant to make confession before the court; therefore POTA charges were added to get the confession recorded by a Police officer according to the wishes of the investigators. It was further submitted that the language and tenor of the confessional statement gives enough indication that it was not written to the dictation of appellants (accused), but it was a tailor made statement of which they had no knowledge

Opinion of the Supreme Court: On the submissions of the defence counsels, the Supreme Court held that though these arguments are plausible and persuasive, it was not necessary to rest its conclusion on these probabilities.

On the issue of compliance of procedural safeguards as provided in Section 32 and the other safeguards contained in Section 52 of POTA in respect of recording of confessional statements, the prosecution contended that the DCP before recording the confession, gave the statutory warning and then recorded the confession at a place away from the police station, gave a few minutes time

for reflection and only on being satisfied that the accused Afzal volunteered to make confession in an atmosphere free from threat or inducement that he proceeded to record the confession to the dictation of Afzal. The Supreme Court however observed that the investigating authorities failed to comply with the procedural safeguards. The court pointed out that the more important violation of the procedural safeguards was not appraising the accused the right to consult a legal practitioner either at the time they were initially arrested or after the POTA was brought into picture as required under sub-section (2) read with sub-Section (4) of Section 52 of the POTA. The Commissioner of Police, who is competent to investigate the POTA offences, failed to inform the persons under arrest of their right to consult a legal practitioner, nor did he afford any facility to them to contact the legal practitioner.

The Supreme Court further pointed out that the investigation authorities failed to inform the family member or relative of the arrested persons about the arrests. Sub-section (3) of Section 52 of POTA enjoins that the information of arrest shall be immediately communicated by the Police Officer to a family member or in his absence, to a relative of such person by telegram, telephone or by any other means and this fact shall be recorded by the Police Officer under the signature of the person arrested.

Another breach of safeguard that the Supreme Court pointed out was not giving reasonable time to the accused for reflection before recording their confession. The court observed that 5 to 10 minutes time admittedly granted to the accused by prescribed authority who recorded the confession for thinking/reflection before recording their confession was not adequate.

The Court finally held,

> "All these lapses and violations of procedural safeguards guaranteed in the statute itself impel us to hold that it is not safe to act on the alleged confessional statement of Afzal and place reliance on this item of evidence on which the prosecution places heavy reliance."

Issue no.2: Circumstances against Mohd. Afzal Guru

Opinion of the Supreme Court: It had been held that numerous circumstances on record were against Afzal. Among others, the Court observed that (Accused 1) Afzal knew who the deceased terrorists were and he identified the dead bodies of the deceased terrorists. There was frequent telephonic communication among Afzal and couple of the dead terrorists. The Court also observed that there is clear evidence to the effect that the mobile instruments were being freely exchanged between Afzal and Mohammed and other terrorists. It had been further pointed out that the details of the phone calls and the instruments used revealed close association of Afzal with the deceased terrorists.

The other circumstances which prominently shed light on the involvement of the accused Afzal relate to the discovery of the abodes or hideouts of the deceased terrorists and the recovery of various incriminating articles therefrom as well as the identification of certain shops from where the appellant and one or the other deceased terrorist purchased various items used for preparation of explosives etc.

(Endnotes)

1. Surinder Koli has been held guilty in one of the 16 cases of rape and murder of young women and girls in Nithari village in Uttar Pradesh. The girls and children were killed over a period of time and skeletal remains of a number of missing children were discovered from a drain near the house of Maninder Singh Pandher at D-5, Sector 31, Noida where Koli was employed as a domestic servant. Koli and Pandher are co-accused in 11 cases which are yet to be concluded. As Koli faces the gallows, Pandher had walked free from Dasna jail, Uttar Pradesh on 27 September 2014 after being granted bail by the Allahabad High Court on 24 September 2014.

2. Hanging Koli May Bury The Truth Of Nithari Killings, Ushinor Majumdar, Tehelka, 30 August 2014 available at http://www.tehelka.com/nithari-killing-hanging-surinder-kohli-will-bury-the-truth/

3. See section 15 of the TADA, 1987 as amended by Act 43 of 1993 provides "15. Certain confessions made to police officers to be taken into consideration.- (1) Nothwithstanding anything in the Code or in the Indian Evidence Act, 1872, but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either 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 6[or co-accused, abettor or conspirator] for an offence under this Act or rules made thereunder:

   [Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused].

   (2) The police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily."

4. A terror of a Bill: Frontline Magazine, Volume 17 - Issue 16, August 5 - 18, 2000; available on: http://www.frontline.in/static/html/fl1716/17160240.htm

5. Ex-CBI man altered Rajiv death accused's statement, The Times of India, 24 November 2013, available at: http://timesofindia.indiatimes.com/india/Ex-CBI-man-altered-Rajiv-death-accuseds-statement/articleshow/26283700.cms

6. State through Superintendent of Police, CBI/SIT vs. Nalini and Ors.[AIR1999SC2640]

7. M.P. Sharma v. Satish Chandra, District Magistrate, Delhi and Others:1954 AIR 300: 1954SCR; Raja Narayanlal Bansilal v. Maneck Phiroz Mistry: (1961) 1 SCR 417: AIR 1961 SC 29; and Nandini Satpathy v. P.L. Dani: (1962) 3 SCR 10: AIR 1961 SC 180: (1978) 2 SCC 424: 1978 SCC (Cri) 236

8. Section 25 of Indian Evidence Act. Confession to police officer not to be proved - No confession made to police officer shall be proved as against a person accused of any offence.

9 . Section 26 of Indian Evidence Act. Confession by accused while in custody of police not to be proved against him - No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate[1], shall be proved as against such person

10. Section 27 of Indian Evidence Act. How much of information received from accused may be proved- Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

11. 161 of CrPc. Examination of witnesses by police.

    (1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

    (2) Such person shall be bound to answer truly all questions relating to such case Put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

    (3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.

    "Provided further that the statement of a woman against whom an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code is alleged to have been committed or attempted shall be recorded, by a woman police officer or any woman officer."

12. 162 of CrPc. Statements to police not to be signed: Use of statements in evidence.

    (1) No statement made by any person to a police officer in the course of' an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it, nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

    Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of' his statement, if duly proved, may be used by the accused, and with the permission of' the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872) and when any part of' such statement is so used, any part thereof' may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

    (2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act.

    Explanation: An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.

13. Section 164 of CrPC. Recording of confessions and statements.

    (1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:

    Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

    (2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

    (3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorize the detention of such person in police custody.

    (4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect-

    "I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and

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.

(Signed) A.B. Magistrate".

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

14. TORTURE IN INDIA 2011, Asian Centre for Human Rights, 21 November 2011
15. See section 15 of the TADA, 1987 as amended by Act 43 of 1993
16. **SC notice to Centre on pleas questioning POTA, The Hindu, 27 August 2002 available at** http://www.thehindu.com/thehindu/2002/08/27/stories/2002082702481300.htm
17. A terror of a Bill: Frontline Magazine, Volume 17 - Issue 16, August 5 - 18, 2000; available on: http://www.frontline.in/static/html/fl1716/17160240.htm
18. http://lawmin.nic.in/legislative/THE%20%20POTA%20Ordinance%20(latest).htm
19. http://mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/UAPA-1967.pdf
20. Devender Pal Singh Bhullar Vs. State (NCT of Delhi) AIR2002SC1661
21. Ibid
22. Ibid
23. Ibid
24. Ibid
25. Ibid
26. State through Superintendent of Police, CBI/SIT vs. Nalini and Ors. [AIR1999SC2640]
27. Ibid
28. Ibid
29. Ibid
30. Ex-CBI man altered Rajiv death accused's statement, The Times of India, 24 November 2013, available at: http://timesofindia.indiatimes.com/india/Ex-CBI-man-altered-Rajiv-death-accuseds-statement/articleshow/26283700.cms
31. Adambhai Sulemanbhai Ajmeri & Ors. Vs. State of Gujarat (Criminal Appeal Nos. 2295-2296 of 2010 with Criminal Appeal No. 45 of 2011)
32. Ibid
33. Ibid
34. Jayawant Dattatray Suryarao vs. State of Maharashtra[AIR 2002 SC 143]
35. Ibid
36. Ibid
37. Ibid
38. Ibid
39. Krishna Mochi and Ors. vs. State of Bihar etc.[2001(3)CriminalCC190]
40. Ibid
41. Ibid
42. Ibid
43. State (N.C.T of Delhi) Vs. Najvot Sandhu @ Afsan Guru And Shaukat Hussain Guru Vs. State (N.C.T. of Delhi) : AIR2005SC3820
44. Ibid
45. Ibid

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