SUPREME COURT OF INDIA

Bharatbhai @ Jimi Premchandbhai

Vs

State of Gujarat

03/10/2002

(Y.K.Sabharwal & H.K. Sema.)

Appeal (crl.) 594 of 2002
Appeal (crl.) 720 of 2002
Appeal (crl.) 721 of 2002
Appeal (crl.) 731 of 2002
Appeal (crl.) 828 of 2002

JUDGMENT

Y.K. Sabharwal, J.

Deceased Raghunath Yadav was convicted and sentenced by the Sessions Court at Varanasi for the murder of father of Brijesh Singh who is one of the absconding accused in the present case. While on bail in appeal, Raghunath Yadav, apprehending danger to his life, came to reside at Mehsana in the State of Gujarat. On 14th June, 1992, Raghunath Yadav was murdered at Mehsana.

In TADA case Nos.1, 2 3 and 7 of 1996, twelve accused were tried by the Designated Judge, Ahmedabad for offences under Sections 302, 397, 307, 120B IPC, Section 3(1), 3(3), 3(4) and 5 of the Terrorist And Disruptive Activities (Prevention) Act, 1987 (for short 'TADA Act') and under Section 25(1)(a) and (b) of the Arms Act.

The charge-sheet against accused Nos.1 to 3 was filed on 6th April, 1993, against accused Nos. 4 to 6 on 1st July, 1994, against accused Nos. 7 to 11 on 15th April, 1996 and against accused No.12 on 26th November, 1996. The charges were that the accused persons and the absconding accused Sharifkhan Azizkhan Pathan, Daud Ibrahim Meman, Brijeshsinh Bholansinh, Radayanarayansinh alias Harinarayansinh alias Bhulansinh Thakur, Unita Prajapati, deceased accused Sunil Savat and Abdullatif Abdul Vahab Shaikh had hatched a conspiracy to commit murder of Raghunath Yadav and thereby, committed criminal acts punishable under Section 120-B of the Indian Penal Code; as per the above conspiracy on 14th June, 1992, accused Nos. 1, 3, 4, 8, 9 and the absconding accused Radayanarayansinh @ Harinarayansinh @ Bhuvansinh Thakur and Brijeshsinh Bhuvansinh @ Ravinathsinh Thakur had gone to S.T. Bus stand, Mehsana and after obtaining information about the identification of the deceased as a part of the conspiracy made firing with the pistol and caused murder of Raghunath Yadav and created an atmosphere of terror and fear at the said place and then fled away in the vehicles and, thus, committed offences punishable under Section 302 read with Section 120B IPC and under Sections 3(1) and 3(3) of TADA Act read with Section 120B IPC; while fleeing away from Mehsana after firing and committing murder as aforesaid, Police Sub-Inspector, Zala who tried to arrest the accused was fired at by the accused causing him injuries and

had run away taking the Government Maruti Gypsy with them and, thus, committing offence punishable under Sections 307, 120B IPC and under Sections 3(1), 3(3), 3(4) and 5 of the TADA Act read with Section 120B IPC and Section 397 read with Section 120B IPC.

The Designated Court, by the impugned judgment and order convicted and sentenced accused Nos. 4 Subhashsinh @ Mahesh Shobhnathsinh Thakur, accused No.5 Abdul Khuddarsh Abdulgani Shaikh, accused No.7 Bharat Premchandbhai Patel, accused No.8 Ramdularsinh Ramdharisinh Thakur and accused No.9 Shitalaprasad Devjansinh Thakur for offences punishable under Sections 120B, Section 302 read with Section 120B, Section 307 read with Section 120B, Section 397 read with Section 120B IPC and offence under Sections 3(1), 3(3) of the TADA Act read with Section 5 read with Section 120B IPC. All of them have been sentenced to undergo life imprisonment for offence under Section 120B, offence under Section 302 read with Section 120B IPC and fine of Rs.500/- each and further imprisonment of one month for default in payment of fine. For other offences, varying punishments have been awarded. Accused No.12 died during trial and the remaining were acquitted.

The convicted accused have preferred these appeals under Section 19 of TADA Act. We have perused the record and heard Mr. Yashank Adhyaru for accused No.7 (Crl.A. No.594/2002), Mr. Ranjit Kumar for accused No.9 (Crl.A. No.720/2002), Mr. V.S. Kotwal for accused No.8 (Crl.A.No.731/2002), Mr. U.R. Lalit for accused No.4 (Crl.A. No.721/2002), Mr. Sushil Kumar for accused No.5 (Crl.A. No.828/2002) and Mr. Mahendra Anand for the respondent.

The conviction of the appellants is primarily based on the two confessional statements. One made by accused No.7 Bharatbhai and the other by accused No.8 Ramdularsinh Thakur. These statements were recorded by Mr. A.S. Bhatia, Superintendent of Police (PW18) under Section 15 of TADA Act. In respect of the conviction of accused Nos.4, 5 and 9 which is also based mainly on these confessional statements, according to the prosecution, there is also sufficient corroborative evidence against them.

The fate of the entire case rests on the legality of the confessional statements. If the confessional statements are held as inadmissible, the prosecution case against all the appellants will fail. It has not been disputed and, in our opinion, rightly, by Mr. Anand, learned counsel for the respondent-State that in case the confessional statements are held inadmissible and, therefore, discarded, it would not be possible to sustain the conviction of the appellants. The learned counsel has, however, strenuously urged that no provision of the TADA Act or rules framed thereunder has been violated in recording of the confessional statement and submitted that the confessional statements of accused Nos. 7 and 8 have been rightly relied upon by the Designated Court in convicting all the appellants. The facts leading to the recording of the confessional statements and what is contained therein may be briefly noticed. Raghunath Yadav was murdered on 14th June, 1992. Accused No.7 was arrested on 13th December, 1995. His remand had been obtained upto 29th December, 1995. He was produced before PW18 A.S. Bhatia, on 27th December, 1995 at 7.30 p.m. PW18 is competent to record the confessional statement under Section 15 of the TADA Act. The accused was told by PW18 that he was not legally bound to give confession and the same shall be used against him. The accused stated that still on his own and without any sort of pressure, threats or mental/physical harassment, he intended to give the confessional statement. The confessional statement was, however, not recorded on 27th December, 1995. He was given time to think over. His confessional statement was recorded on the next date, i.e., 28th December from 10.45 upto 1145 hours.

Similar is the position in respect of the confessional statement of accused No.8 Ramdularsinh

Thakur. He was first produced before PW18 at 8 p.m. on 27th December, 1995. The confession was recorded on 28th December from 1145 upto 1215 hours. His arrest was also on 13th December, 1995. His remand was obtained upto 29th December, 1995. The english translated typed copy of the confessional statement of PW7 runs into 35 pages whereas that of PW8 runs into 12 pages. The identical statement of accused Nos.7 and 8 that were recorded on 27th December, 1995 read as under : "In connection with the Mehsana City police station Cr.R. No.I-197/92 for the offence punishable under sections 147, 148, 149, 307, 397, 120-B of the Indian Penal Code and under section 25(i)B, A and u/s 3 of the TADA Act, I have been arrested by the police on 13/12/95, and a remand has been obtained upto 29/12/95. Since I intend to voluntarily give my confessional statement as regards the facts of this offence known to me and the parts which I did play therein, I have been today produced before you. I have been given understanding by you that I am legally not bound to give this confession and that the same shall be used against me. Still, however, I on my own and without any sort of pressure, threats or mental/physical harassment, intend to give this confessional statement.

I state that I have been given sufficient time to think over giving this confessional statement by you, and after due and thoughtful consideration, I have been produced before you to give this confessional statement."

The first paragraph of the statement of accused No.7 that was recorded on 28th December, 1995 reads as under : "Upon being personally interrogated, I state that I am residing at the above address for the last one and half years and doing the work of filing share issues forms, purchase and sale of shares, purchase and sale of small big properties and playing cards (gambling). Since I am fond of gambling since my childhood, I also gain or lose money in it."

In respect of accused No.8 that paragraph reads as under :

"Upon being interrogated personally, I state that I am residing at the above address and running a flour mill. My wife and children are residing at the above address of my native place and they are doing the agriculture work and I many times go to my native place once or twice in a year. I am residing here since last 19 years and I have studied upto Std.7 in Hindi medium. I know, understand and speak Gujarati language very will."

In the confessional statement, accused No.7 has given a detailed account as to how he came in contact with the absconding accused and the other accused persons; how and when they had been coming to his house and making telephone calls; his going to Ahmedabad Airport with Bachchisinh in the car of Sunil Savat to receive Subhashsinh Thakur who came from Delhi along with Brijeshsinh Thakur. That was on 10th June, 1992. Sunil Savat, Brijeshsinh Thakur and Bachchinsinh came to his house from hotel and Sunil Savat had talked to Daud at Dubai and told him to make all arrangements. The talks were in code words. Thereafter, after five minutes, a phone call was received from Abdul Latif who talked with Sunil Savat. Latif stated that he will make all the arrangements. All persons went to the house of uncle of Subhashsinh named S.D. Thakur. Subhashsinh introduced all with him PSI S.D. Thakur and talked with him as regards their going to Mehsana on the next day. S.D. Thakur gave the name and address of another 'Bhaiya' to Subhashsinh. Thereafter all went to the house of Latif where Sharifkhan and Abdul Khudarsh accused No.5 were also present. As per the talk between Sunil Savant and Latif, since murder of one 'Bhaiya' was to be committed at Mehsana, Latif told that arrangements of car and persons shall be made by him and that two cars and persons would reach the hotel. Sunil Savant told him to come to the hotel on the next day at about 6.30 hours in the morning. He went there at about 7.00 a.m. All 6

persons were ready at the Natraj Hotel. After some time two cars sent by Latif came to hotel out of which one was Maruti 1000 of metallic blue colour wherein Abdul Khudarsh, Sunil Savant, Brijeshsing and one boy out of the two sat. It was told that car should stop at Nandsan Hotel. Latif's persons came in the Maruti Fronti wherein Subhashsinh and two other persons sat. He and Bachchisinh were in Hyundai car. Bachchisinh was having the address of Anupam Cinema and, therefore, their car was kept ahead where Ramdularsinh (accused No.8) met them. On finding Ramdularsinh on road, Bachchisinh was dropped there and he (accused No.7) returned home in the Hyundai car. Bachchisinh and Ramdularsinh sat in the Maruti Fronti car which had followed the car of accused No.7 from the hotel. After taking Ramdularsinh, they went in the Maruti Fronti to take S.D. Thakur. From there, all were to gather at Nandasan Hotel. He did not see as to which weapons were kept in which car. At 4.30 p.m. in the evening, Sunil Savant and Brijeshsinh Thakur came to his house in a frightened condition. Sunil Savant informed accused no.7 that "he has been finished, but quandary (lafada) occurred, many bullet shots were fired, everything has been disturbed, we left the cars and returned." Sunil Savant talked to Daud and informed him about this incident and also informed that the work is over and the cars were left there only. He also talked about the incident with Latif over telephone in Hindi. Latif told him that whatever has happened, has already happened, don't worry. He also stated about going to the house of S.D. Thakur with Subhashsinh and others on the next day and Subhashsinh informing his uncle that the work is over. He has further stated about going to Nepal with Sunil Savant and Bachchisinh. He has also made statement about the boys of Mumbai having accepted 'supari' for N.G. Patel for a big amount and his being frightened on that account.

At the end the confession reads that "The above facts as narrated by me are true and correct". It has been signed by accused No.7. The signatures of PW18 appear below the words 'Before me'. In the same manner as above, the confessional statement of accused No.8 at the end records that "The above facts as narrated by me are true and correct which has been read over to me". It has also been signed by the accused. The signatures of the Superintendent of Police (PW18) appear in a similar fashion as above.

Accused No.8 has, inter alia, stated that he had not known Brijeshsinh Thakur but heard his name and had got the information that he has been doing the activities of murders etc. in Banaras, Lucknow and the surrounding areas. He knew Subhashsinh Thakur for the last 4-5 years and also accused No.9 for the past 10-12 years; the disputes/quarrels between Yadav's of the Dhavarhara village of Brijeshsinh and Thakurs were going on since years. At about 12 midnight, accused No.9 came to his house and informed him that they have to go to Mehsana next day in the morning and on asking for the purpose for going there, accused No.9 stated that he will tell him the next day morning. On the next day morning Subhashsinh Thakur came in Maruti Fronti car and with him, he went to accused No.9 who told him that to take revenge of the murder of father of Brijeshsinh, the murder of Raghunath Yadav is to be committed and accused No.8 knows him and, therefore, he should identify him at Mehsana. Accused No.8 agreed to go with accused No.9 to Mehsana. In that car, Subhashsinh and accused NoS.8 and 9 were sitting. In another car that was following them 6-7 persons were sitting. On reaching Mehsana, they went to bus stand; there was rush at sugarcane juice stall. On his asking as to where is Yadavji, he was told that he was getting his beard shaved in the nearby cabin. On looking into the cabin, he found that Raghunath Yadav was getting his beard shaved. He told Subhashsinh as to the person who was getting shaved was Raghunath Yadav. After showing Raghunath Yadav, he and accused No.9, after consulting Subhashsinh left the bus stand and Subhashsinh and other persons in the car waited there. He and accused No.9 came to Ahmedabad after taking a jeep from Mehsana Highway bus stand where they reached by taking a rickshaw. The passenger and the jeep driver were discussing on the way that firing had taken place at Mehsana S.T.

bus stand. Therefore, we knew that Subhashsinh and his other companions had made firing.

The confessional statement recorded under Section 15 of TADA Act by a Police Officer authorized therein is admissible in evidence. It is also no more res integra that a confession recorded under Section 15 is a substantive piece of evidence [State through Superintendent of Police, CBI/SIT v. Nalini & Ors. (1999) 5 SCC 253]; [Devender Pal Singh v. State of NCT of Delhi & Anr. (2002) 5 SCC 234] and Ravinder Singh @ Bittu v. The State of Maharashtra JT 2002 (4) SC 470].

The maker of a confessional statement can be convicted solely on the basis of his confessional statement made under Section 15 of the TADA Act. That statement is also substantive evidence against his co- accused. Against the co-accused, though taken as substantive evidence as a rule of prudence, to get support, the Court would look upon corroborative evidence as well.

Thus, the fate of not only the accused but the co-accused as well hinges on the confessional statement recorded by a Police officer under Section 15 of the TADA Act. Such a statement cannot be recorded in a mechanical manner. All the safeguards provided in the Act and the Rules have to be strictly adhered to. There can be no room for any latitude in the matter and manner of recording of a confessional statement. Any material discrepancy will be fatal unless satisfactorily explained by the prosecution. The burden of proving confessional statements always remains on the prosecution. It is for the prosecution to prove that the confessional statement that is being relied upon was voluntary, truthful and all safeguards were complied with while recording it. The burden of proving such confessional statement on the prosecution cannot be lightened by urging that the confession was not retracted or challenged except in the cross-examination of the witnesses. Undoubtedly, when the confession is duly recorded and is proved to be voluntary and truthful, then it can be taken to be the most reliable piece of evidence coming from the accused himself and made sole basis of conviction in the manner stated earlier, confession being an admission of the guilt.

The conviction in the present case is based mainly, if not entirely, on the strength of what is stated in the confessional statements made by accused Nos.7 and 8. The confessional statements have been recorded by a police officer. It was not contended for the State that the conviction could be supported even if the confessions were inadmissible. The admissibility in evidence of confessional statements made by an accused before a police officer has for long been an anathema to the rule of law. The police has, ordinarily, been suspect of using third degree methods in obtaining confession. Section 25 of the Evidence Act stipulates that no confession made to a police officer, shall be proved as against a person accused of any offence. Section 26 provides that no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. Section 24 provides that a confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. Article 20(3) of the Constitution of India provides that no person accused of any offence shall be compelled to be a witness against himself.

In Kartar Singh v. State of Punjab [(1994) 3 SCC 569], a serious challenge was made to the constitutional validity of Section 15 of the TADA Act which contained a drastic departure from the existing provisions of the Evidence Act, in particular Section 25 thereof, and provided that

notwithstanding anything contained in the Indian Evidence Act, 1872, but subject to the provisions of that section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded in the manner provided in the section shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under the TADA Act or rules made thereunder. The co-accused, abettor or conspirator is required to be charged and tried in the same case together with the accused for the applicability of Section 15(1) of the TADA Act. Section 15 (2) stipulates that the police officer shall, before recording any confession under Section 15(1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily. Thus, this provision was made in consonance with Article 20(3) of the Constitution as the compulsion on an accused to make a statement against him has been interdicted by the Constitution.

In Kartar Singh's case, it was contended that the procedure prescribed in the TADA Act is the antithesis of the just, fair and reasonable procedure. A blistering attack was made on the validity of Section 15. It was, inter alia, contended that the existing Codes of law which have a life history of more than a century proceed on the footing that police confessions are untrustworthy and, thus, Section 15 gives a death-knell to the very basic principle hitherto recognized and followed that a confession made before a police officer under any circumstance as well as a confession to a Magistrate or a third party while in police custody is totally inadmissible and that such a confession cannot be proved as against a person accused of any offence. It was contended in the said case that oppressive behaviour and excessive naked abuse and misuse of power by the police in extorting confession by compelling the accused to speak under the untold pain by using third degree methods with diabolical barbarity in utter violation of human rights, cannot be lost sight of or consigned to oblivion and the courts would not be justified by showing a volte-face and turning a blind eye to the above reality and drawing a legal presumption that the confession might have been obtained by a police officer not lower in rank than a Superintendent of Police in terms of Section 15(1) only in accordance with the legally permissible procedure. The counsel castigated the conduct of the police officers in whisking away the accused either on arrest or on obtaining custody from the court to an unknown destination or unannounced premises for custodial interrogation in order to get compulsory self- incriminating statement as a source of proof to be produced before a court of law. Examples were cited where on several occasions, this Court have ordered exemplary compensation to the victims at the hands of the police officials. It was submitted therein that the police officer is inherently suspect of implying coercion to obtain confession and, therefore, the confession made to police officer should totally be excluded from evidence. The emphasis was more on the police culture rather than on the person, the contention being that the climate was still not conducive for effecting a drastic change by investing the police officer with a power to record confession and then make it admissible in evidence. It was submitted that without bringing about a change in the outlook of the police, such a drastic departure was not justified.

The challenge to the constitutional validity of Section 15 almost succeeded as seems clear from the observations that were made in the majority opinion in Kartar Singh's case while upholding the constitutional validity of Section 15. The observations are : "Though we at the first impression thought of sharing the view of the learned counsel that it would be dangerous to make a statement given to a police officer admissible (notwithstanding the legal position making the confession of an accused before the police admissible in some advanced countries like United Kingdom, United States of America, Australia and Canada etc.) having regard to the legal competence of the legislature to make the law prescribing a different mode of proof, the meaningful purpose and object

of the legislation, the gravity of terrorism unleashed by the terrorists and disruptionists endangering not only the sovereignty and integrity of the country but also the normal life of the citizens, and the reluctance of even the victims as well as the public in coming forward, at the risk of their life, to give evidence hold that the impugned section cannot be said to be suffering from any vice of unconstitutionality. In fact, if the exigencies of certain situations warrant such a legislation then it is constitutionally permissible as ruled in a number of decisions of this Court provided none of the fundamental rights under Chapter III of the Constitution is infringed."

The two learned Judges, however, expressed the minority opinion that Section 15 is unconstitutional. While upholding the validity of Section 15, a note of caution was added in Kartar Singh's case in the following terms : " we state that there should be no breach of procedure and the accepted norms of recording the confession which should reflect only the true and voluntary statement and there should be no room for hyper criticism that the authority has obtained an invented confession as a source of proof irrespective of the truth and creditability as it could be ironically put that when a Judge remarked , 'Am I not to hear the truth', the prosecution giving a startling answer, 'No Your Lordship is to hear only the evidence'." (Emphasis is ours)

In the same context, while laying down the guidelines so as to ensure that the confession obtained in the pre-indictment interrogation by a police officer not lower in rank than a Superintendent of Police is not tainted with any vice but is in strict conformity with the well-recognised and accepted aesthetic principles and fundamental fairness, the Constitution Bench also said that : "Though it is entirely for the court trying the offence to decide the question of admissibility or reliability of a confession in its judicial wisdom strictly adhering to the law, it must, while so deciding the question should satisfy itself that there was no trap, no track and no importune seeking of evidence during the custodial interrogation and all the conditions required are fulfilled." (emphasis is ours)

Before basing conviction on confessional statement, it is necessary to examine whether all conditions for recording of confession have been fulfilled or not. The requirements of Section 15 have already been noticed earlier. In exercise of the powers conferred by Section 28 of the TADA Act, the Central Government has made the Terrorist and Disruptive Activities (Prevention) Rules, 1987. Rule 15 relates to recording of confession made to police officers. It reads as under : "15. Recording of confession made to police officers.(1) A confession made by a person before a police officer and recorded by such police officer under Section 15 of the Act shall invariably be recorded in the language in which such confession is made and if that is not practicable, in the language used by such police officer for official purposes or in the language of the Designated Court and it shall form part of the record.

(2) The confessions so recorded shall be shown, read or played back to the person concerned and if he does not understand the language in which it is recorded, it shall be interpreted to him in a language which he understands and he shall be at liberty to explain or add to his confession.

(3) The confession shall, if it is in writing, be (a) signed by the person who makes the confession; and (b) by the police officer who shall also certify under his own hand that such confession was taken in his presence and recorded by him and that the record contains a full and true account of the confession made by the person and such police officer shall make a memorandum at the end of the confession to the following effect :- 'I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing and recorded by me and was read over to the person making it and admitted by him to be

correct, and it contains a full and true account of the statement made by him. Sd/- Police Officer."

(4) Where the confession is recorded on any mechanical device, the memorandum referred to in sub-rule (3) in so far as it is applicable and a declaration made by the person making the confession that the said confession recorded on the mechanical device has been correctly recorded in his presence shall also be recorded in the mechanical device at the end of the confession.

(5) Every confession recorded under the said Section 15 shall be sent forthwith to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate having jurisdiction over the area in which such confession has been recorded and such Magistrate shall forward the recorded confession so received to the Designated Court which may take cognizance of the offence."

What is required to be examined is whether requirements of Section 15 of the TADA Act and the aforesaid Rule 15 when recording the confessional statements in question, have been complied or not. Let us examine whether requirements of Rule 15 have been complied by PW18 when he recorded confessional statements of accused Nos.7 and 8. One of the requirements of Rule 15(3)(b) is making of a memorandum at the end of the confession. It is not in dispute that Rule 15(3)(b) has not been complied with in as much as the memorandum at the end of the confession has not been appended. PW18, the police officer who recorded the confession, admitted in his deposition that such a memorandum was not made. The core question is its effect on the admissibility of confession.

Learned counsel for the appellants contend that it is fatal to the case of the prosecution. In absence of such a memorandum, the confession is inadmissible and cannot be relied upon and the conviction, impugned in the present appeals, being based only on confession is liable to be upturned is the contention. On the other hand, counsel for the respondent would submit that though no memorandum, as required by Rule 15(3)(b), has been made and appended by PW18, but in substance the rule has been complied with. The contention is that the deposition of PW18 in Court shows that he was satisfied that the confession was voluntarily made and, therefore, the absence of the memorandum is only a defect of form and not of substance. Hence, the non-making of memorandum in the present case is of no consequence is the contention. In the aforesaid light, the vital question to be determined is can the defect of non-making and appending of memorandum, as required by Rule 15(3)(b), be cured by oral deposition of the Superintendent of Police who recorded the confession, while appearing as a witness in court. In other words, can oral evidence in Court be a substitute for a memorandum to be made under Rule 15(3)(b) is the point for determination.

The significance of the confessional statement has already been noticed earlier. It is such that the fate of not only the accused but co- accused, abettor and conspirator depends upon it. It can result in the hanging of accused and co-accused etc. Relying on it, punishment upto death penalty can be imposed on the maker as also on others. First of all, let us remind ourselves of the observations that have stood test of time as made in the off-quoted decision of Privy Council in Nazir Ahmad v. King-Emperor [AIR 1936 PC 253] holding that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. In S.N. Dube v. N.B. Bhoir & Ors. [(2000) 2 SCC 254], the trial court had taken the view that the officer recording confession did not write the certificates and the memorandums in the same form and terms as are prescribed by Rule 15 of the Rules framed under the TADA Act and the same were, therefore, inadmissible. Counsel for the accused submitted before this Court that the certificates and the memorandums having not been recorded in identical terms and as Rule 15 is mandatory, the trial Court was right in holding the confessions inadmissible for non- compliance

with that mandatory requirement. While considering the question whether the certificate and the memorandum are required to be written in the same form and terms as required by the Rule, this Court held that :

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

explained about his right not to make the confession and the danger of its being used against him as evidence. That statement appears in the body of the confession but not at the end of it. Can the confession be regarded as not in conformity with Rule 15(3)(b) only for that reason? We find no good reason to hold like that. We hold that the trial court was wrong in holding that there was a breach of Rule 15(3) and, therefore, the confessions were inadmissible and bad."

(emphasis is ours)

Thus, what has been laid in the aforesaid case is that the writing of certificate and making the memorandum are mandatory and these matters are not left to be proved by oral evidence alone. The requirement of the Rule is preparation of contemporaneous record regarding the manner of recording the confession in the presence of the person making it. This Court, while holding that making of the memorandum is a mandatory requirement of the Rule, further held that what was not mandatory was the form and words of the certificate and memorandum. Thus, the making of certificate and memorandum was held to be mandatory but not form thereof.

In the present case, admittedly no such memorandum has been prepared. That mandatory requirement is sought to be fulfilled by oral deposition of PW18. Reliance has been placed on the testimony of PW18 when he stated that :

"I again asked him that, whether he is giving this confession under any threat, pressure or temptation and he replied no. I was, therefore, satisfied that he voluntarily wanted to give his statement and thereafter his statement came to be recorded. From the statement recorded it appeared to me that the averments made by him were absolutely true."

The first part of the aforesaid deposition relates to stage prior to actual recording of the confession and the latter part that has been underlined by us relates to stage after recording of the actual confession. According to Rule 15(3)(b), the satisfaction to be recorded is about the confession having been made voluntarily. The memorandum to be recorded at the end of the confession requires the recording officer to state that "I believe that this confession was voluntarily made". For the present, assuming that oral testimony in Court can be a substitute of memorandum, what has been deposed in Court by PW18 is not the belief that the confession was voluntarily made but "it appeared to me that the averments made by him were absolutely true". Hopefully the officer knew difference between the words 'voluntary' and 'truth'. None explained what PW18 meant. In Chandran v. The State of Tamil Nadu [(1978) 4 SCC 90] in the memorandum that had been made instead of certifying that the officer believed that confession was voluntarily made, the Magistrate had stated that "I hope that the statement was made voluntarily". It was noticed that although the Magistrate was examined as a witness at the trial, no attempt was made by the prosecution to establish from his word of mouth that the use of the word "hope" by him was inadvertent or accidental. The confession was, therefore, excluded from consideration. At the cost of repetition, we may again note that in Dube's case, it was held that writing the certificate and making the memorandum are mandatory; these matters are not left to be proved by oral evidence alone; the requirement of the rule is preparation of contemporaneous record regarding the manner of recording the confession and the preparation of contemporaneous record in the presence of the person making the confession are mandatory requirement but forming and words are not mandatory. Unlike present case, Dube was a case where certificate and memorandum had been prepared though not using exactly same words as required by the Rule. In the present case, PW18 admits that no such document was made and appended at the end of the confession. The contemporaneous record has to support the deposition in Court. If the recording officer without contemporaneous record is allowed

to depose later after lapse of several years in Court, it would be too hazardous to rely on such testimony as, ordinarily, an officer is likely to depose in court what was left out to be recorded in documents as per mandatory provisions of the Act and the Rules, once he knows that he had made vital omission. If the contemporaneous record shows that in substance though not in form, the requirements of the Rule were fulfilled, the defect of form can be cured by oral deposition made, may be after many years, on the basis of the contemporaneous record. The importance of fulfilling all the requirements of the provision while recording confessional statements has already been noticed. As already noticed, the fate of not only the accused but others also hinges on such a confession recorded by a Police officer. Further what heavily weighed with the Constitution Bench when it upheld the constitutional validity of Section 15, is that all requirements in respect of recording of confessional statements will be fulfilled which would act as safeguard to the accused. The making of certificate and memorandum is not an empty formality of the Rule. It is required to be made at the end of the confession. The officer certifies the manner in which the statement was given by the accused and was recorded. The satisfaction as per Rule 15(3)(b) of recording officer has substantial relevance on the aspect of voluntary nature of confession, which is the heart of confession for it being made the basis of conviction.

In Chandran (supra) this Court held that the law peremptorily requires that after recording the confession of the accused, the Magistrate must append at the foot of the record a memorandum certifying that he believes that the confession was voluntarily made. It was further held that the reason for requiring compliance with this mandatory requirement at the close of the recording of confession, appears to be that it is only after hearing the confession and observing the demeanour of the person making it, that the Magistrate is in the best position to append the requisite memorandum certifying the voluntariness of the confession made before him. If, the Magistrate recording a confession of an accused person produced before him in the course of police investigation, does not, on the face of the record, certify in clear, categorical terms his satisfaction or belief as to the voluntary nature of the confession recorded by him, nor testifies orally, as to such satisfaction or belief, the defect would be fatal to the admissibility and use of the confession against the accused at the trial. As earlier noticed in the said case, the memorandum had been made and the Magistrate in the memorandum appended by him at the foot of the confession had merely expressed a 'hope' that the confession was voluntarily made. Even in his oral evidence at the trial, the Magistrate did not vouch for the voluntariness of the confession. He did not say that use of the word 'hope' by him in the memorandum was due to some accidental slip or heedless error. Under these circumstances, the confessional statement was excluded from consideration. It can, thus, be seen that this was a case where a memorandum was appended but with using different language as abovenoticed. The argument that the preliminary satisfaction before recording of confession about its voluntary nature can be substitute for recording satisfaction after recording of confession was not accepted holding that there was no requirement to record satisfaction at the earlier stage whereas there was such a requirement of satisfaction being appended at the foot of the confession.

In Ayyub v. State of U.P. [(2002) 3 SCC 510], while considering the contention that the police officer, who recorded the confessional statement, had not certified that he believed that the confession was voluntarily made, this Court held that as the confession made under Section 15 of the TADA Act is made admissible in evidence, the strict procedure laid down therein for recording confession is to be followed. Any confession made in defiance of these safeguards cannot be accepted by the court as reliable evidence. The confession should appear to have been made voluntarily and the police officer who records the confession should satisfy himself that the same had been made voluntarily by the maker of that statement. The recorded confession must indicate that these safeguards have been fully complied with. The confession was held to be inadmissible

evidence as the recorded confessional statement did not show that the officer who recorded the statement had followed the guidelines. After noticing that under Article 20(3) of the Constitution, the accused person has the protection of being compelled to be witness against himself, the Court held that "As the confession made under Section 15 of the TADA Act is made admissible in evidence, the strict procedure laid down therein for recording confession is to be followed. Any confession made in defiance of these safeguards cannot be accepted by the court as reliable evidence the police officer who records the confession should satisfy himself that the same has been made voluntarily by the maker of that statement. The recorded confession must indicate that these safeguards have been fully complied with."

Let us now consider the case of State of Maharashtra v. Bharat Chaganlal Raghani & Ors. [(2001) 9 SCC 1] on which strong reliance was placed by the learned counsel for the respondent-State in support of the contention that if there is oral evidence in Court showing substantial compliance with Rule 15(3), the confession cannot be discarded for want of preparation of memorandum. It appears that that was not a case where memorandum was not prepared at all, but was a case where the contention for the accused was that the mandate of Rule 15(3) had not been complied with because the recording officer has not made the memorandum in the form specified therein and, therefore, confessional statement cannot be held admissible in evidence and relied upon as a piece of evidence against the accused person. Under these circumstances, the Court held that though the memorandum was not recorded as desired by the Rule but, at the same time, from the questions put by the recording officer to the accused, the trial court was satisfied and so was this Court that the confessional statements were made voluntarily without any threat, inducement or pressure and strictly in accordance with the mandate of the TADA Act as interpreted by this Court from time to time. That does not appear to be a case where the memorandum was not prepared at all.

In Sharafat Hussain Abdul Rahaman Shaikh & Ors. v. State of Gujarat & Anr. [(1996) 11 SCC 62], the conviction of the appellant was primarily based on confessions of each of them. Allowing the appeal and setting aside the judgment of conviction passed by the Designated Court and citing with approval Chandran's case (supra), this Court held that : "4. Admittedly, in none of the four confessions (Ext. 72, 73, 75 and 76), with which we are concerned in this appeal, such a memorandum finds place. The question, therefore, that falls for our consideration is what is the value of such a memorandum and, for that matter, the effect of absence thereof. The answer to this question has been given by this Court in Chandran v. State of T.N. while dealing with sub-section (4) of Section 164 Cr.P.C., which lays down the procedure to be followed by a Magistrate in recording a confession and is pari material with the above- quoted Rule 15(3), with the following words : (SCC p.101, para 31)

'But the law does peremptorily require that after recording the confession of the accused, the Magistrate must append at the foot of the record a memorandum certifying that he believes that the confession was voluntarily made. The reason for requiring compliance with this mandatory requirement at the close of the recording of the confession, appears to be that it is only after hearing the confession and observing the demeanour of the person making it, that the Magistrate is in the best position to append the requisite memorandum certifying the voluntariness of the confession made before him. If, the Magistrate recording a confession of an accused person produced before him in the course of police investigation, does not, on the face of the record, certify in clear, categorical terms his satisfaction or belief as to the voluntary nature of the confession recorded by him, nor testifies orally, as to such satisfaction or belief, the defect would be fatal to the admissibility and use of the confession against the accused at the trial.'

(emphasis supplied) 5. Apart from the fact that PW6 did not give any certificate, in accordance with the earlier quoted Rule 15(3) of his satisfaction or belief about the voluntariness of the confessions after the same were recorded, it is also an admitted fact that while being examined as a witness he did not testify about his such satisfaction or belief. Resultantly, in view of the above-quoted observations of this Court, with which we are in complete agreement, the confessions allegedly made by the four appellants cannot be pressed into service to prove the charges leveled against them. Since there is no other evidence on record from which it could be said that the appellants are guilty of the offences for which they were charged and convicted the appeal must succeed."

Learned counsel for the State submitted that the observations in para 5 above show that by oral evidence in court, prosecution can show that Rule 15(3)(b) was complied with. While making this submission what is being missed by the learned counsel is that facts of the case do not show, one way or the other, about the existence of contemporaneous record. As noticed above, in Chandran's case there was contemporaneous record in the form of memorandum itself though using different words. Sharafat Hussain's case is not a decision which holds that without contemporaneous record, oral evidence can be led to establish the fulfillment of mandatory requirement of the Rule. It may also be stated that harsher the consequences, the stricter is the need to comply with the requirement of the Rules. In view of aforesaid discussion, our conclusions are as follows :

A. Writing the certificate and making the memorandum under Rule 15(3)(b) is mandatory.

B. The language of the certificate and the memorandum is not mandatory.

C. In case the certificate and memorandum is not prepared but the contemporaneous record shows substantial compliance of what is required to be contained therein, the discrepancy can be cured if there is oral evidence of recording officer based on such contemporaneous record.

D. In absence of contemporaneous record, discrepancy cannot be cured by oral evidence based on memory of the recording officer. In the present case, admittedly Rule 15(3)(b) has not been complied. No memorandum as required was made. There is also no contemporaneous record to show the satisfaction of the recording officer after writing of confession that the confession has been voluntarily made. The confession of accused No.7 does not even state that it was read over to him. Thus, confessional statements are inadmissible and cannot be made basis of upholding the conviction. Once confessional statements are excluded the conviction cannot be sustained.

Further, in view of the above, oral evidence could not be led to show compliance of Rule 15(3)(b). That apart, as earlier noticed, in fact, even oral evidence of PW18 does not satisfy the requirement of the Rule. For the reasons aforesaid, we set aside the impugned judgment of the Designated Court, allow the appeals and direct the appellants to be set free forthwith, if not required in any other case.