

(2014) 10 BOM CK 0018
In the Bombay High Court
Case No : Criminal Appeal No. 1309 of 2013

Pappu

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 14-10-2014

Acts Referred:

Arms Act, 1959 — Section 27(2)
Constitution of India, 1950 — Article 141, 21
Criminal Procedure Code, 1973 (CrPC) — Section 151, 161, 162, 162(1), 172
Evidence Act, 1872 — Section 135, 136, 137, 138, 139
Penal Code, 1860 (IPC) — Section 109, 120A, 120B, 120B, 302
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 18, 3

Citation : (2015) ALLMR(Cri) 1136 : (2015) 3 BomCR(Cri) 344

Hon'ble Judges : S.C. Dharmadhikari, J;A.K. Menon, J

Bench : Division Bench

Advocate : A.P. Mundargi, Senior Advocate, Girish Kulkarni, Bhojraj Jeswani i/by M.G. Shukla and Ganesh Gole, Advocate for the Appellant; Vikas B. Patil-Shirgaonkar, Special P.P, Advocate for the Respondent

Judgement

S.C. Dharmadhikari, J.—This appeal against conviction is by the original accused No. 1 Pappu @ Suresh Budharmal Kalani, hereinafter referred to as A1 for brevity's sake. He is aggrieved and dissatisfied with the conviction and sentence handed down on 3rd December 2013 in Sessions Case No. 218 of 1999.

2. By the impugned judgment and order, the accused No. 1 who was tried alongwith five others has been convicted of an offence punishable under Section 120-B read with Section 302 of the Indian Penal Code (IPC for short). He is sentenced to undergo life imprisonment and to pay fine of Rs. 5000/-. In default, he shall suffer rigorous imprisonment for six months.

3. The operative order in the judgment of the learned Additional Sessions Judge, Kalyan reads as under:-

"1] Accused no. 1 Suresh @ Pappu Budharmal Kalani is hereby convicted for

having committed an offence punishable under section 120-B r/w. 302 of IPC and is sentenced to undergo life imprisonment and to pay fine of Rs. 5000/- (Rupees Five Thousand only) i/d. to suffer R.I. for 6 months.

2] Accused nos. 3, 6 and 7 namely Mohammad Arshad Mohammad Taher, Bacchi @ Ramchandra Sitalaprasad Pande and Gabriel @ Baba Hans Moben are hereby convicted for having committed an offense punishable under section 302 r/w 120-B of IPC and are sentenced to undergo life imprisonment and to pay fine of Rs. 5000/-(Rupees Five Thousand only) i/d. to suffer R.I. for 6 months.

3] Accused nos. 3, 6 and 7 namely Mohammad Arshad Mohammad Taher, Bacchi @ Ramchandra Sitalaprasad Pande and Gabriel @ Baba Hana Moben are hereby convicted for having committed an offense punishable under section 450 r/w 34 of IPC and are sentenced to undergo 10 years rigorous imprisonment and to pay fine of Rs. 5,000/- (Rupees Five Thousand only) i/d. to suffer R.I. for 6 months.

4] Accused nos. 3, 6 and 7 namely Mohammad Arshad Mohammad Taher, Bacchi @ Ramchandra Sitalaprasad Pande and Gabriel @ Baba Hana Moben are hereby convicted for having committed an offense punishable under section 506(2) r/w. 34 of IPC and are sentenced to undergo 7 years rigorous imprisonment and to pay fine of Rs. 3,000/- (Rupees Three Thousand only) i/d. to suffer R.I. for 3 months.

5] Accused nos. 3, 6 and 7 namely Mohammad Arshad Mohammad Taher, Bacchi @ Ramchandra Sitalaprasad Pande and Gabriel @ Baba Hana Moben are hereby convicted for having committed an offense punishable under section 353 r/w. 34 of IPC and are sentenced to undergo 2 years rigorous imprisonment and to pay fine of Rs. 1,000/- (Rupees One Thousand only) i/d. to suffer R.I. for 1 months.

6] Accused nos. 3, 6 and 7 namely Mohammad Arshad Mohammad Taher, Bacchi @ Ramchandra Sitalaprasad Pande and Gabriel @ Baba Hana Moben are hereby convicted for having committed an offense punishable under section 27(2) of Indian Arms Act and are sentenced to undergo 1 year rigorous imprisonment and to pay fine of Rs. 1,000/- (Rupees One thousand only) i/d. to suffer R.I. for 1 month.

7] Accused No. 1 namely Suresh @ Pappu Budharmal Kalani is hereby acquitted for having committed an offense punishable under sections 109 r/w 302 of IPC.

8] Accused No. 2 namely Dr. Narendra Hemandas Ramsinghani is hereby acquitted for having committed an offense punishable under sections 120-B, 109, 307, 302 r/w 34 of IPC.

9] Accused No. 3 namely Mohammad Arshad Mohammad Taher, Accused Nos. 6 and 7 namely Bacchi @ Ramchandra Sitalaprasad Pande and Gabriel @ Baba Hana Moben are hereby acquitted for having committed an offense punishable under sections 109, 307 r/w. 34 of IPC.

10] Accused No. 5 Richard Robert Fernandes @ Satish Suvarna is hereby

acquitted for having committed an offense punishable under section 120-B, 109, 450, 506(2), 353, 302, 307 r/w. 34 of IPC.

11] Sentence of accused nos. 3, 6 and 7 run concurrently.

12] Investigation Officer is directed to file fresh chargesheet against absconding accused no. 4 Shyamkishor @ Kishorbhai Murlidhar Garikapatti after securing his presence or original documents including FIR, spot panchanama as well as exhibited documents and seized property be handed over to Investigating Officer to facilitate filing of fresh charge-sheet after securing presence of absconding accused no. 4 Shyamkishor @ Kishorbhai Murlidhar Garikapatti."

4. The prosecution case as unfolded by the record is as under:-

(a) The complainant police constable Ghanshyam Vijaykumar Bendre, Buckle No. 1115 was assigned as a Bodyguard to Inder Sunderdas Bhatija (Inder) from 17th March, 1990. His duty hours were 8 am to 8 pm. He used to make entry in the register which has been maintained by the Vithalwadi Police Station. This entry was made while reporting on duty and also after leaving duty. The Bodyguard complainant used to carry 410 musket butt No. 362 and 30 rounds with him while on duty. The complainant was assigned as a Bodyguard to the deceased Inder because of an application made by the deceased Inder requesting for protection. The deceased Inder was apprehending a threat to his life on account of previous enmity between accused No. 1, Himmat Kalani and his supporters. The real brother of the deceased Inder, Ghanashyamdas Bhatija hereinafter for brevity's sake deceased referred to as Ghanshyamdas, is alleged to have been murdered by accused No. 1, Himmat Kalani and others.

(b) As usual, the complainant police constable Bendre reported on duty at 8.15 a.m. on 28 April, 1990. After the necessary endorsement and entry at Vithalwadi Police Station, he reported at the residence of deceased Inder in Camp No. 3, Ulhasnagar. He reported alongwith his musket and rounds. He relieved the night duty police constable Darade. At about 8.45 a.m., the complainant escorted deceased Inder to his burner factory. That was at about 8.50 a.m. They came to this factory in a Maruti car No. MH-05/A 6867. After parking the vehicle/car, the deceased Inder went inside the factory office while the complainant stood as guard just outside the same. The complainant was joined by the watchman Shivbahadur Ramdhiraj Shukla.

(c) The prosecution case further is that at about 12.15 p.m. one biscuit colour Maruti car came from the direction of Hotel Pinto and stopped in front of the office. Four persons alighted from the same. Two out of them approached, namely, Bacchi @ Ramchandra Sitalaprasad Pande and Gabriel @ Baba Hana Moben approached the watchman Shivbahadur Ramdhiraj Shukla and the complainant Bendre. They suddenly removed the revolvers from their pockets and threatened them not to move or make any noise. It is alleged that these persons threatened the complainant and the watchman Shivbahadur Ramdhiraj Shukla that if they do not agree, they would be shot down. They also directed

the complainant and the watchman to look only in the front failing which they would be shot. The complainant tried loading the musket but the assailant who was pointing the revolver at the watchman snatched the musket from the complainant's hand and flung it on the office roof. In the meanwhile, remaining two assailants had entered the office of deceased Inder. The watchman tried to run away and entered the office of the deceased Inder from a side entrance only to warn him. However, just then both of them heard a firing sound and saw the two assailants who had entered the office of the deceased Inder rushing out therefrom. The two assailants who had threatened the complainant and the watchman joined them and all four of them escaped and ran away in the biscuit colour Maruti car towards Camp No. 3. The car number was noted as BLL 5647. The complainant then rushed to the office of Inder and found him lying in a pool of blood on the floor between the table and chair. He was bleeding from his head. The complainant tried to bring him out of the office and take him to the hospital but could not succeed. He, therefore, went to seek help. By that time, a mob had gathered outside the office. About 3 to 4 persons from the factory came there and with their help, complainant picked up the deceased Inder and brought him out of the office. Just then, one Mohan Behrani, maternal uncle of deceased Inder came at site in a Maruti car. Deceased Inder was carried inside a van and taken to the Central Hospital. The complainant tried to call Vithalwadi Police Station but to no avail. He then told a young boy to get the musket from the roof of the office. After taking the same into custody, the complainant went to the Central Hospital where Inder was undergoing treatment. His attempts to make a telephone call to Vithalwadi Police Station failed. He, therefore, went to the Police Station and lodged the complaint Exhibit 270. The offence was registered as C.R. No. I-89/90.

5. The investigation was handed over to Police Inspector (PI) Vilas Shripadrao Jadhav. He deputed Police Sub Inspector Harihar for recording the statement of the injured Inder Bhatija who was admitted at the relevant time at Sion Hospital. He also directed PSI Deshmukh to draw spot panchanama, who in turn visited the spot and recorded the same. The officer also attached articles from the spot viz. two pieces of tiles, out of which one was stained with blood, one pair of slippers stained with blood, one pair of spectacles and three used cartridges and one live cartridge under spot panchanama Exhibit 275. In the meanwhile, information was received through PI Bhare that injured had succumbed to his injuries in the hospital. The investigating officer Shri Jadhav also recorded the statements of witnesses including that of eye witness PW 13 Vijaybahadur Shukla. He also obtained copy of the complaint given by deceased Inder on 27th February, 1990 and placed it on record. The Assistant Sub Inspector of Police Popat Shivaji Kale in the meanwhile collected clothing of deceased Inder which was attached under panchanama Exhibit 304. PSI Vithal Vishwanath Harihar recorded inquest panchanama Exhibit 307. Subsequently, the investigations were transferred to Punjabi Colony Police Station. The Deputy Commissioner of Police Subhash Bhalchandra Phadke subsequently took over the investigation and

initially a chargesheet was forwarded to the Designated Court under the Terrorist And Disruptive Activities (Prevention) Act, 1987 (for short, TADA), Pune as accused were chargesheeted under sections 3 and 18 of that Act. In the said chargesheet, three accused viz. A1, Dr. Narendra Hemandas Ramsinghani and Mohammed Arshad Mohammed Taher Shaikh were arraigned and A4 to A7 were shown as absconding. Thereafter, accused Richard Robert Fernandes was arrested in a case of Sahakar Nagar Police Station, Pune on 3rd April, 1994. Therefore, DCP Phadke obtained his custody. His confessional statement under the provisions of TADA was recorded and subsequently, chargesheet was sent up. Then accused Bacchi Pande @ Ramchandra Shitlaprasad Pande was arrested in another offence by Delhi Police. DCP Phadke obtained custody of this accused also and recorded his confessional statement under TADA. A request letter was sent for conducting identification parade of the said accused. Thereafter, the supplementary chargesheet was sent up (Exhibit 310). There was a seizure effected by PW26 Shivdas Bajrang Tagtode. He took over the investigation and he realized that in C.R. No. 159 of 1991 registered at Khar Police Station, Bacchi Pande, Baba Gabriel and others have been arraigned as accused and some provisions of TADA have been applied to them. In that case, these accused had given a confessional statement confessing to the commission of the present offence before the competent authorities. Hence, Mr. Tagtode recorded statements of various witnesses including the brother of the deceased, Kamal Bhatija and issued a letter to the concerned PI of Khar Police Station for handing over weapons and other articles seized in C.R. No. 159 of 1991 as well as the accompanying documents like seizure panchanama, confession etc. He then obtained custody of accused Mohd. Arshad Taher Shaikh.

6. Thus, the prosecution case summed up from the statements of various witnesses and other documents is that A1 Pappu @ Suresh Kalani and A2 Dr. Ramsinghani were the masterminds and had hatched a conspiracy to murder the deceased victim Inder Bhatija. Therefore, the I.O. arrested A1 and Mohammed Arshad Taher Shaikh. Thereafter he called the complainant and the watchman and showed them photo albums in which photos of accused Bacchi Pande, Baba Gabriel and Mohammed Arshad Taher were appearing and they were identified by these two persons. The I.O. also recorded statement of the father of deceased Inder, Mr. Sunderdas Bhatija at Exhibit 410, the widow of said Inder Rekha Bhatija and other family members. He collected documents including copies of some non-cognizable and other cases registered against various accused. The seized articles were dispatched for Chemical Analysis. While in custody, accused Mohammed Arshad Taher expressed willingness to confess to the crime and hence, he was sent to Magisterial custody. A supplementary chargesheet was then sent up against the arrested accused. However, all the accused filed applications before the Designated Court under the TADA and applied for discharge. An order was passed by the said Court discharging the accused from the provisions of TADA but clarifying that they can be proceeded against under the Indian Penal Code and by the competent Court therein under the Code of

Criminal Procedure, 1973. Therefore, the matter was transferred to the Court of the Additional Session Judge at Kalyan, District Thane. The then learned Additional Sessions Judge framed charge (Exhibit 105). On the charge being read over and explained, the accused pleaded not guilty and claimed to be tried. Their defence was of total denial and that they were falsely implicated in the present case. It is in these circumstances that the trial in the Sessions case which has been numbered as Sessions Case No. 218 of 1999 proceeded before that Court.

7. The prosecution examined a number of witnesses (29) and number of them turned hostile. They were cross-examined by the Public Prosecutor after the requisite leave under the provisions of law was obtained by him.

8. We will first refer to the evidence of those witnesses who did not turn hostile.

9. The complainant Ghanshyam Vijaykumar Bendre, a police constable attached for protection of the deceased Inder deposed at Exhibit No. 269 as prosecution witness 4.

10. He has in the examination-in-chief narrated the incident and reiterated his version of the prosecution as referred in the above details by us. In his cross examination by the accused Nos. 3, 5 and 6, he was asked several questions and given various suggestions. He has stated that it is true that when he reached the Central Hospital, Ulhasnagar, the police had already reached there. He could not give an answer to the question as to whether the police staff was from Vithalwadi Police Station but clarified that the police from that police station had also reached the Central Hospital. He admitted that he took about half an hour after the incident to meet the police. He stated that he was in the hospital for about 5-10 minutes and thereafter he went to the Police Station. He gave a report of the incident to the senior officers and there was an enquiry which continued even after 28th April 1990. He confirmed the contents of the FIR and his signature as well. He stated that he did not feel that he committed any mistake at the time of lodging of the report. This was because the description of the assailants is required to be given when they are unknown. He stated that he was asked about this at the time of recording the report, but for one assailant, he was unable to give description of others. However, he stated their ages. He also stated at the time of lodging the report that he had not clearly seen the persons who entered the office of deceased Inder. He was asked as to when was his statement recorded and he stated that the same was recorded after about quarter to three years from the date of the incident. He was asked as to his postings and he candidly stated that till 1992 he was attached to Headquarters and thereafter he was transferred to Ramnagar Police Station, Dombivli, Dist. Thane. Till January 1993, he was called by the investigating officer on many occasions either to identify the arrested accused or to identify the accused from photographs. He has stated that one of the accused was shown to him in police lock-up at Thane alongwith other accused. He has stated that the four persons who had entered the office of the deceased were unknown to him and he had not seen them before the incident. He was asked a question as to how many photos were shown

to him and he answered that, only two photographs were shown to him on 20 February 1993. The person viz. accused who was shown to him at Thane police lock-up was thereafter seen by him only in Court. He was not in a position to clarify whether photographs of those two persons were shown to him previously. He was also asked about the signatures on those photographs which were shown to him but his signatures were not obtained. He stated that the police told him the names of persons whose photographs were identified by him. He was asked about his statement recorded by the police and certain details with regard to the photographs and he stated that the photographs shown to him did not comprise of the photograph of a person who snatched a rifle from him and threw it on the tin sheet. He confirmed that the culprits whose photographs were identified by him were described by him in the report by ages and no other description was given by him. He was again called on 25 February, 1993 by the Crime Branch but he did not recollect why he was called and no statement was recorded. He said that after 25 February 1993 whether his statement was recorded or not is something which he cannot recollect now nor can he recollect as to whether any photographs were shown to him. He said that the photographs were shown to him when he was called at Bombay for the identification parade in 1995-96. Thereafter, he was called for another identification parade held at Yeravada jail and that must have been held after one year from 1995-96. He had seen these two accused identified by him at Bombay and Yeravada jails only in Court thereafter.

11. We have referred to these details because Mr. Chitnis, learned senior counsel appearing in the other appeal has raised a serious grievance about firstly there being no test identification parade and alternatively, the one which was stated to be held does not meet the requirement of law. It is for appreciating these arguments that we would be required to refer to these aspects and that is why it would be appropriate to refer to them in this very judgment so that even if separate order is passed in the other appeals, there is no repetition.

12. The cross-examination of this witness then proceeded on the point of the location of the office of deceased Inder. There are questions put to him in para 7 of his deposition with regard to the distance of the office from the road and its proximity as to what is called a busy road and other factories. The witness has in answer to one of the questions stated that the front door of the office of the deceased Inder was closed. It was attached with a door closer. He then stated that the person coming from the road comes towards the first floor of the office which is attached to the door closer. Nobody was sitting in front of that door. He stated that while entering the office from another door one has to cross the front door and thereafter from second door inside the passage one can pass through another door which is to the right side of the office. He stated that a person whose description is shown to him in the report has a strong build and black complexion. He entered the office. He denied the suggestion that he did not see the person entering the office clearly and still proceeded to give his description. He confirmed with regard to the other persons description but stated that he has

not given description of the accused who aimed a revolver at him. He could not give description of other three accused. He was then asked about the two photographs of some of the accused and he admitted that he did not read any news about the arrest of those accused till he had been to Bombay and Pune for identification parade. The photographs were shown to him at Kalyan and Thane by Crime Branch but he was never called to Bombay for enquiry with reference to the offence. He has stated with regard to several questions posed about how and when he reported at the Thane City Police Station.

13. Most of the questions in paras 8 and 9 are with regard to the test identification parade. The witness has stated that watchman Bahadur was with him for identification parade at Bombay as well as at Pune but he cannot confirm as to whether Bahadur reached both places prior to him. His answers about the presence of panchas at the test identification parade held at Bombay and Pune are set out and there are questions in para 9 posed to seek details of the identification parade at Bombay and Pune. Similar is the position with regard to the questions at para 10.

14. The witness was also asked whether the clothes of the deceased Inder were stained but what he has stated that when he tried to lift the said deceased, his clothes might have been stained to some extent. However, he was holding the deceased by his legs. The said witness also states that his clothes were not seized by I.O. nor was he asked to produce the same. He also stated that he was not asked by any superior officer to give a written report in connection with the incident nor was any enquiry held against him in connection with the incident. He stated that he has been continuously on duty after the said incident.

15. In paras 12 and 13 further suggestions were given to this witness. On the identification parade, he denied the suggestion that two persons identified by him in the identification parade were shown to him prior to the said parade. He also denied the suggestion that their photographs were shown to him. He denied the suggestion that he has previously seen these accused on many occasions and prior to the identification parade. He did not admit any of the suggestions given to him with regard to the identification of the accused and denied the suggestion that no identification parade was held at Bombay or Pune.

16. He stated that after the identification parade, enquiry was made by the officers of Crime Branch with him but denied the suggestion that his statement was reduced into writing after the identification parade at Pune and Bombay. Whether any memorandum was made by the panchas or not was something which he was unable to clarify. He specifically denied the suggestion that he was not present on duty on the date of the incident and that he is deposing falsely to protect his service. He also denied the suggestion that he is deposing falsely about the presence of the accused.

17. The accused No. 1 and accused No. 2 adopting this cross examination did not independently put any questions to this witness. The deposition of this witness

was recorded on 9.5.2005.

18. The other witness, who has not turned hostile is the brother of deceased Inder, who deposed as PW 26 at Exhibit No. 447.

19. In his examination-in-chief, he stated that deceased Inder and another victim Ghanshyam are his brothers. He stated that deceased Inder was carrying on the business in the name and style Anand Burner Factory prior to his murder. The other victim/deceased Ghanshyam was carrying on hotel business under the name and style Pinto Park (Prakash Hotel) prior to his murder.

20. The said PW26 stated in his examination-in-chief that he knows accused No. 1 and accused No. 2 Dr. Narendra very well. He stated that A1 is in his relation. The version of this witness is that his brother Inder was murdered in his office inspite of police protection. It is stated that Bhatijas are residing at Ulhasnagar. They started one Prakash Hotel in 1986. On 27 November 1987, some persons came to the hotel in three vans at about midnight. A1, his brother Narayan Kalani and Dhan Kalani were amongst them. They were all searching the other victim Ghanshyam and PW26 heard them saying that they would kill him. 10 to 12 persons who had come on that day damaged the entire hotel and they were armed with knife, sword, revolver and bomb. However, they could not find Ghanshyam and hence they went to his house and broke open the door of the house.

21. PW26 then states that there was an Assembly Election on 27th February, 1990. Kamal (PW26) and deceased Ghanshyam and others represented Bhartiya Janata Party in that election. It is stated that on 27th February, 1990 at about 3.00 pm, they were present at the site O.T. No. 3. A1 Pappu Kalani came there in a big car. He got down and went towards Ghanshyam. He threatened Ghanshyam and stated that Ghanshyam is working in the elections against A1 and A1 will see him after the elections. However, all the 3 brothers viz. Kamal, Ghanshyam and Inder continued the election work. On the very day i.e. 27th February 1990 after finishing the election work at about 7.15 pm, PW26 received an information on telephone that Ghanashyam has been fired at. He states that he rushed to the spot and then to Central Hospital, Ulhasnagar. The complaint of this incident was lodged by Inder Bhatija who is victim/deceased in the present crime. However, there was no response from the police even after the statement of PW26 in relation to this crime was recorded.

22. PW26 stated that Inder was an eye witness to the incident of firing at Ghanashyam thus and witnessed the same. That is why Inder started receiving threatening calls from A1. That is why the deceased Inder and his father Sundardas Bhatija gave applications to the Deputy Commissioner of Police one Y.C. Pawar, Commissioner of Police Tyagi, Chief Minister of State of Maharashtra and then Prime Minister of India. Therefore, police protection was given to deceased Inder. Even then the threatening calls were received by him. The caller stated that the deceased Inder had killed A1's uncle Dulichand Kalani and now

that Ghanashyam was murdered, he will also be murdered and finished.

23. PW26 stated that on 28th April, 1990 that is exactly about two months from the murder of Ghanashyam, Inder was murdered. PW26 confirmed that the rifle or weapon of the police guard protecting Inder was snatched at that time and thrown on the roof. PW26 stated that deceased Inder was shot and the complaint in relation thereto was lodged by police constable Bendre PW4 Exhibit 270 but PW26's statement was not recorded on account of terror. Accused Pappu Kalani was arrested in 1992 and thereafter PW26 was called by police and his statement was recorded in January 1993.

24. The PW26 in his examination-in-chief also stated that A1 and many persons came in the van on 27th November, 1987 at about 12 to 12.30 and they were also searching for deceased Inder. It was also stated by this witness that there were Municipal elections in the year 1986 and Congress party on its own got the majority seats. PW12 Sunderdas Bhatija, Mohan Behrani, A1 Pappu Kalani, Narayan Kalani, Gop Behrani and Trilok Kalani were elected in the election. However, there was a dispute with regard to the post of President of Ulhasnagar Municipal Council between Pappu Kalani and Gop Behrani. The Congress party high command issued a direction that these two persons will share the President's post for a two and a half year each. The Bhatijas and particularly their father Sunderlal was strong supporter of Gop Behrani. PW26 also stated that A1 Pappu Kalani refused to vacate the post of President after two and half years. PW26 stated that there was a murder of Dulichand Kalani. Dulichand was uncle of A1. Deceased Inder and Ghanashyam was arraigned as accused in the murder case of Dulichand and the witness states that this was at the instance of A1. The brothers of PW26 were involved because Gop Behrani supported A1 Pappu Kalani at that time. PW2 stated that the brothers were made accused so as to obtain support of PW12 Sunderlal to accused A1 Pappu Kalani.

25. In para 7 of the examination-in-chief PW26 states that he can identify the copies of the applications given by deceased brother Inder and his father Sunderlal to DCP Pawar, Police Commissioner Tyagi in respect of threatening calls by A1 to them. It is stated that photo copy of the application dated 14th March, 1990 to Police Commissioner Tyagi given by Sunderlal and shown to this accused is the same. The signature of his father Sunderlal was identified by PW26. These document was marked as Article B. We would refer to these aspects in further details when we consider the arguments of Mr. Mundargi, learned senior counsel appearing in support of this appeal.

26. This witness was asked as to what evidence his father Sunderlal gave before the Court in this case but he was unable to give the details and only stated that as on 14th March, 2011, PW12 Sunderlal was not alive and had passed away.

27. This witness was cross-examined in great details by the advocate for A1-Appellant before us. He was asked about his educational qualifications and business. He was also asked about the business of the brothers who are no more

and deceased. He was asked with regard to the distance of PW26 is place of business and that of the deceased brother Inder.

28. The witness was asked as to whether he and deceased brother Inder resided together and he stated in the affirmative but clarified that deceased Ghanashyam resided separately. He gave the detailed residential addresses of the brothers and the distance between their houses.

29. In an answer to one question, this witness stated that Gop Beharani, Mohan Beharani and Thakur Beharani are his maternal uncles. Gop Behrani died in 2008 and prior thereto in 2007, Mohan also expired. Both died of natural causes. The year of the death of PW Sundarlal is stated by this witness as 2009. The said Sundarlal was 95 to 97 years of age. This witness in his cross-examination by A1 admitted that he was knowing Dulichand Kalani very well. Both the brothers who are deceased, Gop Beharani, Mohan Beharani, Gopal Rajwani, Lalumal Hemje, Godu Krishnani, Vasu Krishnani and others were accused in the murder of Dulichand. The said Dulichand was also murdered.

30. PW26 in his cross as well confirmed his presence at Pinto Park (Hotel Prakash) at the time of the incident which took place on 27th November, 1987 and stated that he lodged FIR in respect of the said incident at Vithalwadi Police Station but stated that though he does not know why the case was not pursued, however, that does not mean that the incident did not occur at all. This witness was asked as to when police recorded his statement in the present case on 15th January, 1993 and on 25th February, 1993 though he referred to the incident of 27th November, 1987, he does not know the reason for the same. He was asked specifically as to why in his statement and the supplementary statement, the portion in his examination-in-chief about all the accused going to the house of said Ghanashyam (another victim/deceased) and they broke open his house, has not been appearing and he replied that he will not be able to explain the reason for the same. He denied the suggestion that he did not inform the police about this incident when his statements were recorded nor did he give any details regarding the same.

31. The witness was asked as to when he gave the statement to the police on 15th January, 1993 in respect of the incident of 27th February, 1990 as to why the portion that when they were standing at O.T. No. 3, A1 came in a car and got down has not been referred. He was asked as to what is the reason for which incident is not referred and he could not give the same. He denied the suggestion that this incident was not narrated or referred by him because he was not present at the time of the same i.e. 27th February, 1990.

32. He was further asked as to why in his statement, he has not stated that since Dulichand Kalani was killed by Bhatijas and others, Ghanashyam also will be murdered and so also Inder. However, he denied the suggestion that there were no threatening calls received.

33. In para 14 of the cross-examination, it is stated by the witness that he had

gone to the Police Station with a complaint with regard to the murder of both Ghanshyam and Inder but police did not take it on account of terror of accused Pappu Kalani. The witness admitted that the complaint was not sent to the police by post. He admitted that his statement was recorded on 9th October 1990 in respect of the murder of Ghanshyam. He states that he is also witness in Sessions Case No. 219 of 1999. This witness admitted that he was in jail for 10 months in a case under section 420 of IPC in the State of Gujarat and this must have been between 2006-2007. The witness was asked about whether he deposed about the incident stated to have occurred on 27th November, 1987 either in the statements recorded while investigating the murder of Ghanshyam or during trial of the case. The witness did not recollect as to whether the details of this incident were narrated by him while deposing in the case of murder of Ghanashyam. Then the attention of the witness was invited to the certified copy of his statement recorded by police on 9th October, 1990 as well as his evidence recorded in Sessions Case No. 219 of 1999 on 4th May 2009. The witness after going through the certified copies admitted that there is no reference with regard to this incident and in the police statement as well as in his evidence in Sessions Case No. 219 of 1999. However, he once again stated that he had stated about this incident in another statement (supplementary) recorded in that case but he does not recollect the date of its recording. He stated that he was under trauma and was nervous when his evidence was recorded in Sessions Case No. 219 of 1999. He denied the suggestion that no incident of 27th November, 1987 has taken place.

34. Thereafter, he denied the suggestion with regard to the incident of 27th February, 1990. He denied the suggestion that he was falsely deposing against A1 about the threats given to deceased brother Inder. He denied the suggestion that he is deposing falsely with regard to the application given to the police authorities by the complainant about the terror unleashed by A1 and that is how the police is not recording his statement.

35. The cross-examination of this witness by advocate for accused Nos. 3 to 7 was declined. Thereafter there is another eye witness who has not turned hostile. He is PW21 the investigating officer Shri Jaising Shivajirao Patil.

36. Before that we refer to the deposition of PW26 Shivdas Bajrang Tagtode. He was posted in October, 1992 in Crime Branch, Kalyan as Senior Police Inspector and was entrusted the investigation in the present case on 5th December, 1992. He took over the investigations from PI Gaikwad and the papers comprised of complaint of the police constable Bendre. Thereafter, this witness refers to the spot panchanama drawn by PSI Deshmukh. The seizure of the property and the notes received by him regarding postmortem. He stated that the papers received were also comprising of an inquest panchanama. There were certain statements recorded till that date and after he took over the investigations and referred the case diary, he proceeded to record the statement of one Ramesh Thavardas Chetwani. He proceeded to arrest accused Narendra Hemdas Ramsinghani who

was arrested in other crime in respect of the death of Ghanashyam. Thereafter, this witness narrates as to how the panchas drew the panchanama and the contents of the spot panchanama have been confirmed by him. It is this witness who drew the spot panchanama and seized the chair on which the deceased was sitting at the time of incident. He then refers to the several details including the directions given by him to collect photo album of sharp shooters in Mumbai, Navi Mumbai, Thane and Thane city. He proceeded to narrate as to why the statements of watchman has been recorded in this case and the further statement. He refers to the search carried out by him and the statements of other witnesses which have been recorded. He has referred to the statement of Kamal Beharani recorded by him and the details about how he procured the custody of Mohd. Arshad Tahir Shaikh and effected his arrest and that of A1. That deposition initially refers to the details collected by him after the investigations were handed over to him. He also narrates about further steps taken. In his cross-examination by the accused, some details were sought and particularly about the identification of photographs and why the details of photo album are not to be found in the case diary. In the cross-examination of this witness by A1, he was asked about the antecedents of deceased Inder Bhatija and he admitted that he was one of the accused in the murder case of the uncle of Pappu Kalani. He clarified that Mohan Behrani is maternal uncle of deceased Inder and Gop Behrani. He in the cross-examination stated that in 1986, there were Municipal elections and it was agreed that Pappu Kalani would President of two and half years and thereafter the post will be held by Gop Behrani. He was asked about the political background of these persons and whether there was any family dispute between Behranis and Kalanis. All the suggestions about non-involvement of A1 in this case have been denied by this witness.

37. PW21 Jaising Patil in his examination-in-chief has deposed about how he while working as Police Inspector (Crime) at D.N. Nagar Police Station, Mumbai and being part of the anti-terrorist squad established by Additional Commissioner of Police, North Region, Mumbai, had an occasion to confront certain persons at a raid carried out in the premises of one Calbrow Polyster Limited. He stated that this raid was conducted by Inspector Quavi. He found three persons sitting in that office and on enquiry they disclosed their names as Dilip Mulchandani, Gabriel @ Baba son of Hans Moben, Ramchandra @ Bacchi Pande. This witness stated that the persons present in Court hall are the same. He confirmed about their search in the presence of panchas Mahaveer and Bhimsingh. The search of Baba Gabriel showed that he was in possession of foreign made pistol loaded with live rounds. That pistol was taken by this PW21 in his possession. Thereafter, search of Bacchi Pande resulted in seizure of a revolver. That is how he proceeded to arrest the three accused and seized the weapons, live cartridges and one hand grenade. The other three accused arrested on instructions of Bacchi Pande and Gabriel are not the accused in the present case except one Arshad. The accused as well as the weapons were taken to Khar Police Station, they were sealed and labeled and were seized under panchanama. The place of

panchanama and its conclusion are stated. This witness was not cross-examined by A1 and A2 but by accused Nos. 3, 5, 6 and 7. The witness was asked as to where is the office of Calbrow Polyster Ltd. and as to what information he had received about the persons thereat. The witness was unable to recollect some details. His cross-examination in paras 7 and 9 are relied upon by the counsel appearing for the other accused and in these paragraphs, the questions and suggestions are with regard to the presence of the accused Bacchi Pande and Gabriel, seizure of weapons from them and the absence of some details in the panchanama but which have been spoken in the oral deposition or examination-in-chief in this case. There are certain questions about the weapons and the details not being mentioned in the panchanama or that of a personal search of accused carried out. The suggestion that there was no visit or search of the premises of Calbrow Polyser Ltd. or the premises of M/s. Papilon tailors have been denied by him.

38. The depositions of other witnesses and which have been relied essentially by Mr. Mundargi and Mr. Chitnis, learned Senior Counsel are of PW9, PW10, PW11, PW12, PW20, PW27, PW29 and PW14. We will refer to the deposition of these witnesses in details when we are considering their submissions.

39. Mr. Mundargi, learned senior counsel appearing on behalf of A1 submitted that the three aspects and on which rests the conviction and sentences recorded are (1) conspiracy (2) motive and (3) legal issues.

40. On the question of conspiracy, Mr. Mundargi submits that on perusal of the charge, it is apparent that the same is based on the statements of one Tardalkar PW9, Dashrath Vishwasrao, PW10 and Balu Kakade PW11. All three of them have turned hostile. As far as Tardalkar is concerned, he claims to have stated that there are two vehicles which were used by A1 and they belonged to the Ulhasnagar Municipal Council. Tardalkar was working as head clerk. He claims that since 1985, he was incharge of vehicles of Municipal Council, Ulhasnagar and till the year 2000. Being incharge of vehicles of this council, it was his job to assign duties to the drivers and look after the maintenance of the vehicles. He claims to have given vehicles to the officers of different departments for official work. A1 Pappu Kalani was President of Municipal Council and no vehicle was given to the President officially. Mr. Mundargi submits that he deposes about two vehicles owned by Municipal Council but when he stated that these vehicles were never used by A1, the permission was sought to declare this witness as hostile and thereafter the APP cross-examined him. In his cross-examination, he has given vital admissions and which are to the effect that the drivers were not writing any log book. He has admitted in his cross-examination that several statements are attributed to him by the police but those are not made by him. He denied a suggestion that he is deposing falsely and under pressure of A1. Mr. Mundargi submits that there is no corroboration of any of the statements which are attributed to him by the prosecution and from which he has resiled. Mr. Mundargi submits that there is absolutely no proof of conspiracy because even

witness PW10, a driver in the service of Ulhasnagar Municipal Council and Balu Tukaram Kakade, PW11 turned hostile and denied their statements made to the police and recorded under section 161 of Criminal Procedure Code. Thus, the bogey of pressure and terror by A1 has not been substantiated and proved at all. If there is an apprehension in the mind of the staff members of the Ulhasnagar Municipal Council and they have not stood by their version given to the police that is not because of any pressure or force exerted by A1. A picture has been painted that A1 unleashed terror in the locality and created fear in the minds of everybody including the residents and that is why none comes forward to depose against him or make a complaint against him. That is absolutely false. There cannot be an unilateral terror theory and particularly when deceased and his family are also affluent and well connected persons residing in the same locality. They are supporters of Bhartiya Janata Party and claimed to have known several top political and social leaders. They could have easily approached the police even during the course of the elections or when other disputes arose as between them and A1 and his family. Therefore, the inference drawn that there was terror and pressure throughout his based on inadmissible evidence. There is no foundation for the conclusion reached by the learned Judge on this aspect. That A1 let loose a reign of terror in the locality is not even a suggestion given to any witness. In such circumstances, the findings of fact are clearly vitiated firstly by non-application of mind and secondly by omission to make any reference to vital materials including admissions of the witnesses. Similarly, when majority of the prosecution witnesses have turned hostile and have not supported the version then all the more it was risky for the learned Judge to have concluded that the offence under section 120B of the Indian Penal Code stands proved as against accused No. 1. Pertinently, accused No. 2 has acquitted by concluding that there was no cogent and satisfactory material to record any finding of conspiracy against him.

41. Mr. Mundargi submits that assuming without admitting that the version of the hostile witnesses can be relied upon but that is with a rider that it must fully support the prosecution case and secondly, there should be corroboration for the same by way of independent material. These tests have not been fulfilled in the present case. By mere political opposition, neither a conclusion of conspiracy nor of motive can be reached.

42. Insofar as motive for the crime is concerned, Mr. Mundargi submits that proof of it does not dispense with the requirement of proof of commission of the crime. This is a case of circumstantial evidence. The motive is, therefore, relevant factor. Even otherwise, if the case is based on direct evidence and therefore, motive is not relevant, still, as far as that aspect is concerned, the version of PW12, PW20 and PW26 is inadequate. PW12 is the father of the deceased Inder but he turned hostile and has refused to stand by the prosecution case. He has admitted that in the murder case of Dulichand Kalani, his both sons Ghanshyam and Inder were implicated as accused. Further he did not support the prosecution version that Pappu Kalani was going to cause the

death of all those involved in the murder of Dulichand Kalani. He has specifically resiled from the statement marked "C". Secondly, he has not stood by the version of the prosecution that there was any complaint made to the Commissioner of Police or Deputy Commissioner of Police or Assistant Commissioner of Police or to the then Prime Minister of India or Lalkrishna Advani about the activities of Pappu Kalani. All that he has stated is that there might be a telegram sent to the police and the contents of that telegram might have been mentioned by his brothers in law. It is in these circumstances that his version is not enough to arrive at a conclusion of motive for the crime. Similar is the case with regard to the evidence of PW20. Mr. Mundargi criticized the approach of the learned Judge in relying on the evidence of the wife of deceased Inder, Rekha. She has also not stood by her stand before the police. She has specifically denied of being aware of any police protection sought by her husband. It is in these circumstances that Mr. Mundargi submits that if the version of PW26A, the surviving brother of the deceased is considered firstly that is a very belated version. Secondly, all that he has referred to is the incident of 27th November, 1987 and 27th February, 1990. The gap or time period between these two incidents is more than two years. If there was a reign of terror and unleashed by A1, then, there could have been series of altercations and exchanges as both families were involved in political activities. Both families were supporting the then major political parties. They being well known in social and political circles so also having diverse business interests, then in a place like Ulhasnagar, there could have been occasions when they clashed with each other. The only two incidents are in the context of the murder of Dulichand and the elections in February, 1990. However, the version of Kamal was common to that of Sunderlal PW12 the father. However, the threat given to Inder and after Ghanshamdas's alleged murder is not proved as the complaint or copy thereof has not been marked in evidence. The learned Judge has termed this document which is marked Article "B" as Exhibit but the prosecution has not taken any steps to prove the contents thereof. Sundarlal who supposed to be the author of complaint but he has denied of having made it. All that has been proved is a signature below the copy of the said complaint but that is restricted to Sundarlal's signature on a copy of the complaint and does not prove the contents thereof. The proof of existence of a document is distinct from the proof of contents thereof. The proof of contents has to be independently led. That has not been tendered at all. In these circumstances, the motive for the crime is not established and proved at all. Mr. Mundargi then submitted that PW26A has not been able to prove the threat and terror and rather his version would demonstrate as to how he has a definite intent to depose against A1. Firstly, he is brother of two murdered victims. Accused No. 1 is a common accused in both criminal cases. Kamal PW26 is a witness in both. The tendency is to get over and improve upon the deficiency and lapse the evidence recorded in relation to the other crime viz. murder of Ghanshyam. Further, the conduct of this witness needs to be considered in as much as if he was indeed threatened and apprehended some danger to his life and property by A1, nothing prevented him

from making a complaint to the police in writing and sending it by post. Therefore, his is a false version and goes on to state that none was willing to record any statement and no police officer would come forward and proceed against A1. The version of this witness is, therefore, imaginary and full of omissions and contradictions. He is, thus, no witness to prove the motive for the crime.

43. Similarly, Mr. Mundargi criticized the version of PW27 and submitted that as a tax collector in Municipal Council at best this person may have known A1 but there is nothing in it which would enable the Court to conclude that A1 was a character totally feared by residents, acquaintances and colleagues. That apart, in the evidence of PW27, there is no reference of any terror or threat by A1. Rather, he refers to an apology tendered by A1 for the act of his brother Narayan and for allegedly harassing lady staff of the Tax Department of Municipal Council, Ulhasnagar. There is absolutely no evidence of reign of terror. Rather, this witness has expressed a opinion and which can have no evidentiary value. Similar is the version of Jamil Ahmed Juber Khan who is in scrap business and who is stated to have been present on 27th February, 1990 at Pinto Park Hotel. This witness was declared hostile and in his cross-examination by the Public Prosecutor nothing could be elicited which would enable this Court to conclude that there is any evidence for motive to commit the murder. If this is the direct evidence, then that cannot be held to be sufficient to hold that motive for the crime is not a relevant factor in this case. In other words, in the absence of any direct evidence, motive would become a relevant factor and cannot be discarded and brushed aside.

44. Mr. Mundargi then submitted that the circumstances which have been relied upon and tried to be brought on record to support motive to commit the crime are to be found in the version of PW18 but even that is inadequate and insufficient. PW18 was working as ACP at Ulhasnagar and all that he has done was to record the complaint in relation to the present crime. He may have placed on record the FIR in Sessions Case No. 218 and 219 of 1999. However, he has equally admitted that when Ghanshyam's murder was investigated, it transpired that there were criminal cases lodged against Ghanshyam and Inder at Vithalwadi Police Station. In these circumstances, the findings of fact recorded by the learned Judge by relying upon the depositions at pages 348 and 358 of the paper-book and at paras 75 and 76 of the impugned judgment are wholly erroneous and do not establish and prove the motive. Further, when the complaint of alleged terror and made in writing itself is not proved, then the question of any motive for the crime particularly arising out of political and family enmity does not arise.

45. For all these reasons, it is submitted that the judgment of the learned Additional Sessions Judge is totally erroneous and illegal.

46. In the written submissions tendered by the counsel for accused No. 1 apart from the above oral submissions, it is urged that the prosecution version is not at

all corroborated independently of the depositions of hostile witnesses. The evidence on the point of conspiracy and motive is unreliable and not truthful at all.

47. In continuation with the motive part A1 draws the attention of this Court to the fact that this deceased was not only involved in the murder of Uncle of accused No. 1 Dulichand Kalani but also in 2 other different murder cases which can prove that the deceased just didn't have enmity with accused No. 1 but he had enmity with other people also.

48. The finding appears to be based on A1's his antecedents or is bad track record. Merely because such is his history it does not mean that he is guilty of the crime for which he has been tried. The proof of his having committed the crime must be independently found and no conviction can be based on mere bad behavior or bad conduct or bad record of any accused. It is, therefore, submitted that this finding is vitiated by non-consideration of vital materials.

49. As far as legal issues, Mr. Mundargi submitted that the Criminal Jurisprudence stipulates that finding of a guilt cannot be based on result of investigation by police, it should be based solely on evidence produced during trial and as such the learned Trial Court committed a grave error of law in relying upon the statement of witnesses recorded under section 161 of the Code of Criminal Procedure.

50. It is then submitted that there is a specific bar under the provisions of Section 162 of the Code of Criminal Procedure for using the statement made under section 161 of the Code against an accused person.

51. It is also submitted that perusal of aforesaid provision of Section 162 of the Code makes it apparently clear that there is an absolute bar against the statement made before a police officer being used for any purpose whatsoever and it only enables the accused to rely upon it for a limited purpose of contradicting a witness in the manner provided by section 145 of the Evidence Act in his interest.

52. It is further submitted that the learned Trial Court committed a grave error of law in relying upon the judgment of Hon''ble Supreme Court in Bhagwan Dass Vs. State (NCT) of Delhi, in as much facts of that case are entirely different from the facts of the present case. It is submitted that in Bhagwan Dass (Supra) there was a case of extra-judicial confession by accused to his mother and the concerned hostile witness was mother of the accused, who was interested in the acquittal of the accused whereas in the present case concerned hostile witnesses were father and wife of the deceased who by no stretch of imagination can be said to be interested in acquittal of the Appellant and there is no extra judicial confession of present accused to any one of hostile witnesses.

53. It is then submitted that the observations in aforesaid Bhagwan Dass (Supra) are per incuriam in as much as the decision was rendered without referring and

discussing the law laid down by the Constitution Bench of Hon'ble Supreme Court in *Tahsildar Singh (Supra)* followed by many others and as such *Bhagwan Dass (Supra)* is not a precedent. It is respectfully submitted that the Hon'ble Supreme Court in catena of judgments held that a decision which is not founded on reasons nor it proceeds on consideration of the issue, cannot be deemed to be a law declared so as to have a binding effect as is contemplated under Article 141 of the Constitution of India. It has been held that uniformity and consistency are core of judicial discipline and that which escapes in the judgment without any occasion is not *ratio decidendi*.

54. It is further respectfully submitted that there is nothing in the evidence so as to prove that the appellant conspired with others for alleged offence and the learned trial Court for convicting the appellant again resorted to statement of witnesses recorded under section 162 of the Code of Criminal Procedure which is inadmissible in law. Moreover, the Hon'ble Supreme Court in *State of U.P. Through C.B.I. Versus Dr. Sanjay Singh and Anr.* 1994 Supp (2) SCC 707 (Para 19) has laid down that mere suspicion of motive alone is not sufficient.

55. That it is further respectfully submitted that the learned Trial Court violated the fundamental rights of the appellant enshrined under Article 21 of the Constitution of India in as much as the learned trial Court flouted the procedure by exhibiting certain documents at the time of delivering the judgments which were in the form of photocopies and copies of photocopies and were earlier shown as Articles. It is respectfully submitted that it is no longer *res integra* that mere marking of an exhibit does not dispense with the proof of its contents and those documents becomes inadmissible in evidence unless author thereof is examined; the contents thereof cannot be held to have been proved unless he is examined and subjected to cross-examination in a Court of Law.

56. Mr. Mundargi's submissions on legal issues have been adopted by Mr. Chitnis, learned senior counsel appearing for the appellant in Criminal Appeal No. 1294 of 2013, Mr. Desai appearing in Criminal Appeal No. 1322 of 2013 and Mr. Adsule appearing in Criminal Appeal No. 1323 of 2013.

57. Since we are passing separate orders in each criminal appeal particularly because Mr. Mundargi has confined his arguments to the role of accused No. 1 in the crime that we are not referring to the evidence of other prosecution witnesses. We would refer to the same in details in other appeals.

58. Mr. Patil, learned Public Prosecutor appearing for the State submits that there is no substance in the contentions of Mr. Mundargi at all. He submits that there were two murders in Bhatija family. The first one was of Ghanshyam and in that murder, deceased Inder was eye witness. The first murder was on 27th February, 1990 and within two months, the eye witness to the crime and the brother of the deceased Ghanshyam, Inder was killed. There is enough material on record to indicate that the relations between Bhatija and Kalani family were strained. Mr. Patil submits that there is no substance in the contention that complaint of Inder

Bhatija has not been exhibited or that it is not exhibited formally means it has lost all evidentiary value. Mr. Patil submits that no objection was taken by any of the accused to the marking of a copy of this complaint in writing made by Inder to the Police as an exhibit. The copy has been exhibited because the original FIR from which the same emanates has been filed in the record of Sessions Case No. 219 of 1999. Mr. Patil relies upon the evidence of PW18 in this behalf. He submits that PW18 Kishor Eknath Jadhav was working in 1990 as Assistant Commissioner of Police, Ulhasnagar. He has deposed that on 28th April, 1990, police constable Ghanshyam Bendre came to the police station to lodge report in respect of murder of Inder Bhatija. The then PI of Vithalwadi Police Station reduced the complaint in writing. Being an senior officer and working as ACP, he verified the complaint of police constable Bendre and put his endorsement at the bottom of the complaint. Thus, this witness has proved the contents of the complaint, the signature below it and even the spot panchanama.

59. He had also deposed that while working as ACP at Ulhasnagar Police Station on 27th February, 1990 which was a polling day, Inder Bhatija came to Vithalwadi Police Station to complain about the murder of his brother Ghanshyam. That complaint was made to PI Inamdar. This witness has stated that Inder Bhatija was present in the police station and the complaint regarding murder of Ghanshyam was verified by him, he enquired about the incident and in the presence of Inder, the contents of the FIR in Hindi were narrated to Inder and he admitted them to be true and correct. He also admitted the signature, the copy of the FIR was taken on record and marked Exhibit 310.

60. During the cross-examination of this witness by the advocate for A1, he was specifically asked about the relations between the families. He was asked as to how Behranis and Kalanis are related and equally as to how Behranis are related to Inder Bhatija. This witness has deposed that there were two political groups at Ulhasnagar, one led by Kalani and another by Behrani. During the tenure of this witness as ACP at Ulhasnagar, there was continuing rivalry between two groups. This witness also deposed that A1 is always the ruling party at Ulhasnagar. Thereafter, this witness was asked questions by the advocate for accused 3 and 5 to 7 and about the death of the deceased Inder. This witness was also asked about his tenure at Ulhasnagar as ACP and he stated that he was posted as ACP at Ulhasnagar till the end of May, 1990. Mr. Patil also relied upon the fact that the marking of copies as exhibits during the course of recording of evidence of PW18 on 28th October, 2005 has not been objected. There was no objection during the course of recording of evidence and even thereafter though the right was reserved. Further, the father of the deceased Inder, PW12 turned hostile but he has specifically stated that there was a threat given by A1 to Ghanshyam and the further incident which took place at 7.15 pm on that day of firing in which Ghanshyam was killed has been confirmed. This witness has also admitted Exhibit 310 which shows as to how there was continued political enmity between two families. In such circumstances and when there is a reference to the lodging of the complaint by Inder after the incident of 27th February, 1990 in the

deposition of other witnesses, then, it is too late in the day to raise any grievance or make a complaint about the marking of the copy of the complaint dated 27th February, 1990 as an Exhibit. Mr. Patil submits that close proximity between two crimes is enough to conclude that Inder was under fear and anticipating that being an eye witness to the crime of murder of his real brother Ghanshyam even he would be eliminated by A1 and his henchmen. That is why he approached the police authorities and sought protection. That police protection was given to deceased Inder is undisputed. The argument is about the presence of the police guard on the day of death of deceased Inder. That presupposes that there is no dispute that police protection was given to Inder. It is, therefore, clear that the complaint in that behalf must have been made by the Bhatija family. That is how Inder, a eye witness to the murder of his brother, was given police protection. In such circumstances and merely because out of 29 witnesses examined by the prosecution, 19 have turned hostile, does not mean that prosecution version is false or unreliable. It is not the quantity of evidence but the quality thereof which is material and crucial. Mr. Patil submits that this is not a case where two accused being acquitted and accused No. 4 absconding that any benefit of doubt should be given to the convicted accused. Their conviction and sentence is supportable and tenable, both in law and on facts. There is proof beyond reasonable doubt and the complicity of these accused in the crime is established and proved.

61. Insofar as accused No. 1 is concerned, on all counts, there is enough material. Insofar as motive and conspiracy is concerned, the prosecution witnesses 12 and 22 have proved that there was a political rivalry. There is a history inasmuch as A1 was influential politically in the area and for a long time. He was a member and thereafter a President of the Municipal Council. He had very good connections with the Congress Party. He also contested the elections to the State Assembly. One Shitaldas was his opponent. Shitaldas was supported by Bhartiya Janata Party. Both Ghanshyam and Inder Bhatija worked for Shitaldas. In the circumstances, there is material to conclude that A1 hatched a conspiracy to eliminate both brothers. That was also planned and executed so as to avenge the death of uncle of A1 Dulichand. A1 suspected that both these brothers are involved in the murder of his uncle Dulichand. Since the family relations were so strained it is natural that the A1 threatened his political opponent deceased Ghanshyam with dire consequences. That was for working against A1 in the elections held in 1990. On the day on which the threat was administered to him by A1, Ghanshyam was killed. Since Inder was an eye witness to the murder of Ghanshyam at the hands of A1 and his men that A1 had clear motive to eliminate and kill Inder as well. In such circumstances within a short time he ensured that Inder was murdered. That is clear from version of all the witnesses. Some of the witnesses may have turned hostile but the law is very clear that with the leave of the Court, the witnesses who turn hostile can be cross-examined by a person who has called them to depose on his behalf. It is in these circumstances permission was given to cross-examine PW12 after he

turned hostile. Mr. Patil submits that there is absolutely no confusion insofar as the law is concerned inasmuch section 145 of the Indian Evidence Act, 1872 will confer a right of cross-examination as to previous statement in writing. The right conferred by section 145 in this case is available to the accused. The other provisions viz. Section 154 of the Indian Evidence Act provides for questioning by party of his own witness. Sub-section (1) thereof confers a discretion in the Court to permit the person who calls a witness to put any question to the witness which might be put in cross-examination by the adverse party to that person. Thus, leave of the Court is contemplated to cross-examine one's own witness. Mr. Patil submits that judicial notice has been taken by the Hon'ble Supreme Court from time to time about the witnesses in a criminal trial turning hostile. The witnesses turned hostile out of fear, inducement, threat or they are won over by the adversaries by corrupt means. Therefore and that they have been declared hostile does not result in automatic wiping out of their evidence. Even the evidence of hostile witness, if it finds corroboration from the facts of the case may be taken into account while judging the guilt of an accused. The law is that the evidence of hostile witness can also be relied upon to the extent to which it supports the prosecution version. The evidence of such witness cannot be treated as washed off from record. It remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence. It is in these circumstances that the prosecution sought leave to cross-examine PW12 Sunderlal Bhatija, the father of deceased Ghanshyam and Inder. He confirmed the demand for police protection for himself and his family. Sunderlal was a social worker and also businessman. Once his sons have been brutally killed, there is every reason for this witness at the fag end of his life turning hostile. He had a fear in his mind and that was out of concern for the surviving members of his family. It is under tremendous stress that he did not entirely support the prosecution version. However, his version is corroborated in material particulars. This should not be taken as a routine matter merely because even the wife of the deceased Inder turned hostile. The continued presence of A1 in the area, his political clout and his might therefore, forced the witnesses to resile from their version. It is apparent that Sunderlal gave a statement to the police on 25th February, 1993 but when he deposed before the Court about 10 to 12 years thereafter, he could not recollect everything exactly. Yet, he has specifically stated about the political background and the family relationship. This is also a version of the other hostile witness, the wife of the deceased. It is in these circumstances that the inference that there was a threat to the life of Inder is valid and this Court should not accept any technical pleas and arguments. If other witnesses turned hostile but at the same time tremendous courage and strength was shown by PW26A, PW29 and equally the police constable posted to guard and protect the deceased Inder, then, a balance has to be struck and that has been rightly done by the learned Additional Sessions Judge. Against the overwhelming and voluminous evidence proving the involvement of these accused in the crime, the trial Court had rightly brushed aside and disregarded minor omissions and contradictions which had no material

bearing on the prosecution case. None of these accused have been able to controvert leave alone make a dent in the prosecution case. That is how they are now relying on some technicalities and to gain an acquittal. However, this attempt should not be upheld by this Court.

62. Mr. Patil submits that the trial Court judgment is reasoned and well considered. Merely because the learned Judge has accepted the documents or given them Exhibit numbers or marked them as exhibits during the course of the judgment does not mean that there is a contravention of a mandatory rule or provision of law. Some procedural lapse may have occurred but that should be overlooked because the sessions case was pending for nearly 15 years. In these circumstances no capital can be made of any error or lapse on the part of the learned Judge. He, therefore, submits that the influence and domination of accused No. 1 is such that even in the absence of any settlement or compromise the witnesses have turned hostile. The wife of the deceased also turns hostile and that is a serious matter which must be noted by this Court. This is no case for acquittal. The judgment of the trial Court cannot be said to be perverse or illegal and erroneous. It deserves to be upheld.

63. Elaborating these submissions and on the aspect of conspiracy, Mr. Patil submits that the evidence of PW9 shows that everything including vehicles were controlled by the A1 who was a President of Ulhasnagar Municipal Council. The vehicle which was used in the crime was produced by PW9. He was an employee and at the instance of the A1 was employed in the Ulhasnagar Municipal Council. He was under influence of A1 and in any event loyal to him. PW9, 10 and 11 may not have supported the prosecution version in entirety but the fact that A1 was President of Ulhasnagar Municipal Council, controlling its affairs is not in dispute. All the three witnesses have at one time or the other rendered personal service to A1. They have either ferried the guests of A1 at the hotel or a private resort belonging to him. The other accused had also visited the private resort and at some time or the other, the A1 had entertained the guests or other persons ferried or brought in by PW9 and 11 would show that those working for him or under his control were trusted by A1. They were ready and willing to do anything for him. The accused A3, A6 and A7 are residents of Mumbai. They had no enmity with the deceased. It is in such circumstances that the trial Judge has held that the services of these accused were engaged and they were hired by A1 or at his instance, they carried out the act of eliminating deceased Inder. A1, therefore, can be termed as a kingpin. Mr. Patil, therefore, submits that the motive, conspiracy and result are all facets which have been duly established and proved by the prosecution. Our attention has been invited to portions which have been marked as A, C, D and E from the statement from pages 403 to 406 of the paper-book. Each of these portions were specifically put to the witness Shivdas Bajrang Taktode, PW26 and he states that these portions are from the statements of Tukaram Tardalkar and Mohan Gangaram Rajale. The portion marked "B" is portion of Tukaram Tardalkar. It is recorded as per his say. Portion marked "B" is also recorded as narrated by Tukaram Tardalkar. Therefore, these

and the statements attributed to Balu Kakade would go to show that the vehicle/ jeep of Mahindra company and used in the commission of the offence and later on seized under panchanama exhibit 265 has been produced on 31st December, 1992 by Tukaram Tardalkar. Hence, this is a fit case where it can be concluded that the conspiracy to eliminate Inder was hatched by A1 and it was executed with the aid and assistance of other accused. It is in these circumstances that the learned Judge concluded that firstly that in order to avenge the death of Dulichand Kalani and secondly on account of political enmity and strained family relations, A1 had decided to kill the deceased Inder. Thirdly, there was a strong motive because A1 was aware that the deceased Inder was an eye witness to the murder of his brother Ghanshyam and which was also at the instance of A1. Therefore, the learned Judge has rightly reached the conclusion that on all three counts viz. strong and clear motive, leading role in the conspiracy so also in a planned manner A1 caused the death of deceased Inder through the other accused.

64. Lastly, it is contended by Mr. Patil that from the deposition of Sunderdas Bhatija, it is clear that he has stood by the version of PW26A and equally the wife of the deceased Inder. Further, from the deposition of PW18, it is apparent that after the incident of 27th February, 1990 a complaint was given by Inder Bhatija to Vithalwadi Police Station about the murder of his brother. This witness has also stated in answer to several questions in the cross-examination that Dulichand Kalani was related to Pappu Kalani. Further, Mohan Behrani and his two brothers are maternal uncles of Inder Bhatija. It may be that Behrani brothers were chargesheeted for murder of Dulichand Kalani but there were two political groups at Ulhasnagar, one led by A1 and another by Behrani brothers. There was rivalry between two groups and it continued. The other person about whom reference has been made at Exhibit 310 shows that alongwith A1 even Kimmat Kalani was in the car which came near Ghanshyam and it is from this car that A1 came to the place may or may not have got down but from the car itself A1 threatened Ghanshyam, deceased brother of Inder of dire consequences. It is in these circumstances and after minute scrutiny of the entire evidence that the learned Judge has concluded that there was enmity because Bhatijas were canvassing for Bhartiya Janata Party whereas A1 is belonging to Congress party. The extent of fear instilled by A1 is also clear from the version of PW29 who stated that after the incident he left Ulhasnagar for his native place in State of Uttar Pradesh. This witness came forward and gave his statement to the police only after the arrest of A1. For all these reasons, objections now raised and as an after thought, should not be entertained. These objections do not and in any manner shake the version of the prosecution. The prosecution story is capable of being believed and the independent witnesses having spoken about the specific acts of the accused, then, all the more this Court should reject this appeal. Mr. Patil was at pains to point out that the documents marked as Article "A" and "B" have been referred by the defence in the cross-examination of PW12 Sundardas and our attention has been invited to pages 328 and 329 of the paper-book. It is

clear that if these documents are referred in cross-examination by the accused then they cannot turn around and claim that the contents of these documents have not been proved or that they should not be marked as exhibits. Apart therefrom, the counsel for the accused do not dispute that police protection was indeed provided to deceased Inder and that is how the guard was posted. The police guard would not be posted unless requisition. In such circumstances an when it was but natural that the deceased sought police protection and which was given shows that the complaint and its contents have been rightly marked as exhibits. If they remained to be marked as such earlier and during the course of recording evidence does not mean that later on they cannot be marked or numbered as exhibits. That is a formal act performed by the learned Judge and during the course of the delivery of judgment. In the circumstances, there is absolutely no illegality or any irregularity committed by the learned trial Judge.

65. Insofar as the legal submissions are concerned, Mr. Patil submits that Bhagwan Dass's case was relied upon for the limited purpose by the learned Judge. In Bhagwan Dass's case, the accused had admitted to have killed his daughter. That admission was given by him to his own mother. In her statement to the police, this fact was stated by the mother but when she was examined in Court as a witness, she turned hostile and denied that any admission was given by her son. The Hon''ble Supreme Court observed that it was but natural that the mother would try and protect her son. She firmly believed that in order to protect the honour of the family, the daughter was killed by her own father and for that reason she was trying to justify such a drastic act in Court. The Hon''ble Supreme Court held that in preference to her version before the Court and which is an after thought, her earliest response and reaction deserved to be given more credit and more credence. In other words, she gave a truthful version in her statement to the police but resiled from it before the Court and for the above reasons. Her conduct in the Court was deprecated by the Hon''ble Supreme Court and beyond that the Hon''ble Supreme Court has neither held that a statement to the police can be used to bring home the guilt of the accused nor has it observed anything which is contrary to the law laid down in Tahsildar Singh and Another Vs. The State of Uttar Pradesh, . For all these reasons, he submits that the appeal be dismissed.

66. With the assistance of the learned counsel appearing for parties, we have perused the paper-book carefully. We have perused the version of the prosecution witnesses and relevant for the purpose of dealing with this appeal. Since the controversy in the appeal narrows down only two or three major aspects and there being no dispute raised about other factual matters that it is not necessary to refer to the deposition of all prosecution witnesses. Suffice it to clarify that when we have perused the statements and deposition of the prosecution witnesses and in such order as they were brought to our notice, we have seen them in their entirety.

67. Upon perusal of the entire material, the only point that arises for our

determination is whether the prosecution has proved the charge against accused No. 1 appellant before us beyond reasonable doubt and whether the judgment of the learned trial Judge is correct and proper or is vitiated by error of law apparent on the face of record and perversity as is contended before us. In this appeal and others, the parties have addressed us on the charge qua each appellant. They have thus confined and restricted their arguments to the specific allegations and have invited our attention to the evidence of the witnesses examined by the prosecution qua them. Hence, our discussion in these judgments proceeded accordingly. It can be safely assumed that the material with regard to which there is no debate and dispute raised by parties remains unchallenged.

68. Before we proceed further, reference is necessary to two or three principles and which are fairly well settled. In an appeal against conviction, the powers of this Court are fairly wide. The whole case is open for scrutiny by this Court and in order to satisfy itself completely, the Court can review the evidence upon which the order of conviction has been based. In *Dhanna, etc. Vs. State of Madhya Pradesh*, , the Hon"ble Supreme Court held that there is no distinction as regards the power of the High Court in dealing with an appeal against an order of an acquittal and that against a conviction. The High Court has full power to review the evidence upon which the order of the trial Court is founded and to reach a conclusion as to whether on that evidence a conviction could have been based. Further, it is also settled law that where the case turns on oral evidence of witnesses, the estimate of such evidence by the trial Court is not to be lightly set aside. The Court of appeal may possess full power to go into the entire evidence and of relevant circumstances to arrive at its own conclusion about the guilt or innocence of the accused but the further principle that if the trial Court's judgment has to be reversed, the appellate Court must on appreciation or appraisal of the evidence reach a definite conclusion that the trial Court's judgment is perverse and that the prosecution has failed to bring home the charge. In such circumstances, these principles will have to be applied to reappraise the evidence to arrive at our own conclusion.

69. Before we proceed to analyze the evidence led on behalf of the prosecution at the subject trial, we must also make a brief reference to the other settled legal principles. There is substance in the contention of the learned Public Prosecutor that the menace of hostile witnesses cannot be ignored by the Court. In *State of Gujarat Vs. Anirudh singhh and another*, , the Hon"ble Supreme Court held as under:-

"27. In that case, the evidence of a hostile witness was scanned by this court and found to be accepted and relied on. In *State of U.P. Vs. Ramesh Prasad Misra and another*, , it was held thus:

"It is rather unfortunate most unfortunate that these witnesses, one of whom was an advocate, having given the statements about the facts within their special knowledge, under Section 161 recorded during investigation, have resiled from

correctness of the versions in the statement. They have not given any reason as to why the Investigating Officer could record statements contrary to what they had disclosed. It is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted."

28. In view of the above settled legal position, merely because some of the witnesses have turned hostile, their ocular evidence recorded by the Court cannot be held to have been washed off or unavailable to the prosecution. It is the duty of the Court to carefully analyse the evidence and reach a conclusion whether that part of the evidence consistent with the prosecution case, is acceptable or not. It is the salutary duty of every witness who has the knowledge of the commission of crime, to assist the State in giving the evidence; unfortunately for various reasons, in particular deterioration in law and order situation and the principle of self-preservation, many a witness turn hostile and in some instances even direct witnesses are being liquidated before they are examined by the Court. In such circumstances, it is high time that the Law Commission looks into the matter. We are informed that the Law Commission has recommended to the Central Government to make necessary amendments to the Cr.P.C. and this aspect of the matter should also be looked into and proper principles evolved in this behalf. Suffice it to state that responsible persons like Sub-Divisional Magistrate turned hostile to the prosecution and most of the responsible persons who were present at the time of flag hoisting ceremony on the Independence Day and in whose presence a ghastly crime of murdering a sitting M.L.A. was committed, have derelicted their duty in assisting the prosecution and to speak the truth relating to the commission of the crime. However, we cannot shut our eyes to the realities like the present ghastly crime and would endeavour to evaluate the evidence on record. Therefore, it is the duty of the trial Judge or the appellate Judge to scan the evidence, test it on the anvil of human conduct and reach a conclusion whether the evidence brought on record even of the turning hostile witnesses would be sufficient to bring home the commission of the crime. Accordingly, we undertake to examine the evidence in this case."

70. This judgment has been applied and followed in several decisions of the Hon"ble Supreme Court thereafter. The Hon"ble Supreme Court has observed that there are increasing number of cases and trials in which witnesses who are citizens of this country and residents of the locality have deviated from the correct path and did not perform their duty. Therefore, the Court has to be very careful, prima facie, regarding the witness who make conflicting and contradictory statements. Such a witness has no regard for the truth. However, merely because he was declared hostile at the instance of the Public Prosecutor and the Public Prosecutor was allowed to cross-examine the witness summoned at the instance of prosecution furnishes no justification for en bloc rejection of

his evidence. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The Court should be slow to act on the testimony of such witness and normally, it looks for corroboration thereof but merely because the witness deviates from the statement made in the FIR his evidence cannot be held to be totally unreliable. The deposition of the hostile witness can be relied upon at least upto the extent he supported the case of the prosecution. His evidence is not effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out to what extent he has supported the case of the prosecution. (see Paramjeet Singh @ Pamma Vs. State of Uttarakhand, .

71. The third and more important aspect of this is that a witness must be protected and unless he feels secure and safe, one cannot expect him to be truthful. The importance of fair criminal trial is emphasized by the Hon"ble Supreme Court in the case of Vikas Kumar Roorkeval v. State of Uttarakhand, reported in AIR 2011 SC 726. That a fair trial means the witnesses have to boldly come forward and depose the truth. In this decision at para 14 and 15 this is what the Hon"ble Supreme Court has held.

"14. The learned counsel for the petitioner has placed reliance on a decision of this Court in Himanshu Singh Sabharwal Vs. State of M.P. and Others, , where this Court in paragraphs 14 and 15 has observed as under:-

"14. "Witnesses" as Bentham said : are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the Court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by Courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingenuously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the court and justice triumphs and the trial is not reduced to mockery.

The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who has political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in Court the witness could safely depose truth without any fear of being haunted by those against whom he has deposed. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short the "TADA Act") have taken note of the reluctance shown by witnesses to depose against dangerous criminals-terrorists. In a milder form also the reluctance and the hesitation of witnesses to depose against people with muscle power, money power or political power has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before Courts mere mock trials as are usually seen in movies.

15. Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the Courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair as noted above to the needs of the society. On the contrary, the efforts should be to ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance if not more, as the interests of the individual accused. In this courts have a vital role to play."

15. Above judgment clearly enunciates the importance of witness in criminal trial. This is a case of murder of a Superintending Engineer. There is no manner of doubt that brutal assault was mounted on him which resulted into his death. The son of the deceased is seeking transfer of proceedings on ground of coercion and threat to the witnesses as well as doubtful sincerity of the investigating agency and prosecuting agency. In effective cross-examination by public prosecutor of the driver who resiled from the statement made during investigation speaks volumes about the sincerity/effectiveness of the prosecuting agency. The necessity of fair trial hardly needs emphasis. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases. The learned Judge has failed to take participatory role in the trial. He was not expected to act like a mere tape recorder to record whatever has been stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confers vast and wide powers on Court to elicit all necessary materials by playing an active role in the evidence collecting process. However, the record does not indicate that the learned Judge presiding the trial had exercised powers under Section 165 of the Evidence Act which is in a way complimentary to his other powers. It is true that there must be reasonable apprehension on the part of the party to a case that justice may not be done and mere allegation that there is

apprehension that justice will not be done cannot be the basis for transfer. However, there is no manner of doubt that the reasonable apprehension that there would be failure of justice and acquittal of the accused only because the witnesses are threatened is made out by the petitioner."

72. The other principle and equally well settled is that in matters of appreciation of evidence, a Court endeavoring to arrive at the truth must read the evidence as a whole. It is not that every trivial or minor omission or lapse can be termed fatal. It has been repeatedly held and on analysis of section 3 of the Evidence Act, 1872 and the further provisions that it is the duty of the Court to scrutinize the evidence carefully and the Court starts not with the assumption that some of the witnesses who may be police officers are not deposing the truth. Further, the delay in recording of the version or the delay in trial by itself and without anything more cannot be a ground to discard acceptable evidence. The Court has to perform its duty to separate truth from falsehood or to sift grain from the chaff. It is by applying these settled principles that we proceed and go about our task.

73. We must not lose sight of the undisputed factual position and which emerges from the record of this case. The first undisputed and rather admitted factual position is that in Ulhasnagar and particularly in Ulhasnagar Municipal Council, the A1 was working as a President from 1986. Thereafter, he contested the elections to the Maharashtra State Legislative Assembly. That he is politically powerful and influential and has loyal supporters. That he and the family of the deceased are related to each other. A genealogical/family tree was handed over by the advocate appearing in criminal appeal No. 1323 of 2013 and that shows that the Bhatija family comprises of Sundardas, his wife Bhagwatibai, sister of Gop, Thakur, Mohan Behrani. That Sundardas had three sons and one daughter. His son Ghanshyam was murdered on 27th February, 1990. That his daughter Meena is married to one Kumar Ailani who is a member of the Maharashtra Legislative Assembly representing the constituency. Other son deceased Inder was married to Rekha. The son who is alive viz. Kamal, PW 26A has deposed and equally others about the relationship between Bhatija and Behrani. The wife of Mohan Behrani, Bhavna is the real sister and the wife of A1. That on account of divergent political views and for a long time the family members working against each other for distinct political parties that the relationship was strained. That on 27th February, 1990 Ghanshyamdas was killed and the victim or deceased in the present crime Inder Bhatija is his real brother and a eye witness to the crime.

74. Upon this admitted factual basis if we now scan the oral evidence on record, what has emerged therefrom and with regard to this aspect is that the three families were all residing in Ulhasnagar and had their business or place of work at Ulhasnagar. A1 was related to the Bhatijas. PW26 Kamal Sundardas Bhatija is the surviving brother of the deceased. The victim Inder was running Anand Burner Factory where as the other brother Ghanshyamdas was in hotel business. Ghanshyamdas together with Inder and Kamal, PW26 were representing Bhartiya

Janata Party in the Assembly election on 27th February, 1990. PW26 has stated that at about 3 p.m. when they were standing at O.T. No. 3, A1 came there in a car, got down and walked towards Ghanshyamdas and threatened him for having worked in the assembly elections against him. He further stated that he will see him later on and after the election is over. PW26 states that after finishing the election work on 27th February, 1990, he went back to his workshop and about 7.15 p.m. in the evening, he received a telephone call that Ghanshyam has been fired at. He rushed to the spot and then to the Central Hospital, Ulhasnagar. PW26 states that the complaint with regard to the incident of firing at Ghanshyam was lodged by deceased Inder. There was no response from the police and even the statement of Kamal was not recorded. The witness further deposes that Inder was eye witness to the incident. Even Inder received threatening calls from A1. The father Sundardas gave application to Deputy Commissioner of Police, Commissioner of Police, Chief Minister and Prime Minister. Therefore, police protection was given to the brother deceased Inder. This witness deposes that PW4 was the police constable assigned to protect the deceased Inder. Thereafter also the deceased Inder continued to receive threatening calls and the caller stated that you have killed my uncle Dulichand Kalani, now Ghanshyam is murdered and you will also be murdered. PW26 then states that on 28th April, 1990, the victim deceased Inder was murdered in his office. The incident took place in the presence of the police guard on duty. Even his rifle was snatched and thrown on the roof. Inder was shot from a close range and the police constable lodged the FIR exhibit 270 about this incident. PW26 states that police did not record his statement in respect of this incident on account of terror. After A1 was arrested in 1992 that PW26 received a call from the police and his statements were recorded in January, 1993. This witness has also deposed further in his examination in chief that accused Pappu Kalani and many persons came in the van on 27th November, 1987 in the midnight at 12 to 12.30 and they were searching the deceased Inder. He also stated that in the election of Municipal Council in 1986, Congress party was in majority. PW12 Sunderlal Bhatija, Mohan Behrani, A1, Narayan Kalani, Gop Behrani and Trilok Kalani were elected in that election. There was a dispute and on who shall be the President of Ulhasnagar Municipal Council. The dispute was between A1 and Gop Behrani. The Congress party high command gave directions that the post of President shall be shared for two and half year each by A1 and Gop Behrani. PW12 Sunderlal was supporter of Gop Behrani. A1 took over the post of President initially but refused to vacate after completion of the tenure of two and half years. Thereafter, there was a murder of one Dulichand Kalani. He was uncle of accused Pappu Kalani. The deceased brothers Inder and Ghanshyam were accused in that murder case. The version of PW26 is that because Gop Behrani thereafter supported A1 that is why Bhatija brothers were made accused. Then relations of Bhatija and A1 were strained. The witness then refers to the copies of the applications given by his deceased brother Inder and his father Sunderlal to the police in respect of calls and threats by A1 to them. The photo copy of this application was shown to the witness PW26. The date of the application is stated

to be 14th March, 1990. The witness identifies the signature on it. The document was marked as Article "B". The PW26 also stated that his father PW12 Sundarlal was not alive as on the date of recording of the deposition of PW26. He further stated that PW12 was tortured by A1 for giving evidence in his favour.

75. This witness was cross-examined but in the cross-examination what we found is that the fact of the Bhatijas residing in Ulhasnagar, the brother Ghanshyam carrying on hotel business, brother Inder carrying on running a business of stove burner, has not been denied. That is not proved to be false. Further what remains unaffected is the statement of PW26 which establishes the relationship between Bhatijas and Behranis. Further, the cross-examination in no manner, falsify his version about the murder of Dulichand Kalani and his brother Ghanshyam and Inder being made accused in the said murder case. Then, the witness admits that there is no FIR lodged in respect of the incident which took place at Hotel Prakash on 27th November, 1987. Since much has been made about his cross-examination by A1 and the omissions appearing in his version, it would be proper to reproduce it.

"12. I also stated in my statement as well as supplementary statement that "thereafter they all went to the house of Ghanshyam (deceased). They break open the door of his house" at the time of incident dt. 27.11.87. I cannot tell any reason why the same does not appear in my both statements.

It is not true to say that I did not tell both things to the police because no such incident took place on 27.11.87.

13. I have stated to the police in my statement dt. 15.1.93 in respect of incident dt. 27 February 1990 that "we were standing at about 3 p.m. at O.T. No. 3. Accused Pappu Kalani came there in a Car" and got down. I cannot give any reason why there is no reference of at about 3 p.m. and coming in a Car by accused Pappu Kalani. It is not true to say that I did not tell to the police the same as I was not present at the time of incident dt. 27 February 1990.

I also told to the police in my statement dt. 15.1.93 as well as supplementary statement dt. 25.2.93 in respect of incident of 27 Feb. 1990 that there were calls "you have killed my uncle Dulichand Kalani, Ghanshyam is murdered and you will be also murdered". I cannot give any reason why it does not appear in both. It is not true to say that no such threatening calls received therefore it is not there.

14. I had gone to the police station with complaint in respect of murder of brothers Ghanshyam and Inder (deceased) but police did not take it on account of terror of accused Pappu Kalani. I did not sent the complaint to police by post. The police recorded my statement on 9th October 1990 in respect of murder of Ghanshyam. My evidence was recorded in S.C. No. 219/99 in Court.

16. My brother Ghanshyam was murdered in 27.2.90. My another brother Indar Bhatija murdered on 28.4.90. The police have recorded my statement in a murder case of my brother Ghanshyam. It was recorded on 9.10.90. My evidence

was also recorded in that case on 4.5.2009.

I have stated to the police in my statements on 9.10.90 recorded in a case of murder of Ghanshyam that on 27.11.87 in the midnight at 12 to 12.30 many persons came in three vans. The accused Pappu Kalani and his brother Narayan Kalani were also amongst them. They all were searching deceased brother Ghanshyam and Indar (deceased) and saying to the 10 to 12 persons to kill him. They damaged the entire hotel completely. They were having knife, Talwar, revolver and bomb. They did not find Ghanshyam, therefore they went to his house and broke door of his house." I do not remember whether I have stated the details of the incident of 27.11.87 while giving evidence in the said case of Ghanshyam or not.

My attention is drawn towards the certified copies of my statement recorded by police on 9.10.90 as well as evidence in S.C. No. 219/99 on 4.5.2009. I say after going through the certified copies that the same is not mentioned in my police statement as well as in evidence in S.C. No. 219/99. I have stated the said thing to the police in my another statement (supplementary) in that case. I do not remember the date of recording of it. It is not true to say that no supplementary statement was recorded by police in that case.

I was under trauma and nervous when my evidence was recorded in S.C. No. 219/99. It is not true to say that no such incident occurred on 27.11.87 therefore the same is not appearing in my police statement and evidence in the Court.

17. It is not true to say that no such incident on 27 Feb 90 occurred. It is not true to say that I am deposing falsely that accused No. 1 Suresh @ Pappu Kalani was giving threats to my deceased brother Indar. It is not true to say that I am deposing falsely that we gave application to the police authorities falsely that on account of terror of accused Suresh @ Pappu Kalani police did not record my statement. It is not true to say that I gave false evidence."

76. It is necessary to then refer to the deposition of the PW12. PW12 had in examination-in-chief stated as to how he shifted to Ulhasnagar with his family and set up a business of manufacturing socks and engaged himself in social work. Though he said that he is not a member of political party, yet, he admitted that he was a member of the Municipal Council since 1978 to 1992 or 1995. He has also stated that A1 was elected as member and thereafter became President of the Ulhasnagar Municipal Council. He has stated as to how before being a President of the Council, A1 contested the election to the Maharashtra Legislative Assembly in 1990 as Congress party candidate and was opposed by one Shitaldas. Shitaldas was put up by the Bhartiya Janata Party. Thereafter, the witness stated that his son Ghanshyamdas died on the day of polling of the 1990 elections and on that day, Sunderlal was standing at one booth and Ghanshyam was at another. There was a message given about Ghanshyam and two others quarreling and that is why the witness went there and after that the witness deposes about the murder of Dulichand Kalani and as to how brother in law of

PW12 had taken the vehicle of his son Inder for causing death of Dulichand. This witness who turned hostile stated that he met Mr. Lalkrishna Advani and narrated the incident of the death of his son to him and the brothers-in-law had sent telegrams to the Prime Minister and others about the incident.

77. After this statement, the witness turned hostile and in his cross-examination by the APP under section 154 of the Indian Evidence Act, 1872, he admitted that a telegram was sent to the police and one application was given to R.D. Tyagi, Commissioner of Police, Y.C. Pawar, Deputy Commissioner of Police and Mr. Jadhav, Assistant Commissioner of Police and which was signed by PW12 Sunderlal. Though the application was given by his brother-in-law but the witness admits that he had gone to the office of Y.C. Pawar with the other son PW 26A. PW12 also says how police protection was provided to his son. Though he has not stood by his version to the police entirely but what we find is that this witness was cross-examined by the advocate for A1 and this witness states that both Mohan and Thakur Behrani are the names of his brothers in law. Though he denied knowing the contents of telegram or letters addressed to several authorities and stated that they were prepared by his brothers in law, he admitted that Pappu Kalani and Gop Behrani were councilors of Ulhasnagar Municipal Council at that time and Gop Behrani was involved in the murder case of Tej Watchmaker. The witness stated and he is having good relations with Pappu Kalani but admitted that in elections of President of Municipal Council, Gop Behrani was rival of Pappu Kalani. Gop Behrani was intending to become President and it is confirmed by him that even Mohan Behrani is from rival group of Pappu Kalani. This witness has been asked about how his brothers in law are falsely implicating A1 and the suggestions in that regard and given to him may have been accepted but what essentially follows from the deposition of this witness is that there was a political and family rivalry. That stand of the prosecution as reflected from his statement is consistent with the other materials including the deposition of PW 26A, non-hostile family member. That is also consistent with the version of PW20 Rekha Inderlal Bhatija. She is the wife of the deceased Inder and she has also stated about the murder of Ghanshyam and how her husband was murdered in the office and though he was given police protection one month prior to his death. She may have said that she does not remember the reason why her husband requested for police protection but immediately proceeded to state that since her husband was feeling that his older brother was murdered he may also be murdered by somebody and how he had lodged a complaint in respect of the murder of Ghanshyamdass. Thereafter, this witness was declared hostile and permission to examine her under section 154 of the Indian Evidence Act, 1872 was granted yet, apprehending that this witness also has deposed consistently with the version of other prosecution witnesses that the advocate for the A1 cross-examined her. This was to extract from her a admission that the Behranis are maternal uncles of deceased husband and though she denied the suggestion that there was a dispute in respect of the property between her husband and her brother on one side and Gop Behrani on

the other, what was essentially suggested to her that her husband alongwith Behranis were involved in the murder case of uncle of A1 Dulichand.

78. Now, if we peruse in this light the deposition of PW18 who was at the relevant time the Assistant Commissioner of Police at Ulhasnagar, he has confirmed as to how there was a complaint lodged in respect of the murder of Ghanshyamdas on 27th February, 1990 at Ulhasnagar and the complainant was non else than the deceased Inder. The witness was cross-examined by A1 and similar suggestions have been given but what we find is that the witness has stated there were two political groups at Ulhasnagar, one led by Kalani and one by Behrani brothers and there was rivalry between two groups and it continued during his tenure. He stated that A1 Pappu Kalani belonged to the ruling party. It is in these circumstances that we find that Mr. Mundargi's submission that the charge of conspiracy is not proved, cannot be accepted.

79. From the deposition of these witnesses, it is apparent that there was family enmity and political rivalry. The two groups were trying to dominate the local politics. That Bhatijas alighted with the BJP and Behranis and thus were the opposite group is also clear from the above materials. That the uncle of A1 was killed and for that act the Behrani and Bhatija family members were blamed by A1 is also a admitted position. Added to all this is the further are of the deceased Ghanshyamdas working against A1 in the 1990 Assembly election. There may have been some inconsistencies and contradictions in the version of the prosecution witnesses about the details of the incident of 27th February, 1990 but those do not indicate that no such incident took place. The incident is confirmed by the witnesses so also the threat given by A1 TO Ghanshyam. Whether A1 sat in the car, got down or not so as to walk upto the deceased Ghanshyam hardly makes any difference to the prosecution version particularly after the evidence is read as a whole. That the presence of Ghanshyam at the electoral booth on 27th February, 1990 is confirmed by all so also his working and campaigning for the political adversary of A1. In a local set up, Municipal Council and thereafter at the State level, the Congress and Bharatiya Janata Party are rivals is undisputed so also the homicidal death of Ghanshyam on the date of polling, namely, 27th February, 1990 evening hours. All these incidents and events seen cumulatively give enough reason for A1 conspiring to kill the deceased Inder. More so, when Inder was eye witness to the killing of his brother Ghanshyam. A1 is commonly accused of conspiring to kill both. His decision to avenge the killing of his uncle and added to that both brothers fomenting the opposition to the undisputed political supremacy of A1 thus rule out false implication of A1.

80. Mr. Mundargi has pointed out as to how PW9, 10 and 11 who were the only witnesses examined to support the major part of this charge but they have not supported by the prosecution. In that behalf, we have minutely perused the deposition of PW9. He has said very clearly that he was in service of Ulhasnagar Municipal Corporation and incharge of vehicles of Municipal Council from 1985 to

2000 and he who was assigning duties to the drivers and looking after the maintenance of the vehicles. He would give the vehicles of officers of different departments for official work and though Pappu Kalani as President of Municipal Council was not given any vehicle officially but jeep No. MH 05-87750 was owned by Municipal Council and another vehicle Maruti van MH 05-6222 was also owned by Municipal Council. Balu Kakade, Bharat Viswasrao and other 20 to 22 persons were working as drivers.

81. The witness has stated in the examination under section 154 of the Evidence Act by the APP that he was supplying the vehicles to different departments on demand and it was for the drivers to write the log book. The witness has then stated that though he had not mentioned to the police that Pappu Kalani being President of the Council, used to demand the vehicles from PW9 and he would tender the same but he does not know the reason why the police has taken down his version. Now, the trial Court has found from the further statements of this witness that certain drivers while driving the vehicles of Municipal Council for the then President used to stay at his bungalow. The drivers Anant Mane, Manohar and B.D. Sharma were working as drivers and driving such vehicles. This witness denied the suggestion that he is deposing falsely because of the pressure of A1. However, Bharat Vishwasrao, PW10 confirmed that he was in service of the Municipal Council as driver and that he may not have stood by his version as told to the police yet, he states that he is in service with the Ulhasnagar Municipal Corporation and at present wife of A1 is the mayor and that was the position on 17th June, 2005.

82. The other witness PW11 Balu Tukaram Kakade has resiled from his statement given to the police but he has stated that he was working at the residence of Pappu Kalani and he knows the three drivers Bharat, Manohar and Anant Mane. A suggestion given to him that these drivers were working at the residence of Pappu Kalani so also PW Balu. That suggestion is denied. Yet in answer to another question, what this witness states that it is not true that he is deposing falsely under pressure of Pappu Kalani and as his wife is Mayor of Ulhasnagar Municipal Corporation.

83. Mr. Mundargi submitted that an unilateral terror story or a false bogey has been raised but what one finds from the deposition of family members as also these witnesses and the police officers that on account of continued political rivalry, the relations were strained. When the material on this charge is considered as a whole, the conclusion of the learned trial Judge that A1 engaged and hired the other accused 3 to 7 to eliminate the accused. These accused had no personal enmity against the deceased Inder. In fact, some of them are not locals. They were brought in to commit specific acts and at the instance of A1. They had done such jobs for A1 earlier and all this has emerged from the record. The law on the point of conspiracy and motive is well settled to require any reiteration. In the recent decision in the case of R. Shaji Vs. State of Kerala, , the principles based on which the applicability of section 120B has to be tested are

referred. The Hon'ble Supreme Court in this decision holds as under:-

"31. A criminal conspiracy is generally hatched in secrecy, owing to which, direct evidence is difficult to obtain. The offence can therefore be proved, either by adducing circumstantial evidence, or by way of necessary implication. However, in the event that the circumstantial evidence is incomplete or vague, it becomes necessary for the prosecution to provide adequate proof regarding the meeting of minds, which is essential in order to hatch a criminal conspiracy, by adducing substantive evidence in court. Furthermore, in order to constitute the offence of conspiracy, it is not necessary that the person involved has knowledge of all the stages of action. In fact, mere knowledge of the main object/purpose of conspiracy, would warrant the attraction of relevant penal provisions. Thus, an agreement between two persons to do, or to cause an illegal act, is the basic requirement of the offence of conspiracy under the penal statute. (Vide: *Mir Nagvi Askari Vs. C.B.I.*, ; *Baldev Singh Vs. State of Punjab*, ; *State of Madhya Pradesh Vs. Sheetla Sahai and Others*, ; *R. Venkatakrishnan Vs. Central Bureau of Investigation*, ; *S. Arul Raja Vs. State of Tamil Nadu*, ; *Monica Bedi Vs. State of A.P.*, and *Sushil Suri Vs. C.B.I. and Another*, ."

84. Thus, it is not that every aspect and detail of the plan and the agreement must be known to a person like A1 in this case. A broad and general agreement is what is held to be enough and thereafter the details are left to be worked out by somebody. This is not a case where we can agree with Mr. Mundargi that there is no positive evidence about the conspiracy. The other witness and who has clearly stated about the statements made by PW9, 10 and 11 is PW26 who was a Investigating officer and had recorded their statements as such. He has very categorically stated that he recorded the statement of Balu Kakade on 30th December, 1992 and the portion marked A to E from this statement from which Balu resiled were recorded by PW26 as per the say of Balu. He also said that on 31st December, 1992 witness Tukaram Tardalkar produced vehicle that is jeep of Mahindra company alleged to have been used for commission of offence. It came to be seized under panchanama in presence of panchas. He has also recorded the statements of Kamal Bhatija and Jamil Ahmed Juber @ Don. He recorded the statements of Sunderdas Bhatija, Rekha Bhatija and it was on 1st March, 1993 that a photo album was shown containing photographs of arrested accused Mohammed Tahir to Balu Kakade who identified the photograph of Bacchi Pande and Baba Gabriel as well as Mohammed Tahir. This witness also states that he recorded the statement of Shivkumar Saraswat and he has stood by his version about there being an enmity between Behranis and A1. He denied the suggestion given to him that he has incorporated anything in the statements of witnesses viz. exhibits 406, 408, 412 of his own and not as per what was stated by the witnesses. We have carefully perused the depositions of PW9, 10 and 11. Each one of them turned hostile and were examined under section 154 by the Public Prosecutor. It is pertinent to note that none of them stated that their statements were recorded in any language other than Marathi. They speak in, read and write this language. When confronted with their statements or portions thereof and

made to and recorded by the police they stated that they do not know why the police recorded that the co-accused Mohammed Tahir (A3), Bacchi Pande (A6) and Baba Gabriel (A7) were known to A1. They had been to the residence of A1 and stayed at Seema Apartment, Kalani Mahal as well as Seema Resort. There is no explanation forthcoming from PW10 as to how he knows these accused by name. The only inference and rightly drawn by the trial Court is that he knows them because as they were regularly visiting the residence of Kalani (A1). The familiarity, the details of the premises, residential and business, belonging to A1 shown the proximity of all of them. That A1 had obliged these witnesses, that they were under his influence and pressure hence they turned hostile is thus obvious. Their statements made to the police were proved by the prosecution by examining the officer who recorded them (PW26). The earliest response was rightly relied upon and in preference to this belated one in Court particularly when there are no reasons assigned as to why the police will record something which was not narrated or spoken. The version to the police was also consistent with the other material on record.

85. In these circumstances, it is not possible to agree with Mr. Mundargi that the prosecution failed to lead any positive evidence about the conspiracy. We have also been shown the deposition of PW14 Vikas Shripadrao Jadhav who was working as Police Inspector at Vithalwadi Police Station from March, 1989 to December, 1990 and who not only reduced the statement of PW4 into writing but conducted the investigations in this case. He has recorded the statement of Vijay. B. Shukla, PW13. He has stated that during investigation, it transpired that Inder Bhatija had given complaint at Vithalwadi Police Station which collected from the police station and just for record. It was relating to protection demanded by said Bhjatija for safety for his life. The copy of that application was shown to him and he identified the same. Thus, a copy of the complaint from Vithalwadi Police Station produced from the records of the same and shown to the witness then posted at that police station and investigating the very crime would mean that the complaint was indeed made and based on the same police protection was given. We find substance in the contentions of Mr. Patil that from the depositions of PW12 and 22, political rivalry, family rivalry and involvement of Bhatijas in the murder of the uncle of PW1 are enough materials to conclude that A1 conspired to eliminate both the brothers. First brother Ghanshyamdas was killed because A1 suspected him of having murdered his uncle Dulichand and further Ghanshyamdas also worked against him in the election of Maharashtra Legislative Assembly by supporting his rival candidate and party viz. Bhartiya Janata Party. Secondly, Inder having witness the murder of Ghanshyamdas and going further and lodging a complaint in that behalf within within two months the deceased Inder was eliminated is demonstrative of both the conspiracy and motive for the crime. The learned Judge has in that regard rightly relied upon the version of these witnesses to conclude that A1 is guilty of the offence punishable under section 120B of the IPC. The conclusion in para 69 in this behalf cannot be said to be vitiated by any error of law apparent on the face of the record or

perversity. The learned Judge has not omitted from consideration any relevant and vital materials nor has considered inadmissible evidence. The learned Judge observed that there was history of political rivalry and the two factions were of different political thought and ideas. The Behranis and Bhatijas formed one faction where as the other was the Kalani group. That it was the dominant group and controlled the Municipal Council is apparent. None would leave any direct proof of conspiracy as there is always a veil of secrecy but we find that in para 70, the learned Judge has rightly referred to both section 120A and 120B of IPC. There is a reference made rightly to principles and which we have culled out above. True it is that these circumstances brought on record must show an agreement but when they are such as would demonstrate the arrangement and complete chain of events with specific role and contribution therein by the parties involved, then, there is no reason to discard the material in that behalf.

86. That there was a fear and lurking in minds on the opponents of A1 has been deposed not only by persons belonging to rival groups but also the family members and police officials. There were acts and which demonstrate as to the extent to which rivals, especially in local politics go about eliminating each other. The learned Judge has referred to the fact that the deceased Inder was first informant and eye witness of the murder of his brother Ghanshyam. It was not possible for Inder to escape the wrath and anger of A1 thereafter particularly when his brother Ghanshyam was done away with for having voted and supported a rival and other group/party. It is clear that after the incident of 27th February, 1990 and following the murder of his brother Ghanshyam, the deceased Inder sought police protection and police protection was given to him. That there was a apprehension in his mind and that he too would not be spared is also clear from the documents including FIR filed in Sessions Case No. 219 of 1999 Exhibit 310. The FIR in Sessions Case No. 219 of 1999 Exhibit 310 has been proved by the prosecution by examining PW18 DCP Jadhav. The FIR Exhibit 319 was lodged by deceased Inder, victim in the present case. It may be that there is a criminal case pending against deceased Ghanshyam and his deceased brother Inder. The case is in Vithalwadi Police Station but by that itself we cannot hold that A1 was not planning to avenge the death of his uncle and in which he suspected Ghanshyam having a role and definite hand. Added and compounding, was the act of Ghanshyam working for political rival of A1. These are the circumstances and considering the influence and political power wielded by accused NO. 1, the material cannot be said to be lacking as complained by Shri Mundargi.

87. Insofar as motive for the crime is concerned, the FIR in Sessions Case No. 219 of 1999 contains the details of and the matter in which the brother Ghanshyam was murdered on 27th February, 1990 and there is a specific allegation in the same that A1 had sent professional killers to murder him. At that time, even the victim Inder was present but he avoided any injury by ducking in the nick of time. In these circumstances, and being an eye witness to this incident that it is apparent that both elements are proved. Insofar as motive

for the crime is concerned, the principles again are well settled. In *Alagupandi @ Alagupandian Vs. State of Tamil Nadu*, , the Hon"ble Supreme Court has summarized these principles and held as under:-

"These circumstances emerging from the record clearly show reason for some kind of animosity and ill-will on the part of the accused towards the deceased. Existence of a motive for committing a crime is not an absolute requirement of law but it is always a relevant factor, which will be taken into consideration by the courts as it will render assistance to the courts while analysing the prosecution evidence and determining the guilt of the accused."

88. Existence of a motive for committing a crime is not an absolute requirement of law but it is always a relevant factor, which will be taken into consideration by the Courts as it will render assistance to the Courts while analyzing the prosecution evidence and determining the guilt of the accused. Applying this principle to our case, we find that there is material to conclude that A1 had motive to commit the crime. We cannot reject the testimony of the witnesses and as claimed by Mr. Mundargi in toto. It has been a further well settled principle and which again requires no reiteration. That in matters of appreciation of evidence, firstly the evidence of deposition must be read as a whole. It is not permissible to pick up a sentence here and there and read it out of context. The Supreme Court has time and again held that the contradictions/omissions must be of such nature which materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements which do not affect the core of the prosecution case should not be a ground to reject the evidence of the witness in entirety. The omissions which amount to contradictions in material particulars and which go to the root of the case/materially affect the trial or core of the prosecution case, render the testimony of the witness liable to be discredited. It is but natural that after a long gap from the commission of crime that the trial in this case was held. It cannot be forgotten that initially the provisions of the Terrorist and Disruptive Forces Act (TADA for short) were applied to this case and on an application made before the Designated Court by all the accused, which was allowed, the Designated Court held that TADA cannot be invoked and applied to them. One of the cases which were part of that proceedings is the instant one. Therefore, though the crime was committed on 28th April, 1990, the case was registered as Sessions case No. 218 of 1999. The reason for this is that in this duration and long period, the matter was at large before the Designated Court under TADA. Even after the case was made over to the regular Sessions Court bearing in mind the local factors and presence of strong and influential accused, the trial could not commence immediately. The evidence was recorded right upto 2005 and in the sessions case of 1999. Even after recording of the evidence, the arguments were not commenced and no judgment was delivered because of the same reasons and delaying tactics. Eventually, the brother or family member of the victim/deceased Inder had to approach this Court in writ jurisdiction and in the light of the direction issued to the trial Court that the judgment was delivered in 2013. In a decision reported in *Zahira Habibullah Sheikh and Another Vs.*

State of Gujarat and Others, , the Hon"ble Supreme Court outlined the importance of a criminal trial and the duty of the Court. It held as under:-

"30. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice. The operative principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial: the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.

31. In 1846, in a judgment which Lord Chancellor Selborne would later describe as "one of the ablest judgments of one of the ablest judges who ever sat in this Court", Vice-Chancellor Knight Bruce said (ER p. 957):

"The discovery and vindication and establishment of truth are main purposes certainly of the existence of courts of justice; still, for the obtaining of these objects, which, however, valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination... Truth, like all other good things, may be loved unwisely-may be pursued too keenly-may cost too much."

The Vice-Chancellor went on to refer to paying "too great a price..... for truth". This is a formulation which has subsequently been frequently involved, including by Sir Gerard Brennan. On another occasion, in a joint judgment of the High Court, a more expansive formulation of the proposition was advanced in the following terms: "The evidence has been obtained at a price which is unacceptable having regard to the prevailing community standards."

33. The principle of fair trial now informs and energises many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new changing circumstances, and exigencies of the situation-peculiar at times and related to the nature of crime, persons involved-directly or operating behind, social impact and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system.

35. This court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affects the whole community as a community and is harmful to society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata the courts have always been

considered to have an overriding duty to maintain public confidence in the administration of justice-often referred to as the duty to vindicate and uphold the "majesty of the law". Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal courts to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

36. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

37. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact in issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not

by an isolated scrutiny.

89. We are forced and constrained to comment on this aspect and elaborately simply because we are mindful of the pressure of work on the trial Courts. We are equally mindful of the situation in the area where the Sessions Court exercises its jurisdiction. There are several reasons including lack of police force or staff and which results in delay of criminal trial. The witnesses are not produced on the given dates and time. Even if they are produced and are present in Court by virtue of part-heard cases, the Presiding Officer being absent or on leave, the Court of the Presiding Officer being vacant are other factors which result in further delay. One cannot, therefore, blame the witnesses or police machinery alone for such a serious lacunae and defect in our system. It is necessary that we sensitize our district and subordinate judiciary specially those to whom criminal cases are assigned and impress upon them that their duty is towards public and the society. Crime is committed against the society and must not be viewed as an act of an individual or a group or a gang. Criminal activities eventually affect the law and order, peace and calm in the society. The impact of serious crimes on the even tempo of life has been emphasized repeatedly and even by the highest Court in this country. Therefore, all concerned have to gear up and take up for disposal old cases. The fact that witnesses are not coming, accused are absconding or not produced, vacancies in the post of Public Prosecutors and Additional or Assistant Public Prosecutors records are not traceable or have not been constructed or reconstructed cannot be reasons for postponing trials and cases indefinitely. The practice of consigning cases to the records and by labeling them as unready or not to be taken up for trial on account of pendency of applications, revisions, writ petitions in higher courts cannot be countenanced and as enough ground not to touch the files and take up the cases. The tendency of Presiding Officers to postpone cases where there are large number or multiple accused but only take up trials where witnesses have turned hostile, where there is a accomplice or approver needs to be deprecated. Even the Public Prosecutors craving for publicity and mileage in criminal cases do not turn up to conduct and argue sessions cases which are old and pending long enough. The prevailing pattern amongst advocates and lawyers to appear and conduct only short cases and particularly interim matters which can be disposed of in one or two hearings has been projected as one more malady in the system. Therefore, all concerned must be introspect and by working together find a solution to such problems. The workshops or conferences held in the District in the presence of the Guardian and Inspecting Judges ought to be utilized as a platform to interact with the Judges and they must be told to expedite and dispose of criminal cases. Nowadays, in even High Court expedited matters lame, untenable excuses and reasons are offered by the Presiding officers to seek extension of time. They ought to realize that the higher courts are continuously and untiringly making efforts to bring in changes not only in the working conditions of the Judges and Presiding Officers but in the Judicial infrastructure. The basic amenities and facilities are being provided and would be provided but

because they are lacking does not mean that the larger interest of the society should be sacrificed or surrendered. Eventually, the stake holders must feel that the judicial system works for protecting, safe-guarding, upholding their interests. The victims, the accused, the society as a whole suffers silently because of increasing crimes and prevailing conditions in which guilty are not brought to book and punished promptly and expeditiously. Therefore, this aspect has an important bearing on the present matter. We must not look for loose ends and pick up holes in the version of the witnesses simply because it would be difficult for them to recall every small and minor detail as they are deposing after more than 10 years of the commission of crime and 8 to 10 years after arrest of the accused. It is not only the accused but equally the prosecution which suffers when time goes by and it is difficult to secure the presence of the witnesses. Even if that is secured, one cannot expect the person who has retired from police service to remember the dates and events so meticulously and to recount them as if everything has happened just a few days or hours or months back. In the present case, at least 3 police officers have come to the Court and deposed as prosecution witnesses after they retired and are 60 plus. In such circumstances, we are unable to agree with Mr. Mundargi that every witness had a tendency to exaggerate or to improve or imagine something and all of which should be discarded. It is the Court which has failed as a whole in this case. Even the recording of evidence is mechanical with no observation about demeanour of witnesses, no endorsement on marking of documents as Exhibits, no proper rulings on any objections if raised. If the presiding Officers continue to act in such a casual and light hearted manner it is the rule of law and guarantee of justice to all which becomes a casualty. A very heavy price is then paid by the society. The Judges owe a larger duty and stand on a higher plain. They must be vigilant at all stages and ensure that there are defects or deficiencies, technical lacunas at a trial and no mistakes in the judgment.

90. Mr. Mundargi has criticized the deposition of PW27. He is 56 years of age as on the date of his deposition viz. 10th June, 2011. He states that he was working as a tax collector in Municipal Council, Ulhasnagar since 1978 and was a union leader of staff of Municipal Council, Ulhasnagar in 1978. He knows accused No. 1 and claimed to have known him since the time of his college days. He states that he was student of RKT College. The brother of accused No. 1 Dhan Kalani was also student of RKT College. A1 was studying in Chandibai College. In his examination-in-chief, he states that A1 was rusticated from Chandibai college. A1 entered politics and was elected as Ward Member of Municipal Council of Ulhasnagar and later on was its President. His brother Narayan Kalani was Chairman of tax department of Ulhasnagar Municipal Council. The deceased Dulichand Kalani, the uncle of A1 was also known to the witness. PW27 Shivkumar Narayan Saraswat said that Dulichand was President of Education Committee of Ulhasnagar Municipal Council. Narayan Kalani is stated to have taken some lady staff of the Tax Department of Municipal Council, Ulhasnagar to Seema Resort which belongs to A1 on 13th January, 1991. The lady staff

complained about this to PW 27 on 15th January, 1991. They went to Central Police Station, Ulhasnagar and made a complaint. The witness stated that Narayan Kalani came to his cabin and threatened him to withdraw this complaint and pointing out revolver at him. The accused A1 Pappu Kalani, then President of Municipal Council came out and called him in his adjoining chamber. He enquired about the incident and apologized for the act of Narayan Kalani. Thereafter, the complaint was withdrawn.

91. Then again a complaint was made on 16th January, 1991 regarding a threat by Narayan Kalani at gun point but the police did not take any action against those involved on account of the terror of accused No. 1. This witness states that though he continued his work as union member, he was aware that Inder Bhatija and Ghanshyam Bhatija were murdered. The police recorded his statement in respect of the murder of Inder Bhatija.

92. Mr. Mundargi would submit that in the light of the apology tendered by A1 for the act of his brother, this witness cannot be believed for his version about the fear and terror on account of A1's presence in Ulhasnagar. He submits that the version of this witness is not enough to conclude as above.

93. We are unable to agree because there is nothing in the cross-examination of this witness which falsifies his version referred above. We cannot presume that the Union Member had any axe to grind against A1 or was falsely implicating him. The other prosecution witnesses have also referred to A1's dictatorial and dominating attitude, his political influence, the threats given by the A1 to his opponents and rivals in politics. Therefore, this witness merely reiterates the same and supports it by instances involving A1 and his brother. At best he may be completely correct about who was rusticated and from which college. However, he has very categorically stated that A1 was rusticated from Chandibai college. It is not that he does not know that RKT college where he studied is a different institution than Chandibai college. The fact remains that from college days, the persona of A1 was typical of a trouble maker and menace to the society. He was a part of the Municipal Council and ensured that he and his family controlled its affairs to the exclusion of others. He had a tendency to pressurize either by himself or through his brothers, the staff. He has a hand in several illegal activities. Some of the resorts and hotels in the locality were belonging to him. Those clashing with him or his political business interests were warned and threatened with dire consequences frequently. This witness, therefore, can be believed when he narrates the acts of harassing the Municipal staff. They were helpless because of the influence and continued presence of A1. This could be definitely termed as attempt to unleash terror and create fear psychosis. The other witness PW29 Jamil Ahmed Juber Khan stated in his examination-in-chief about elections held on 27th February, 1990. He has stated that he knows A1. In his examination under section 154 of the Indian Evidence Act, 1872 he stated that he used to purchase scrap from Ulhasnagar, Kalyan and Dombivali. He says that it is true and correct that A1 was President of Municipal

Council and there was a district head of Shiv Sena Party between 1986 to 1990 and his name is Anand Dighe. PW29 Jamil was working for Shiv Sena and Bhartiya Janata Party at that time. In 1990 elections, Jamil was canvassing for Shiv Sena and BJP. He confirmed that PW26 and his brothers Ghanshyam and Inder Bhatija were also canvassing for BJP. They would come in contact during election propaganda with A1. This witness also contested the Municipal election in 1992 and A1, Narayan Kalani, Trilok Kalani were representing their party in the election. This witness denies that he was pulled out from one of the polling booth Nos. 91, 92 and 93 by A1, his brother Narayan Kalani and Trilok Kalani and threatened at gun point. However, this witness denies that this incident was reported and a complaint was lodged with the Central Police Station in respect of the same. This witness denied that one Inspector Faruki was forcing him to work for A1.

94. Paras 5 and 6 of his deposition are material and relevant for our purpose. They read as under:-

"5. It is correct to say that accused Pappu Kalani had given me message to see him at his bungalow after the incident of booth. I had gone to Seema Resort accordingly. Accused Pappu Kalani was present there. It is not true to say that he gave threat to vacate the place given by Ghanshyam Bhatija otherwise he will kill me.

I had given an application to the Home Minister for giving police protection at the time of election. It is correct to say that P.I. Faruki had detained me as per Sec. 151 of Cr.P.C. in spite of police protection. It is correct to say that after arrival of Anand Dighe I was shifted to the lock up of Vithalwadi Police Station. I went to U.P. at my native place after release on account of fear. It is incorrect to say that I remained at native place till arrest of accused Pappu Kalani.

6. I was called by police for enquiry in connection with murder of Ghanshyam Bhatija. It is not true to say that I told to the police about witnessing the murder of Ghanshyam Bhatija. It is not true to say that I am deposing falsely to save accused Pappu Kalani as matter is settled with him."

95. Therefore, it is evident that this witness though having resiled from some of the police statements eventually admitted to certain events and incidents which reflect the enormous and continuing influence of A1 in the locality. The fact that a dissenting voice or one that is not supporting but conflicting is suppressed and at every cost is thus proved. It is not that every witness who comes and deposes about such activities is blemishless in character, that another anti social element in the locality feels threatened and, therefore, such activities ought not be viewed seriously but as usual happenings is not the law. The character of the witness or the person deposing before the Court though relevant cannot be taken into consideration and to such an extent so as to overlook much less condone the conduct of the criminals facing a serious charge of conspiracy to murder. In such circumstances, one cannot agree with Mr. Mundargi that Bhatijas were

themselves involved in crimes or that some of the witnesses who deposed of receiving threats are themselves of questionable character and their dealings were not necessarily lawful.

96. On such specious grounds, we cannot omit from consideration the deposition of PW26. The plea of A1 thus cannot be accepted. This witness has spoken at length about the investigations that he has carried out in the subject crime and also the crime registered at Khar Police Station vide C.R. No. 159 of 1991 involving accused Bacchi Pande, Baba Gabriel and others. He has spoken about their confessions. He has also spoken about how the statements of other witnesses came to be recorded and he effected seizure and the panchanamas were drawn. This witness has also referred to several cases in para 7 of his deposition wherein A1 was involved and arrested. This witness who is a police officer, therefore, cannot be said to be giving a one sided version. It is well settled that deposition of police officers cannot be discarded or brushed aside merely because they speak about several crimes in the society and with which they are concerned. In this context a reference can usefully be made to the judgment of the Hon"ble Supreme Court in the case of Pramod Kumar Vs. State (GNCT) of Delhi, . In para 10 at page 3347 the Hon"ble Supreme Court held as under:-

"The witnesses from the department of police cannot per se be said to be untruthful or unreliable. It would depend upon the veracity, credibility and unimpeachability of their testimony. This Court, after referring to State of U.P. v. Anil Singh, State, Govt. of NCT of Delhi v. Sunil and another and Ramjee Rai and others v. State of Bihar, has laid down recently in Kashmiri Lal V. State of Haryana that there was no absolute command of law that the police officers cannot be cited as witnesses and their testimony should always be treated with suspicion. Ordinarily, the public at large show their disinclination to come forward to become witnesses. If the testimony of the police officer is found to be reliable and trustworthy, the court can definitely act upon the same. If, in the course of scrutinising the evidence, the court finds the evidence of the police officers as unreliable and untrustworthy, the court may disbelieve him but it should not do so solely on the presumption that a witness from the department of police should be viewed with distrust. This is also based on the principle that quality of the evidence weighs over the quantity of evidence."

The contents of Exhibit 310 which has been held to be proved by deposition of PW18 is also another aspect on which Mr. Mundargi submits that we should not believe another police officer. He proved the contents of the FIR based on which other sessions case No. 219 of 1999 has been registered. He has pointed out in details as to how the victim/deceased Inder came to lodge a complaint about the murder of his brother Ghanshyam at Vithalwadi Police Station. To our mind, these are all witnesses who have at one time or the other witnessed or seen the activities in which A1, his family and his supporters were involved and apprehended or proceeded in accordance with law. Therefore, on both counts

that A1 conspired to kill deceased victim Inder and had definite motive for the same the charges are proved by direct evidence.

97. Once we have dealt with the contentions of Mr. Mundargi and the prosecution on the aspect of conspiracy and motive then all that remains for being dealt with and considered are the common legal submissions. The thread flowing and common to all the accused in this legal submission is that the learned trial Judge committed an error in relying on the judgment of the Hon''ble Supreme Court in the case of Bhagwan Dass Vs. State (NCT) of Delhi, . Mr. Mundargi went to the extent of urging that this judgment is per incuriam as it flies in the face of authoritative pronouncement of the Constitution Bench of the Hon''ble Supreme Court in the case of Tahsildar Singh and Another Vs. The State of Uttar Pradesh, . He also submits that the learned Judge was in error in failing to appreciate sections 161 and 162 of the Code of Criminal Procedure, 1973 and sections 145 and 154 of the Evidence Act, 1872. It is contended in that behalf that section 145, section 32 and section 27 all in the Evidence Act are an exception to the bar contained in section 162(1) of the Code of Criminal Procedure. Further, it is submitted that no reliance can be placed on a mere denial of the witness but what is contemplated by sub-section (2) of section 154 is that the deposition or statement of the witnesses who have turned hostile will have to fall within the term "evidence" as defined in section 3 of the Evidence Act or in other words, what is envisaged therein is not a mere statement in denial but evidence and which deserves acceptance. Thus, the evidence of a hostile witness and consistent with the prosecution case can be believed and relied upon provided it has been corroborated by other evidence led on behalf of the prosecution. However, in no case, a mere denial by the witness of a suggestion could constitute evidence is the submission.

98. For appreciating the legal submissions firstly, a reference will have to be made in detail to the facts in the case of Bhagwan Dass. This decision is heavily relied upon by the trial Court.

99. In Bhagwan Dass, the facts are that the appellant Bhagwan Dass was very annoyed with his daughter, who had left her husband Raju and was living in an incestuous relation with her uncle Shrinivas. This infuriated him and he thought that her conduct brought dishonour to the family. He, therefore, strangulated her with a electric wire. The Trial Court convicted the appellant and that judgment was upheld by the High Court.

100. The matter was of circumstantial evidence. Hence, the Hon''ble Supreme Court referred to the links in the chain of circumstances connecting the accused to the crime beyond reasonable doubt. That part of the judgment and discussion on legal principles need not detain us.

101. What has been relied upon by the prosecution to bring home the charge was the unnatural conduct of the appellant-accused who did not inform the police about the death of his own daughter and secondly, the admission that the

daughter's stay with the appellant-accused on the fateful night. The mother of the appellant-accused was too old to commit the crime and there was none other suggested to have committed the crime including the brother of the accused. That ruled out the possibility of somebody else committing the crime. The presence of the accused at the scene of the offence and the conduct noted above, provide both motive and opportunity for the accused to commit the murder. The conviction, therefore, could have been confirmed and on this cogent and satisfactory material. The Court was also satisfied that the further conduct of the accused and his family who were preparing to perform the last rites of the deceased daughter when the police arrived was enough to prove that the appellant-accused was guilty of the crime. However, what is material to state and for the present appeal is that a witness was examined by the prosecution and the name of that witness is Smt. Dhillo Devi. She is the mother of the accused-appellant who killed his own daughter. When the crime was investigated, this mother made a statement before the police that her son admitted to her of having killed his own daughter. At the trial, Dhillo Devi turned hostile and she did not support the prosecution case but denied the statement or any admission on the part of her son. Therefore, resorting to the legal provisions, her statement made to the police was shown to her and on being confronted with the same, she denied that she made the statement of this nature before the police.

102. That is how the Hon''ble Supreme Court in paras 15,16 and 17 held thus-

"15. The mother of the accused, Smt. Dhillo Devi stated before the police that her son (the accused) had told her that he had killed Seema. No doubt a statement to the police is ordinarily not admissible in evidence in view of Section 162(1) CrPC, but as mentioned in the proviso to Section 162(1) CrPC it can be used to contradict the testimony of a witness. Smt. Dhillo Devi also appeared as a witness before the trial court, and in her cross-examination, she was confronted with her statement to the police to whom she had stated that her son (the accused) had told her that he had killed Seema. On being so confronted with her statement to the police she denied that she had made such a statement.

16. We are of the opinion that the statement of Smt. Dhillo Devi to the police can be taken into consideration in view of the proviso to Section 162(1) CrPC, and her subsequent denial in court is not believable because she obviously had afterthoughts and wanted to save her son (the accused) from punishment. In fact in her statement to the police she had stated that the dead body of Seema was removed from the bed and placed on the floor. When she was confronted with this statement in court she denied that she had made such a statement before the police. We are of the opinion that her statement to the police can be taken into consideration in view of the proviso to Section 162(1) CrPC.

17. In our opinion the statement of the accused to his mother Smt. Dhillo Devi is an extra-judicial confession. In a very recent case this Court in Kulvinder Singh v. State of Haryana referred to the earlier decision of this Court in State of Rajasthan v. Raja Ram, where it was held (Raja Ram case, SCC p. 192, para 19)

"19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak of such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility."

In the above decision it was also held that a conviction can be based on circumstantial evidence. Similarly in B.A. Umesh v. State of Karnataka the Court relied on the extra-judicial confession of the accused."

103. It is essentially where the Supreme Court held that the statement of Dhillon Devi to the police can be taken into consideration in view of the proviso to Section 162(1) of the Code of Criminal Procedure and her subsequent denial before the Court was not believable, is what is stated to be running counter to the ruling in Tahsildar Singh and Another Vs. The State of Uttar Pradesh, .

104. Section 162 of the Code of Criminal Procedure reads as under:-

162. 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.

105. A bare perusal thereof denotes that the statements to police are not to be signed. Sub-section (1) thereof states that no statement made by any person to police officer in the course of the investigation under the concerned chapter viz. Chapter XII shall, if reduced into writing, be signed by the person making it nor shall any such statement or any record therein whether in a police diary or any part of such record be used for any purpose save as provided in that section itself, viz. section 162 at any enquiry or trial in respect of any offence under investigation at the time when such statement was made. The proviso is vital and important. That clarifies that any witness is called for the prosecution in the enquiry or the trial and whose statement has been reduced into writing in terms of sub-section (1) of Section 162, 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 and when any part of such statement is so used, any part thereof can also be used in re-examination of such witness, but for the purpose only of explaining the matter referred to in his cross-examination.

106. The further perusal of this section would belie the contentions of all the senior counsel that the proviso comes to the aid only of the accused or the defence and not the prosecution. If the permission is given by the Court and if the prosecution can confront the witness, whose statement has been recorded and reduced into writing within the meaning of sub-section (1) of Section 162 or any part of the statement if duly proved, to contradict him. The manner of contradicting him and with the statement or any part thereof is set out by Section 145 of the Indian Evidence Act, 1872. The reason for all this appears to be obvious and that there is no fetter or limit or restriction, when confronting the witness while deposing in Court with his previous statement reduced into writing or any part thereof so as to elicit the truth. Eventually every enquiry and trial in a sessions or a criminal case is to bring out unvarnished and complete truth. If the endeavour is to bring out the truth, then, nothing can prevent the same being brought out and in accordance with law. This is a legitimate course permitted by law and when evidence is being recorded, the witness first examines himself and it is known as his examination in chief. That cannot be relied upon and will not answer the definition of the term "evidence" unless and until an opportunity is given to the other side to test its veracity and which is by

cross-examination. Section 145 of the Indian Evidence Act serves a salutary purpose. Its object is to enable effective and proper cross-examination. Therefore, the witness deposing in Court can be cross-examined not only on his oral testimony but also by confronting him or showing him the documents or statements which have been made by him and reduced into writing. So long as they are relevant to the matter in question, the witness can be confronted with these statements without showing him such writing or being proved but if it is intended to contradict him with this writing, his attention has to be invited to those parts of it which are to be used for the purpose of contradicting him. Therefore, the witness can be confronted as to the previous statement made by him in writing or reduced him into writing and without such writing being shown to him or being proved but if it is intended to contradict him, his attention be invited to that writing or to that part which is to be used for the purpose of contradicting him. This is only an exception and if any previous statement made to the police by the witness is reduced into writing, Bhagwan Dass holds, that is not out of the preview of Section 145 of the Indian Evidence Act, 1872. Ultimately, it is a statement made and reduced into writing. Merely because, it is reduced into writing by a police officer, does not mean that the same cannot be utilized so as to contradict the witness. This is what Bhagwan Dass holds and we do not see any basis for urging that this conclusion can never be reached in law or it being so reached the same is per incuriam as it ignores other authoritative pronouncement. Firstly because section 145 of Indian Evidence Act has been specifically referred in section 162(1) proviso of the Code of Criminal Procedure, 1973. Secondly, the proviso engrafts a exception and which enables the witness at a trial to be confronted with his statement reduced into writing. The words "as aforesaid" would mean that the statement made by him to a police officer in the course of an investigation under Chapter XII if reduced into writing or any part thereof can be used and the crucial words "may be used by both the accused and with the permission of the Court by prosecution," to contradict such witness in the manner provided by Section 145 shows that the mode of confronting him or inviting his attention to any statement made previously by him in writing or reduced into writing is set out in section 145 of the Evidence Act. There is nothing in the provision, namely Section 162(1) proviso, which excludes a statement made to police and reduced into writing from its purview. On the other hand to allow a limited use of such statement and at a trial that the proviso is inserted.

107. In Chapter X under Indian Evidence Act in which Section 145 falls, appear number of sections commencing from section 135 and what are crucial therein are section 135 and 136. The same reduced as under:-

"135. Order of production and examination of witnesses.-The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.

136. Judge to decide as to admissibility of evidence.-When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact."

108. When a witness is called by a party, his examination is called examination-in-chief. The examination of a witness by an adverse party is called cross-examination and the re-examination of a witness is something which takes place subsequent to the cross-examination and it is by the party who called him. This is the order to be followed in terms of sections 137 and 138. Section 139 states that a person called upon to produce the documents does not become a witness by the mere fact that he produces it, unless and until he is called as a witness. The witness then may be cross-examined and re-examined. Then come section 141 to 144 which provide as to what question could be asked and what may not. Section 145 follows section 144 and which states that evidence as to matters in writing can be given but the document ought to be produced or secondary evidence as to its contents has to be led. Therefore, what Section 145 provides and naturally is cross-examination and as to previous statement in writing. Therefore, we are not in agreement with Mr. Mundargi and Mr. Chitnis that what the Supreme Court in Bhagwan Dass has permitted would run counter to the said legal position and namely the statement to the police cannot be used as evidence. Then reference was made to Section 154 and in which there is a discretion in the Court to permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party and by insertion of sub-section (2) of Section 154 reliance can be placed on any part of evidence of such witness. Therefore, this only reinforces the settled principle that testimony or deposition of hostile witness need not to be effaced from the record. That cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar for conviction upon his testimony or any part of evidence of such witness provided it is corroborated by other reliable evidence.

109. Way back in the decision in the case of State of Kerala Vs. Babu and Ors, , this aspect of the law has been succinctly discussed and the questions of law particularly as formulated by the Hon"ble Supreme Court in para 1(b) are the

same which have been raised before us:-

"(b) Whether the learned Sessions Judge can call for the police diaries of a case which is not under inquiry or trial before him and permit it to be used by the accused for contradicting a witness examined in another case under trial before him.

(c) Whether Section 162 of the Cr.P.C. permit the use of statement recorded under Section 161 of Cr.P.C. in any other proceeding other than the inquiry or trial in respect of the offence for which the investigation was conducted."

4. Before examining the applicability of Section 172 of the Code, we will first consider the right of an accused to cross-examine a witness with reference to the previous statement of a witness in a trial.

5. A perusal of this Section shows that this Section permits the cross-examination of the witness in any trial, with reference to his previous statement, to establish a contradiction and the manner in which such contradictions can be established. Section 155 of the Evidence Act provides that the previous statement of a witness can be made use of during the cross-examination of that witness for the purpose of impeaching the credit of the witness. Thus, it is seen it is the right of a party in a trial to use the previous statements of a witness either for the purpose of establishing a contradiction in his evidence or for the purpose of impeaching the credit of the witness. This right given to a party in a trial under Section 145 of the Evidence Act is somewhat controlled in criminal trials by the provisions made in the Code.

6. Section 161 of the Code provides that the police officer investigating a case is entitled to examine any person and reduce the statement of such person in writing. This statement recorded by a police officer under Section 161 even though is a previous statement for the purpose of Section 145 of the Evidence Act, such statement can be used for the purpose of establishing a contradiction or impeaching the credit of the witness only in the manner provided for in Section 162 of the Code. The use of the previous statement recorded under Section 161 of the Code is controlled by Section 162 of the Code.

7. Therefore, it is seen even in a criminal trial the previous statement of a witness can be used by the accused for the limited purpose mentioned in Section 162 of the Code as provided for in S. 145 of the Evidence Act. The object of enacting Section 162 is noticed by this Court in the case of *Tahsildar Singh and Another Vs. The State of Uttar Pradesh*, wherein it was held thus (Para 11):

"It is, therefore, seen that the object of the legislature throughout has been to exclude the statement of a witness made before the police during the investigation from being made use of at the trial for any purpose, and the amendments made from time to time were only intended to make clear the said object and to dispel the cloud cast on such intention. The Act of 1808 for the first time introduced an exception enabling the said statement reduced to writing to

be used for impeaching the credit of the witness in the manner provided by the Evidence Act. As the phraseology of the exception lent scope to defeat the purpose of the legislature, by the Amendment Act of 1923, the section was redrafted defining the limits to confine it only to contradict the witness in the manner provided under Section 145 of the Evidence Act. If one could guess the intention of the legislature in framing the section in the manner it did in 1923, it would be apparent that it was to protect the accused against the user of the statements of witnesses made before the police during investigation at the trial presumably on the assumption that the said statements were not made under circumstances inspiring confidence. Both, the section and the proviso intended to serve primarily the same purpose i.e., the interest of the accused."

8. Therefore, on a reading of Section 162 of the Code bearing in mind the object of the said Section and Section 145 of the Evidence Act, it is clear that an accused in a criminal trial has the right to make use of the previous statements of a witness including the statements recorded by the investigating agency during the course of an investigation for the purpose of establishing a contradiction in the evidence of a witness or to discredit the witness. The question then arises how does the accused confront the previous statement made by a witness in the course of an investigation to establish the contradiction in the evidence given by the witness in the trial. So far as the statements made during the course of investigation of the case being tried is concerned, there is no difficulty because an accused is entitled under Section 207 of the Code for the supply of free copies of the documents referred to in the said Sections which includes the previous statement recorded under sub-section (3) of Section 161 of the Code. The accused does not have such a right as a matter of course in regard to other previous statements; moreso, in regard to the statements recorded by the investigating agency under Section 161 in a case other than the one that is being tried by the Court. Therefore, in the instant case, the accused made an application for summoning the case diary of Crime No. 81/91 invoking the provisions of Section 172 of the Code. But the State contends that this Section does not apply to summoning the case diary of cases other than the one that is being tried.

110. The later part of the decision deals with as to how the police diary of another case could have been utilized so as to confront the witness with the previous statement in writing. We are not concerned with that part of the judgment in this case.

111. We are surprised that how in the teeth of this judgment and reported in State of Kerala Vs. Babu and Ors, could it be argued that the course adopted by the learned trial Judge in this case was impermissible in law or that the same runs counter to Tahsildar's case (supra). We need not multiply cases on this point. Although our attention has been drawn to several other cases and decisions, the view taken in State of Kerala v. Babu has neither been distinguished far from being reversed later. Hence, Bhagwan Dass may not be

referring to this judgment but the conclusion in Bhagwan Dass cannot be said to be contrary to law. Once this view is taken and of the provisions of law, then, there is no need to refer to the other Judgments relied upon by the counsel. The section itself being clear, its plain words cannot be ignored.

112. Nowadays, there is a tendency to argue and with regard to even the judgments of the Hon'ble Supreme Court of India in the teeth of Article 141 that they are per incuriam. What is being argued before us today is in the context of a supreme Court judgment. The judgment of the Hon'ble Supreme Court binds us by virtue of the above constitutional mandate. It continues to bind us so long as the Hon'ble Supreme Court itself declaring that it is neither laying down the correct law or it is reversed by it in the later decision.

113. Such is not the position before us and yet, the judgment in Bhagwan Dass case is termed as per incuriam. That is without understanding the contours of judicial discipline. A judgment of the Hon'ble Supreme Court is binding and cannot be brushed aside on a specious plea that some argument has not been noticed or that a different argument which is now made or a different shade of it was not presented. Similarly, there cannot be a deviation therefrom on some possibilities. The principle of per incuriam is explained in the judgment of Hon'ble Supreme Court which reported in Central Board of Dawoodi Bohra Community and Another Vs. State of Maharashtra and Another, . At paras 6 and 7 the Hon'ble Supreme Court states the principle thus:-

"6. Ms. Indra Jaisingh, the learned Senior Counsel for the petitioners submitted that the view of the law taken by the abovesaid four Constitution Benches is per incuriam and is not the correct law as previous decision of this Court by a Constitution Bench in Union of India (UOI) and Another Vs. Raghubir Singh (Dead) by Lrs. Etc., , takes a contrary view and being an earlier decision was binding on the subsequent Benches. We do not agree with the submission of the learned Senior Counsel that the decisions referred to by the learned counsel for the respondent No. 2/applicant are per incuriam. She has also placed reliance on a Constitution Bench decision in Union of India (UOI) and Another Vs. Hansoli Devi and Others, , wherein the Constitution Bench heard a Reference made by two Judge Bench expressing disagreement with an earlier three Judge Bench decision.

7. The Constitution Bench in the case of Dr. Chandra Prakash and Others Vs. State of U.P. and Another, , took into consideration the law laid down in Parija's case and also referred to the decision in Union of India and Anr. v. Raghubir Singh (dead) by LRs. etc. relied on by Ms. Indra Jaisingh, the learned Senior Counsel and then reiterated the view taken in Parija's case. Per incuriam means of decision rendered by ignorance of a previous binding decision such as a decision of its own or of a Court of co-ordinate or higher jurisdiction or in ignorance of the terms of a statute or of a rule having the force of law. A ruling making a specific reference to an earlier binding precedent may or may not be correct but cannot be said to be per incuriam. It is true that Raghubir Singh's

case was not referred to in any case other than Chandra Prakash & Ors. case but in Chandra Prakash & Ors. case, Raghubir Singh's case and Parija's case both have been referred to and considered and then Parija's case followed. So the view of the law taken in series of cases to which Parija's case belongs cannot be said to be per incuriam."

Further in the case of State of Gujarat and Another Vs. Hon'ble Mr. Justice R.A. Mehta (Retd.) and Others, :-

"35. There can be no dispute with respect to the settled legal proposition that a judgment of this Court is binding, particularly, when the same is that of a coordinate Bench, or of a larger Bench. It is also correct to state that, even if a particular issue has not been agitated earlier, or a particular argument was advanced, but was not considered, the said judgment does not lose its binding effect, provided that the point with reference to which an argument is subsequently advanced, has actually been decided. The decision therefore, would not lose its authority, "merely because it was badly argued, inadequately considered or fallaciously reasoned". The case must be considered, taking note of the ratio decidendi of the same i.e., the general reasons, or the general grounds upon which, the decision of the court is based, or on the test or abstract, of the specific peculiarities of the particular case, which finally gives rise to the decision. (Vide: Smt. Somavanti and Others Vs. The State of Punjab and Others, ; Ballabhadas Mathurdas Lakhani and Others Vs. Municipal Committee, Malkapur, ; Ambika Prasad Mishra Vs. State of U.P. and Others, ; and Director of Settlements, Andhra Pradesh and Others Vs. M.R. Apparao and Another, ."

Hence, the argument of the learned senior counsel that Bhagwan Dass is per incuriam and will not bind us has no substance and must be rejected. Bhagwan Dass may not refer to Tahsildar (supra) but State of Kerala v. Babu specifically refers to it and holds as reproduced above. There is no conflict between Bhagwan Dass and Babu (supra) and both take the same view.

114. Having cleared the legal ground and finding that there is positive evidence with regard to the complicity of A1 that we are of the opinion that the findings and conclusions reached by the learned trial Judge in that regard cannot be faulted. The learned Judge has properly marshalled the evidence on point No. 2 framed by it for recording the conviction against only A1. That does not suffer from any legal infirmity or perversity warranting our interference in appellate jurisdiction. We also do not find any fault with the learned Judge in referring to the contents of the FIR in the Sessions Case No. 219 of 1999 (Exhibit 310). The learned Judge has also applied the correct legal principles and recorded the conclusion that the charge of criminal conspiracy has proved against accused No. 1 only.

115. As a result of the above discussion, this criminal appeal fails and it is dismissed.

116. The defect in the recording of the sentence and as handed down by the

learned Trial Judge is then highlighted. It is submitted that when A1 has been convicted and sentenced to undergo imprisonment for life, the usual clause with regard to the applicability of Sections 427 and 433 of the Code of Criminal Procedure which confers power to suspend sentences and by further provision including section 433A, the restriction is carved out for powers of remission or commutation of certain cases should have been inserted. These are powers distinctly conferred in the State by the Criminal Procedure Code. Their applicability is not necessarily depending upon what has been stated or held in the judgments in a sessions case. It is the power of the appropriate Government and which can be exercised by it. The Hon''ble Supreme Court has held that the power of remission may be exercised but that does not mean the imprisonment for life is not for a term. That is definitely a punishment and for the remainder of the convicts life. In Sangeet and Another Vs. State of Haryana, , the Hon''ble Supreme Court has held that an order giving a sentence in a capital offence of 20 years or 30 years imprisonment without remission, is in effect an injunction against the appropriate Government from exercising its power of remission for the specified period. This is not permissible. The appropriate Government cannot be told that it is prohibited from granting remission of sentence. Similarly a convict cannot be told that he cannot apply for a remission in his sentence, whatever be the reason. The life convict has to undergo custody for his entire life span and has no right to get released after 14 or 20 years of imprisonment. His custody is for indefinite period. Remission earned is notional and therefore, for his early release, specific order under the abovementioned provisions of Criminal Procedure Code needs to be passed (see paras 58 to 79 and the conclusions recorded in para 80).

117. Hence, we do not see how the conviction and sentence as handed down can be said to be vitiated when the guilt of the accused has been brought home. There is proof beyond reasonable doubt and the satisfaction of the learned Judge on that count cannot be termed as perverse or vitiated by any serious legal infirmity so as to call for interference in our appellate jurisdiction. The learned Judge has applied the correct legal principles and appraised and apprehended the evidence properly and bearing in mind the statutory prescription. Therefore, there is no merit in the appeal as held above and it is dismissed.