

Bombay High Court People'S Union For Civil ... vs The State Of Maharashtra & Others on 22 February, 1999 Equivalent citations: 1999 (4) BomCR 608 Author: N Arumugham Bench: N Arumugham, S R Desai ORDER N. Arumugham, J. 1. These three writ petitions have been filed under Article 226 of the Constitution of India seeking the Mandamus against the respondents who are the State of Maharashtra, the Director General of Police, Maharashtra, Mumbai, the Commissioner of Police, Mumbai, and other officials working under them and Coroner of Mumbai, (i) directing the respondent Nos. 1 to 3 to furnish the particulars regarding the number of persons killed in last one year in police encounters, their names, addresses, the circumstances in which these persons are killed, the enquiries, if any, conducted with respect to the said killings and any other relevant information and the action taken, if any, by them: (ii) directing the respondent No. 1 to register offence under section 302 of the Indian Penal Code and other relevant enactments against the Police Officers, if found prima facie responsible for the violation of the fundamental rights and the provisions of the Indian Penal Code and other relevant enactments; (iii) directing the 4th respondent, viz. the Coroner of Mumbai, to submit a detailed report and the details of actions taken by him under the provisions of the Coroners Act, 1871 and (iv) directing the appropriate authority to enquire into and report to this Court in all the police encounters that have taken place not only in the city of Mumbai but also in the State of Maharashtra in which persons have been killed or injured in police encounters; (v) directing the State of Maharashtra to constitute the Maharashtra State Human Rights Commission as provided under section 21 and other provisions contained in the Protection of Human Rights Act, 1993 and (vi) directing the State of Maharashtra to frame appropriate guidelines governing planning and carrying out encounters by the police and other authorities for the purpose of protection of life and liberty guaranteed under Article 21 read with Article 14 of the Constitution of India, the above prayers were made in Criminal Writ Petition No. 1146 of 1997, (Prayers in Writ Petition No. 1032 of 1997), (i) directing the respondents to call for the records with regard to the death of Abu Sayama @ Javed and with regard to the encounter (fake) in which the said Abu Sayama was killed on 28-8-1997 at Ballard Pier/by M. R. A. Marg Police Station, and also to produce files and papers with regard to all the 65-68 encounters in which different persons were killed between January 1997 till the end of September, 1997; (ii) directing the 2nd respondent and his subordinate officers to register or get registered a case of murder under section 302 of the Indian Penal Code against the 3rd respondent in Criminal writ petition No. 1032 of 1997 for killing Abu Sayama @ Javed under the guise of fake encounter, and also for an order for a departmental enquiry against respondent No. 3 for his misconduct ; (iii) directing the respondent No. 1 to investigate with regard to 68 cases of encounters of the Bombay Police to be made through the Central Bureau of Investigation or any other investigating agencies of the Union Government; and (Prayers in Writ Petition No. 1064 of 1997); (i) directing the respondents to hand over all the cases concerning encounters between the Bombay Police and the alleged criminals in the years 1995, 1996 and 1997 to the Central Bureau of Investigation for the purpose of investigation and Central

Bureau of Investigation may be permitted to proceed against the accused under the relevant sections of the Code of Criminal Procedure; and prosecute them in accordance with law. 2. The petitioners, in Criminal Writ Petition Nos. 1164 and 1064 of 1997, are People's Union for Civil Liberties, a voluntary body working for the welfare and interests of general public, and the 2nd petitioner is its Vice President and the petitioners in Criminal Writ Petition No. 1032 of 1997 are the members of a political party, by name Samajwadi Party, and the 3rd petitioner is a Municipal Corporator elected from Ward No. 7 as a candidate sponsored by the Samajwadi party. They filed the above petitions against the respondents for the above said reliefs as a 'Public Interest Litigation'. Likewise the petitioners in Criminal Writ Petition No. 1064 of 1997 are a Committee for the Protection of Democratic Rights, Mumbai, through its Treasurer Mr. J. Pandey, and they filed the above criminal writ petition as a public interest litigation. 3. Mainly based upon the news item published in the media of Bombay city and relying upon the same, these three writ petitions have been filed as aforesaid, by the voluntary Association and the public bodies to challenge the genuineness or otherwise of nearly 99 the so-called encounters held between the Mumbai Police and the alleged criminals resulting in the death of 135 persons in all between 1995 to 1997. It was alleged in all the three writ petitions that the respondents-police, through its subordinates, had claimed that all the encounters were the one carried out individually, happened between the police, on one hand, and the dreaded gangsters, on the other hand, by using the modern dreaded weapons and that in which all the deaths, viz. 135 persons were died due to the head injuries sustained by the bullets fired by the police with their service weaponry only above the naval portion of their bodies individually and that in none of the incidents, not even a single police personnel had sustained any kind of injury whatsoever and that it was also alleged that the police, on receipt of a secret tip off about the possible arrival of the dreaded gangsters on a particular area of the Mumbai Metropolis and pursuant thereto, on being watched, they used to lay a trap to nab such of the dreaded criminals or the gangsters and during the said sojourn they used to lay in wait with all the police personnel with arms and that on arrival of said persons wanted, the police used to surround them and asked the criminals or gangsters to surrender, for, they had been surrounded already and that on their defiance, they whipped out a modern armoury and tried to aim at the police party or open the fire. With a view to protect their persons in exercise of right of private defence as provided by law, the police party had to open fire by way of retaliation and as a result of which the accused or the criminals or the gangsters sustained injuries and became incapacitated resulting in their deaths before getting them admitted in the hospital on the way as pronounced by the doctor. This way of mode of operation claimed consistently by the police for in all the 99 encounters above referred resulting into killing of 135 persons in all since the year 1995 till the date of filing the writ petition, appears to be uniform and general in pattern, and since no Police Officers would have any single injury even during the alleged encounters inspite of the fact that all the dreaded gangsters are sharp shooters, desperado, weapon wielding, monsters possessed with all modern weaponry. It

was alleged that the encounters claimed by the police, are fake encounters and have not taken truly but all the 135 persons were killed by the police deliberately in order to eliminate them and that it was also alleged that there was no proper investigation done and reported to the Court or the enquiry conducted in this regard by the respondents to justify the said encounters or whether any encounter had, really, taken place or not. The very attitude and activities of the respondents are clearly violative of Articles 14 and 21 of the Constitution of India which provides that the life of individual citizen is being guaranteed by Article 21 of the Constitution and that no person shall be deprived of his life except in accordance with the procedure adopted by law. 4. The averments made in the entire three writ petitions with regard to the above are, almost, identical and similar representing one with each other. It was also alleged that though several criminals were taken and arrested, the possibility of picking of several innocent youths and citizens being nabbed and taken away for the purpose of such elimination, cannot be ruled out for the reason that there was no enquiry, nor trial nor any investigation in this regard. 5. In Writ Petition No. 1032 of 1997, it was an instance with regard to one encounter by the police that had taken place on 28-8-1997 in Mumbai City. The factual matrix, in substratum of the same, is alleged that a Muslim, by name, Abu Sayama residing in Maharashtra Nagar, Zopad Patti Slaughters' house compound Bandra (West), Mumbai-50, was aged about 21 years, and was found missing from Bandra on 26-8-1997 and that in respect of which one John Fernandes, residing at Sashtri Nagar No. 1 Opp. Station Road Masjid Bandra (W), Mumbai 400 050, saw him at 2 p.m. on that day after returning from mosque at Bandra that 3-4 policemen, in ordinary dress, nabbed and took him into the auto-riksha and to the above said effect the said John Fernandes had declared an affidavit and that he knew the said person who was the deceased Abu Sayama @ Javed. Then it was alleged further that he was killed in fake encounter by the 3rd respondent in Criminal Writ Petition No. 1032 of 1997. It was stated further that the deceased, by name Abu Sayama @ Javed was staying with his mother, by name, Shaikh Abu Talib Fajama Begum and his sister Rubina Begum, wife of Sayyed Javed in the said Slum. In the affidavit of John Fernandes, besides he knew his family members, he had also claimed that he went to his house and informed his mother and sister that they would be going to Bandra Police Station to make enquiry about the said Javed. He stated further that he went to M. R. A. Marg Police Station on 2-9-1997 and the possession of the dead body of Abu Sayama was taken by Rubina in his presence and that on his body there were bullet injuries on his chest and also near his eyes and the copy of the affidavit of the said John Fernandes was marked as Exhibit-A. It was also claimed that several letters were addressed by the Counsel on behalf of the above deceased to the National Human Rights Commission and then to the State Authorities and Dy. Chief Minister of Maharashtra all were of no avail. But the deceased family and the petitioners came to know that he was shot dead by the police in an encounter, which had supposedly taken place on the night of 27/28th August 1997 at Sportt Road, Ballard Pier, Mumbai. According to the petitioners, deceased Abu Sayama @ Javed was extremely a poor person doing the business of

selling peanuts at and near Bandra Railway Station. He was physically beaten and that therefore it was totally unable for him to take part in any encounter. He was neither a gunda nor a criminal and that the fact that he was living in an impoverished condition in a slum along with his ailing mother, widow and sister, would go to show that he was whisked away by the police and made him that he had appeared during the encounter and that, therefore, the said encounter was a fake one and the 3rd respondent who is responsible for shooting him down, is liable to be punished in accordance with law. In the said writ petition, it has also been averred that the fake encounters are in violation of the fundamental right to live and that even a criminal is not to be killed without the trial and that if people are to be killed under the guise of such encounter, then there would be a flagrant violation of the constitutional guarantee under the Fundamental Rights. Therefore, the claim of the encounters which are fake in nature by and on behalf of the respondents-police, are rank misuse of powers and unless and until it will be checked by this Court, lives of citizens will be in total danger and the liberty, as provided by the Constitution, will also be at stake. 6. It is also claimed in the said writ petition that the 3rd respondent Mr. V. R. Dhobale is guilty of murder punishable under section 302 of the Indian Penal Code and looking to his history it was quite likely that he had taken law in his hand and had killed an innocent person under a mistaken identity. According to the petitioners, they came to know that one Javed Fawda who was required by the police on various charges was held in Arthur Road Prison and killing of Abu Sayama is purely on a mistaken identity. 7. In all the three writ petitions, it was averred that the petitioners came to know the particulars of all the encounters, the encounter deaths and the modus operandi of the same only through the local news media and to substantiate the same, the petitioners have appended the news items published in various local news-media both in English and local vernacular languages. 8. It was also further averred that during the communal riots in the State of Maharashtra which had taken part in the past, there was a large scale violation of human rights and the fundamental rights guaranteed under the Constitution of India; and that it was for those reasons the Parliament has enacted the Protection of Human Rights Act, 1993, (Act 1994), for better protection of human rights and the matters connected or instant death thereto. For the said reason that during the hearing of the above writ petitions, the Court was confined to find out and select the appropriate authorities to enquire into such 99 admitted instances of encounters resulting in the death of 135 persons and the Court, it felt it, may consider in referring all or any of the incidents of the encounters to the National Human Rights Commission in furtherance of finding out the violation of fundamental rights enshrined in the Constitution of India. The petitioners also would claim that it is always impossible for the people of State of Maharashtra and other States or the Human Rights Organization to approach the National Human Rights Commission in each and every case of deprivation of human rights of the people and citizens and that in view of the same since the said Act provides the constitution of the State Human Rights Commission in States under Chapter V of the said Act and that, in exercise of the said powers, as several States have found and constituted the State Human

Rights Commission, a direction is asked for constitution of State Human Rights Commission also in this State, as the 1st respondent denounced the imperative of the said constitution of the Human Rights Commission on the one pretext or the other. In the view of the petitioners, section 21 of the Protection of Human Rights Act provides an imperative mandate and safeguard the human rights as per our Constitution and the universal declaration by the U.N.O. 9. As there were no written guidelines provided by any special Statutes either passed by the Legislature covering the whole episode of an encounter by the police, the petitioners also seek proper guidelines to be issued by this Court for the respondents to follow necessarily in each and every one of the encounters framed by them, which is truly in furtherance of fundamental rights guaranteed and the human rights declared to be maintained. 10. Criminal Application Nos. 3397 and 3433 of 1998 were filed in Writ Petition No. 1146 of 1997 and Criminal Application No. 3432 of 1998 was filed in Writ Petition No. 1064 of 1997 by the Organization known as 'Citizens Organization for Public Opinion and Voluntary Association of Maharashtra, to intervene in these three writ petitions to vindicate their grievance that the people of Maharashtra, particularly in Mumbai Municipal Metropolis consisting of most predominantly educated business community, builders and so on, are suffering very much at the humiliation, apprehension and threats posed by dreaded criminals every day in and day out and that there was sudden spurt in the criminal activities of the Underworld dreaded gangsters, Dons with the result the members of their Associations and other general public will be put to irreparable loss and hardship and that their lives, professions and liberties to move are at peril and that humiliate in the hands of dreaded criminals for which the respondents-police are to maintain law and order and curb the same by taking appropriate steps in order to vindicate their rights and to cause objection for branding the police activities as a whole is a fake one, the interveners want to get themselves impleaded and for the said purpose they have come forward with these Applications and finding that when the above three writ petitions were directed to be posted for final hearing, however, the same was replied in counter and after notice to the other sides, the same have filed in counter reply also. Admission of the said applications was also taken and heard along with the above main writ petitions as the final hearing of the same has already been fixed in. Therefore, admission of the interveners' applications, entirely, depends upon the disposal of these three main writ petitions. Accordingly the same are to be disposed of along with the main three writ petitions. 11. There was no counter reply affidavit filed by the 1st respondent- the State of Maharashtra, but the Counsel for the 1st respondent appeared and argued that the Director General of Police, the 1st respondent in two Writ Petition Nos. 1146 and 1064 of 1997, has filed the sworn reply affidavit/ return in the said two writ petitions particularly the Commissioner of Police, Mumbai- Mr. R.H. Mendonca has filed a detailed sworn reply affidavit in all the three writ petitions, contending, inter alia, denying each and every one of the averments made by the petitioners and major allegations pertaining thereto made in the writ petitions. Mr. Vasant Raghunath Dhobale. Inspector of Police, also filed a detailed affidavit and denied his specific overtact and the

very motive allegedly attributed by the petitioners against him. Thus, in all, in response to the allegations made in the writ petitions, the respondents have filed various affidavits. Mr. R.H. Mendonca, Commissioner of Police, Mumbai by filing his reply affidavit, denied the allegations made by the petitioners and submitted that there has been no violation of Article 21 of the Constitution of India during any of the incidents referred to by the petitioners and that from January 1997, till date (till date of filing of his affidavit) there were in all 47 incidents wherein the police had to use fire arms to defend themselves from the attack on them with fire arms by the hard-core criminals during their attempts to arrest the said accused persons who were known criminals and Underworld gangsters and desperado and that almost all of them were accused of offences punishable with death or imprisonment for life and they wanted to resist their arrests. He also contended that there were 70 deaths and two criminals were injured in these 47 incidents (during 1996 there were 43 encounters resulting into the death of 57 alleged criminals) and that all the deceased persons had criminal records ranging from murder, attempt to murder, dacoity, extortion and so on and almost all of them were found with deadly weapons like firearms including, in some cases, imported and sophisticated fire arms. He has further stated that there is no practice of encounters as alleged by the petitioners and that in a situation which is forced upon the policemen who have arrived only to perform their lawful duties and in order to arrest the wanted criminals, it is the criminals who precipitated the situation where the Police Officers have no other choice but to use force, firstly, in discharge of their lawful duties and secondly, in exercise of their right of private defence. Placing reliance upon the provisions of section 46 of the Code of Criminal Procedure and Rule 169 of the Bombay Police Manual and the provisions of section 100 of the Indian Penal Code, he would justify the officer in causing the death in resisting to arrest the criminal who poses a threat of life of officers or the police personnel or the people in the vicinity. 12. The Commissioner of Police would further state that the criminals' reputation for violence would generate a belief in the mind of the police officers of impending attack by the gangsters on his person and in most circumstances it is unreasonable to expect the police officers exercising the right of private defence to act with commonest and deliberation when dealing with the criminals of dangerous disposition and that when confronted by a dreaded gangster, an ordinary citizen will not even dare to challenge him, but, however, according to him, a police officer is in duty bound to tackle the weapon wielding desperado or the dreaded gangster and that if he does not do so, he can be charged with override attitude and that if these protections and immunity were not afforded, the society will not get any one to enforce the law. He has stated further that there will be very few that he would like to decide on the path to overcome a situation if they were held answerable later on the that such a situation will bestow legitimacy with possible cowardice which is loath to police functioning. It is, therefore, according to him that the decision taken on the spot by the enforcement officers, is not justifiable unless it is void off the mark. To further substantiate his contention, he has relied on section 161(1) of the Bombay Police Act. 13. With regard to the incident of death of Abu Sayama

@ Javed Talib Shaikh, it was stated in the affidavit of P.I. Vasant Raghunath Dhobale that one Javed Talib Shaikh was known in criminal circle because of his protruding teeth as Javed Fawda and was a known criminal and gangster in Mumbai who had affiliation with the dreaded criminal Abu Salem Gang, a dreaded Lieutenant of Dawood Ibrahim. It is also stated that Javed Fawda wanted in three cases for offences like murder and other serious offences. It is also pointed out that he was also arrested in Shivaji Park Police Station under C.R. No. 339/96 under sections 307, 34 of the Indian Penal Code. Mr. Vasant Dhobale has also stated that on 27-8-1997, an information was received by the Crime Intelligence Unit of the D.C.P., C.I.D. that Javed Fawda was likely to visit along with his associates for some criminal activities near Ballard Pier area on the intervening night of 27th and 28th August 1997. Pursuant thereto, staff of Crime Intelligence Unit, D.C.P., C.I.D. kept a close secret watch in the said area with a view to effect an arrest of the said Javed Fawda. At about 00.15 hours white Maruti car bearing registration mark No. MH-04-1265 arrived at and near the Exchange building, Sprott Road at Ballard Pier, Mumbai. The said Maruti car was occupied by three persons and one of them got down from the said car. The police personnel immediately found that the same man was of the description of Javed Fawda. 14. A.P.I. Dhobale immediately got himself out and him, by name, Javed and said "Javed Bhagna Nahi". The said person, in response to the said call and oral order, turned around, however, whipped out a fire arm from his custody and fired at the police party. As the said attack by the fire arm was very sudden and unexpected and as the police was already aware of his notorious past attitude, with the instinct of self preservation, A.P.I. Dhobale immediately responded by firing at Javed Fawda by his service revolver. During the exchange of fire, another round fired by Javed Fawda, damaged the windshield of the Ambassador car. P.S.I. Bhosale-Patil also fired one round at Javed Fawda by his service revolver and A.P.I. Dhobale, in all, fired four rounds at Javed Fawda. In the mean time, the persons sitting in the Maruti car managed to escape. The injured person, viz: Javed Fawda, was immediately removed to St. George Hospital, Mumbai, however, he was declared dead before admission. A.P.I. Dhobale also stated that Javed Fawda was armed with foreign made pistol having "Star Mark". Consequently, an offence was also registered at M.R.A. Marg Police Station immediately at 01.50 hours on 28-8-1997 under Crime No. 697 under sections 307 and 34 of the Indian Penal Code read with sections 3 and 35 of the Arms Act against Javed Fawda and three of his associates. He has stated further that when the post mortem was being conducted, finger prints of the dead body of Javed Fawda were taken and these finger prints tallied with the finger prints of Javed Talib Shaikh who was arrested by the Shivaji Park Police Station in C.R. No. 339 of 1996 under sections 307 and 34 of the Indian Penal Code. A.P.I. Dhobale has, therefore, stated that Javed Fawda and Javed Talib Shaikh are one and the same person. 15. Mr. R.H. Mendonca, Commissioner of Police, Mumbai, in his respective reply affidavit filed in these three writ petitions and other affidavits filed on his behalf along with the police officers concerned, has thus taken a very consistent and categorical stand from his inception that while nabbing or apprehending or arresting the criminals, the

police personnel assigned for that job, never took the law into their own hands but, however, taking after every precautionary steps to arrest the most dreaded criminals and Underworld gangsters who are posing every danger not only to the public but also the police, armed with modern sophisticated weaponry in their hands, and whenever such persons are to be apprehended on prior tip off after having a close watch and monitor and opting a particular place by laying a trap, it was the every endeavour of the police to surround such dreaded criminals first and reminded them that they have been surrounded and that therefore to surrender before them but however in defiance of the same for their natural instinct inherited with them, the dreaded criminals opened the fire or attempted to open fire at the police personnel and that in view of the imminent danger to their lives, after exhausting their imperative duties, at the first instance, the police personnel who got enough training to shoot out could operate their arms provided to them as a last resort and for which the victim succumbed to their firings. Therefore, according to the Commissioner of Police, nothing can be attributed to the police personnel who indulged in the risky job of securing the most dreaded criminals and armed desperado. In fact, according to him, each incident is followed by an encounter and in which fires were exchanged through the firearms and in which the dreaded criminals were happened to succumb to the firings of the police. Therefore, nothing can be attributed against the police and that following the encounter, the case has been duly registered and documents pertaining to the said encounters was clearly perused by the higher officers concerned with the dispatch of 25 column report to the Government and that, therefore, he denies the very violation of either the human rights or the fundamental rights as alleged in the petitions. For all the encounter deaths, Mr. Mendonca, Commissioner of Police had claimed, particularly that they were happened in real terms and such of the persons who happened to shoot out the police party have become succumbed to deaths by retaliation of the police as a self-defence. In short, he would say that the police have no intention of mens rea to take any innocent persons and to kill them elsewhere and to make it appeared subsequently that such innocent persons died in the fake encounter. In short, the police officers have denied in toto the averments and allegations made against them. 16. In the above juxtaposition, on 10-12-1997, a Division Bench of this Court consisting of A.P. Shah and J.A. Patil, JJ., happened to hear the above three criminal writ petitions upon perusing the affidavits filed on behalf of the respective parties and pleadings put therein and the contentions, arguments advanced at the Bar on behalf of their respective parties and while doing so, an order was passed by the Division Bench, the relevant observations of the same is to be extracted as hereunder for the purpose of proper and total adjudication of the matter in hand. “11. With the assistance of learned Advocates for the parties, we have carefully examined the police papers pertaining to the above said cases and some other cases of encounters occurred during this year. We find that in all these cases where the police have alleged that the concerned persons have died in encounters, the alleged criminals were armed with sophisticated weapons, but no injury had been caused to any of the police officers who had participated in the operation. Invariably the injuries caused to

the deceased are on the vital parts of the body and he is declared dead before admission to the hospital. In no case the firing was made by the police officer with an intention to disable the concerned criminal. At least prima facie we find substance in the allegation of the petitioner that there is a general pattern in these F.I.Rs. We wish to make it clear that this Court is not oblivious to the difficulties faced by the police in tackling with organised crime, which has taken root in the society. We are also conscious of the fact that the Mumbai police have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation and increasing number of underworld and armed gangs and criminals. It is argued that if the Court lays too much emphasis on their fundamental rights and human rights, such criminals may go scot-free without exposing any element or iota of criminality and the crime would go unpunished. Our attention was drawn to incidents of murders of some important and prominent persons in the city in recent times. But all this cannot justify in police resorting to extra judicial methods. As observed by the Supreme Court in *D.K. Basu v. State of W.B.*, cure cannot be worse than the disease itself. In para 33 of the said Judgment, the Supreme Court observed:- There can be no gainsaying that freedom of an individual must yield to the security of the State. The right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different Statutes has been upheld by the Court. The right to interrogate the detenus, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. The Latin maxim *salus populi supreme lex* (the safety of the people is the supreme law) and *salus republicae supreme lex* (safety of the State is the supreme law) co-exist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however, must be "right, just and fair". Using any form of torture for extracting any kind of information would neither be "right nor just nor fair" and, therefore, would be impermissible, being offensive to Article 21. Such a crime-suspect must be interrogated indeed subject to sustained and scientific interrogation determined in accordance with the provisions of law. He cannot however be tortured or subjected to third-degree methods or eliminated with a view to elicit information, extract confession or derive knowledge about his accomplices, weapons etc. His constitutional right cannot be abridged in the manner permitted by law, though in the very nature of things there would be qualitative difference in the method of interrogation of such a person as compared to an ordinary criminal. Challenges of terrorism must be met with innovative ideas and approach. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to "terrorism". That would be bad for the State, the community and above all for the rule of law. The State must, therefore, ensure that various agencies deployed by it for combating Terrorism Act within the bounds of law and not become law unto themselves. That the terrorist has violated human rights of innocent citizens may render him liable to punishment but it cannot justify the violation of his human rights except in the manner permitted by law. Need, therefore, is to develop scientific methods of investigation and train the investigators properly

to interrogate to meet the challenge“. The learned Judges further observed as under: -”12. We fail to see how a law abiding and law enforcing agency shall even have any apprehension that a fair and impartial inquiry by a judicial authority to find out the truth or otherwise of those incidents, in any way, cause any prejudice to them or shall bring to their fair name any disrepute. No person in authority who discharges his duties honestly and fairly should ever have any apprehension in placing all that is true about his activities before any other authority. Mr. Manohar also urged that in a similar case the Division Bench comprising of Justices A.C. Agarwal and F.I. Rebello directed an inquiry before the District Magistrate. In our considered opinion, such an inquiry is of no use in the present case since the Government officials at the highest level have taken a stand that these encounters are genuine encounters. It is futile to expect an independent and wholly objective investigation by the said authorities. Even otherwise, people will have little confidence in the investigation no matter how honest and objective the investigation be. We, therefore, deem it necessary to order an independent inquiry by a Judicial Officer. 13. In view of the foregoing reasons, we direct the learned Sessions Judge (Principal Judge of the City Civil and Sessions Court, Mumbai) to hold an inquiry in the death of (a) Abu Sayama alias Javed Talib Shaikh in police encounter on 28th August 1997 and also the identity of the deceased Abu Sayama alias Javed Talib Shaikh who is alleged to have been killed on a mistaken identity as Javed Fawda; and in the deaths of (b) Sada Pawle and Vijay Tandel, killed in encounter on 26th September, 1997 and also to find out whether the encounters in which the above persons died were genuine or stage managed encounters. The learned Sessions Judge shall record the evidence of the relevant witnesses and submit a report to this Court within three months from the date of receipt of the writ from this Court. To enable the learned Sessions Judge and to appreciate the facts of the case and also to enable him to identify the witness to be summoned, copies of the relevant writ petition's and affidavits along with the enclosed annexed documents and affidavits shall be forwarded to him. The learned Sessions Judge shall examine the deponents of such affidavits as well as the concerned officers. It is made clear that the petitioners organisations will be entitled to be heard in the inquiry to be conducted by the learned Sessions Judge. The respondents are directed to file in this Court all the original papers pertaining to the encounter deaths of the aforestated three persons within two days. The Registrar shall keep these papers in a sealed cover and forward the same to the learned Sessions Judge along with the copy of this judgment and other relevant papers. Before commencing of the inquiry, the learned Sessions Judge shall send notices to the petitioners as well as the respondents. It is made clear that the observations made herein above are only prima facie and tentative observations and the learned Sessions Judge shall hold his inquiry uninfluenced by the same. Petitions to be listed on board after receipt of the report from the learned Session Judge, Needless to mention that the police shall extend full co-operation to the learned Session Judge and make available to him all the documents which, according to the learned Sessions Judge, are necessary for the purpose of holding the inquiry and finding the truth." 17. Perusing the case records, it is found that pursuant to

the direction given by the Division Bench of this Court on 10-12-1997, it has been duly complied with by the learned Sessions Judge, Mumbai, after sending the notices to both the parties and the receipt of the entire case papers along with their respective affidavits deposed by such of the persons as deponents and thus both the parties were given opportunities to adduce evidence further. A perusal of the preliminaries of the learned Sessions Judge, in his report contained in a separate volumes of the compilation, would clinch the matter in a detail and very elaborate. However, it is also noticed that before commencing the actual enquiry, viz. recording of the oral evidence from the witnesses of either of the parties, it appears that the Division Bench of this Court consisting of A.P. Shah and J.A. Patil, JJ., was again approached by the Bar for some of the parties seeking some clarification with regard to nature and credibility of the statements recorded from the police officers whether to use it to contradict them or to use it against them in other proceedings. 18. After hearing the learned Counsel for both the parties, the learned Judges of the Division Bench, on 12-2-1998 has passed the following order:- "We have heard all the learned Advocates appearing for the enquiry before the learned Principal Judge., City Civil & Sessions Court, Mumbai. The learned Advocates sought clarifications on certain aspects of the inquiry. Mr. Bhatt and Mr. Ponda appearing for the police officers sought clarification as to whether the statements made by the witnesses, particularly the police officers, are likely to be used against them in any other proceedings including a prosecution which might be directed against them. We wish to make it clear that the inquiry ordered by this Court is only an informal inquiry and is intended to facilitate the decision on the aforesaid writ petitions pending before this Court. By way of abundant caution, we make it very clear that the statements made by the police officers in the inquiry shall not be used against them in any other proceedings including a possible criminal prosecution against them. Mr. Bhatt and Mr. Ponda also submitted before us that it will be necessary to examine the petitioners in the aforesaid petitions including Abu Asim Azmi, petitioner No. 1 in Criminal Writ Petition No. 102 of 1997 in order to bring out the motivation of the petitioners in initiating these proceedings. The question as to whether examination of Abu Asim Azmi and other petitioners is necessary or not, will be decided by the learned Judge. It seems that application in that behalf is already made before the learned Judge but we wish to make it clear that while considering the said application, the learned Judge shall have regard to the propriety of examining such witnesses and particularly whether their evidence will be necessary in order to throw light on the question whether the encounters in question were genuine or fake encounters and the identity of deceased Abu Sayama. So far as inquiry involving the death of Sada Pawle and Vijay Tandel is concerned, Mr. Rane and Mr. Sebastian informed us that they will give the list of the witnesses whom they propose to examine and also file affidavits within two weeks from today. The learned Judge shall thereafter give reasonable time to other side in order to prepare for cross-examination. A grievance is also made that the inquiry is being prolonged due to extremely lengthy cross-examination. This was vehemently denied by Mr. Bhatt and Mr. Ponda. We do not propose to make any observations on

this controversy but we would again like to emphasise that this is only an informal inquiry and it would be desirable that the learned Judge should not permit repetitive and or unnecessary questions. We are sure that the learned Judge will control the cross-examination keeping in mind the object of the inquiry which is indicated above. Lastly, there is a joint request made for adjournment of the proceedings till 2nd March 1998 on account of personal difficulty of Mr. Bhatt and Mr. Memon. By consent of all the parties, the inquiry is adjourned to 2nd March 1998. It is however, made clear that thereafter such adjournments will not be granted and the inquiry will proceed on day-to-day basis. Having regard to the progress of the inquiry so far, we think it proper to extend the time by one month". 19. Pursuant to the above orders passed by the Division Bench of this Court on 10-12-1997 and 17-2-1998, as above referred, the learned Principal and Sessions Judge, Mumbai, had conducted enquiry by dividing the enquiry pertaining to the death of Abu Sayama @ Javed Abu Talib Shaikh as Enquiry No. 1 of 1998 and Enquiry No. 2 pertains to the deaths of Sada Pawle and Vijay Tandel by recording the oral evidence and admitting the documentary evidence on behalf of the respective parties. Before dealing with the said aspect in Enquiry No. 1 learned Enquiry Judge also took up the case of mistaken identity of killing of Abu Sayama @ Javed Talib Shaikh for mistaken identify of Javed Fawda. In his full and final report dated 15-7-1998, the mode of conducting the enquiry and the manner in which it has been conducted by examining the witnesses and the respective applications and requisitions made by the Bar for the respective parties and the names of the witnesses which were supplied by the Bar for the respective parties to be examined and all their rostrum from the commencing of the enquiry till the end as per the record have been given by the learned Enquiry Judge from paragraph 1 under the heading "Preliminaries" to paragraph 22 at page 29. For the elaborate details contained in the above said passages of the report it is enough for us to refer the same but not to traverse it in detail for the sake of brevity. 20. In the Enquiry No. 1, the learned Enquiry Judge, with the consent of all the learned Counsels appearing for the respective parties and after hearing them, framed the following points for determination:- i) Whether the person killed in the encounter on 28-8-1997, i.e. Abu Salyama @ Javed s/o Abu Talib Shaikh is the notorious gangster known as "Javed Fawda" as claimed by the police? ii) Whether the encounter, on 28-8-1997, in which the alleged gangster "Javed Fawda" was killed, was a fake or genuine encounter? 21. Pursuant to the directions given by the Division Bench of this Court while conducting with Enquiry No. 1, a case of mistaken identity of deceased Abu Sayama was also taken under the separate heading by the learned Enquiry Judge at page 30 in paragraph 24 of the report. After recording the oral evidence of (P.W. 1.) Rubina, sister of deceased Abu Sayama @ Javed Abu Talib Shaikh and other two persons, by names Mr. Nanu Machhan Khan (P.W. 2) and Anwar Khan Mehbood Khan (P.W. 3) for the petitioners side, and oral evidence of seven witnesses on behalf of the respondents-police, amongst whom by name Netaji Ramchandra Tambvekar, Senior Police Inspector attached to Matunga Police Station examined as R.W. 5 and Mr. Vasant Ragunath Dhobale, Addl. Police Inspector attached to C.I.U. D.C.B. C.I.D. examined as (R.W. 7) are the

star witnesses for the respondents along with Dr. Vijay Harishchandra Kelvekar (R.W. 3) who did the autopsy and Mr. Sudhakar Haribhau Ramteke, Assistant Chemical Analyzer (Ballistics Expert in connection with firearms) (R.W. 4), documentary evidence, and after hearing rival contentions, after having thoroughly and carefully gone through the same, the learned Enquiry Judge came to the conclusions that: i) Javed Abu Talib Shaikh is not the alias of Abu Sayama or vice versa. Javed Abu Talib Shaikh and Abu Sayama, probably, are two different and distinct persons: ii) "Javed Fawda" is not the real or actual or official name of any person. It is a pet nickname or a combination of both, projecting the person's physical abnormality, namely, protruding teeth. iii) "Javed Abu Talib Shaikh was in all probability known as "Javed Fawda" because of his protruding teeth or protruding upper gums. He was admittedly called "Javed". iv) It is not established that there is any gangster known as "Javed Fawda" in existence other than the deceased Abu Sayama alias Javed Abu Talib Shaikh, who was killed in the police encounter on the night of 27th/28th August 1997 and was known to the police as Javed Fawda. v) It is established that Javed Abu Talib Shaikh @ Javed Fawda had a criminal background. He was arrested in the Shivaji Park Police Station C.R. No. 339/96 in a case of attempt to murder and was a wanted accused in C. Rs. of several other police stations, such as Kurla, Dadar, Dharavi, Matunga and the D.C.B. C.I.D. albeit as an unknown accused; and that vi) It is proved by a comparison of the fingerprints that Rubina's brother Javed Abu Talib Shaikh, arrested by the Shivaji Park Police Station in C.R. No. 339/96, is the same person whom the police knew as Javed Fawda and who was shot in the police encounter on the night of 27th/28th August 1997 and whose body was claimed by his sister Rubina (P.W. 1). 22. It is, thus, seen that after having an elaborate discussion of the evidence given by P.Ws. 1 to 3 who were examined on behalf of the petitioners and seven witnesses on behalf of the respondents-police, learned Enquiry Judge came to the above conclusions and on the question of mistaken identity he has given the following finding:- "There is no substance in the petitioners' case that the police have killed Abu Sayama @ Javed Abu Talib Shaikh mistaking him for some other notorious gangster called "Javed Fawda". There is no case of mistaken identity." 23. Similarly, in the alleged encounter that took place at 2.10 p.m. on 26-9-1997 between a posse of police and two dreaded gangsters, by name, Sada Pawle and Vijay Tandel and that the encounter claimed by the police is a genuine or a fake one after examining four witnesses on behalf of the petitioners who are by names, Hausabai Gundu Tawde P.W. 1, sister of Sada Pawle, Anita Anant Pawle (P.W. 2), sister-in-law of Sada Pawle and wife of Anand Bhimrao Pawle, Anand Bhimrao Pawle (P.W. 3), brother of Sada Pawle, and Baldevsingh Jaswantsingh Panesar (P.W. 4), a colleague and friend of Anand Bhimrao Pawle and six witnesses on behalf of the respondents in the II Enquiry who are, by names, Avinash Balchandra Sawant, P.S.I., (R.W. 1), Subhash Ganpat Mayekar P.S.I. (R.W. 2), Hemant Rajaram Desai (R.W. 3), and Arun Dada Jadhav, Police Constable No. 1642 (R.W. 4) and Sarogi (R.W. 5) and Ashok Balewasaheb Kamble (R.W. 6) and perusing the documents produced on behalf of the respective parties, the learned Enquiry Judge has given his findings at

paragraphs 270 of his report that the encounter in which Sada Pawle and Vijay Tandel were killed, cannot be said to be a genuine encounter. With regard to Enquiry No. 1 pertaining to the question, the learned Enquiry Judge has held that deceased Javed Fawda @ Abu Sayama @ Javed Abu Talib Shaikh was not killed in the encounter as claimed by the police. It is doubtful whether any such encounter took place. 24. With the above findings and its connected reasoning and observations given therefor by the learned Enquiry Judge, the learned Enquiry Judge sent his report on 15-7-1998 to this Court for final disposal of the above three writ petitions. After the receipt of the Enquiry Report with all its connected records and affidavits and notes of evidence in a sealed cover, it was opened in the open Court in the presence of the learned Counsel for the respective parties and the Registry was also directed to translate all or such of the documents found in the other language than English and to produce copies of every one of the papers to the learned Counsel appearing for the respective parties and thereby full opportunities to the respective parties were given. For the findings given by the learned Enquiry Judge in his report dated 15-7-1997, a detailed written objection was filed on behalf of the respondents, viz. the police but none on behalf of the petitioners in the above writ petitions. 25. After commencing the hearing of the case in question, as above referred, we have heard the rival submissions from the Bar for the respective parties mainly for and against the report of the learned Enquiry Judge as well as other prayers asked for in the above writ petitions. That apart, we have heard Mr. Bobade, learned Senior Counsel for Human Rights Commission and the learned Counsel for the interveners also. 26. Mr. Lalit Chari, learned Counsel appearing for the petitioners in Criminal Writ Petition No. 1146 of 1997, submitted that if Sada Pawle was a sharp shooter and armed with AK-56, a modern sophisticated weaponry, the story of the respondents viz. police, about the manner in which he was intercepted, cannot be accepted for the reason that Sada Pawle, on seeing the police party, would put the automatic mechanism in operation and that in which case the magnitude of the result will be terrible on the side of the police and that is to say that no one would have to escape but, however, in the instant case, no person of the police convoy or posse had sustained even any abrasions. Secondly, he contended the claim that out of 17 cartridges found intact and Sada Pawle fired only 4 or 5 shots which was not at all probable if the police were armed with revolvers. Therefore, the use of AK-56 was not at all possible. He would also contend that it is not possible for the police officers to get spared without sustaining a single scratch upon their bodies. He also contended that identifying the injuries caused on Sada Pawle and Vijay Tandel only on the vital parts of the bodies, viz. head and chest and above the naval portion of the human body that it presumes a deliberate attempt to kill him and that it was also not possible for Sada Pawle to fire again after he was wounded by shooting by the police officer by name Avinash Bhalachandra Sawant, i.e. R.W. 1. 27. Quoting the passages at page 204 of Statutes and Arms, Mody's Medical Jurisprudence, 21st Edition, and C.K. Parikh's book at page 275 also a passage found at page 58 in Barrard's Jurisprudence, the learned Counsel Mr. Chari would contend that the alleged shots were fired from a close

range as is evident from tattooing and singing marks on the dead body and even the evidence of Hemant Desai (R.W. 3) and Sawant, respective shots were fired from a close range. By pointing out several probabilities and improbabilities, mostly relied upon, learned Counsel Mr. Lalit Chari would say that the case of police is totally a false one and cannot be accepted at all. 28. Adding to the above said contention, Mr. Sebastian, learned Counsel appearing for the petitioners in Writ Petition No. 1032 of 1997, besides the argument advanced by Mr. Majit Memon, has stated that in so far as 135 persons were killed till the year 1997 in all the claimed 99 police encounters, it is a peculiar fact that not a single officer is killed or sustained injuries so far but however all the persons killed were dreaded criminals who were claimed to be the sharp shooters armed with sophisticated weapons. He would contend further that while the case of the police is that they opened the fire in retaliation and by way of self defence with their indigenously made weapons, it is noted, except the two all the persons who were shot dead in the hospital before admission, would prima facie belie the story of the police and, as such, the learned Counsel Mr. Sebastian would claim that shootings claimed by the police are arbitrary and according to him, that even the criminals also have a right to live. Therefore, according to him, the instant case in hand requires investigation by an independent agency like Central Bureau of Investigation. 29. Quoting from the evidence of Hausabai Tawade (P.W. 1) in the 2nd Enquiry, Anita Pawle (P.W. 2) and Anand Pawle (P.W. 3) who all turned hostile, the learned Counsel for the petitioners brought to our notice that the only witness who spoke for the writ petitioners is Mr. Baldevsingh's statement and his evidence was recorded and examined as P.W. 4 which is in conformity with the spot panchanama, post-mortem notes and rough sketch prepared by the investigating officer subsequently. The learned Counsel pointed out according to (P.W. 4) Baldevsingh, that Sada Pawle and Vijay Tandel were dragged out from the fiat car and were taken to Maruti car which intercepted the fiat car and afterwards both were shot dead by the police on the relevant day and time. The learned Counsel also pointed out that blood spots were found near Maruti car in which the police party obstructed the car of the Sada Pawle for the reason of blood spots found near the car is manifestly a falsehood. 30. Pointing out several improbabilities in the claim of the police and several lapses on their part in the investigation and bringing the notice of this Court about no police officers had sustained any injury, the learned Counsel Mr. Sebastian stated that the instant encounter, as well as all encounters, police have committed an offence under section 299 of the Indian Penal Code and for the same reason they are not entitled to protection under section 100 of the Indian Penal Code as they have not followed the procedural mandates contained in section 46 of the Criminal Procedure Code, or section 161 of the Bombay Police Act. He would state further that there is a clear violation of Arts. 14 and 21 of the Constitution of India. According to the learned Counsel Mr. Sebastian, if the protection provided under sections 46 of Cr. P. Code, and 161 of the Bombay Police Act, will come to the rescue of the respondents only if they have done their duties in accordance with law but certainly not in instant cases, for, they have committed the murder and certainly not in an encounter. He would

submit further that since the remedies asked for in these writ petitions are the constitutional remedies provided under Article 226 of the Constitution of India, the same have not been controlled by the ordinary law, viz. the provisions of the Indian Penal Code, nor Criminal Procedure Code. He would state that it cannot be argued that the people concerned should come with a private prosecution. He states that the 1st respondent must perform his duties truly and since all the encounters claimed in the instant cases are fake one, compensation will have to be paid to such of the persons concerned basing upon the legal ratio laid down in *S.K. Jain v. T.L. Thakur*, 1991 Cri.L.R., (Mah.) at page 445. 31. We have heard the argument of Mr. Majeed Memon learned Counsel appearing for Writ Petition No. 1032 of 1997. Most of the arguments projected by the said learned Counsel, is purely based on improbabilities and unnaturalness and omissions and alleged material contradictions of the witnesses, viz. the police officers, who gave evidence in support of their cases. In fact, learned Counsel Mr. Majeed Memon has expressed openly his grievance against the finding of the learned Enquiry Judge upon the question of mistaken identity and that in other respect the learned Counsel in substratum supported the contentions and arguments advanced by Mr. Sebastian after having taken us through the recorded oral and documentary oral evidence pertaining to the factual matrix of the case. 32. Mr. Bobade, learned Senior Counsel for and on behalf of the National Human Rights Commission, respondent No. 5 has also contended that there was no report of the fingerprints nor any damage to the car, and that, therefore, it was not at all possible that a man who lifted AK-56 after three bullets, had fired at him. He would contend further that even criminals have right to live and not only that their rights are violated but the rights of their heirs are also violated and the heirs of the deceased have lost some part of their rights under Article 21 of the Constitution of India and hence they are entitled to compensation. He would say further that whenever there is a violation, there should be an enquiry. Investigation, be given to an independent agency and for the said purpose, the other cases can also be reopened and so far as the provisions referred to the Human Rights Commission is concerned under the relevant provisions of Protection of Human Rights Act, bar of limitation provided by other Statutes will not come into play particularly in case of violation of Article 21 of the Constitution of India as decided by the Supreme Court in (), A.I.R. 1998 S.C.W. 3743 paragraph 13. 33. Controverting every one of the contentions and points advanced on behalf of the learned Counsel for the petitioners, Mr. V.R. Manohar as guided by Mr. Bhat, Special Public Prosecutor and Mrs. Usha Kajariwal, Additional Public Prosecutor has contended that for the enquiry report submitted by the learned Enquiry Judge dated 15-7-1998 there was a written serious objection filed on behalf of the police and that in and by which they have challenged the report of the learned Enquiry Judge in its entirety except on the question of mistaken identify of Abu Sayama. With regard to factual matrix pertaining to the occurrence proper in the two incidents happened on 28-8-1997 and 26-9-1997, Mr. Manohar has claimed that several witnesses examined on their behalf in the two enquiries had clinchingly elaborated and proved that there were encounters happened and held between the police and the dreaded

gangsters while police were engaged in arresting them and as they had defied by attempting to open the fire at the police in furtherance of the self defence provided to the posse of the police by virtue of section 100 of the Indian Penal Code and section 161 of the Bombay Police Act and section 46 of the Code of Criminal Procedure Code, the police have retaliated by opening the fire upon the dreaded gangsters in the instant case and in which the gangsters had succumbed to the injuries before they got admitted into the hospital. Mr. Manohar, learned Senior Counsel, has also taken us through-out the evidence recorded from the witnesses examined on behalf of the petitioners and the respondents, the post mortem notes the Ballistic Experts and the Doctors evidence in this regard. By having such an endeavour, the learned Senior Counsel for the respondents would contend that the alleged encounter claimed by the police in the instant case has been proved beyond the realm of any doubt and in which Abu Sayama @ Javed Abu Talib Shaikh @ Javed Fawda was killed in the encounter held on 28-8-1997 by 00.15 hours in the Sportt Road, Ballard Pier, Mumbai within the jurisdiction of M.R.A. Marg Police Station and that in the encounter that had taken place at about 1.15 or 2 at the junction of Rajawadi Road and M.G. Road on 28-9-1997, Sada Pawle and Vijay Tandel, the most dreaded gangster criminals, were shot dead while retaliating the fires by them by way of self defence by the police and in which they were dead. To substantiate the said contention, the learned Senior Counsel relied on several circumstances and mostly the evidence given by the P.W. 2 and R.W. 5 & R.W. 7 in the 1st enquiry. The learned Senior Counsel expressed his whole grievance against the mode of assessment of the evidence done by the learned Enquiry Judge and particularly the assessment made by the learned Enquiry Judge upon the evidence of P.W. 4 Baldevsingh for the petitioners and P.S.I. Mayekar and Hemant Desai and Arun Jadhao in the 2nd enquiry. The learned Senior Counsel also relied upon the post mortem notes of both cases which proves and substantiates the police case. 34. It is significant to note that Mr. Manohar, learned Senior Counsel would say that accounting of the police witnesses viz. (R.W. 5) Netaji Tambvekar and (R.W. 7) A.P.I. Vasant Dhobale in the 1st enquiry and the evidence of (R.W. 1) Avinash Sawant and P.S.I. Mayekar and Hemant Desai would assume the character of eye-witnesses accounting and that therefore their testimonies cannot be disregarded and discredited for the simple reason of minor omissions, contradictions or improvements. According to the learned Senior Counsel, if we peruse the recorded oral and documentary evidence particularly the chemical analyser's report, post mortem notes and other documents in its proper perspective, it is made clear that the case of the police has been substantiated and established beyond all doubts and that in which the encounter had taken place and the three dreaded gangsters had been killed by the police while retaliating their fires in furtherance of their self defence and private defence. 35. While claiming so, learned Senior Counsel has admitted very generously and frankly that there are some lapses inherited in the investigation done by the police, but however, it is noticed that the lapses had erupted only after the encounters were over and complaints were lodged in that regard and that, therefore if any lapses, whether serious or causal, found relied upon by the learned Counsel for the petitioners,

cannot be deemed to abdicate the very occurrence proper which had taken place on the date, time and the manner in which the encounter had been pleaded. In short to say, the learned Senior Counsel for the respondents-police would contend that any serious or minor lapses on the part of the investigating officer who came to the picture only subsequently to the encounter may not deem to be drawn in favour of the petitioners or the adverse inference as claimed by the Bar for the petitioners. 36. He also brought to our notice several case laws in which the Apex Court has laid down the legal ratio that under what circumstances the concept of right of private defence or self-defence has come to picture and available to one who is supposed to exercise his right. In the instant cases of encounters, Mr. Manohar, learned Senior Counsel contended that the moment the dreaded gangsters, by name, Abu Sayama @ Javed Abu Talib Shaikh @ Javed Fawda, referred to by the police officer Dhobale (R.W. 7) by referring his request not to run and, in turn, the gangster turned towards him and aimed at him, right of private defence was very much available to him to the opposite party, viz. the police officer to apprehend over the danger to his life at the hands of the deceased, so also in the case of Vijay Tandel and Sada Pawle in other encounter, and according to him it is not always necessary to exercise the right of private defence or self defence to the person who exercises it must receive grievous bodily injury endangering to his life as a condition precedent. By taking through the evidence of all the witnesses whose evidence were recorded by the learned Enquiry Judge, learned Counsel Mr. Manohar appearing for the respondents-police also vehemently opposed and seriously challenged the very finding of the learned Enquiry Judge, except the one given on the question of mistaken identity of Abu Sayama @ Javed Abu Talib Shaikh @ Javed Fawda. By raising so many other contentions the learned Senior Counsel Mr. Manohar persuaded us to reject all these three writ petitions as vexatious by holding that the alleged encounters were true, genuine and in which the gangsters were killed during the retaliation while retaliating by way of self defence and private defence by the police. 37. In the context of the above rival contentions and position of the parties, we have meticulously perused and analysed the adduced and recorded evidence by the respective parties in this case and documentary evidence marked and relied and placed before the Court of law for perusal and the respective contentions of the learned Counsel for the parties in the instant case as well as the final report of the learned Enquiry Judge in his impugned report. Before proceeding further, we have to see that on 10.12.1997 the Division Bench of this Court has directed the learned Enquiry Judge to conduct an enquiry with what object and purpose. As has been pointed out in the order itself, as above narrated, in order to find out genuineness or otherwise of the encounters claimed by the police on the night of 27-8-1997 and 26-9-1997 and that the three deceased named persons in the instant cases were really killed during the encounters as claimed by the police for which the learned Principal and Sessions Judge, Mumbai, was directed to conduct an enquiry and for the said purpose he has to go through the affidavits filed on behalf of the respective parties and the request of the learned Counsel appearing for themselves respectively and also record the evidence of the relevant persons and to whom the parties want

them to be examined. In short that is to say the nature and characteristics of the enquiry directed to be conducted by the learned Principal Sessions Judge, Mumbai is a fact finding enquiry to be conducted in an informal way to find out the truth or otherwise as above mentioned. While saying so, we are able to see that apart from the examination of such of the witnesses who filed their affidavits, before the High Court during the pendency of the writ petitions and such of the persons who were required to be examined by the respective parties during the enquiry and also in deserve such of the persons whose evidence before the Enquiry Judge is necessary to find out the truth, are also to be examined. Concedingly by the learned Counsel for all the parties herein, if the learned Enquiry Judge suggests such of the persons whose evidence became pertinent and important to decide and identify the real factum or truth as directed by the Division Bench of this Court who are found to be summoned by the learned Enquiry Judge himself in order to find out truth or otherwise of the question referred to him in the enquiry. 38. The learned Enquiry Judge, while conducting the enquiry as directed as per the specific directions given by the Division Bench of this Court on 10-12-1997 and 17-2-1998, cannot be expected to sleep away the above prerogative right of the fact finding enquiry and that if he does so, the enquiry done by him for the reason he has not summoned such of the important witnesses he deemed fit and proper, would have certainly an impact upon his report given on the basis of the adduced recorded evidence. Therefore, we are constrained to hold that the learned Enquiry Judge is duty bound not only to record the evidence given by the witnesses for the respective parties but also of such persons whose evidence became deemed it necessary vital and important, must also be summoned and their evidence are to be recorded for the purpose of finding the truth or otherwise of the question referred to in the instant enquiry. The word “relevant” spelt out by the learned Judges of the Division Bench would clearly imply and indicate the above duty cast upon the learned Enquiry Judge. Apart from this, there cannot be any quarrel amongst the Bar about the powers vested with the Enquiry Judge while conducting the enquiry if it is on a fact-finding mission. 39. Of course, it was in the given circumstances of the factual matrix of this case, as we have deduced from pages 1 to 30 of the impugned report of the Enquiry Judge, we are able to see that such of the witnesses opted by and on behalf of the respective parties during the enquiry were examined and their evidence were recorded after confronting with the cross examination by the other side. 40. As we have already adverted to the report of the learned Enquiry Judge on the question of whether there was a mistaken identity by the respondents-police in killing Abu Sayama @ Javed Abu Talib Shaikh @ Javed Fawda and it was a mistaken one for the identity of Javed Fawda. The learned enquiry Judge has given the finding in paragraph 68 of his report at page 74 which reads as follows : “There is no substance in the petitioners’ case that the police have killed Abu Sayama @ Javed Abu Talib Shaikh mistaking him for some other notorious gangster called Javed Fawda. There is no case of mistaken identity.” 41. Generally speaking and in common parlance, if a concept of mistaken identity involves, then there must be two identical persons who are different and distinct in person, but, however, with

habits, movements, characteristic features accept the resemblance, then only it arises the mistaking of one is possible for another for any purpose. The mistaking of one person for another was due to so many factors as the basic fact to stand in similarity in looking, physical characteristics, attitude and outward appearance. However, it is a combination and co-existence of a bundle of facts with the knowledge of one or two. 42. It was the consistent case of the petitioners that Abu Sayama @ Javed who is an innocent peanut vendor living with his ailing mother and sister Rubina (P.W. 1), was taken away way back by the policemen in plain clothes at about 2 p.m. on 26-8-1997 when he came out of the mosque at Bandra after the worship and he was whisked away. It came to know subsequently that he was killed in an encounter with the police as he was a dreaded gangster attempted to attack the police which, however, was retaliated by the police by way of self-defence. The said killing of Abu Sayama by the police in cold blood was for mistaking him to be notorious gangster by name Javed Fawda. On the other hand, claim of the police seems to be that the person who was killed in the police encounter at Sprott Road, Ballard Pier, Mumbai was, indeed, a notorious gangster known as "Javed Fawda" and as such there was no case of mistaken identity whatsoever. In the above context of the rival pleas, it is seen that the learned Enquiry Judge has framed the following propositions for consideration:- 1. Whether Abu Sayama @ Javed Abu Talib Shaikh, the innocent peanut vendor and the alleged notorious gangster known to the police as Javed Fawda, are two different persons or one and the same person? 2. Whether Abu Sayama @ Javed Abu Talib Shaikh was an innocent peanut Vendor? 3. Whether the person whom the police referred to as Javed Fawda was a notorious gangster/criminal? 4. Whether Abu Sayama @ Javed Abu Talib Shaikh, the brother of Rubina (P.W. 1) killed by the police in the encounter, is the same person known to the police as Javed Fawda, the notorious gangster? The petitioners' claim seems to be that Javed Fawda is a distinct person from Abu Sayama and Abu Sayama was never known as Javed Fawda and that they are two separate and distinct persons and in view of the said consistent plea taken in Writ Petition No. 1032 of 1997 itself and the ground projected by the Bar throughout, barring the present hearing, is taken for consideration, we feel that the possibility of one being mistaken for other, cannot be ruled out. But, however, the consistent case of the police from the very beginning is that Abu Sayama @ Javed is none other than the notorious gangster whom they knew as Javed Fawda. In other words, there was only one person known as Abu Sayama @ Javed Abu Talib Shaikh alias Javed Fawda and that, therefore, there is no question of mistaken identity being involved him in the encounter. 43. According to (P.W. 1) Rubina, sister of deceased Javed Abu Talib Shaikh @ Javed Fawda @ Abu Sayama was killed in an encounter with the police on the night of 26-8-1997 at Sprott Road, Ballard Pier, Mumbai, but however he was not a notorious gangster. Javed Fawda was an innocent person earning his livelihood by selling peanut at Bandra Railway Station, Bandra (West). According to her, Abu Sayama, who was 18 years of age at the time of his death, was picked up by the police from outside the mosque near the Bandra Railway Station, Bandra (West) where he had gone for Namaz on 26-8-1997. She would further claim

that she was informed by a boy who came and told her that Abu Sayama was whisked away by the plain clothes police in an auto-ricksha. With the result, she immediately rushed to Bandra Police Station and from there to the crime branch which is just behind Bandra Police Station and made enquiries but she was not able to find out her brother. The enquiries made at the Santacruz, Vile Parle, Andheri, Goregaon and other police stations were of no help and that on the next day again she went to Bandra Police Station and informed them of missing of her brother. But she could not get any relief. The 3rd day also she met with no tangible result inspite of efforts taken by her to trace her missing brother. However, she was able to manage to give a missing complaint to Bandra Police which was taken on record in the station diary as well as in the missing persons diary and the same are marked as Exhibit H-1 and Exhibit J-1 it was also the evidence of Rubina (P.W. 1) that for eight days thereafter she made enquiries at all the police stations mentioned earlier and only on the 8th day she went to Killa Court, however, she had corrected herself and said that she went to Killa Court on 1-10-1998. 44. Throughout her examination-in-chief (P.W. 1) Rubina has referred to her brother as Abu Sayama and claimed that after such persuasion, Bandra Police recorded the complaints as Exhibits H-1 and J-1. The learned Enquiry Judge has perused the same and found out that P.W. 1 Rubina had given the name of her missing brother as Javed Abu Talib Shaikh and in nowhere in the missing complaint she had given the name "Abu Sayama" at any place in Exhibits H-1 or J-1. However, she has referred to her deceased brother only as Abu Sayama in evidence but not as Javed Abu Talib Shaikh. She has improved in her cross-examination rather reluctantly that the name of her brother was affectionately referred as "Javed". Thus, it is noted that the name of Abu Sayama was missing in the missing persons, complaint at exhibit H-1 and the diary entry at Exhibit J-1. The finding of the learned Enquiry Judge in this regard about the evidence of (P.W. 1) Rubina, is totally convincing and can be accepted. 45. It is also noticed that (P.W. 1) Rubina's brother Javed Abu Talib Shaikh was arrested by Shivaji Park Police Station in C.R. No. 339/96 on a charge of attempt to murder and that nowhere in the police papers in the said C.R. the name of Abu Sayama appeared and in all these records the accused name referred as Abu Talib Shaikh, was given the name of her brother as Abu Sayama and sister as Rubina. The respondents police also claimed that fingerprints of Javed Abu Talib Shaikh arrested in C.R. No. 339/96 of Shivaji Park Police Station, tally with the fingerprints of the deceased taken by M.R. A. Marg Police Station after the incident. The opinion of the fingerprint expert is annexed to the petitions and is not challenged either by the petitioners or the respondents. 46. The body of the deceased referred to by the police as Javed Fawda was claimed by Rubina (P.W. 1), his sister. She alleged that she was forced to refer to her brother as Javed Fawda while claiming the body and was told that unless she referred to the body as that of Javed Fawda, the same would not be handed over to her. Therefore, the learned Enquiry Judge has come to the conclusion, candidly that there is, therefore, no dispute and it is established beyond doubt that the body claimed by Rubina (P.W. 1) was that of her brother Abu Talib Shaikh, who was arrested by Shivaji Park Po-

lice Station in C.R.R. No. 339/96 on a charge of attempt to murder. However, absence of the name Abu Sayama in the entire police records of C.R. No. 339/96 of Shivaji Park Police Station and the fact that the accused in the said C.R. has signed his name on the Vakalatnama and the two bail bonds Exhibit-C and Exhibit-D as “Javed” indicates that Abu Sayama is not the alias of Javed Abu Talib Shaikh and therefore the name Abu Sayama could possibly be the name of another brother of Rubina (P.W. 1). The learned Enquiry Judge has referred to a suggestion and a possible explanation given by the Bar for the respondents that Rubina has referred to the official name of the deceased as Abu Sayama and she has also admitted in the cross examination that he was called “Javed” out of love and affection. This would indicate that Abu Sayama was the official name of her brother. However, a perusal of the ration card would indicate that one Abu Sayama is the son of Mohammed Sabir and Rubina (P.W. 1) is also shown as the daughter of Mohammed Sabir on the ration card. The name of Mohammed Sabir was not given as the name of the father of the deceased either in the Missing Persons Complaint registered at Bandra Police Station or in the C.R. No. 339/96 registered at the Shivaji Park Police Station. However, in the ration card the age of Abu Sayama in 1993 was given 20 years. Rubina’s elder brother Mohammed Sabir is shown as 26 years of age. Another brother Jahabas is shown as 25 years of age and lastly another brother by name Abu Gaffar is shown as 15 years of age. The ration card thus indicates that Abu Sayama and Rubina (P.W. 1) are the children of Mohammed Sabir and not Abu Talib. Further in the ration card the name of Abu Talib aged 65 years, appears as the brother of Mohammed Sabir, the ration cardholder. No other relative of Abu Talib has been shown in the ration card. On 23-1-1998, the names of Abu Talib Shaikh as the brother of Mohammed Sabir, Jahabas and Abu Gaffar as sons of Abu Talib. Samshad as daughter-in-law and Abu Ashwad as the granddaughter of Mohammed Shabir have been added in the ration card. Therefore, it was claimed that the ration card contains no name as “Javed” and made it clear that Javed was not residing at the Bandra address as claimed by Rubina (P.W. 1). From perusal of the ration card, the learned Enquiry Judge found that no person, by name, Javed or Javed Abu Talib Shaikh is referred to therein and therefore Javed Abu Talib Shaikh whose body was claimed by Rubina (P.W. 1) from the J.J. Morgue, could not have been residing in the premises at Bandra with the other family members and therefore it is probable that Javed Abu Talib Shaikh must be a cousin brother of Rubina and of Abu Sayama. He has further stated that from the ration card it appears that Abu Sayama is shown in the ration card as 20 years old in the year 1993 and that therefore in the year 1997 he would be 24 years old. The age given by Rubina (P.W. 1) of her missing brother in her evidence as well as in the Missing Persons Complaint at Exhibit H-1 is 18 years on 28-8-1997 and that therefore it appears to be highly improbable that the missing person is Abu Sayama and therefore it can safely conclude that Javed Abu Talib Shaikh is not Abu Sayama or vice versa and the two names refer to two different brothers. According to the learned Enquiry Judge, the fact that the name of Javed Abu Talib Shaikh does not appear in the ration card and the fact that Rubina (P.W. 1) claimed the body as that of

her dead brother whom she admitted was arrested by Shivaji Park Police Station wherein he was known as Javed Abu Talib Shaikh would indicate that she had another brother, by name, Javed Abu Talib Shaikh residing away from the family house at the address at Bandra. This would also indicate why Rubina (P.W. 1) approached the police and J.J. Morgue for claiming the body of her brother with the ration card giving the name of her deceased brother as Abu Sayama. This fact is substantiated by the refusal of the police to hand over the body on the basis of the ration card since the name “Javed” did not appear anywhere in the ration card. 47. The observation given by the learned Enquiry Judge that the claim of Rubina that the police refused to hand over the body of her brother unless she referred to her deceased brother as Javed Fawda, would clearly indicate that the police only knew the deceased, by name, Javed Fawda and not by any other name and it was ultimately admitted by (P.W. 1) Rubina that the body was handed over to her only after she identified it as the body of her brother Javed Fawda, can be accepted without any hesitation. 48. It is also the case of the police that the body of the person whom they claimed to be that of Javed Fawda, is that of Javed Abu Talib Shaikh who was referred in C.R. No. 339/96 of Shivaji Park Police Station. Of course, the police came to know of this fact after the body was claimed by Rubina (P.W. 1) on 2-9-1997 as claimed by (R.W. 7) A.P.I. Dhobale. In the proceedings of Sessions Case No. 366/97 based on C.R. No. 339/96, it is noticed that nowhere the name of Javed Fawda finds place but however. (P.W. 1) Rubina admits that her brother Javed Abu Talib Shaikh was arrested in the said C.R. of Shivaji Park Police Station. In the record of the said proceedings, the deceased appears to have signed as Javed. That person who was shot in the police encounter and known to the police as Javed Fawda, is Javed Abu Talib Shaikh who was arrested also based on the identity of the finger prints of Javed Abu Talib Shaikh in C.R. No. 339/96 and the fingerprints obtained on the dead body of M.R.A. Marg Police Station with whom the First Information Report was lodged about the encounter. 49. For the above reasoning, the learned Enquiry Judge has observed that there was no dispute that the deceased was known as Javed Abu Talib Shaikh and that Javed Abu Talib Shaikh was killed in the encounter and that the body claimed and taken for the last rites by Rubina (P.W. 1) was that of Javed Abu Talib Shaikh and that the contention of the petitioners that the body claimed was that of Abu Sayama, brother of Rubina (P.W. 1), has thus been shattered by the fact that the Missing Persons Complaint at Exhibits H-1 and J-1 nowhere refers to the missing person as Abu Sayama but as Javed Abu Talib Shaikh. A perusal of the ration card would reveal that Abu Sayama and Rubina (P.W. 1) are the children of Mohammed Shabir and not Abu Talib. Therefore, according to the learned Enquiry Judge, Abu Talib Shaikh is not the alias of Abu Sayama. The age of missing person is given as 18 years, and according to the ration card, the age of Abu Sayama in 1993 is shown as 20 years. Therefore, at the time of the incident, Abu Sayama would be 24 years and not 18 years as claimed by Rubina (P.W. 1). Besides, the records and proceedings of C.R. No. 339/96 of Shivaji Park Police Station did not contain the name of Abu Sayama but of Javed Abu Talib Shaikh. Therefore, the learned

Enquiry Judge found that the person killed in the encounter could not be said to be Abu Sayama, the so-called innocent peanut vendor. 50. Under the Sub-heading “Buck-Toothed Fawda” in para 42 of the report, the learned Enquiry Judge has observed that much of the confusion arising in this case out of the charge of killing a wrong person, can be cleared if we analyze what the words “Javed Fawda” mean. While proceeding so, he has pointed out that Rubina (P.W. 1) has in the Missing Persons’ Complaint at Exhibit H-1 referred to her brother as Javed Abu Talib Shaikh, but in her evidence before the Court, for the best reasons known to her, she has referred the name of her brother as “Abu Sayama”. However, in her cross-examination further she has very reluctantly admitted that they affectionately referred to her brother as “Javed”. In this context, it is seen that the name “Javed” is a term of endearment or a pet name used by Muslims and those who are closely associated or related to a person would refer to him as “Javed”. On the other hand nicknames like “Fawda” are epithets that get attached to a person on account of peculiar physical traits or abnormalities. The near and dear ones would naturally not like to refer to him by such a disparaging name that highlights physical disability or abnormality. The name “Fawda” is used to describe a person with protruding teeth. It is also noticed that Javed Fawda is an Enigma, a paradox, a combination of nickname and pet name but not the actual or official name of a person. Quoting the evidence of A.P.I. Dhobale (R.W. 7) stating that Javed is a common Muslim name and Javed Fawda means Javed with “Protruding teeth” and is not a complete name as the surname and father’s name are missing. Therefore, upon the basis of the above factors and material placed before him, the learned Enquiry Judge has arrived at a conclusion that the pet-nick name gets tagged on to a person over a period of time and in the process, the real or official name disappears due to non-use and the pet-nick name becomes the name by which the person is identified. Accordingly, Javed Fawda being only a pet-nick name, the person concerned, must, therefore, have an official name, i.e. a name by which he was christened immediately after birth. 51. The claim of the police was that Javed Fawda was a notorious gangster and his official name is Javed Abu Talib Shaikh who was arrested in C.R.S. No. 339/96 of Shivaji Park Police Station. His body was claimed by Rubina (P.W. 1) as that of her own brother. Therefore, the police claimed that there was no case of mistaken identity and that they had shot and killed the person who was a notorious gangster, namely, Javed Fawda alias Javed Abu Talib Shaikh. In view of deliberate failure on the part of Rubina (P.W. 1) at every stage to refer about the name of her deceased brother, except Abu Sayama, learned Enquiry Judge has given the above observation. Under the sub-heading “Innocents Abroad or Criminals At Large” in para 45 of the report, the learned Enquiry Judge has considered the aspect of the professional activities and attitude of so-called Abu Sayama as claimed by Rubina (P.W. 1) his own sister. As we have already referred P.W. 1 Rubina has admitted that her deceased brother used to sign only in Urdu on the Vakalatnama and under the Bail Bonds at Exhibits C and D connected with C.R. No. 339 of 1996 registered by Shivaji Park Police Station. She also appears to have admitted that another brother Shahabaz alias Jahabas was arrested by Santacruz Police

Station in C.R. 114/92 for murder. Then the learned Enquiry Judge disagreed with the claim of Rubina (P.W. 1) that her brother's name was Abu Sayama doing a peanut business at Bandra Railway Station and also he was a carpenter by profession. According to the learned Enquiry Judge, the above claim of Rubina (P.W. 1) is full of conjectures and surmises, contradictory to each other and, as it is, it cannot be accepted. Considering the subsequent argument and contention that the person, by name Javed Abu Talib Shaikh and known as "Javed Fawda" in common parlance and since such name has not found place in the records produced by the police to show that he was very much involved in Gulshan Kumar Murder case, the learned Enquiry Judge has not accepted the said contention for having found the valid and good reasons in paragraphs 45 to 49 even with reference to his business and so on. After having perused the various observations and findings given by the learned Enquiry Judge from paragraphs 50 to 58 in his report and having considered the same with reference to the adduced evidence given by Rubina (P.W. 1) and A.P.I. Dhobale (R.W. 7) on the question of mistaken identity, we are able to find that every reasoning and findings given by the learned Enquiry Judge are on par with the law, practice and quite convincing and satisfactory and that, therefore, the same can be accepted without any hesitation. 52. Under the Sub-head "Complaint (Exh. H-1) motivated" after a careful consideration of the evidence of Rubina (P.W. 1), Nanu Khan (P.W. 2) Anwar Khan Mehbood (P.W. 3) examined on behalf of the petitioners, it was the finding of the learned Enquiry Judge that Abu Sayama being picked up by the police on 26-8-1997, was found unacceptable and that failure of the petitioners to examine one more person, by name, John Fernandes who had filed an affidavit in the Hon'ble High Court in Criminal Writ Petition stating that he was present when Abu Sayama was picked up by three or four policemen from the Crime Branch, required that an adverse inference be drawn against the petitioners. Therefore, the very fact that Abu Sayama was missing on 26-8-1997 and not before or after 26-8-1997 and that he was picked up or kidnapped by the police, cannot, at all, be accepted for dearth of any iota of evidence either oral or documentary. Even for the lodging of missing complaint, we remember that Rubina (P.W. 1) has stated that she took more than eight days to lodge complaint of her missing brother with Bandra Police Station, but however she has corrected herself that lodging was on 1-10-1997. The alleged kidnapping of Javed Abu Talib Shaikh alias Javed Fawda by the police on 28-6-1997 was disbelieved and not accepted by the learned Enquiry Judge. 53. On the sub-heading "Genesis of the Controversy" in paragraph 60 of the report on the basis of the evidence of Rubina (P.W. 1) and A.P.I. Dhobale (R.W. 7) and "Javed Fawda of Behrampada" in paragraph 64 and upon seeing the post mortem notes of J.J. Marg and the sub-heading "the Motive" in paragraph 65 and the Post Mortem in Paragraphs 66 and 67, the learned Enquiry Judge has summed up his six conclusions as already referred to for the finding that there is no substance in the petitioners' case that the police have killed Abu Sayama @ Javed Abu Talib Shaikh mistaking him for some other notorious gangster called Javed Fawda and that there is no case of mistaken identity. 54. As we have heard Mr. Masajid Memon, learned Counsel appearing for the petitioners

in Writ Petition No. 1032 of 1997, we have no hesitation of any kind in upholding the finding given by the learned Enquiry Judge on the question of mistaken identity for the reasoning that the petitioners or the persons who spoke on behalf of the petitioners in these writ petitions, have not only improved their case or altered their case by deviating from their consistent contention that Javed Fawda is a different person and for whom the person by name, Abu Sayama, brother of Rubina (P.W. 1) has been mistaken and shot down in a fake encounter by the police in a cold blood murder, was given up before us during the hearing from the beginning that Javed Abu Talib Shaikh @ Javed Fawda @ Abu Sayama is one and the same person even though the learned Counsel Mr. Masajid Memon has got his own grievance against the finding given above by the learned Enquiry Judge and our endorsement on the same, we find that the finding of the learned Enquiry Judge on this point of mistaken identity is well reasoned, based on adduced recorded oral and documentary evidence after a careful analysis and due consideration of the same in its entirety. Even taking for a logical conclusion that if a mistaken identity is there, as we have already pointed out, there must be two identical persons, at least one should be a dreaded gangster and another should be an innocent brother of Rubina (P.W. 1). But in the instant case surprisingly we have got innocent brother who had been called by Rubina (P.W. 1) as Abu Sayama conveniently omitting the name of her same brother Javed Abu Talib Shaikh and Javed Fawda. The factum of affectionately calling her brother 'Javed' and further factum that he had protruded teeth, though first denied but subsequently admitted, that his upper gum has been little protruded, would clearly indicate that the names of Javed Abu Talib Shaikh and Javed Fawda were wantonly suppressed by Rubina (P.W. 1), Nanu Khan (P.W. 2) and Anwar Khan Mehbood (P.W. 3) and they have misguided the petitioners in Writ Petition No. 1032 of 1997 on this score in our respectful consideration and view. Thus, after a careful consideration of the entire evidence and observations of the learned Enquiry Judge, in the context of the adduced recorded oral and documentary evidence and the pleadings taken in the affidavits, vice versa, and the respective contentions made by the Bar on behalf of the respective parties, we are fully satisfied to hold that the finding given in paragraph 68 of the report of the learned Enquiry Judge on the question of mistaken identity, is true, correct and valid in law and that therefore we accept to the extent of finding given by the learned Enquiry Judge on the question of mistaken identity. 55. Regarding death of Abu Sayama @ Javed Abu Talib Shaikh in an encounter with the police held on 28-8-1997, the learned Enquiry Judge was directed to conduct the enquiry to find out whether such encounters in which deceased above named were killed, are genuine or fake encounters and that is the subject matter of Enquiry No. 1 by the learned Enquiry Judge. In this above incident, according to the police, the notorious gangster Javed Fawda was killed when the police fired at him in self-defence to arrest him at Sprott Road, Ballard Pier, Mumbai, where they had gone to arrest him upon a secret tip off that the said Javed Fawda and his associates were likely to visit at the spot for the purpose of committing some crime. The case of the petitioners according to the learned Counsel Mr. Masajid Memon appearing in

Writ Petition No. 1032 of 1997, is that the police killed Abu Sayama @ Javed Abu Talib Shaikh who was an innocent peanut vendor in cold blood mistaking him for the notorious gangster Javed fawda and that as such it was a case of custodial death. A submission was also made before the learned Enquiry Judge on behalf of the National Human Rights Commission that from the attending circumstances the only conclusion to be drawn is that there was no encounter as claimed by the police and that the deceased was shot at and killed by the police somewhere else. The case of the petitioners in Writ Petition No. 1146 of 1997 is reflected in the suggestion by their Advocate Mr. Sebastian to A.P.I. Dhobale (R.W. 7) that he has suggested to him that the two associates of Javed Fawda brought him on the spot in the white Maruti car according to a prearranged plan with the police and then dropped him from the car and that thereafter the said Javed Fawda was shot dead. 56. The case of the police regarding the encounter above referred is seen from the evidence of Senior Police Inspector, by name, Tambvekar examined as R.W. 5 and Assistant Police Inspector Dhobale examined as R.W. 7 both attached to crime Intelligence Unit, Mumbai. According to them, Abu Salem, one of the most dreaded gangster group in Mumbai was involved in the murder of Gulshan Kumar (C.R. No, 572/97) which was being investigated by the D.N. Nagar Police Station and later it was shifted to Crime Branch Unit No. 7 for continuing investigation of the same. As the enquiry was shifted to Senior Police Inspector Tambvekar who is incharge of Crime Intelligence Unit about the assailants of the said murder case, Assistant Commissioner of Police Mr. Rao superior officer addressed a memo to Senior. P.I. Tambvekar mentioning that Javed Fawda along with Rauf Raja, Wasim and Rashid were involved in the Gulashan Kumar Murder case. Senior P.I. Tambvekar (R.W. 5) accordingly circulated the Memo (Exhibit - W) which he received from the Senior Officer to the Crime Intelligence Unit officers. Sr. P.I. Tambvekar (R.W. 5) was also informed that one Javed Kaliya who was arrested by Unit No. 10 of Crime Branch in some other case, had disclosed the names of the persons mentioned in the said Memo as associates of Javed Kaliya stating that they belonged to the Abu Salem gang, and that Javed Kaliya further informed the police that those accused were also wanted by the Dharavi, Kurla and Nagpada Police Stations for serious offences. The descriptions of the two persons viz. Javed Fawda and Wasim were given by A.C.P. Rao. Javed Fawda was described as 20-22 years of age slim build fair complexioned and having protruding teeth. He was, therefore, nicknamed Fawda. Wasim was described as being 28-30 years old, fair complexioned long hair and having the habit of chewing pan parag. 57. In the above backdrop R.W. 5, Sr. P.I. Tambvekar, on the evening of 27-8-1997 received information from a reliable source to the effect that on the night of 27th/28th August 1997, Javed Fawda along with 3 or 4 of his associates, would be visiting Sprott Road at Ballard Pier between 12.00 and 12.30 midnight, for the purpose of committing some offences and that they would be coming in a white Maruti car. The above information also gave a description of Javed Fawda as fair complexioned, slim built, curly hair and having protruding teeth. Senior P.I. Tambvekar (R.W. 5) upon the receipt of the above description from A.C.P. Rao and D.C.P. Prasad who cautioned him

to take adequate precautions since the accused were members of a gang and were likely to be armed with weapons. This was followed by (R.W. 5) Senior P.I. Tambvekar along with two other officers. P.S.I. Tonpe and P.S.I. Bhosale Patil visited Sprott Road on a reconnaissance mission and according to Sr. P.I. Tambvekar (R.W. 5) on inspecting the site, the officers felt that it was quite likely that the accused would come from the Grand Hotel side as the Customs House end of the road was comparatively deserted and since rich persons and foreigners would be visiting Grand Hotel, it was apprehended that the suspects would be planning to kill some person at the hotel or there was going to be delivery of weaponry or smuggled goods near the Hotel. Further according to him, keeping this in view, the police selected two spots. One spot selected was near the petrol pump and the BEST sub-station on Sprott Road as from there, the entire road, right upto the Customs House could be seen. The other spot selected was on Karimbhoy Lane, opposite the petrol pump at the corner of Karimbhoy lane and Sprott Road. At about 11 p.m. on 28-8-1997, the police went to Sprott Road in two teams. One team consisting of Senior P.I. Tambvekar (R.W. 5) A.P.I. Pote, P.S.I. Tonpe and one constable travelled by private car and the other consisting of A.P.I. Dhobale (R.W. 7), P.S.I. Bhosale Patil, P.S.I. Kalekar and two constables, travelled by Ambassador Car No. B.L.F. 5084. Senior P.I. Tambvekar's team took up position at the corner of Karimbhoy Lane and Sprott Road, facing the petrol pump, while A.P.I. Dhobale and his team took position opposite the BEST bus stop facing the Customs House end. At about 12.15 a.m. a white Maruti car was seen coming along Sprott Road from the south side, i.e. Customs House side. The car halted in front of the BEST bus stop, which was situated in front of Sapat building. The Maruti car, bearing Registration number MH-04-1265, according to A.P.I. Dhobale, was seen with one person sitting next to the driver in the front seat and who was seen alighting from the car on the left side. The said person walked a little further up to the front left side of the car and which, in turn, A.P.I. Dhobale (R.W. 7) immediately realised that that person was none other than Javed Fawda. A.P.I. Dhobale (R.W. 7) and the other officers got down from the car and he and P.S.I. Bhosale Patil proceeded towards the Maruti car. After taking 4-5 steps, A.P.I. Dhobale took out his revolver and pointing it at that person gave a warning by shouting "Javed Bhagna Nahi". Immediately Javed Fawda turned towards A.P.I. Dhobale (R.W. 7) whipped out a weapon from his waist and fired one shot towards the police officers. According to A.P.I. Dhobale, sensing danger, he retaliated by firing in quick succession. In the meantime, Javed fired one more shot. Simultaneously, P.S.I. Bhosale-Patil fired from his service revolver towards Javed Fawda. At that time, the white Maruti car in which Javed Fawda and his associates had arrived, sped away from the scene proceeding towards Grand Hotel side, i.e. towards the north. P.S.I. Talekar fired one shot in the direction of the escaping vehicle. Javed Fawda was seen lying on the road in an injured condition holding a pistol in his hand. A.P.I. Dhobale (R.W. 7) carefully removed the pistol from the hand of Javed Fawda. The pistol was a foreign make pistol having a Star mark, and consequently he unloaded it and found that it contained three bullets. Then, A.P.I. Dhobale (R.W. 7) also claims that at that

time, he realized that the windshield of his car, viz Ambassador car bearing the mark BL-5084 was shattered when the bullet was fired by Javed Fawda. In the meantime, Senior P.I. Tambvekar, examined as R.W. 5 and his staff rushed to the spot where Fawda was lying. Senior P.I. Tambvekar (R.W. 5) instructed his subordinates to remove Javed Fawda to the hospital. Accordingly, P.S.I. Tonpe rushed and brought a private car in which they had travelled to the spot where Javed Fawda was lying and with the help of the said vehicle, P.S.I. Tonpe, A.P.I. Dhobale, P.S.I. Bhosale-Patil and two constables accompanied the injured in the car to the St. George Hospital, Mumbai. At the hospital, Javed Fawda was declared dead before admission. A.P.I. Dhobale (R.W. 7) then gave a statement to the police belonging to M.R.A. Marg Police Station in the hospital where they had arrived and a case was registered with M.R.A. Marg Police Station in C.R. No. 360 / 97 for the purpose of investigation and thus the law was set in motion. 58. The learned Enquiry Judge has already come to the clear conclusion that there is no case of mistaken identity in the instant case and that the person killed by the police in the alleged encounter and known to the police as 'Javed Fawda', was, indeed, Javed Abu Talib Shaikh alias Abu Sayama @ Javed Fawda. Therefore, the only question that remains for determination, is whether Javed Fawda @ Javed Abu Talib Shaikh @ Abu Sayama was killed in an encounter as claimed by the police or whether the encounter claimed to have been happened at about 12.15 midnight on 27/28th August 1997 before the BEST Bus Stop situated at Sprott Road, Ballard Pier, Mumbai, with the police, was a fake one or stage-managed by the police. 59. Before the learned Enquiry Judge, (P.W. 1), Rubina and two other witnesses have deposed by filing their affidavits, however, confined their case with regard to missing of his brother Abu Sayama and for which the learned Enquiry Judge has already given a finding on the sub-heading of 'mistaken identity' and we have had the occasion to peruse the same and given our finding and conclusion also with regard to the same. 60. With regard to the above narration of the police case, Senior P.I. Tambvekar (R.W. 5) and A.P.I. Mr. Dhobale of the Crime Intelligence Unit of Mumbai had given their testimonies in a very cogent, convincing and narrative sequence and the versions of both with regard to operation of the encounter with the police and Javed Fawda at the place and time above referred were quite convincing, cogent and became more acceptable, inspite of their accounting amounts to an eye-witness account for the reason that they have taken actual part in the operation encounter. For the said reason, it is noticed that on getting a secret tip off about the possible visit of Javed Fawda gang along with his two-three associates as proposed to come to the Sprott Road, Ballard Pier, Mumbai, on the night of 27th/28th August 1997 in a white Maruti car for the purpose of committing some offences and that after receiving the said information, (R.W. 5) Senior Police Inspector, with the consultation of his superiors viz. A.C.P. Rao and D.C.P. Prasad and with the assistance of his subordinate, made a visit of the entire area at Sprott Road and fixed two places where they had laid a trap for arresting or nabbing the gangsters Javed Fawda and his associates and preventing them from commission of any offence which was followed by the operation encounter with the police and Javed Fawda and that at the first instance, on

spotting out of Javed Fawda, (R.W. 7) A.P.I. Dhobale, by having a revolver in his hand warned the gangster by name Javed Fawda by saying “Javed Bhagna Nahi” and that on defiance when the said person turned towards (R.W. 7) A.P.I. Dhobale by whipping out a pistol in his waist and aimed at him, was sensed by R.W. 7 A.P.I. Dhobale that there was an imminent danger to him and the Bhosale Patil, retaliated the fire through the weapons in their hands towards the said gangster which was followed by the shot by another police officer in quick succession and in the meanwhile the white Maruti car which brought the gangster Javed Fawda @ Javed Abu Talib Shaikh and two other associates sped away from the scene inspite of the shots fired at them. Then the injured were taken to St. George Hospital where he was pronounced dead. 61. On having a close scrutiny of the above said facts, it is noticed that the secret tip off received by (R.W. 5) Sr. P.I. Tambvekar had been noted and even before that they had received instructions from his immediate superior officer A.C.P. Rao that Javed and his associates by name Rauf Raja, Rashid and Wasim were involved in Gulshankumar Murder case while he was investigating the said case in C.R. No. 572/97. Thus, it is seen that as per the secrete information received by R.W. 5 Sr. P.I. Tambvekar which had been noted and about which police officers had serious discussions with A.C.P. Rao and D.C.P. Prasad and then it was appraised of all the subordinate officers of the said Unit by R.W. 5 Tambvekar. Consequently, the police officers have inspected the whole area of the Sprott Road and selected two places for laying a trap to arrest or nab Javed Fawda and his associates. Accordingly they formed in two teams headed by (R.W. 5) Senior P.I. Tambvekar at one place and (R.W. 7) A.P.I. Dhobale at other place. 62. It was the consistent case of the police that (R.W. 7) A.P.I. Dhobale, on spotting out Javed Fawda with regard to identity given to him by (R.W. 5) Senior P.I. Tambvekar, gave warning immediately after the deceased had alighted from his white Maruti car, of course, it was admitted that R.W. 7 A.P.I. Dhobale was having his service revolver in his hand pointing out at the accused Javed Fawda. But it is significant to note, that it was never the case of police that police had opened fire immediately after warning not to run. A.P.I. Dhobale (R.W. 7) retaliated the fire only after Javed Fawda defied the warning of the police officer and took out a pistol from his waist and aimed at the police. Thus, the 1st shot was fired by gangster Javed Fawda towards police officers by which it was sensed that there was an imminent danger at the hands of Javed Fawda to the police officers, persons and properties. It is, therefore, under such circumstances, particularly A.P.I. Dhobale (R.W. 7) retaliated the fire by his service revolver towards Javed Fawda by firing in quick succession and even then it was claimed that Javed was able to fire one more shot. It was also claimed that P.S.I. Bhosale Patil also fired from his service revolver towards Javed Fawda. It was also claimed that the white Maruti car sped away from the scene proceeding towards Grand Hotel side, i.e. towards the North and P.S.I. Talekar fired one shot in the direction of the escaping vehicle. The above narration of actual occurrence proper, viz. operation encounter between the alleged gangster Javed Fawda and the police party headed by (R.W. 7) A.P.I. Dhobale had taken place and in which the gangster Javed Fawda atone was found sus-

tained bleeding injury on the vulnerable parts of his body but consequently no police officers sustained any injury whatsoever. 63. Excepting the above two police officers, the others who took part in operation encounter claimed by the police, viz. P.S.I. Bhosale-Patil, P.S.I. Talekar and superior officers A.C.P. Rao and D.C.P. Prasad and two constables have neither filed their affidavits nor gave any evidence before the learned Enquiry Judge. 64. In the above context, the learned Enquiry Judge, after having an elaborate discussion in respect of the claim of the police that the accused, by name Javed Fawda, was involved in the Gulshan Kumar murder case (C.R. No. 572/97) along with his associates by names Rauf Raja, Wasim and Rashid as informed by the A.C.P. Rao as evident from Exhibit-W, the document created subsequently long after the encounter for the very reasoning that the Memo Exhibit-W itself does not show either the description of the identity of the accused Javed Fawda or the details and that the whole case records and investigating papers of Gulshankumar's case including the chargesheet filed in that case in C.R. No. 572/97, does not contain the name of Javed Fawda and that the said circumstance would clinch the factor that Javed Fawda, the person who was shot dead in an encounter happened on the night of 8-8-1997 was not one who wanted in the murder case of Mr. Gulshankumar. While attributing the reason for exhibiting the said document Exhibit-W, at a very later stage, the learned Enquiry Judge has proceeded, perhaps, on the basis that the said document was introduced just to show that deceased Javed Fawda was a notorious criminal gangster wanted in not only in Gulshankumar murder case but also in the cases registered in Dharavi, Kurla and Bandra Police Stations, while arriving at the said conclusion, the learned Enquiry Judge, under sub-heading Exhibit-W-Memo from A.C.P. Rao in paragraphs 75 to 80, had gone through the oral evidence given by the police officers at great length and, after having perused the same, arrived at the said conclusion. With great respect to the learned Enquiry Judge, we are not in a position to accept or appreciate the above said observations for the following reasoning. 65. A.C.P. Rao and D.C.P. Prasad, officers of the Crime Intelligence Unit, were immediate superiors of Senior P.I. Tambvekar (R.W. 5) having controlled over (R.W. 5) A.P.I. Dhobale and all are of his subordinates. It is the duty of the police officers, and that too higher in rank, that on receipt of a secret tip off or intelligence from any source, to have it transmitted to his subordinate officers trusted so and thereby to issue follow up instructions necessary to for further action. Accordingly, the information received by A.C.P. Rao, an immediate superior officer, has been forwarded to (R.W. 5) Senior P.I. Tambvekar in writing that culminated into Exhibit-W, which shows that gangster Javed Fawda along with his associates by names referred to therein, were also involved in Gulshankumar murder case. This message was sent to him in writing, perhaps, for the reason that Senior P.I. Tambvekar was also working under him as a subordinate Senior Police Inspector. For a message to be received by a higher police officer and relegating the same to the subordinate officer for the purpose of follow up action or other things to be taken in accordance with law, nothing can be attributed nor can be said that the same message is the basis for whole commission of crime or the encounter whatsoever, may be the informations are

duly received by A.C.P. Rao is correct, true or mistake, but it is the bounden duty of the police officers to receive such message or information or tip off and to proceed further in accordance with the same and if it was true, they have to take further follow up action and that is their duties prescribed under the law and procedure. 66. Subsequent investigation made by Crime Intelligence Unit as the learned Enquiry Judge came to the conclusion that Javed Fawda and his associates were not actually involved in the murder of Mr. Gulshankumar and that therefore they could have filed the chargesheet before the Court as contemplated by law. Merely because the chargesheet filed in Gulshankumar murder case and its proceedings does not contain the name of Javed Fawda or other names of his associates, does not mean, in all respects, that the person, by name Javed Fawda @ Javed Abu Talib Shaikh @ Abu Sayama, whatever nickname may be, is absolved. 67. Consequently, at this stage, it is pertinent to note that the follow up actions by (R.W. 5) Sr. P.I. Tambvekar along with his police posse or convoy made reconnaissance mission and selected two places for laying the trap in order to arrest and nab Javed Fawda and his associates gang on the following night, was acted particularly on the basis of secret tip off and information received by (R.W. 5) Tambvekar on the evening of 27/28th August 1997. This is what the claim of (R.W. 5) Senior P.I. Tambvekar and that though he has given the evidence before the learned Enquiry Judge by filing the affidavit, nothing has been elicited to discredit this part of evidence in this respect. It is, thus, seen that on a specific secret tip off received from reliable source, a trap in the instant case was held after having a prior reconnaissance mission on the entire area and fixed the two places for implementing the trap and immediately on arrival of Javed Fawda alias Javed Abu Talib Shaikh the encounter followed by which the police retaliated upon the fire opened by Javed Fawda on two occasions and for all the bullet injuries the said gangster succumbed to death before he was admitted in the hospital. For the above reasons, we do not find any merit or substance in the observations and the way of discussion made by the learned Enquiry Judge in the above sub-paras. The learned Enquiry Judge failed to note that there was no actual or legal nexus existed between the investigation of Gulshan Kumar murder case and the investigation of operation encounter involved in the instant case. We could sustain the above finding of the learned Enquiry Judge only if the police had trusted the whole of their case on the basis of Exhibit-W forwarded by A.C.P. Rao to (R.W. 5) Tambvekar but certainly it is not. While that being so, it is wholly wrong on the part of the learned Enquiry Judge to give any observation or finding to the effect that Exhibit-W, the Memo given by A.C.P. Rao is only a subsequent and later movements made by the police to make it believed that deceased Javed Fawda was a notorious gangster. The approach thus adopted by the learned Enquiry Judge is wholly wrong in our considered view and respect and that therefore it cannot be accepted. 68. The avowed purpose of the police in arresting or nabbing Javed Fawda on 28-8-1997 was not solely on the basis of Memo Exhibit-W received by (R.W. 5) Senior P.I. Tambvekar but on the other- hand Exhibit-W had also prompted for the police officer (R.W. 5) Senior P.I. Tambvekar to be very vigilant and conscious about the investigation in crime reports registered

at Dadar, Kurla, Dharavi and Matunga Police Stations and irrespective of the same on the evening of 28-8-1997 (R.W. 5) Senior P.I. Tambvekar was found in receipt of a secret tip off about the arrival of Javed Fawda and his two associates at Sprott Road, Ballard Pier, Mumbai for the purpose of committing offence. Therefore, the police posse or convoy headed by (R.W. 5) Senior P.I. Tambvekar and (R.W. 7) A.P.I. Dhobale in two teams had been to the scene of occurrence and one was required to wait for arrival of the gangster and his associates which followed the encounter. The above fact has been omitted to be considered by the learned Enquiry Judge. So also the learned Enquiry Judge dwelling upon the evidence of (R.W. 7) A.P.I. Dhobale and Senior P.I. Tambvekar (R.W. 5) has casted his doubt about the wanting of the alleged Javed Fawda, a noted gangster in other criminal cases registered in Dharavi, Kurla, Matunga and other police stations. Therefore, the conclusion and the finding given by the learned Enquiry Judge in paragraph 83 of his judgment that from the above discussion it is seen that there is nothing to show that the police had any definite information about the involvement of Javed Fawda in the C.Rs. of different police stations and that what is most surprising is that so far as the C.R. registered at Shivaji Park Police Station is concerned, the police were not aware of the involvement of Javed Fawda in the said C.R. and came to know of it only after 28-8-1997 and that the reasons, therefore, for wanting to arrest Javed Fawda (an alleged notorious gangster) are conspicuously absent and serious doubts arise whether the police did in fact go to Sprott Road to arrest Javed Fawda on the night of 28-8-1997 on account of his being a dangerous gangster and whether the encounter in which Javed Fawda was allegedly killed did in fact take place, is highly erroneous and cannot, at all, be accepted. In a similar fashion, on minor conjectures and surmises, the learned Enquiry Judge, by relying upon the evidence of (R.W. 5) Senior P.I. Tambvekar and (R.W. 7) A.P.I. Dhobale had discussion in paragraphs 84, 85, 86 and 87 on the sub-heading of 'Reconnaissance Mission', held that in light of the above discussion, the alleged reconnaissance mission to Sprott Road is a matter of conjecture also deserves to be rejected. The learned Enquiry Judge ought to have found that on the Sprott road, Ballard Pier Mumbai, within the jurisdiction of M.R.A. Marg Police Station and that in the places which were set up in prior hand for laying trap by the police has become success and all the two places, in one situate near the BEST bus stop at Sprott road it is noticed that the police were able to spot out the alighting of Javed Fawda in Maruti car at about mid-night on 28-8-1997. By a local inspection and personnel on the said spot, the learned Judge was also found the existing physical features of the place of occurrence was vulnerable for commission of unlawful activities by the gangsters or the notorious criminals during midnight even though it was adequately eliminated and lit by the lights on the several sources, but according to the learned Enquiry Judge and the Bar for the respective parties, the place of occurrence in which the encounter had taken place is a deserted and secluded one from the congested traffic of Mumbai city and that therefore it has become vulnerable for the commission of any crime or encounter possible. The word adopted by the learned Enquiry Judge on the "Reconnaissance Mission" of Senior Police Inspector Tambvekar examined as

R.W. 5 and A.P.I. Dhobale examined as R.W. 7, do in our judicial conscious minds, is not a conjecture to a real truth, claimed to have been demonstrated by two responsible police officers. The evidence of the said two witnesses on the above said aspects, cannot be taken so lightly and casually. 69. About the actual occurrence of encounter proper, the various observations given by the learned Enquiry Judge under the sub-heading “Gun Fight at Sprott Road” in paragraphs 88 to 98, and given the finding that in the absence of the corroborative evidence, it was easily available if the police version of the incident is to be believed, A.P.I. Dhobale’s evidence is compared with the defence of his case of having shot and killed Javed Fawda in self defence and retaliation as it deems fit, cannot at all be accepted for a moment even for the following reasons. In paragraph 93 of his report, the learned Enquiry Judge has observed as under:- “Although independent eye-witnesses who were party to the shoot out, were present and were available, for some unexplained reasons, they have not been examined and the respondents have made no attempt to explain why they have not examined these eye-witnesses nor have they shown nor attempted to show that these witnesses were not available, possibly, the respondents might have tried to explain that these eye-witnesses have not been examined as they were party to the shoot-out, if examined, be incriminating themselves. But even this would not be a satisfactory explanation for examining them, since the High Court has, by its order dated 17-2-1998, on the application of the respondents themselves, clarified that the evidence recorded in this enquiry, will not be used in any criminal proceedings or civil action that may be launched against the police officers. The non-examination of two important eye-witnesses by the respondents would require this Court to draw an adverse inference.” 70. The above passage of the finding, with great respect to the learned Enquiry Judge, do not impress, in any way in our minds, for the very reasoning that the encounter operation involved in the instant case is one between the police and the alleged gangster and his associates happened during the midnight of 28-8-1997 at an isolated place of Sprott Road, Ballard Pier, Mumbai city and which took place during the midnight where one cannot expect that any independent witness, like passers-by or dweller or a businessman of the locality, would come and say that such independent witnesses were available and seen the actual occurrence proper. We fail to understand as to whom the learned Enquiry Judge referred to, who are the independent eye-witnesses and who have witnessed the actual occurrence proper, viz the encounter that had taken place on the midnight of 28-8-1997. It was nobody’s case that except the police officer and the gangsters, any other persons were present at that time or a limb of society otherwise than the police officers and the gangsters. We are not able to countenance the above finding and the reasoning given under the sub-heading “Gun Fight at Sportt Road” in paragraphs 88 to 98 for the very reasoning that there was no basis for the said observations. The other police officers, viz A.P.I. Kalekar and two police constables and other A.P.I, who also fired at Javed Fawda, were all the actual participants in the encounter happened and held between the police and the gangster Javed Fawda. It is noticed that except the police officers who are members of the posse or convoy of the police party waiting in lay for the arrival

of the alleged gangster in order to prevent him from committing any offence and nab and arrest him, cannot at all be held as an independent eye-witnesses. If the police officers who took part in the actual operation encounter were termed as independent eye-witnesses for the simple reason that such of the police officers have not been examined before the Court, then we fail to understand what is the legal ratio and norms to be followed to call other independent eye-witnesses for an occurrence proper. Having considered the same at its every breadth and length and, with great respect to the learned Enquiry Judge, the above said finding given in paragraphs 93 is based on mere conjectures and summarises and not based on any facts or the law laid down on this score. 71. Of course, there may be some minor variations or discrepancies, if to say so in accounting the actual occurrence proper between the two witnesses because the faculty of one man cannot reflect the other and it may differ person to person and that, therefore, there cannot be any uniformity in the claims made by the persons who gave the evidence on a particular occurrence. Therefore, what were the facts finding by the learned Enquiry Judge in paragraphs 94 to 98 claiming to be differences between the claim of A.P.I. Tambvekar (R.W. 5) and A.P.I. Dhobale (R.W. 7) do not weight much and that the said difference, if any, alone do not render the whole incident viz. occurrence proper of the encounter falsified. For the above reasoning and for the facts of the same, learned Enquiry Judge has not since dwelt with in his detailed report we are loathe to accept the same, but however we have to reject. 72. Pointing out the one glaring and apparent inaction on the part of the police in paragraph 102 of the report and that the fact that none of the members of the police party received any injury nor sustained any scrap of injury at the hands of deceased Javed Fawda even though he fired at two times upon them, after having discussed in paragraphs 94 to 104 by sub-file "Lay Your Pistol Down", the learned Enquiry Judge has come to the conclusion that there are serious doubts arose whether Javed Fawda fired the first shot at the police with his pistol or whether Javed Fawda at all fired at the police and that it is also doubtful whether Javed Fawda was armed with a pistol or was carrying any arms at all. There may be minor discrepancies, omissions and contradictions while the witnesses for the actual occurrence proper give the narrative of what they have seen with their own eyes due to long passage of time and human fallibility. Therefore, it was the settled principles of law that minor discrepancies, omissions and contradictions cannot be taken by the Court of law either in the case of a trial or the enquiry as a major factor and thereby to reject the actual occurrence proper which has substantially proved by all the eye-witnesses though they have happened to be participants to the actual occurrence proper. While giving the above observation in paragraph 104, the main reason for attributing such remarks and finding by the learned Enquiry Judge was that while A.P.I. Dhobale removing the pistol from the hands of Javed Fawda after he was brought down to the ground by retaliating the fire by the police posse or convoy and totally incapacitated, it was claimed that the said firearm was recovered and the bullets therein were also counted as numbering three and preserved by the investigating staff. It is also notified that while doing so, it is the common knowledge that a police officer and that too in the rank of inspector, is duty

bound to make arrangement to preserve the fingerprints of the gangster or the person who holds it or operated it just before it was removed from the hands of the offender and non-performance of the same is clearly attributed a flagrant dereliction of the duties on the part of the police officer, whoso- ever may be. We may say this for the reasoning that immediately after the offender was brought down to the ground by retaliating the fire by the police party, the offender who used the firearms fell down to the ground and was totally made incapacitated to use the firearm again which prompts the other side, viz police posse or convey to remove that gun from the hand of the offender and while doing so, if the police officer who removes the same ought to have necessarily made every arrangement to preserve the fingerprints which may necessarily be available at the weapon itself, then it will provide a direct nexus and clue that the offender had definitely operated that weapon during the occurrence and that failure to do so will totally rendered the whole investigation suspicious and meaningless. That is the reason why the learned Enquiry Judge in his report has attributed the above non-performance of the police in not preserving the fingerprints of the gangster in the weapons they used and the same act on the part of the Senior Police Officer is unpardonable. However, in our view, this is not the only factor which could be taken as the only parameter to decide whether the gangster had used the weapon or not. 73. The spot panchanama prepared by the investigating staff immediately after the occurrence proper or encounter proper and the recovery pan-chanama, rough sketch showing the topography of the existence of the physical features and recoveries, statements recorded and the post mortem report. Chemical Analyser's report and the report of the Ballistic Missile Experts and all other corroborating factors have also to be taken into consideration while probing the matter in question. If that is the position provided by law, the observation and the finding given by the learned Enquiry Judge in paragraf is 99 to 101 cannot at all be countenanced for a moment but however it deserves to be rejected. 74. The above observations made by the learned Enquiry Judge under subheading "Arms and the Man" in paragraphs 105, 106 and under sub-heading "Shattered Windshield" in paragraphs 107 to 109 and under sub-heading "The Car That Got Away" in paragraphs 110 to 114 and under sub-heading "Dead Men Tell No Talcs" in paragraphs 115 and 116 under sub-heading "Post Mortem and Chemical Analyzer's Reports" and in paragraphs 117 to 119 under the sub-heading "The Spot Panchamama" in paragraphs 120 to 122 are concerned, enough for us at this stage to say that the said observations and the findings are made with no basis at all, but only on the basis of mere conjectures and surmises emanated from the evidence of (R.W. 5) A.P.I. Tambvekar and (R.W. 7) Dhobale. From the main parameter set by the learned Enquiry Judge in rejecting the post mortem certificate and the Chemical Analyser's report inspite of the fact that the doctor who did the autopsy over the dead body of Javed Fawda, by name, Vijay Harishchandra Kelvekar examined as R.W. 3 and the Assistant Chemical Analyzer, by name Sudhakar Haribhau Ramteke examined as R.W. 4, it is seen that they have proved the post mortem notes and the Chemical Analyser's report. The opinion given by Dr. Kelvekar in his post mortem report is that the death of the deceased was

due to loss of blood from injuries to the vital parts of the body and according to him he has prepared the post mortem notes and he has stated further that there were four cut injury wounds on the dead body of Javed Fawda, amongst whom there were three bullet entry wounds and one was a bullet exit wound. Sudhir Haribhau Ramteke, Assistant Chemical Analyser examined as R.W. 4 has given his finding that the two bullets sent by the police surgeon to the Chemical Analyzer for examination were fired by two different. 38 revolvers and that the shots were fired from a distance of less than 35 yards but beyond two feet. This witness has further claimed that there were four shot holes on the shirt, which was examined in this case. Three shot holes were on the front side and one was on the rear side. As per the post mortem notes, the shot hole at the rear side of the shirt is the exit wound and the post mortem certificate would indicate that four shot holes were due to three shots fired and that since he has received only two empty bullets for examination. He cannot say whether the three entry shots on the shirt of the victim were from one, two or three. 38 service revolver. But from the two empty bullets which he examined he could say that there were two. 38 revolvers used and since he did not see the third bullet he could not say whether a third revolver was used or not. The above evidence would make it clear that atleast three bullets from two different revolvers hit the body of Javed Fawda and the impact of one bullet was so fierce, that it penetrated the body through and exited through back. 75. One another reason for which the learned Enquiry Judge has attributed the above finding was that he suspected the very genuineness of the spot panchanama for the reason of some factors are missing and that pancha witnesses were not examined to speak about the existing physical features of the scene of occurrence. Conspicuously, the spot panchanama is perused. It is noticed that it does not contain any reference to spreading of or availability of blood or blood stains anywhere on the place where the encounter had taken place. According to the police, it was prepared within a shot time of shoot out but however it does not indicate that a pool of blood or even spots of blood were found at the occurrence proper. The two witnesses examined in the instant case as R.W. 5 Senior P.I. Tambvekar and R.W. 7 A.P.I. Dhobale claimed that they had rushed to the injured Javed Fawda in the private car and he was taken to St. George Hospital. However, no bloodstains were found in the private car as admitted by R.W. 2 A.P.I. Dhobale. It is also noticed that eight bullets were fired in the instant encounter (four shots by A.P.I. Dhobale, two by Javed Fawda, one by P.S.I. Bhosale Patil and one by P.S.I. Kalekar at the speeding car) but however only two empties were found at the spot but no empties were found in the Ambassador car whose windshield was allegedly shattered by a stray bullet. The spot panchanama refers only two empties found at the spot but makes no mention of any empties being found in the Ambassador car. Based upon the above said aspects, the learned Enquiry Judge has come to the above referred conclusion but, in our respectful view to the learned Enquiry Judge, the matter was otherwise and just converse. Availability of two empties at the spot was recovered and subjected to Chemical examination. Absence of any blood stains or blood spots in the place of occurrence proper should not be the mitigating factor to come to the conclusion that in view of the same,

the occurrence had not taken place. To see whether occurrence had taken in a particular place or not, of course, it was true that spotting out of the blood stains and the spot and the recovery of the same and subjected to the Chemical examination of the same to identify the human blood or group of blood, is one of the important aspects but that is not one and the only mode of parameter to decide the whole question in the instant case. To fix the place of occurrence proper, we have to see the eyewitnesses accounting viz R.W. 5 and R.W. 7 on the score while their accounting of the actual encounter taken place is convincing, cogent but also may be taken into consideration as one of the factors for deciding and fixing the place of occurrence proper. It is also noticed that the two police officers examined as R.W. 5 Senior P.I. Tambvekar and R.W. 7 Dhobale were silent about the availability of the blood spots or blood stains at the place of encounter proper, may be the investigating staff who set the law in motion during the midnight might have reached the place of occurrence on the ensuing morning or immediately or failed to spot out the places where the blood spots were available or even failed to recover the same. Even so the possibility of no blood spots or no places where the bloodstains were found or available cannot be ruled out. It is one thing that if the witnesses claim that the blood was found profusing and oozing out while the injured was laying down, then one would normally expects that the place is to be stained with blood of that person concerned and it ought to have been recovered by the investigating agency under the cover of a panchanama attested by the independent panchas. If there was no such claim made, then one has to look into the other corroborating evidence to find out whether in view of the fire shots and sustaining injuries to the deceased, blood of the deceased had come out and spread away in the place of occurrence. The recovery panchanama shows that the shirt and the chappals of the deceased were found with blood stains and that was subjected to the Chemical Examination in the instant case which were duly recovered under the cover of panchanama attested by the separate panchas. The consistent case of the police is that no bloodstains were found in the place of encounter taken place. It is, in this context, if we look into the post mortem notes, we came to know that immediately after the four injuries sustained by deceased Javed Fawda, there cannot be any profused blood spread away in the actual place of encounter. The post mortem notes has been duly proved by the doctor who did the autopsy and other doctor examined as (R.W. 3) Vijay Kelvekar. Perusal of the post mortem notes vide running page 316 of Volume II of the compilation of the writ petitions at column 5, it was found and referred as per A.D.R., death in police encounter, internal page 6 and running page 322, it was noted that 2000 ml. Itrs. of blood and clots chest cavity was found intact. If 2000 ml. Itrs. blood and clots were found in the chest cavity as evident from the post mortem notes as prepared by the doctor Vijay Kelvekar (R.W. 3) marked at Exhibit-O, it is clear that all from the major and serious injuries, the blood had been oozed out only internally and not outward except a few drops. The few drops, which came out were found on the shirt and chappals belonging of the deceased which were found and subjected to Chemical Examination. It is also noticed that such articles that were subjected to chemical examination for

detecting the human blood and identification of the blood group as found and referred in the Chemical Analyzer's report that the human blood was detected but however no blood group can be identified for the simple reason of its disintegration or inconclusiveness. In the context of the post mortem Exhibit-O and the Chemical Analyser's report we are of the opinion and definite view that the four bullet injuries caused by the firearms to deceased Javed Fawda had ammoniated the blood in most quantity internally and not externally and only such of the blood came out were found spotted at his belongings even which were subjected to Chemical Analyzer examination and that has been proved that the said blood was human and the group cannot be identified for the reasons shown therein. 76. The observations made by the learned Enquiry Judge with regard to non-examination of the police officers by name P.S.I. Bandu Bhau Bhosale, A.P. Kalekar, A.C.P. Rao and Mr. Prasad D.C.P. and thereby not proved the case of the police by corroborating the same or otherwise in the said paragraphs, we will give our observations and findings a little later while we are dealing with similar observations given by the learned Enquiry Judge in Encounter No. 2 which is being ensued. 77. Coming to the observations made by the learned Enquiry Judge with regard to delay in sending the First Information Report made in this case which was registered as C.R. No. 360/97 at M.R.A. Marg Police Station, it is pertinent to note that the learned Enquiry Judge has stated that no copy of the First information Report was sent to the Magistrate as required under section 157 of the Code of Criminal Procedure till 26-11-1997, that is after three months and that the copy of the said First Information Report came to be filed on 26-11-1997 only after an application was made by the petitioners to the Magistrate to furnish them a copy of the First Information Report and that the order of the Magistrate endorsed on the foot of the application reads; "No copy of the F.I.R. received" and that the First Information Report mentions that the informant gave description of Javed Fawda and that he was wanted in the C.Rs of Dharavi, Kurla and Matunga Police Stations etc. and that even so no mention is made in the F.I.R. of Javed Fawda being wanted in the Gulshan Kumar murder case. It is also worthwhile to note that the finding given by the learned Enquiry Judge at para 127 of the compilation page 114 that despite the injured Javed Fawda bleeding profusely, no pool of blood or blood stains were found at the scene of occurrence and despite several shots fired at the time of the shoot out, only two bullets empties were allegedly recovered from the spot but no bullet empty was recovered from the Ambassador car whose windshield was allegedly shattered by a stray bullet and the absence of any mention of blood stains at the scene of offence or in the private car in which the injured Javed Fawda was taken to the hospital could mean that the panchanama was in fact not drawn at the alleged scene of occurrence and that however the scene of panchanama, the First Information Report and Exhibit-W are the documents drawn by and relied upon by the police themselves. The absence of any mention in the panchanama of a pool of blood or at least some blood stains being found at the scene of offence or of more empties than the two being found at the scene of occurrence and the conspicuous absence of any mention of Exhibit-W in the First Information Report creates serious doubts whether the encounter

did in fact take place at Sprott Road as alleged by the police. After having gone through the records and the evidence and the case papers in the instant case, it is seen consistently that immediately after the instant encounter operation is over, (R.W. 7) A.P.I. Dhobale removed the firearm from the hands of gangster Javed Fawda while he was lying on the ground as totally incapacitated with the bullet injuries and that, while doing so, no attempt was made, concedingly, or no arrangements were made to preserve the fingerprints of the person who held and operated the weapon in question to prove the very nexus available between the weapon and the person who handled it. Adding to it, they have also noticed that the First Information Report, in this case, was immediately lodged by A.P.I. Dhobale without any delay to M.R.A. Marg Police Station where his statement was recorded, however a case was registered immediately by M.R.A. Marg Police for an offence under section 307 of the Indian Penal Code and so on against deceased Javed Fawda @ Javed Abu Talib Shaikh. In spite of the fact that it was registered immediately and thus the law was set in motion, the First Information Report has not been sent to the Court of law having jurisdiction over the area to the utter disregard of the law laid down on this core in spite of judicial pronouncement by the Apex Court. In fact, no copy of the First Information Report was sent to the Magistrate as required under section 157 of the Cr.P. Code till 26-11-1997, that is, after three months. A copy of the F.I.R. came to be filed on 26-11-1997 only after an application was made by the petitioners to the Magistrate to furnish them a copy of the F. I. R. The order of the Magistrate endorsed at the foot of the application reads: "No Copy of the F.I.R. Received". Thus it was found that copy of F.I.R. has not been sent to the Court and the to furnish them a copy of the F.I.R. The order of the Magistrate endorsement bore by the learned Magistrate to the above effect clinches the said matter to the surprise of everyone. Sending the First Information Report by the M.R.A. Marg Police Station to the Court of learned Metropolitan Magistrate of Mumbai Town took several months particularly more than three months in the instant case. Therefore, there is some substance and force in the observation and finding given by the learned Enquiry Judge in this regard. 78. Regarding the observation given by the learned Enquiry Judge under the sub-heading "Trigger-Happy Cop" in para 128 of his final report at page 115, we are of the view that we need not consider the same as a valid one for the simple reason that, however worst may be, the bad character of a witness in a criminal case cannot be taken the same to probe the character of the said witness. A.P.I. Dhobale (R.W. 7) admittedly was involved in a case of custodial death and in the trial of the said case, he was convicted for the offence under section 304, Part-11, of the I.P.C. but however in the appeal before the High Court, he was acquitted of the charges under the above section. However a Special Leave Petition against the said order has been preferred before the Supreme Court, which is pending disposal. In this context it is not desirable for us or for the learned Enquiry Judge to take the said A.P.I. Dhobale as a bad conduct or it imputes any presumption against his conduct or a trigger-happy policeman. If a police officer is deployed to carry out the operation within the framework of the law provided therefor, he must discharge the duties under the orders and that is the

very basic fabric of the duty imposed upon any police officer. The very fact that A.P.I. Dhobale (R.W. 7) was deputed with a posse of policemen to lay a wait in a trap set tip by (R.W. 5) Senior P.I. Tambvekar at the relevant time and day in question, it was his duty to obey and discharge his duty to the maximum extent possible and that accordingly he did so and he has discharged the duties. While analysing his duties or probing the said activities causing aspiration against him on the basis of “none to happy at this incident” as referred to above, is not proper for the Court of law and to draw an adverse inference against him and thereby to disbelieve the whole of his claim, has been made in a separate encounter are not justifiable. In the context of our above view, except the sub-titling given by the learned Enquiry Judge, there was no substance or force or legal sanctity in the observations made in paragraphs 128 to 130. The other reasoning given by the learned Enquiry Judge for attributing something against (R.W. 7) A.P.I. Dhobale for having fired a shot at Javed Fawda has no basis for any truth or evidence. 79. The learned Enquiry Judge has also made a site inspection on 12-6-1998 in the presence of the Bar for the respective parties and observed the existing physical features as claimed and that consequent observation of the learned Enquiry Judge made thereof merely amounts to hypothetical and cannot have, in our considered view, any legal sanctity. The absence of any blood spot in the car which carried out injured as well as police officers on the spot or the operation spot, does not render any help to the petitioners or other persons to opine otherwise except the one claimed by the police. The several other observations and findings given by the learned Enquiry Judge from paragraphs 131 and 146 are, in our well considered opinion and view are, merely based on conjectures and surmises and wrong imaginations and not based on any materials placed before him. The Maruti car in which Javed Fawda alleged to have used and to come to the occurrence spot and the same sped away from the scene while the encounter was on the halfway, was not traced for the obvious reason, it was not available and that even so non-tracing of the said car by the respondents-police would, in no way, cause any impairment or impact on the consistent case of the police as observed. Likewise previous history of A.P.I. Dhobale, as brought in his cross-examination by the Counsel for the other side, has nothing to do with the legal exercise expected to be done by the learned Enquiry Judge. 80. Of course, it was true that in the investigation while being carried away by the M.R.A. Marg Police Station with whom a complaint was lodged by (R.W. 7) A.P.I. Dhobale and the law was set in motion and the whole case was registered for the offence under section 307 of the I.P.C. and so on and accordingly the case was being investigated it was found that the investigation conducted by the M.R.A- Marg Police Station has inherited with so many serious infirmities and laxity on his part and that about of which we may point out at the later stage, for, it is applicable to all the investigating staff of the Mumbai police. After having, thus considered the entire case records, adduced recorded oral and documentary evidence, and various observations and findings given by the learned Enquiry Judge upto pages 128 of his report, we are at every difficulty to endorse the finding of the learned Enquiry Judge which was given in paragraph 148 of his report that deceased Javed Fawda @ Abu Sayama @

Javed Abu Talib Shaikh was not killed in the encounter as claimed by the police and it is doubtful whether any such encounter took place. We are constrained to reject the said finding for the reason that the learned Enquiry Judge has not given any finding or referred any material in the evidence to eliminate or reject the evidence of Senior P.I. Tambvekar examined as R.W. 5 and A.P.I. Dhobale examined as R.W. 7 in its entirety and that the learned Enquiry Judge has failed to give the reasons for holding that there was no encounter taken place. It is worthwhile to note, at this stage, that the learned Enquiry Judge has not given any finding that the alleged encounter operation has not at all been taken place in front of the BEST Bus stop situate at Sprott Road, Ballard Pier, Mumbai during the midnight on 28-8-1997. The learned Enquiry Judge ought to have noted that from the place of encounter operation, the vital -materials like slippers, empties of cartridges and other materials were recovered under the recover)'panchanama which were subjected to Chemical Analyser's examination which proved the human blood and the group of which alone cannot be identified for its inconclusiveness. There was no answer provided by the learned Enquiry Judge for the above corroborating evidence, which fixed the place of occurrence of the encounter operation. The learned Enquiry Judge has failed to note that the evidence of (R.W. 5) Senior P.I. Tambvekar and (R.W. 7) A.P.I. Dhobale are from responsible officers of the Mumbai Police Department which mutually and exclusively corroborates each other and the case of the police on the whole. The learned Enquiry Judge has deliberately failed to note that while pleading a mistaken person as killed by the police for the identity of Javed Fawda, someone or the other has mistaken the petitioners in Criminal Writ Petition No. 102 of 1997 in filing this writ petition on the false ground that is as if there were two persons of whom one by name Javed Fawda is a notorious gangster and criminal and another one is a Abu Sayama. The learned Enquiry Judge also failed to note that the case of the petitioners has been taken a total turn during enquiry by the petitioners and that the plea of mistaken identity was totally given up by and on behalf of the petitioners as is evident from the learned Counsel Mr. Majit Memon submitted his contention before us. 81. There was no rhyme or reason to see that the respondents police had developed edge against Javed Fawda @ Javed Abu Talib Shaikh alone on 26-1-1997 on his way back to his home from Mosque and whisked away and that thereafter two days after they have killed the said person if the evidence of (P.W. 1) Rubina, the so-called sister of the deceased Javed Fawda and the writ petitioners in Writ Petition No. 1032 of 1997 is believed. Absolutely the police have no motive or animosity against the said deceased Javed Fawda if he is so innocent and a peanut vendor selling peanuts near Bandra Railway Station. The above aspect has not at all been considered by the learned Enquiry Judge. 82. In the light of the above position and circumstances and after hearing the rival contentions by the Bar for the respective parties, with great respect, we are constrained to hold that there was an encounter held during the midnight of 28-8-1997 in front of the BEST Bus stop situate at Sprott Road, Ballard Pier, Mumbai between the police posse headed by A.P.I. Dhobale (R.W. 7) on the one hand and deceased Javed Fawda on the other hand and that on spotting out of Javed Fawda after he alighted

from his Maruti white car at the said place (R.W. 7) A.P.I Dhobale had given a warning not to run away for the reason that he had begun to walk and on hearing this warning Javed Fawda suddenly whipped out a pistol from his waist and opened the fire towards the police and sensing immediately on the spot an imminent danger to the police, (R.W. 7) A.P. I Dhobale opened fire towards Javed Fawda followed by A.P. 1 Bhosle-Patil by way of retaliation and in self defence which fire caused four injuries to Javed Fawda and sustained in his vulnerable parts of the body and thus he was overpowered and incapacitated and subsequently he fell down on the ground and that afterwards the weapons in his hand was removed and that therefore the consistent case of the police placed before this Court from its very inception that there was an encounter genuine taken place and in which Javed Fawda, a man with criminal background has been killed. While saying so we hold, with every firmness, that" the encounter pleaded by the police during the midnight on 28-8-1997 at Sprott Road, Ballard Pier, Mumbai, is true and genuine and has thus taken place in furtherance of the right of private defence exercised by the concerned police. So much so the finding given by the learned Enquiry Judge in paragraphs 148 in his report is liable to be set aside and as such we are not inclined to accept the same.

83. Coming to deaths of Sada Pawle and Vijay Tandel, it is not disputed that Sada Pawle and Vijay Tandel were killed in the encounter between the police on 26-9-1997 at the junction of Rajawadi Road and M.G. Road, Ghatkopar. The encounter and consequent death of Sada Pawle and Vijay Tandel is seen to be established from the evidence of the witnesses for the petitioners and the respondents. Though Hausabai Gundu Tawde, sister of Sada Pawle examined as P.W. 1 and Anita Anand Pawle, brother's wife of Sada Pawle examined as P.W. 2 and Anand Bhimarao Pawle, brother of Sada Pawle examined as P.W. 3, Baldevsingh Jaswantsingh Panesa examined as P.W. 4, were examined, besides their filing affidavits on two occasions, this would clearly show that the fact that Sada Pawle and Vijay Tandel had been killed by the police at about 2 or 2.15 p.m. on 26-9-1997 at the junction of Rajawadi Road and M.G. Road, Ghatkopar. So also is the case of the police that in a trap held for the above two deceased at the junction of Rajawadi Road and M.G. Road, Ghatkopar, and in an encounter held at the same time and day while the police had retaliated the firing of the two persons above referred, in furtherance of their right of private defence, two persons sustained grievous injuries and succumbed to the same. Thus, it is the common case of both the parties that Sada Pawle and Vijay Tandel were killed in an encounter held between the police on the one hand and the two deceased on the other hand on the relevant time and day at the place mentioned above. There seems to be little difference between the claim of the two parties in the instant case. Prosecution witnesses 1 to 4 - Hausabai Tawade, Amita Pawle, Anand Pawle and Baldevsingh Panesar, sister, sister-in-law, brother and family friend of Sada Pawle respectively, claim that the said encounter with the deceased and the police had taken place at the relevant time and date at the junction of Rajawadi Road Junction, Ghatkopar, but the claim of the police pertains the place of encounter at the junction of Rajawadi Road and M.G. Road, Ghatkopar. It is not known what is the distance between the

two places neither in the report of the learned Enquiry Judge, nor either of the party has adduced any evidence, nor any material has been placed on the above said aspect, viz distance between the place where P.Ws. 1 to 4 claimed and the place where the police claimed for having taken the encounter operation in which both Sada Pawle and Vijay Tandel were killed. 84. The case of the petitioners, as culminated from the affidavits filed before the learned Enquiry Judge, this Court and the evidence adduced before the learned Enquiry Judge, is that P.W. 1 Hausabai is the sister of Sada Pawle, P.W. 2 Anita Anand Pawle is the sister-in-law of Sada Pawle but however wife of Anand Bhimrao Pawle, P.W. 3 Anand Bhimrao Pawle is the brother of Sada Pawle and P.W. 4 Baldevsingh Jaswantsingh Panesar is a colleague and friend of Anand Bhimrao Pawle. 85. P.W. 4 Baldevsingh Jaswantsingh Panesar claims that on 26-9-1997 at about 1.45 p.m. he had been to the house of (P.W. 3) Anand Bhimrao Pawle, as he had asked him to accompany him and his relatives to Shirdi and after having lunch, they set off for Shirdi in a fiat car. He was in the driver's seat as he was specifically asked to accompany them for the purpose of driving the car and next to him, in the front seat was Anand and next to him was his wife Amita Pawle. Anand's sister Hausabai (P.W. 1) and the two relatives whom Anand had introduced to Baldevsingh as Ajay and Bhaskar occupied the rear seat. It must be pointed out here that subsequently Baldevsingh has identified Ajay as Sada Pawle and Bhaskar as Vijay Tandel. Since Anand's residence was at Vidhyavihar Railway quarters; it took them just two minutes to reach the junction of M.G. Road and Rajawadi junction. When they reached the junction, Baldevsingh (P.W. 4) stopped the car for want of signal. It was at that moment he claims that a white metallic gray Maruti car came and stopped in front of their car across the Rajawadi Road and 5-6 persons alighted from the car in civilian clothes but however they were armed with revolvers and pistols and each of them had two weapons, one in each hand and one of them was holding a stun gun. One of them peeped from the window on the left side of the car and then came around to the front of the car to the side where Baldevsingh was, i.e. the driver's seat and peeped into the car and told the two guests who were seated in the rear seat to get down from the car in an orderly manner. The request made by them, seems to be a pure regimentation. The person holding the stun gun, however, pointed and rested the gun at the back of Baldevsingh's neck and told him not to start the car. Anand Pawle who was sitting by the side of Baldevsingh made his wife to get down from the left side and then Anand himself got down from the car and went to the person who was peeping into the car from the side of Baldevsingh and fell at his feet and begged him not to shoot his brother and stated that his brother was ready to accompany them wherever they wanted to go and went on requesting him not to do anything further. The said person kicked Anand (P.W. 3) in his abdomen but, however, Anand still was clung on the feet of that person. The said person asked other of his companions and asked them to remove Anand from the site by using foul and abusive language in Marathi. There was total commotion. Then according to (P.W. 4) Baldevsingh, the assailants tried to force open the rear door of the car, which was locked from inside and started banging on the car from all directions.

Their attempts were resisted. They could not succeed in opening the rear door because they were prevented by the person sitting in the rear seat. However the doors were ultimately opened and the occupants were pulled out from the car. There was a scuffle and Anand's sister hung on to Ajay (Sada Pawle) preventing him from being dragged further. All the three occupants in the rear seat were dragged near the Maruti car. Bhaskar (Vijay Tandel) was separated from the other two. However, Anand's sister still kept clinging on to Ajay (Sada Pawle) and all the while she kept shouting: "Mazya Bhavala Maru Naka". Ajay and Bhaskar (i.e. Sada Pawle and Vijay Tandel) were shouting: Amhi Kahich Karat Nahi Tari Pan Amhala Marat Ahel. Bagha, Bagha, Amhala Wachava". The person who was pointing the gun at Baldevsingh (P.W. 4) told him to get out of the car and to wait outside the same. It was at that time Baldevsingh saw Bhaskar (Vijay Tandel) standing a little away from him towards the right and shouting and Ajay and Anand's sister Hausabai were still clinging to each other. Two or three persons kept pulling Ajay (Sada Pawle) to one side and two-three persons kept pulling Hausa in the other direction to separate them but could not. According to Baldevsingh (P.W. 4) one of persons who was pulling Hausa away, shouted : " Banchyet Hila Sadayala Sang, Nahi Tar Hilach Adhi Ghalto". Ajay then told Hausabai; "Tai Mala Sod, Yana Mala Marayacha Ahe Tar Maroo De". At that time, a shot was fired and Bhaskar (Vijay Tandel) was seen falling down with a bullet injury on the left side above the abdomen with his shirt torn and open in front. Also at that time Hausabai fell down and the man who had peeped into the car shot Ajay on the head above the eyebrow from a distance of about 2-3 feet. One of the persons having a revolver or pistol sat down on the road on the right hand side of Bhaskar (Vijay Tandel) who was lying flat on the road and coolly aimed at the skull of Bhaskar and fired from a distance of 2-3 feet. Someone again fired towards Ajay. In the meantime, the entire traffic had come to a standstill. A wireless van arrived from the opposite direction and stopped at the spot. The person who first peeped into the car said "Kahi Nahi. Kahi Nahi, Amhi Pan Police Ahot". Since the traffic had come to a standstill. There were many vehicles at the spot and a lot of people had gathered there. It is estimated that about 200 people had gathered at the spot. According to Baldevsingh (P.W. 4), Ajay and Bhaskar (i.e. Sada Pawle and Vijay Tandel), did not resist, as they were unarmed. The driver of the wireless van was asked to take it out of the way and park the van near the tabela. The policemen, who were in uniform, took out stretchers from the van and loaded the bodies onto the stretchers and put them in the wireless van. Baldevsingh was made to get out of his car and sit in the back seat of the Maruti car. There was one more person sitting in the back seat. There was a bag containing weapons on the floor of the car in which Baldevsingh (P.W. 4) was made to sit. After sometime, all the assailants who had come in the Maruti car boarded the car, which was then driven to Tilak Nagar Police Station. 86. The case of the respondents, as spoken by P.S.I. Avinash Balchandra Sawant as R.W. 1, P.S.I. Subhash Ganpat Mayekar (R.W. 2), P.S.I. Hemant Rajaram Desai (R.W. 3) and P.C. No. 1642, Arun Dada Jadhav (R.W. 4), is consistent from the very beginning. Since all of them have deposed to the facts pertaining to the incident and about the steps

taken preparatory and subsequent to the incident and the incident itself is not disputed, suffice it for us to mention at this stage that the police team went to the spot of incident to effect the arrest of Sada Pawle, the most dreaded gangster of Arun Gawali gang pursuant to the information received by A.P.I. Salaskar who was not examined. Preliminary arrangements were made for the raid by A.P.I. Salaskar who led the police party in the said raid for the arrest of Sada Pawle. The police went to the said scene in two teams, in two cars, one car led by A.P.I. Salaskar and the other led by P.S.I. Mayekar (P.W. 2). According to the witnesses for the police, they reached the Rajawadi junction at Ghatkopar at about 12.15 noon and stopped their car about 100 meters away to the west from the electric pole No. NIC/011 which is marked "A" on the sketch. As per instructions of A.P.I. Salaskar, the constables took up positions in or about the area. The second car occupied by P.S.I. Mayekar and others stopped about 3-10 feet behind the first car occupied by A.P.I. Salaskar, P.S.I. Sawant and others. Admittedly, all the officers were armed with weapons. A.P.I. Salaskar and P.S.I. Hemant Desai had service revolvers, while P.S.I. Mayekar, P.S.I. Kadam and P.S.I. Sawant had service pistols with them. 87. According to P.S.I. Avinash Sawant (R.W. 1), at about 2.10 p.m. a fiat car bearing registration No. MH-01-R-1778 was seen approaching from the Vidya Vihar side along Rajawadi Road No. 7, moving from west to east. According to P.S.I. Sawant, when the car passed their vehicle, he noticed that the person in the driver's seat was Sada Pawle and besides him was another person. A.P.I. Salaskar took out his handkerchief and waived it signalling to another police posse or convoy and A.P.I. Salaskar started his car and overtook the fiat car from the left and obstructed the fiat car by placing the Maruti across the road in front of the fiat before the junction. The two cars stopped at a distance of about 10 feet from each other. The right side of the Maruti car was facing the front of the fiat car. According to the police officers, Sada Pawle got down from the fiat car holding an AK-56 in his hand. P.S.I. Sawant got down from the left side and moved from the left side to the rear of the car and came to the left front side of the fiat car. At that time Sada Pawle was standing near his car about 12 feet away from the spot where P.S.I. Sawant was standing. At the same time, A.P.I. Salaskar and P.S.I. Desai got down from the Maruti car. At that time the distance between Sada Pawle and A.P.I. Salaskar and P.S.I. Desai was about 10 feet. A.P.I. Salaskar called out to Sada Pawle and called upon him to surrender. At that point of time, Sada Pawle raised his AK-56 in defiance. On seeing this and apprehending imminent danger to the lives of A.P.I. Salaskar and P.S.I. Desai, P.S.I. Sawant fired at Sada Pawle. At the same time, Sada Pawle fired shots from his AK-56 in the direction of A.P.I. Salaskar and P.S.I. Desai. Simultaneously A.P.I. Salaskar and P.S.I. Desai started firing at Sada Pawle from their weapons. P.S.I. Sawant claims that he fired three shots in rapid succession in a second or two and he saw Sada Pawle falling down in an injured condition. At that time, when Sada Pawle fell, P.S.I. Desai was about 5-6 feet away from him. On seeing Sada Pawle fall, P.S.I. Sawant rushed towards Sada Pawle. At that time, P.S.I. Kadam also came there and removed AK-56, which was in the hands of Sada Pawle. P.S.I. Kadam removed the magazine from the AK-56.

Eight live cartridges were found in the magazine. One live cartridge was recovered from the chamber of the AK-56. P.S.I. Kadam informed P.S.I. Sawant and P.S.I. Desai and A.P.I. Salaskar that firing had also taken place on the other side of the car in which Vijay Tandel was injured and that Vijay Tandel was injured while firing at the police and that after Vijay Tandel fell down, P.S.I. Kadam removed the pistol from his hand, P.S.I. Sawant (R.W. I) claims further that P.S.I. Kadam showed them three live cartridges which he said he had recovered from the magazine of the pistol which was in the hands of Vijay Tandel and also one live cartridge which was recovered from the chamber of the pistol. 88. In the meanwhile, the police wireless van arrived. The traffic jam was cleared and P.S.I. Sawant along with constable Shinde took the four injured persons, namely, Sada Pawle, Vijay Tandel, P.S.I. Mayekar and Constable Arun Jadhav in the van to Rajawadi hospital. Sada Pawle and Vijay Tandel were declared dead before admission. 89. P.S.I. Mayekar examined as R.W. 2, leader of the other team, has deposed that A.P.I. Salaskar called him along with the other officers and informed him that Sada Pawle, the main shooter of Arun Gawali gang was likely to come to the Rajawadi junction between 1 p.m. to 3 p.m. in a fiat car, registration No. MH-01-R-1778. A.P.I. Salaskar instructed him to arrange for two Maruti private cars. Accordingly, he organised two Maruti cars and they proceeded in two teams to the spot, namely, the junction of Rajawadi Road and M.G. Road. While A.P.I. Salaskar and his team proceeded in one Maruti car, the witness and others proceeded in the other Maruti car. Then he states that he parked his car about 100 meters away from the electric pole marked "A" on the sketch. At about 2.10 p.m. a white fiat car passed by and A.P.I. Salaskar gave the signal by waving his handkerchief, started his car and overtook the fiat car from the left side and intercepted it just a little before the junction of Rajawadi Road No. 7 and M.G. Road. When the four occupants of A.P.I. Salaskar's car got out from the car, the person who was travelling in the fiat car got down from it, armed with AK-56. On seeing his face, this witness recognised him as Sada Pawle, the dreaded gangster. Hence this witness also opened the door of his car and got down. When A.P.I. Salaskar warned Sada Pawle to surrender, the person who was seated at the side of Sada Pawle also got down from the car with a pistol in his hand. This witness rushed between the fiat car and his Maruti car to apprehend that person accompanied by P.S.I. Kadam and Constable Arun Jadhav. While chasing that person and while he was about 5-6 feet away from this witness, P.S.I. Mayekar asked that person to surrender and informed him that they were policemen. That person immediately turned around and fired a shot from his pistol towards them. At that time, the said person (Vijay Tandel) was 8-10 feet away from this witness and others and this witness received a bullet injury on his left upper arm. This witness and P.S.I. Kadam started moving forward and fired towards Vijay Tandel who also kept firing at them. This witness states that he fired six rounds from his pistol within 2-3 seconds. Similarly, P.S.I. Kadam also fired towards Vijay Tandel and this witness states that he was at a distance of about 5-6 feet away from Vijay Tandel when he last fired at him and after that Vijay Tandel fell down holding the pistol in his hand. As per his directions, P.S.I. Kadam removed the

pistol from Vijay Tandel's hand. Constable Arun Jadhav also received injuries on his palm on his left hand, only after he had fallen. Constable Shetty identified Vijay Tandel. This witness states that after he and Arun Jadhav were taken to Rajawadi hospital by P.S.I. Sawant, he was given first aid and treated and allowed to go. Thereafter he went to Nagpada police hospital where he was again bandaged, treated and asked to take rest. 90. P.S.I. Hemant Rajaram Desai, examined as R.W. 3, corroborated the evidence of (R.W. 1) P.S.I. Avinash Sawant and (R.W. 2) P.S.I. Satish Mayekar except a small manner of deviation in claiming that when Sada Pawle got out of the car he was found with the weapon AK-56 pointing towards the ground. So also in support and substantiation of the respondents' case, (R.W. 4) Arun Jadhav recorded his evidence by confirming the claim of P.S.I. Mayekar (R.W. 2) shouting the other persons to surrender and Vijay Tandel turned around and fired towards them and P.S.I. Mayekar sustained bullet injury on his left arm and he also received the injury on his left thumb when the subsequent event happened. As rightly observed by the learned Enquiry Judge in this regard that it will be seen that the evidence of the above four police witnesses sets out the events, preparatory and subsequent to the encounter as well as the encounter itself in great detail and there seems to be no contradiction or omission in their evidence which would require us to disbelieve them. It is also pertinent to note at this stage that P.S.I. Sawant (R.W. 1) has in his evidence stated that A.P.I. Salaskar warned Sada Pawle to surrender. Sada Pawle raised his AK-56, in defiance and on seeing this, P.S.I. Sawant felt there was an imminent danger to the lives of A.P.I. Salaskar and P.S.I. Desai and therefore he fired on Sada Pawle. The learned Enquiry Judge, while observing so as above mentioned, in the context of minor deviation by P.S.I. Desai that the weapon AK-56 was found in a position of pointing towards the ground when Sada Pawle got out of the car expressed some doubt and held raising of such gun by Sada Pawle is a remote possibility. We differ totally from the said view of the learned Enquiry Judge, for, the said observation has neither logic nor any logical inference. It is, in this context if the matter is viewed, and if a dreaded gangster had acquaintance with the sophisticated gun AK-56 in his arm, got down from the car pointing towards the ground, then on getting warning from the police officers who surrounded surprisingly, it would take no minute for him to lift gun and aim at the police officers. This is a common knowledge of everyone, and being so, we fail to understand how the learned Enquiry Judge came to such an observation in paragraph 158 of his report. We have also perused the evidence of four police officers including Arun Jadhav (R.W. 4). Their case about the encounter taken place between themselves and the dreaded gangsters Sada Pawle and Vijay Tandel on the relevant time, date and place, is consistent from its inception itself, cogent and continuing and, all the more, convincing and as such the same is acceptable in toto. One reason for the said conclusion is that they are the actual participants in the operation encounter and that they had given their eye-witnesses accounting, barring that the 3rd respondent is the police officer had fired Sada Pawle and Vijay Tandel on more than several occasions and caused serious injuries on their vulnerable parts of both body and persons. The retaliation by the police

officers as claimed by R.Ws. 1 to 4 against Vijay Tandel has to be confined to (P.W. 2) P.S.I. Mayekar, P.S.I. Kadam and (R.W. 4) Arun Jadhao. The rest of the police officers, viz. P.S.I. Sawant (R.W. 1), A.P.I. Salaskar who was not examined and P.S.I. Hemant Desai (R.W. 3) are claiming themselves that they have shouted Sada Pawle on more than one occasions in an encounter taken place between themselves and the said two dreaded gangsters in the scene of occurrence as claimed by them at the junction of Rajawadi road and M.G. Road in Ghatkopar. 91. Further looking into the two post mortem notes produced by the police and the report of the Chemical Analyzer and tope-sketch prepared by the police with regard to scene of crime and indications of places where the two pool of bloods were found along with other identification marks given in the said sketch at Exhibit "O" with the spot panchanama prepared by Tilak Nagar Police Station and the recovery panchanama produced before the learned Enquiry Judge as the case records would clearly demonstrate that there was no evidence available contrary to the fact to be held that the alleged encounter had taken place between the police officers R.Ws 1 to 4 on the one hand and dreaded gangsters Sada Pawle and Vijay Tandel on the other hand at about 2.10 p.m. on 26-9-1997 at the junction of Rajawadi Road and M.G. Road in Ghatkopar and that in which two gangsters were surrounded by the police and in which while the police attempted to persuade them to surrender, they defied and tried to open fire towards the police by the arms holding by themselves known as AK-56 assault rifle and the pistol, and sensing imminent danger to their lives, the police opened the fire by way of retaliation and self defence and caused injuries on their vulnerable parts of the deceased and sustained grievous injuries and before they were got admitted in the hospital it was pronounced that they were dead. Post mortem on the dead body of Sada Pawle was conducted. The doctor who did the autopsy upon the dead body of Sada Pawle immediately found on the whole, 17 injuries on his person amongst whom eight were entry wounds and eight more were exit wounds - all caused by firearms and one more operation. The autopsy doctor further found that there were 17 injuries on the body of Vijay Tandel out of whom nine were entry wounds and seven were exit wounds. Autopsy doctor opined that due to firearm injuries and profused bleeding, both of them had died. 92. The Chemical Analyser's report upon the recoveries made under panchanama as corroborated by the spot panchanama would lead the positive conclusion and evidence that the empties recovered during the scene of occurrence were fired by the weaponry produced by the police and other empties were the contents of the bullet fire from AK-56 weapon. It is, therefore, made clear, in so far as the reference for the enquiry is concerned, the police had adduced overwhelming evidence including oral and documentary. The consistent case from the oral evidence of R.Ws 1 to 4 has been corroborated by the medical evidence viz. post mortem certificates issued by the doctor which in turn got substantiation and support from the report of the Chemical Analyzer. It is thus noted that cumulative effect of the recoveries made under the recover panchanama and the scene of occurrence shown in the rough sketch Exhibit "O" and the spot panchanama coupled with the opinion of the autopsy doctor in the two post mortem certificates and the Chemical Analyzers reports,

would clearly demonstrate the fact that there was an encounter genuine and truly happened in the afternoon of 26-9-1997 at about 2.10 p.m. near Rajawadi Road and M.G. Road junction at Ghatkopar within the jurisdiction of Tilak Nagar Police Station between the police posse on the one hand and the two dreaded gangsters on the other hand and in which while the police attempted to persuade them to surrender they defied and tried to open the fire towards the police by the arms holding by themselves known as "AK-56" assault rifle and pistol, the police had to retaliate by way of self defence and caused injuries on the vulnerable parts of the deceased and sustained grievous injuries to which both of them had to succumb to their injuries. Therefore, having thus perused the entire adduced recorded evidence by the police oral and documentary and other circumstances with motive we are constrained to hold that the alleged encounter held between the police and the dreaded gangsters deceased Sada Pawle and Vijay Tandel at about 2 p.m. on 26-9-1997 at Rajawadi Road and M.G. Road junction Ghatkopar Mumbai is true, genuine and nothing was made available to discredit or to differ the same. 93. The finding of the learned Enquiry Judge on this reference which is found in the second encounter is found in paragraphs 268, 269 and 270 of its final reports which may read like this. "268 In conclusion it may be observed that the respondents have come out with a clear positive case that the police had gone to Rajawadi Road junction to apprehend and arrest Sada Pawle the most dreaded gangster of the Arun Gawali Gang. However, they were compelled to shoot Sada Pawle, who was armed with an AK-56, as instead of surrendering when called upon to do so by A.P.I. Salaskar, Sada Pawle raised his AK-56 in defiance, causing an apprehension in the minds of the police officers, especially P.S.I. Sawant who admittedly fired the first shot at Sada Pawle, that there was an imminent danger to the lives of A.P.I. Salaskar and P.S.I. Hemant Desai. 269. The police have brought no evidence on record to show why they considered Sada Pawle as the most "dangerous gangster" of the Arun Gawali gang nor have they brought any evidence on record to show what offences have been registered against him. However, even assuming that the police are right in the assessment of Sada Pawle being the most dreaded gangster or a dangerous criminal who ought not to be allowed to roam freely in society, it was for the police to have established by cogent and compelling evidence that they had in fact gone to the scene of offence, only to arrest Sada Pawle which they have failed to do. Admittedly, the police first fired at Sada Pawle (of course since he raised his AK-56 in defiance). But the police have miserably failed to prove that Sada Pawle was armed with an AK-56 or that Vijay Tandel was armed with a pistol and they have themselves to blame for this as they did not take adequate precautions to preserve the fingerprints on the AK-56 and pistol and other available evidence. The number of bullet injuries on the vital part of the bodies of Sada Pawle and Vijay Tandel, disprove the police claim that they had gone to the spot to arrest Sada Pawle. 270. The encounter in which Sada Pawle and Vijay Tandel were killed, cannot be said to be a genuine encounter." 94. In paragraph 230 of his final report, the learned Enquiry Judge has also concluded that "it must be held that on a general appreciation of the evidence on record, the medical evidence appears to be more

consistent with the evidence of Baldevsingh (P. W. 4) rather than that of the police officers and, therefore, the respondents cannot be said to have proved their version of the incident". Further the learned Enquiry Judge in paragraph 192 held as follows: "It must be remembered that this is not a trial and we are not bound by strict rules of evidence. The earlier affidavits were filed to inform the Court in a general sort of way about the incident. It obviously could not be a detailed affidavit. It is only after this enquiry started that the petitioners got an opportunity to examine the witnesses. The omissions in the affidavit, therefore, could not be treated as contradictions as long as the basic structure of the petitioners' case finds place in the affidavits as it does in the present affidavit. The omission to mention details cannot amount to contradictions requiring this Court to completely discard the evidence of Baldevsingh. Furthermore, it must be remembered that Baldevsingh filed a second affidavit dated 27th March 1998 (Exhibit 10-A) retracting the earlier affidavit". In paragraph 193 of his report, the learned Enquiry Judge has observed that "Despite the subsequent affidavit dated 27th March 1998, retracting the earlier affidavit, Baldevsingh had had the courage to step into the witness box and face the cross-examination by Advocate Mr. Ponda for the respondents. The petitioners' witness Baldevsingh has come out of the cross-examination badly scratched and bruised and with his image tarnished but not damaged beyond repair." Further observations and conclusions made by the learned Enquiry Judge is found in paragraph 182 of his report which has been adverted to herein under:- "182. I am afraid I cannot agree with the submissions made by the learned Advocate Sebastian in defence of Baldevsingh's pretence at not knowing Sada Pawle. It is admitted that Baldevsingh was close to Anand Pawle and his family members. Baldevsingh has attended Anand Pawle's marriage and Anand Pawle's sister's marriage at Kolhapur. He has lived with them, and mixed freely with them as a member of their family. It is, therefore, difficult to believe that he was not aware of Sada Pawle and of his nexus with the underworld. Baldevsingh has in his subsequent affidavit dated 27-3-1998 admitted that he had visited Sada Pawle at Dagadi Chawl on certain days. After the incident, when the body of Sada Pawle was taken to Dagadi Chawl. Baldevsingh had admitted that he had visited Sada Pawle. Baldevsingh in his evidence pretended that he did not know Sada Pawle and that the person whom Anand introduced to him as Ajay was Sada Pawle. It was only when he was confronted with the photograph wherein he is seen carrying a child whom Baldevsingh admits to be the child of Sada Pawle; Baldevsingh's bluff is called. Having mingled with and wine and dined with Sada Pawle, it is difficult to believe that Baldevsingh did not recognize Sada Pawle when he met him at the house of Anand who was proceeding to Shirdi. It is also difficult to believe that Anand Pawle would have introduced Sada Pawle to Baldevsingh as Ajay. In fact, the question of introducing Sada Pawle to Baldevsingh, did not and could not have arisen as Sada Pawle was known to Baldevsingh." 95. While holding so, it is rather amusing to see that the learned Enquiry Judge has believed the prevaricated evidence of (P. W. 4) Baldevsingh Panesar. It is also noticed that the learned Enquiry Judge has disbelieved impliedly the evidence of (P.W. 1) Hausabai Tawade, sister of Sada Pawle and (P.W. 2) Amita

Pawle, sister-in-law of Sada Pawle and wife of Anand Bhimrao Pawle, (P.W. 3) Anand Bhimrao Pawle who is the brother of Sada Pawle. The reason being the following:- All the witnesses, viz, P.Ws. 1 to 4 filed the affidavits sticking to their claims that they are the eye-witnesses present during the encounters and filed their respective affidavits on 2nd/3rd March 1998 after the enquiry by the learned Judge was ordered by the Division Bench of this Court on 22-3-1998 or 30-3-1998 when the said four witnesses including P.W. 4 Baldevsingh filed a second affidavit having retracted the earlier affidavit filed and that the above all they gave their evidence before the learned Enquiry Judge. It is also worthwhile to know that inspite of the retraction made by them in the subsequent affidavit retracting the earlier one, they did not fair well in the witness box before the learned Enquiry Judge and for the said reasoning all the three witnesses, viz, P.Ws. 1 to 3, were treated as hostile and cross-examined. Even then according to the learned Enquiry Judge, the accounting or the answers given by the P.Ws. 1 to 3 are not hostile at all for any purpose. Hence they were rejected. The only evidence upon which the sole deficiency was projected by the learned Enquiry Judge, was (P.W. 4) Baldevsingh. Baldevsingh also was found in the same category. The learned Enquiry Judge proceeded to believe his evidence for the simple reason that inspite of his earlier affidavit he prepared all the affidavits of Anand Bhimrao Pawle (P.W. 3) and corrected and then he has admitted the said correction and that the said correction being based on different facts and omissions and the different story claimed in his own affidavit which has been found as retracted, the one and the only reason was that inspite of all prevarication and different stands taken by P.W. 4 Baldevsingh, the learned Enquiry Judge believed him for the reason of his daringness to come to the witness-box and claimed against the police. Having identified the same, we are totally surprised to see the legal approach adopted by the learned Enquiry Judge, which is definitely not oft par with the recognised procedural law after having gone through the entire accounting of P.W. 4 Baldevsingh, though relied upon and believed by the learned Enquiry Judge for the following reasons:- The case records and the evidence show completely that Baldevsingh's claim that he was an eye-witness to the occurrence proper by sitting on the driver's seat of the fiat car in which two deceased and other P.Ws. 1 to 3 were has been betrayed for the following reasons:- 1. He claimed that his car was over taken by the Maruti car driven by A.P.I. Salaskar and then another Maruti car, on the backside of the several police officers in plain clothes, came and they got down from their respective cars having armed in both the hands with revolvers and pistols from the very beginning. This probably and palpably appears to be a rank falsehood. It is rather astonishing to claim that the police officers, who used to nab the accused or dreaded criminals, on spotting them, alighted from the car armed with weapons in each of them in both the hands. It is nobody's case that each of 5-6 police officers or persons was having armed with weapons in both the hands. This aspect has not even been touched by the learned Enquiry Judge. 2. The substratum of the evidence of Baldevsingh (P.W. 2) attributes only two fire shots injuries to Sada Pawle and two fire shots injuries to Vijay Tandel by the police officers without reference to their names and identities and

thus showing each of the deceased had sustained only two bullet injuries from the police officers individually. If he had a look to the post mortem notes of both Sada Pawle and Vijay Tandel, the autopsy doctor found upon the body of Sada Pawle eight entry wounds and eight exit wounds and, according to his opinion, all the eight wounds could have been caused by fire arms and the deceased could appear to have died by the injuries caused by the firearms with profused bleeding. So also the post mortem notes of Vijay Tandel contains as many as seventeen injuries inclusive of nine entry wounds, seven exit wounds and other minor injuries. If the claim of Baldevsingh (P.W. 4) regarding Sada Pawle and Vijay Tandel, is confined to two guns shots for each, then it is a mystery to see that the bodies of Sada Pawle and Vijay Tandel had as many as 16-17 injuries caused by the firearms. That would mean, each of the bodies had received more than eight shot injuries by the firearms. In this context the evidence of Baldevsingh (P.W. 4) must fall to the ground and proved clinchingly that he was not at all present during the occurrence proper and that he was giving a false account before the learned Enquiry Judge and that is what the reason why he has filed the subsequent affidavit retracting his earlier affidavit.

3. It appears that he himself has prepared the draft of the earlier affidavit and the subsequent affidavit of (P.W. 3) Anand Bhimrao Pawle and himself had conceded that it was he who had removed certain passages in retracting the affidavit of (P.W. 3) Anand Pawle and responsible for not removing certain passages of his affidavit for which he has admitted in his evidence.

4. He was a person known to (P.W. 3) Anand Pawle and close associate of the said witness who had an acquaintance with Sada Pawle's family by attending the marriage of all the sisters of Sada Pawle on previous occasions and even on the date of occurrence he had gone to the house of Sada Pawle which may be Anand Pawle or Sada Pawle and had a lunch with all of them just prior to the alleged encounter and happened to be the driver of the vehicle to go to Shirdi even without driving license.

5. Another accounting of (P.W. 4) Baldevsingh was particularly that immediately prior to driving of the car with Sada Pawle and Vijay Tandel and P.Ws. 1 to 3 in the fiat car, all had non-vegetarian food in the house and within two minutes he took the car and drove along Rajawadi road and came to the scene of occurrence and from where he was intercepted by the police car. Therefore, according to him, immediately after their taking non-vegetarian food in their house within two or three minutes they have been intercepted at the place of occurrence by the police and in the shooting done by the police, deceased Sada Pawle and Vijay Tandel were killed. This claim of (P.W. 4) Baldevsingh is apparently false one, if he had a look into the post mortem notes in one of the column, the doctor who had no axis to grind against both the parties, had found that the stomach contents were semi-digested food. This opinion of the doctor runs clearly counter to the specific claim of Baldevsingh (P.W. 4). The thesis of the learned Experts on Medical Jurisprudence either by Mody, Parikh or Tailor, it is a settled principle that to have a semi-digested non-vegetarian food to reach its digestion, it must take atleast duration of one hour or over one hour but below 2 or 2 1/2 hours. In a full digestion of a non-vegetarian food, even though depends upon the age, it will take for a normal person mini-

mum five hours to have a complete digestion, according to the learned Authors. If the ages of P.Ws. 1 to 3 and both deceased and P.W. 4 - all seems to be middle ages and young ages, and if they took their non-vegetarian lunch and immediately they started to come, then the post mortem certificate would show that the stomach contains undigested food and not semidigested food. In the context of the conflict nature in accordance with the settled principles of law, we have to necessarily, give every importance to medical evidence for the reasons above stated. However, this would clearly demonstrate that Baldevsingh (P.W. 4) was not at all present during the occurrence, nor was he driving the vehicle at the time and manner claimed. 6. He claims further that though he was forced by P.S.I. Hemant Desai to prepare excess fare raised to make it clear that he had attended the duty on 26-9-1998 and made the follow up receipt for remittance of the same. Subsequently, he claims that he never attended the duty on 26-9-1998 but due to duress and threat forced by the police officer he has done so and therefore he wants that his version before the learned Enquiry Judge is to be accepted. Baldevsingh (P.W. 4) is not a man of illiteracy. He is a B.Sc. graduate, irrespective of the subject, which is not in dispute and a railway employee working as a ticket examiner. He claims surprisingly that he need not sign the muster roll for his presence or absence but enough for him to sign it once in a week about his attendance. This is a strange claim, which no railway or Government authorities would allow to do so as claimed by (P.W. 4) Baldevsingh. 7. He was threatened by the police to prepare a false receipt even though he was not on duty and prepared receipt for excess fare and remitted fares falsely. Certainly he knows the ways of dealing with such unlawful activities of the police as known to the law by reporting to authorities or the Court or the other institution but he was conspicuously silent for the obvious reason known to him. 8. He has conceded his retraction of the affidavit and in one of which he claimed that he was not an occurrence witness as he was not present during the occurrence proper and that he has admitted further he has filed the affidavit at the first instance and then retracted and he does not want to stick on to the contents of the affidavit for the reason that he came to know that P.W. 3 and other P.Ws have also withdrawn and retracted their earlier affidavits. It is, thus, made clear that he did everything only for the sake of P.Ws. 1 to 3 and deceased Sada Pawle. 9. Above all to show that this witness is a close associate in aid to deceased Sada Pawle and his family, that not only he accepted to drive the car to go to Shirdi on the relevant day by disclaiming that he had no acquaintance with their family but curiously admitted in his cross-examination that he had gone to Dagadi Chawl, the house belonging to and being occupied by Arun Gawali, one of the leaders of the Underworld gang, on a number of occasions along with (P.W. 3) Anand Pawle, the brother of deceased Sada Pawle. He also accompanied the dead body of Sada Pawle when it was taken from M.R.A. Morgue to Dagadi Chawl and he was there. All the above said aspects would clinchingly, demonstrate that Baldevsingh (P.W. 4) is a cooked up man, though braved, came out in his couching cross-examination with all abrasions and bruises, and his image is tarnished and totally damaged beyond any repair and proved clearly that he is a man set up by P.Ws. 1 to 3 in this regard to

speak about the police officers falsely. Therefore, placing reliance upon the evidence of (P.W. 4) Baldevsingh by the learned Enquiry Judge, in our respectful view, is totally a wrong approach, erroneous and incorrect and cannot at all be accepted. If the image of Baldevsingh (P.W. 4) is tarnished and his whole claim is bruised and resulted in the cross-examination, we do not understand how the damage caused by him can be repaired by the learned Enquiry Judge except by placing reliance upon his evidence which is unjustifiably and without any basis. It is therefore, in the present context, in the absence of any palpable and convincing reasons given by the learned Enquiry Judge to believe the evidence of (P.W. 4) Baldevsingh, we are totally constrained to reject his evidence in toto as untrustworthy and (P.W. 4) Baldevsingh was giving a total falsehood and that he was not at all present during the occurrence. If we reject the evidence of (P.W. 4) Baldevsingh, it would mean that the case of the petitioners, in its entirety, would go as unestablished to the existence of the prima facie even. 96. As we have already observed about the consistent and the truthfulness of the police case and police evidence and other documentary and oral evidence, it has cumulatively and constructively been established that the alleged encounter was true and genuine. In both the enquiries I and II, it has all along been observed by the learned Enquiry Judge that the police officers in the earlier encounter, A.C.P. Rao, D.C.P. Prasad and other police officers and at the subsequent enquiry P.S.I. Salaskar, P.S.I. Kadam and other officers have not been examined and that therefore due to the failure of non-examination of the police officers, adverse inference has to be taken and accordingly it has been taken. This, in our considered view with great respect to the learned Enquiry Judge, is a wrong approach and cannot at all be countenanced, as it lacks the legal sanctity. We have already quoted the order of the Division Bench of this Court directing the Principal Judge, City Civil and Sessions Court to hold an enquiry. This enquiry is supposed to be conducted by the learned Enquiry Judge. It is a fact finding enquiry for which the learned Enquiry Judge has itself admitted that this is not a trial to be conducted in accordance with the procedural law and the Evidence Act and this is only an enquiry which is being held to find out a truth of a particular fact or not. If that being so, we do not countenance the observation of the learned Enquiry Judge that either of the parties had failed to prove its case. The upper most task of the learned Enquiry Judge is to find out whether the alleged mistaken identity in shooting down Abu Sayama is true and that there was really a mistaken identity and further two encounters, in question claimed are true, or vague one. The above fact are to be found out by the learned Enquiry Judge for which he is bound to record not only the evidence produced by the respective parties and on their behalf, but also he is empowered to and bounden and liable to summons such of the witnesses whose evidence becomes necessary if he feels and examine them in order to find out the truth and fulfil his part of obligation as an Enquiry Judge. While holding this enquiry is not a trial at one stage and setting the norms for the same at several parts during the enquiry in preparing the report, the learned Enquiry Judge has go-by the norms adopted, and adopted a new norm, that is to say, he has conducted the enquiry like a trial ascribing the onus of a proof on private parties and adopting all the

different norms by the learned Enquiry Judge, is clearly an indicative of a bias intention in proceeding with the enquiry and the learned Enquiry Judge gave a finding thereon and that is what the reason, perhaps, we feel that the learned Enquiry Judge has placed reliance upon the evidence of (P.W. 4) Baldevsingh irrespective of the major infirmities found several in numbers with the character and conduct of Baldevsingh (P.W. 4). Enough for us, at this stage, to say that the different norms adopted by the learned Enquiry Judge in identifying credential legal value to the evidence of (P.W. 4) Baldevsingh, on the one hand, and P.Ws. 1 to 3 on the other, is not at all correct and cannot be countenanced in the eyes of law. By not summoning the police officers above referred by the learned Enquiry Judge, by himself, though vested with the powers to find out the truth of encounter or otherwise, casting onus of discharging burden upon either of the parties, by the learned Enquiry Judge, is an attempt which causes every prejudice to either of the parties and amounts to a arbitrary and biased finding. The non-summoning of any of such witnesses whose evidence became necessary to decide the points very much directed in the enquiry on the part of the learned Enquiry Judge amounts to a total negation of the well laid principles of law and judicial pronouncement which resulted in the deeming the enquiry report as a whole is dubious in nature and character. It is, therefore, for all the said reasoning, we are at every difficulty to countenance and endorse the finding given by the learned Enquiry Judge on this question. The term "Investigation" has been defined in section 2 Clause (h) of the Criminal Procedure Code as stated hereunder: "Investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person other than a Magistrate who is authorized by a Magistrate in this behalf. The investigation conducted, in other words, indicates the collection of materials and evidence for the commission of a crime, which was recognised either by the State or by the Court inclusive of the materials after setting the law in motion by registering a First Information Report. While thus the law was set in motion for the purpose of investigation, the investigating agency shall not fail in discharging their duties on any account. He has to act very diligently and truly and proceed with strict action so rapidly and collect such of the materials and evidence by recording statements of witnesses, collecting materials objects, arresting the accused who is wanted in that commission of crime and probe the possibility of a person or persons involved in such crime and prepare the chargesheet after the investigation is over and so on. To set the law in motion, to investigate a crime, locus-standi to lodge a complaint is unknown to our land. Anybody can go and set the law in motion by giving complaint either in writing or oral and if it is cognizable offence alleged of, the police officer in the police station must necessarily act in accordance with the provisions of section 154 of the Criminal Procedure Code. In these two encounters in the instant case, immediately after the occurrence proper viz. encounter operation is over, the injured persons seems to have been removed to the hospital and the complaints have been registered before the M.R.A. Marg Police Station and Tilak Nagar Police Station respectively by the police officers. Thus, without any delay, the two police station officers of the Mumbai Metropolis have set the law in motion

for investigation. There is a difference between the actual occurrence proper and the subsequent investigation, which took place. One cannot be expected to have nexus between the investigation and the actual occurrence proper. Investigation, in this respect, is deemed to be a legal process to be done as a follow up measure after the occurrence proper. To collect the evidence and material to prove the commission of crime or otherwise or the factual matrix, the investigation is to be done so expeditiously without any delay and that is what the settled principles now a days in our country by the higher hierarchy of the judiciary and with regard to this there cannot be any controversy by the Bar. 98. However, the learned Counsel for the respective parties, particularly Mr. Sebastian, Counsel appearing for the writ petitioners in Writ Petition No. 1032 of 1997 and Writ Petition No 1064 of 1997 and Mr. Majeed Memon brought to our notice that the F.I.R. in this case, though registered at the earliest point of time without any delay, has not been sent to the concerned Magistrate's Court of law as held by section 157(1) of the Criminal Procedure Code which reads as under:- "157. Procedure for investigation (1)-"If from information received or otherwise, an officer incharge of a police station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and if necessary, to take measures for the discovery and arrest of the offender." The High Courts, in our country, and the Apex Court have, time and again, repeatedly held that the First Information Report and other major material records like spot panchanama with rough sketch showing the topography of the scene, showing the existence physical features of the crime then and there, i.e. during the commission of the offence and enclosed report under section 174 of the Criminal Procedure Code and the remand report of the accused, if any , and the statements of the witnesses recorded, should reach the Court of competent jurisdiction without any delay whatsoever. That means all of them should have been forwarded and dispatched by the investigating agency to the Court of law and, failure to do so, will give rise to inclusion of false name in the criminal case to face unnecessarily and harass them and possible interpolation. The judicial pronouncement made by the higher hierarchy of the Court, particularly the Supreme Court, held in no uncertain terms that the First Information Report and the material objects and the spot Panchanama should reach the Court as expeditiously as possible without any delay, more particularly the First Information Report should reach the Court without any iota of delay whatsoever about the commission of a cognizable crime and, in short, generally to say, that the investigation of a grave crime complained of, is to be investigated with every promptness and perfection. 99. The investigating agency, viz. the police, particularly in-charge of the investigation is, thus, vested with onerous duty of acting swiftly and as expeditiously as possible, first to send the First Information Report to the Court of competent jurisdiction about the commission of

a possible cognizable crime and a copy of which to the higher authority and then immediately all other relevant materials collected during the course of investigation and after investigation is over, a final report is to be sent with all documents collected and record to be forwarded to the Court under section 173 of the Criminal Procedure Code. On receipt of such report with the documents, if the Court has perused the same and found the substance to frame the charges under the relevant provisions of law, he has to proceed further. This is the legal position. 100. In discharging the above duties, the police personnel have got onerous duties to be performed and that in this regard the police are not only answerable and their duties have become so onerous but they are also liable and accountable not only to their immediate master but also to the society as a whole. If only they discharge their duties properly, punctually and correctly, then only the law and order could be maintained and the society, as a whole, and large population will be protected in a democratic set up like the one in our country. It is, therefore, become imperative that law and order enforcing authority in maintaining the law and order, performs the investigation in such a rapid ways with every acuteness, punctual and perfection as provided by law. 101. In the context of the above admitted position, if we happened to countenance the contention of the learned Counsel appearing for the petitioners with regard to certain lapses committed in the instant case, we are bound to say that we have been perturbed very much upon the laxity and callousness on the part of the investigating agency in the instant petitions. Though the crime alleged under section 307 read with 34 of the Indian Penal Code in the encounter case of death of Abu Sayama in the first encounter, has been duly reported immediately by A.P.I. Dhobale after the occurrence to M.R.A. Marg Police Station and registered as C.R. No. 360 of 1997 and thus the law was set in motion, the Bar for the petitioners pointed out that the First Information Report or a copy of the same has not at all been forwarded to the Court for more than nearly three months from the date of occurrence. Likewise, it is not known that immediately the First Information Report registered in the subsequent case of Tilak Nagar Police Station is forwarded to the Court of competent jurisdiction. It was pointed out that only after the lapse of more than three months on 28-11-1997, when a copy of the application was filed before the concerned Magistrate's Court for grant of copy of the First Information Report a note was found that no First Information Report was sent in this regard. Only after that the F.I.R. seems to have been forwarded to the Court of law. Another most distressing laxity on the part of Mumbai police identified in this case is that almost in all the encounter cases, they failed to take such or other necessary arrangements to preserve the fingerprints of the persons who handled the weapons in order to provide the nexus to the weapons seized of and by the persons who handled the same. The preservation of the fingerprints or the weapon handled by the deceased during the encounter assumes much significance and importance for the reason that it provides actual nexus and interaction between the accused and the weapon that he has handled the same during the occurrence proper. There cannot be any difficulty in preserving the same if it is available for the reason that the person handled the same weapon was totally overpowered and

incapacitated, brought down to the ground and thereafter the police happened to reach his person and carefully removed the weapon from the clutches or the hands of such person. While the police are able to set to remove the weapon from the accused person, the same logic can be made applicable to the police to take arrangement to preserve fingerprints of the weapon, which was used in the occurrence proper. This has not been done conspicuously and continuously. This grievance of the learned Counsel for the petitioners appears to us a well founded one and as such we accept the same. The most disturbing feature made available in the instant case is that P.S.I. Kadam and A.P.I. Dhobale, in both the encounters, removed the weapons from the accused so carefully in the presence of the Senior Police Officer, it is rather unfortunate that they had not taken any steps to preserve in securing the fingerprints of the accused on the weapon itself. 102. There is no evidence in this case led on behalf of either of the parties particularly by the police that immediately after the occurrence and the injured had been removed from the scene of occurrence and after having the law set in motion by registering a case in the concerned police station that the scene of occurrence was guarded by the police party in order to safeguard the existing physical features as was available then for the purpose of making the exact and perfect spot panchanama or otherwise and to draw a topography of the rough sketch pointing out the existing physical features which are more prominently required for the purpose of analysing the truth or otherwise of the entire case. The investigating agency, in the instant case, appears to have not done so. 103. No topography of the sketch has been drawn by the police. We are rather surprised to see, without specifying or drawing a rough sketch of the topography, how the investigating agency can complete the perfect and prompt investigation to be made in the case in question. Not only the material documents, like the report or the statements recorded immediately have been forwarded to the Court with top priority given to the First Information Report and the material objects collected but also it is not known in the instant case when the investigation has been completed and the final report has been sent to the Court in the two encounters cases for the reason that complaints were lodged by the police against the deceased accused for the offence of attempting to murder the police officers. 104. Once the First Information Report registered by the concerned police station for the commission of cognizable offence under section 154 of the Criminal Procedure Code is done and registered and the copy of the same has been sent to the Court, and the Court is seized of the matter, then, in our considered view, the police, being the instrumentality of the Government, viz the State of Maharashtra-the 1st respondent, have no legal authority to get the final report and close the case by itself without informing the Court of law. In other words, if so done otherwise, it is to be deemed that the procedure has become highly deprecated. 105. Lastly, we have noted with every pains that the police have failed to produce such of the materials and the important witnesses before the Court of law, particularly in the instant case and examine them for the purpose of recording evidence so as to substantiate their case either to find out the truth or otherwise or a prima facie case, once they are the party and that too an offending party claiming a privilege of right of

private defence by way of retaliating the fire while nabbing the dreaded criminals and accused it has become the imperative duty of the police to examine all or such of the witnesses which are necessary to be examined before the Court of law and that has not been done so in the instant case. 106. All the above, in our considered view, has to be done by the investigating agency of the Mumbai police during the time of investigation of the case and subsequently therefore the same latches can be termed as serious laxity on the part of the investigating police and, however it may be serious, it cannot be allowed to have a nexus between the actual occurrence proper and to decide upon the basis of which the actual occurrence proper is a falsehood or genuine one. 107. Minor discrepancies, omissions or contradictions in minor nature and character, negligible to be allowed due to human fallibility, have to be taken into consideration and are to be considered while assessing the truth or otherwise of a given occurrence. Similarly because of minor discrepancies, omissions and contradictions even if any, courts are not always to be carried away by such of minor aspects but to be confronted with the legal and legal evidence alone. We are also constrained to hold that the discrepancies, omissions and contradictions of minor in nature and character do not always rule out the entire occurrence proper but, on the other hand, the improvement also made by one of the witnesses, can be identified by the Court while assessing the genuineness or otherwise. In our considered view, the learned Enquiry Judge, after having pointed out the above lapses and laxity on the part of the Mumbai police, particularly in carrying out the investigation not in accordance with procedural law laid down on the score and placing reliance upon the minor deviations, like discrepancies, omissions and contradictions, has proceeded to give various findings and observations, as if he is conducting a trial of a murder case in which the prosecution is bound to prove its case beyond reasonable doubt whereas the accused is not. It is not a correct approach and the basis upon which the learned Enquiry Judge has proceeded on different norms setting as the basis, is highly erroneous, in our respectful view, and that, therefore, we are not in a position to appreciate and accept the finding given in the second encounter of the learned Enquiry Judge. 108. Pertinent, at this stage, to advert a case law held by the Supreme Court in *People's Union for Civil Liberties v. Union of India*, as hereunder:- "It may also be that under these conditions, certain additional and unusual powers have to be given to the police to deal with terrorism. It may be necessary to fight terrorism with a strong hand, which may involve vesting of good amount of discretion in the police officers, or other paramilitary force engaged in fighting them. If the version of the police with respect to the incident in question were true there could have been no question of any interference by Court. Nobody can say that police should wait till they are shot at. It is for the force on the spot to decide when to act, how to act and where to act. It is not for the Court to say how the terrorists should be fought. We cannot be blind to the fact that even after fifty years of our independence, our territorial integrity is not fully secure. There are several types of separatists and terrorist activities in several parts of the country. They have to be subdued. Whether they should be fought politically or be dealt with by force is a matter of policy for the Government to determine. The

courts may not be the appropriate forums to determine those questions. All this is beyond dispute.” 109. Following the said ratio and pronouncement made by the Supreme Court as it has become the law of the land by virtue of Article 141 of the Constitution of India, everyone has to follow the same and accordingly this Court, while rendering a judgment in Criminal Writ Petition No. 227 of 1998 (Unreported Judgment) and Writ Petition No. 228 of 1998 *Vandana Vikas Waghmare v. The State of Maharashtra and others*, decided on 22nd and 23rd June, 1998 (by a Division Bench to which one of us (N. Arumugham, J.) is a party, has also followed the said authority and dismissed the said writ petition on the same ratio. 110. In *D.K. Basu v. State of W.B.*, , the Supreme Court in paragraph 33 of the judgment had the occasion to observe the following ratio :— “There can be no gainsaying that freedom of an individual must yield to the security of the State. The right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different statutes has been upheld by the courts. The right to interrogate the detenus, culprits or arrestees in the interest of the nation must take precedence over an individuals’ right to personal liberty. The Latin maxim *salus populi suprema lex* (the safety of the people is the supreme law) and *salus republicae suprema lex* (safety of the State is the supreme law) co-exist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however, must be “right, just and fair“. Using any form of torture for extracting any kind of information would neither be “right nor just nor fair“ and, therefore, would be impermissible, being offensive to Article 21. Such a crime/suspect must be interrogated indeed subject to sustained and scientific interrogation-determined in accordance with the provisions of law. He cannot, however, be tortured or subjected to third-degree methods or eliminated with a view to elicit information, extract confession or derive knowledge about his accomplices, weapons etc. His constitutional right cannot be abridged in the manner-permitted by law, though in the very nature of things there would be qualitative difference in the method of interrogation of such a person as compared to an ordinary criminal. Challenges of terrorism must be met with innovative ideas and approach. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to “terrorism“. That would be bad for the State, the community and above all for the rule of law. The State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto them. That the terrorist has violated human rights of innocent citizens may render him liable to punishment but it cannot justify the violation of his human rights except in the manner permitted by law. Need, therefore, is to develop scientific methods of investigation and train the investigators properly to interrogate to meet the challenge.” The Supreme Court in *Deo Narain v. State of U.P.*, , while dealing with the scope of section 102 of the Indian Penal Code for exercising the right of private defence, has held the following :— “This right rests on the general principle that where a crime is endeavoured to be committed by force, it is lawful to repel that force in self-defence. To say that a person could only claim the right to use force

after he had sustained a serious injury by an aggressive wrongful assault is a complete misunderstanding of the law embodied in section 102. The right of private defence is available for protection against apprehended unlawful aggression and not for punishing the aggressor for the offence committed by him. If after sustaining a serious injury there is no apprehension of further danger to the body then obviously the right of private defence would not be available. Therefore, as soon as a reasonable apprehension of danger arises, the right of private defence can be exercised. Again, the nature of apprehension depends upon the use of the weapon as also the manner in which the weapon is used. Merely because the complainant's party had used lathis, it cannot be said that the accused was not justified in using his spear, particularly when a blow with a lathi was aimed at a vulnerable part like the head." Mr. Sebastian, learned Counsel for the petitioners, submitted a catena of judgments as under : — 1. The judgments, which deal with section 161 of the Bombay Police Act: State of Maharashtra v. Atmaram, A.I.R. 1966 S.C. 1786, vide paras 2, 3 and the last para in column 2 on page 1787. S.K. Jain v. T.L. Thakur, 1991 Cri.L.R. (Mah.) 445, vide paras 4, 5, 19, 23, 24, 25 and 28. 2. The judgments which deal with C.B.I, inquiry: Navkiram Singh v. State of Punjab, . K.S. Sodhi v. State of U.P., 1994 Supp. (1) S.C.C. 143, vide paras 1 and 2. Mohd. Anis v. Union of India, 1994 Supp. (1) S.C.C. 145, vide paras 2 and 5. Paramjit Kaur v. State of Punjab, , vide paras 11, 13 and 14. 3. The judgments in regard to Administrative Liquidation is not permissible: People's Union for Civil Liberties v. Union of India, , vide paras 1, 3, 4, 5, 8, 9 and 13. The judgment of Andhra Pradesh High Court in Writ Petition No. 16868 of 1995 vide pages 5, 18, 27, 45, 51 and 53 and one English case law pertaining to the relevance and validity of Public Interest Litigation Queen's Bench Division 1968(118) Regina v. Commissioner of Police of the Metropolis, and soon and also the judgment of the learned Single Judge of the Bombay High Court held between S.K. Jain v. T.L. Thakur, 1991 Cri.L.R. (Mah.) at page 445. 111. All the above judgments have been perused and dealt with but, in our considered view, since we are firm and constrained to hold that the two encounters are found to be genuine and true really happened and in which the police have retaliated by fire causing serious injuries to the three deceased persons in the instant cases and that there was no mistaken identify for Abu Sayama while we find no quarrel with the propositions of law and legal ratio in all the above case laws, we are of the view that the importing of such legal ratios from the above case law, does not render any help to the petitioners to improve the case. Therefore, we are not inclined to advert or to deal with every individual case by one after another in this judgment for the sake of brevity. 112. In the enquiry in both the encounters cases, it is the usual pattern of the learned Enquiry Judge to hold while attributing onus of proving their case is upon them, one of the norms as set out by him while observing so in his final report, has also observed that the post mortem notes and the report of the Chemical Analyzer have not been proved by calling the authors of the documents and that therefore though the said documents were not made available before this Court and the learned Enquiry Judge, it has to be held that it has not been proved. In this regard, we find that there is fallacy in the

said observation for the reason of credibility of the post mortem notes and the Chemical Analyzer's report given under the law. At this junction, it has become relevant to note section 293 of the Criminal Procedure Code, which provides as follows:— "293. Reports of certain Government scientific experts.—(1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code." In sub-section (4) of the above section, it has been stated that this section applies to the following Government scientific experts, namely:— (a) any Chemical Examiner or Assistant Chemical Examiner to Government; (b) the Chief Inspector of Explosives; (c) the Director of the Finger Print Bureau; (d) the Director, Haffkeine Institute, Bombay; (e) the Director, Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory; (f) the Serologist to the Government. Under section 294 of the Code, it has been stated that, "where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document." 113. The cumulative effect of the above two provisions of the Criminal Procedure Code appears to have totally ignored by the learned Enquiry Judge while observing in his final report to say that the post mortem report has not been proved and the report of the Chemical Analyzer has not been proved in both the encounters. Even if, there is any difficulty created by and on behalf of the respective parties, since the learned Enquiry Judge is directed to conduct a informal enquiry, nothing could prevent him to look into the said documents and assess the same for its genuineness or otherwise. If the said enquiry is said to be only an informal enquiry and not a trial as laid down by the Code of Criminal Procedure, what is the norm or parameter which the learned Enquiry Judge has adopted to hold that such and such has not been proved and such and such party or police has not been examined. As we have already adverted to, as the instant enquiry having been conducted by the learned Enquiry Judge, is an informal enquiry and which has not been controverted, the learned Enquiry Judge ought to have summoned by himself suo moto such of the witnesses who deem it necessary and whose evidence becomes essential to find out the truth or otherwise of the question for which the enquiry was directed and instead casting the burden upon the shoulder of either of the parties and observing the same without summoning any of the witnesses and stating that he has not discharged his onus, or he has not proved his case, in our respectful considered view, is not a correct approach and as such the said approach cannot be at all countenanced in the eyes of the procedural law. 114. On our direction, Mr. Paransingh, D.C.P. Crime had shown us an empty AK-47 assault rifle and demonstrated before us in the open Court as to how it was functioning. According to him, magazine part of the rifle has the capacity of filling 32 bullets within and three more in the chamber of the rifle. The magazine is removable from the gun. There is

a cock device provided near trigger of the gun, which would operate on three points. On the first point, it will provide a total lock to the entire firing and at the second stage it will give for all rounds in magazine and the chamber to be fired and the 3rd gun of the said device will provide the firing of one bullet after another. That would mean that each round would have to be fired at the single triggering off. He has stated that functioning system of AK-47 is, more or less, and almost the same in AK-56 gun also. The above detailing was done before us in the open Court in the presence of the learned Counsel for both the parties. From the above, it is noticed that Sada Pawle, during the relevant day and time and encounter, had his AK-56 assault rifle in his hand with the device for firing of the single bullet or the entire bullets, is neither in the evidence nor the contention of any of the Counsel for the parties on record. Therefore the above position will go a long way to speak about the false line of the petitioners.

115. It was also urged by the Bar on behalf of the parties as well as the learned Enquiry Judge that there are some discrepancies and inconsistencies in the distance of fire range by the police from the deceased in the 2nd encounter purely basing upon the post mortem notes and Chemical Analyzer's report. Tattooing blackening or singeing marks alone cannot make the things proved beyond all realm of doubts with all the accurate distances at which shots can be fired. Two feet to ten feet is a close range, one could have a maximum or a minimum allowance to the thesis of the learned Authors Mody and other Authors in laying down the common principles emphasized on the Medical Jurisprudence. The evidence of the eye-witnesses who are the police officers de hors their accounting and other corroborating circumstances viz. post mortem notes and the Chemical Analyzer's report would clinchingly substantiate the case of the respondents that the real encounter had taken place and in which police had retaliated with their firearms and caused injuries to both the deceased in furtherance of their self-defence and to this respect the learned Enquiry Judge has not dwelt the matter at any stage and that, therefore, we are not in a position to agree with him in holding that the encounter was a fake one.

116. The learned Counsel appearing for the writ petitioners has dwelt their most of the attacks and contentions merely on the basis of preponderance of probabilities and improbabilities to be inferred from the evidence of the police officers. However, it appears for us while they are projecting so much of the contentions they have ignored their evidence and documents filed on behalf of the petitioners which have its own tilting factors in favour of tilt respondents police. In any event, the totality of the evidence, both oral and documentary adduced in this case during the enquiry before the learned Enquiry Judge, clearly demonstrates that the two encounters consistently and cogently from the very beginning pleaded by the police, have happened at the time and place where they had claimed and in which there was an exchange of fire between the gangsters on the one hand and the police posse on the other hand and while the police, after having made attempts to persuade them to surrender for the purpose of arrest, since they defied and aimed at the police sensing imminent danger to their lives, the police had retaliated in self-defence by opening fire thereby caused the injuries on vulnerable parts of the body of the deceased who had necessarily to suc-

cumb for the same and this has clinchingly and categorically been established and found out from the adduced evidence on the record. 117. The above our elaborate observations and findings give a total compliance and response to the various contentions raised by Mr. Sebastian, the learned Counsel appearing for the petitioners -The Committee for the Protection of Democratic Rights- and Mr. Majeed Memon, learned Counsel appearing for the petitioners in Writ Petition No. 1032 of 1997. The joint efforts made by the Bar on behalf of the voluntary associations in this public interest litigation was mainly based upon the news media published in the local newspapers and the same has been relied on as documentary evidence while preparing this as public interest litigation and that in which various reliefs have been asked for particularly in order to find out genuineness or correctness of the so-called encounters pleaded by the police and to avoid the recurrence of the same by conducting the enquiry by some other investigating agency and also to set up other independent body to monitor and to save and protect the human rights and so on. It is also noticed that from the years 1995 onwards till the date of filing the writ petition, in the instant batch, 99 encounters have been taken place resulting in the deaths of 135 persons so far. Of course, it was true, the learned Counsel Mr. Sebastain and Mr. Majeed Memon and Chari for and on behalf of the writ petitioners have dwelt their first contention that in almost in all the encounters claimed by the police right from 1965 (sic 1995) onwards, a general pattern of cases for death of the police bullets pierced on the alleged gangsters and the injuries seem to have been found above the naval parts of the deceased. This uniform pattern causes every suspicion and if so taken in that sense, the learned Counsel has pleaded that it has become necessarily to prove each and every one of the same, even though the said contention appears to have had some force in the context of the uniform pattern of the encounters claimed by the police. We do not find any tangible or useful clue to reopen all the cases individually or jointly for the purpose of probing any more hereinafter for the reasoning that the present public interest litigation has been filed only on the basis of news published in the local media. It is, in this context, we are bereft of any material or proof and authenticity of and the genuineness and the source of the said news so as to find out a basis of nexus to accede the request of the learned Counsel appearing for the petitioners. Of course, a sworn affidavit reply has been filed by one of the top police officers of the Mumbai Police viz. the Commissioner of Police and A.P.I. Mayekar has also filed a separate affidavit with a separate sheet detailing the number of cases registered and pending against deceased Sada Pawle and Vijay Tandel in various police stations and within Mumbai Metropolis. The total number of pending cases either at the stage of investigation or trial against deceased Sada Pawle, according to the Index supplied along with sworn reply, is 31 in number and against Vijay Tandel 15 in number - all cognizable crimes involving of a serious nature. From this, it can be deduced without any hesitation that the said two deceased are the dreaded gangsters and if not notorious criminals, always indulged in committing serious offence in the Mumbai Metropolis. While hearing the three writ petitions, the Division Bench of this Court consisting of A.P. Shah & J.A. Patil, JJ., on 12-10-1997. while

passing the order of direction for conducting an enquiry by the learned Enquiry Judges, has taken these two encounters cases alone as an illustration for finding out the truth or otherwise or the existence of a prima facie case in all the 99 encounters resulting in 135 deaths, It is, at this juncture, has become necessary for us to advert the reply affidavit filed on behalf of the 2nd petitioner who is one Mr. Yogesh Vadilal Kamadar in Criminal Writ Petition No. 1146 of 1997. In para 2 of the said affidavit of rejoinder filed in November 1997, he has stated the following:- “I say that in pursuance of the direction dated 18-11-1997, the petitioners were supplied with the copies of post mortem notes and the medical certificates in case of persons killed and injured in cases of encounters during the years 1995, 1996 and 1997. I say that the index, which is supplied along with the said post mortem notes and medical certificates disclose the names of persons killed or injured, date of the incident and Cr. Nos. are F.I.R. Nos. or such incidents”. And that further in paragraph 5 he has stated as follows :- “Copies of the F.I.Rs. brought for inspection were of 9 CRS of encounter deaths that took place in 1995. 43 CRs of encounter death that took place in 1996 and 47 CRs of encounter deaths that took place upto 18-10-97. All the said C.Rs were registered at the respective police station on a report given by the Police Officer who was a party to the respective encounters.” 117-A. Since the two incidents, viz., the encounters, very much dwelt with in these writ petitions and the enquiry by the learned Principal, City Civil and Sessions Court, Mumbai, had been opted to for the purpose of probing the matter to find out the existence of prima facie case of the truth or otherwise or genuineness of the same, the enquiry, in question, has been conducted and accordingly the report of the Enquiry Judge has been done with the findings. But however, after a careful and meticulous consideration of the same, we are not inclined to accept the said finding with regard to the two encounters but on the other hand we have held that the said two encounters are of genuine character in nature and truly happened and in which three persons have been killed in retaliation by the police in self defence. Therefore, we are not accepting the findings given by the learned Enquiry Judge on the two encounters and then with regard to prayer of delegating the entire encounter cases to further probe or to other investigating agencies, since no material has been supplied or placed before us to show even the existence of prima facie case and since the whole case has been built up upon the news published in the local newspapers which are different and distinct in nature and character, we are not in a position to accede to their request made in writ petitions for and on behalf of the learned Counsel for the respective parties. 117-B. In view of the lapses and laxity on the part of the investigating staff of the Mumbai police in carrying out the investigation, as we have pointed out already and pointed out by Mr. Sebastian and Mr. A. Majeed Memon, learned Counsel appearing for the writ petitioners in Writ Petition Nos. 1032 of 1997 and 1064 of 1997 that unless and until the said lapses and laxity are cured, the possibility of mistaking or taking undue advantage of concept of private defence or self defence provided to the police by virtue of sections 161 of the Bombay Police Act and section 46 of the Criminal Procedure Code and section 102 of the Indian Penal Code. After having considered the whole gamut of the case,

we may agree and endorse the view of the contention of the learned Counsel. To illustrate, one of the said laxity during the course of arguments, we have put one question to Mr. V.R Manohar, learned Senior Advocate for the respondents who was resisting these writ petitions on behalf of the respondents-police, that as to why after the encounters were over, did not the investigating staff of the Mumbai police or the respondents-police had failed to make any arrangement to preserve the fingerprints of the persons who handled the weapons in the place of occurrence or investigation staff, the response placed by Mr. V.R. Manohar, learned Senior Counsel is that since the very impel of the police at that time was self-preservation and their primary duty was to incapacitate the assailants, viz. gangsters or criminals, they could not do so. We are not, with great respect to the learned Counsel, for a single minute to countenance with the learned Counsel appearing for the respondents-police. We are saying so for the simple reason that the very nexus, proximity and the important clue and the interaction existing and made available is the fingerprints of criminals who handled that weapon and if those preservations tallied with the fingerprints of the deceased like the one of first encounter which deals with the death of Abu Sayama that gives a direct and useful evidence before the Court of law to abdicate or response to unnecessary doubt of violating the fundamental rights. It appears apparently that there is no impediment or obstacle for the police to preserve the fingerprints, rightly available on the weapons they have recovered because admittedly they have recovered the said weapons immediately after operation encounters and the criminals have been brought down to the ground, that means after having totally incapacitated. Therefore, the inaction of the above nature and kind on the part of the police would go a long way for its consequential affairs, which in our view, would precipice filing of the false petitions and room for spreading any type of lobby depending upon the circumstances and the capacity. Therefore, in our considered view, in the context of the rival contentions held and the lapses and laxity pointed out above, as conceded by the bar for the respective parties both in the writ petitions and during the course of arguments, we are very much constrained to give the following guidelines to the respondents-police to be followed hereinafter necessarily and mandatory:-

1. Whenever the respondents-police are on receipt of intelligence or a tip off about the criminal movements and activities pertaining to the commission of grave crime, it shall be entered into a case diary. If the receiving authority is the Police Officer of a particular police station, the relevant entry has to be made in the General diary and if the receiving authority is the higher Police Officer, the relevant entry to the said effect has to be made by a separate diary kept and provided therefor and then pursue further in accordance with the procedural law.
2. Regarding any encounter operation is over and persons are killed or injured and the same is reported to either orally or writing to the police in furtherance of section 154 of the Criminal Procedure Code, it shall be registered in Crime Register of that particular police station and that further the said First Information Report along with copies to the higher officials and the Court in original shall be sent with immediately without any delay whatsoever through proper channel so as to reach to the Court without any delay at all. A report,

as enjoined under section 157(1) of the Criminal Procedure Code, shall also be followed necessarily by the concerned police station. 3. After setting the law in motion by registering the First Information Report in the Crime Register by the concerned police officer of the particular police station, the investigating staff of the police shall take such steps by deputing the man or men to get the scene of crime guarded so as to avoid or obliterate or disfigure the existing physical features of the scene of occurrence or the operation encounter. This guarding of the scene of occurrence shall continue till the inspection of occurrence takes place by the investigation staff of the police and preparation of spot panchanama and the recovery panchanama. 4. The police officer who takes part in the operation encounter or the investigating officer of the concerned police station, shall take all necessary efforts and arrangements to preserve fingerprints of the criminals or the Dreaded gangsters of the weapons who handled immediately after the said criminal was brought down to the ground and incapacitated and that the said fingerprints, if properly taken and preserved, must be sent to the Chemical Analyser for comparison of the fingerprints of the dead body to be taken. 5. The materials which are found on the scene of occurrence or the operation encounter and such of the materials including the blood stained earth and blood stained materials and the sample earth and other moveable physical features, shall also be recovered by the investigating staff under the cover of recovery panchanama attested by the independent witnesses. 6. To fix the exact date and actual place of occurrence in which operation encounter has taken place, a rough sketch regarding the topography of the existing physical features of the said place shall be drawn by the police or the investigating staff of the police either by themselves or by the help of the staff of the Survey Department even during the spot panchanama is prepared. 7. The inquest examination shall be conducted by the investigating staff of the police on the spot itself without any delay and statements of the inquest witness are to be recorded under section 161 of the Code of Criminal Procedure and the inquest panchanama shall also be sent along with the above case record prepared along with the First Information Report without any delay whatsoever to the Court. 8. If the injured criminals during the operation encounter are found alive, not only that they should be provided medical aid immediately but also arrangements and attempts shall be taken by the police to record their statements under section 164 of the Criminal Procedure Code either by a Magistrate, if possible and if not, by the Medical Officer concerned duly attested by the hospital staff mentioning the time and factum that while recording such statements the injured were in a state of position that they will be able to give statements and the connected certificates by the doctors appended thereto. 9. After the examination of further witnesses and completing the investigation inclusive of securing the accused or accused persons, the concerned police is directed to send final report to the Court of competent jurisdiction as required under section 173 of the Criminal Procedure Code for further proceeding. 10. Either in sending the First Information Report or sending with the general diary entry referred in the guideline Nos. 1 and 2, the concerned police shall avoid any iota of delay under any circumstances whatsoever so also rough sketch showing the topography of the scene and the recovery

of the materials and the blood stained materials with the sample earth and the blood stained earth with the other documents viz. the spot panchanama, recovery panchanama - all seems very vital documents - the respondents - police are also directed to send them to the Court of concerned jurisdiction without any delay. We would make it clear that on receipt of the above documents with the final report, let the Court of competent jurisdiction will decide the matter further in accordance with the procedure mandated in the Code of Criminal Procedure Code, 1973 and let not the police by themselves decide the overacts purported by the police either by way of self defence or private defence and they shall not close the case for any reason whatsoever. The above directions are given to the respondents-police officers necessarily to be followed, perhaps, mandatory besides their sending 21- column report to the Government. We are observing and giving the said directions for the reason that when the Court is seized of a particular matter of the commission of a cognizable offence, then the Court and the Court alone has the power to decide further course of action to be taken as provided by the Code of Criminal Procedure and certainly not either by the police officer or the Government as the police officers are the mere instrumentality of the Government. 118. With the above guidelines, we hope that there may not be any lapses or laxity on the part of the respondents-police and, if any, could be avoided the recurrence of the same in future. The learned Senior Counsel Mr. V.R. Manohar has also conceded for the proper guidelines to be framed and issued by this Court in order to avoid recurrence of any lapses in future and there is also a prayer in the writ petition for and on behalf of the writ petitioners. 119. From the arguments advanced by the Bar for the respective parties on the factual matrix and the legal aspects of the instant case, in the context of the final enquiry of the learned Enquiry Judge dated 15-7-1997, it is to be noticed that every day in and day out , the strength of the criminals in the Mumbai Metropolis and elsewhere of the State is being increased and that the shooting out either by criminals targeting the limb of the society or general public or shooting by the police during the encounter, has become the normally of the present day context. We do not mean while saying so that the law and order enforcing authorities are totally inactive and that they are keeping silent. We are not oblivious to the difficulties faced by the respondents-police who are the law and order enforcing authorities in tackling the dreaded gangsters and hardcore criminals who are indulged in committing the organised crimes like murder, kidnapping, extortion and so on by employing persons of their own like provided with the modern sophisticated weaponry held from elsewhere of the country. We are also conscious of the fact that the Mumbai police have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation and increasing number of underworld and armed gangs and criminals. Therefore, the possibility of attributing casualty on both sides and. some times either one of the sides happened to exceed, cannot be ruled out. But however, we are fully conscious of the fact that the fundamental rights enshrined to every citizen of this country, particularly the one provided under Articles 14 and 19 of the Constitution of India, are safe-guarded and seen to be protected for the said avowed difficult task in the light of the increasing crimes

and incidents not only to the litigations and the proceedings initiated by the voluntary organizations, like the petitioners herein, but also to the other instrumentality of the Government, a new system or device or an instrument is to be constituted keeping in view of this perhaps in Criminal Writ Petition No. 1146 of 1997 in prayer clause C (ii) it was also prayed for a mandamus directing the 1st respondent to constitute the State Human Rights Commission, solely to preserve the human rights as being not violated by anyone as guaranteed by the Articles of the Constitution. To vindicate the above relief, perhaps with the object in mind, National Human Rights Commission is also added as 4th respondent in Criminal Writ Petition No. 1146 of 1997. In the body of the writ petition, appropriate pleading has also been taken by and on behalf of the petitioners with reference to section 21 of Chapter V of the Protection of Human Rights Act, 1993. Section 21 in Chapter V of the Protection of Human Rights Act, 1993 provides as under:- “21. Constitution of State Human Rights Commission:—(1) A State Government may constitute a body to be known as the(name of the State) Human Rights Commission to exercise the powers conferred upon, and to perform the functions assigned to, a State Commission under this Chapter.” Though the above Act was passed by the Parliament with the prescribed statement of objects and reasons in the said Act, a power is seen to have been vested with the State Government to constitute a State Human Rights Commission for the purpose of specifically spelt out and enumerated in the Act itself. It was contended that though the word “may” has been adumbrated in the above section of law, Mr. Sebastian, learned Counsel appearing for the writ petitioners would contend that the said word is to be meant in such a constructive way keeping in tune with the objects, reasons of the very Act passed. If that judicial exercise has been done, according to him, in the context of gradual spelling of the activities of the Underworld Dons and the dreaded criminals, not to have a non slot of the large population of the society as a whole of the country. The word “may” shall be interpreted into “shall” and that therefore it has become necessarily imperative for and on the part of the respondent-State of Maharashtra- to constitute Maharashtra State Human Rights Commission immediately to preserve the fundamental rights enshrined in the Constitution to every citizen of the country and the State. Having perused the provisions of the Act and the objects and reasons of the same and importing the same in the context of the current situation particularly prevailing within the Bombay Municipal Metropolis of the State of Maharashtra, we are, in entire agreement with the learned Counsel for the writ petitioners in this regard. 120. Besides and that apart, if the State Human Rights Commission is constituted, as contemplated by the very Act passed by the Parliament in 1993, the possibility of monitoring every incident by the State Human Rights Commission, or approach Human Rights Commission for every alleged violation of the fundamental rights and the meanings of the human rights, has become possible and expedient convenient to every citizen of this city of the State of Maharashtra in future and that the said constitution of the Human Rights Commission has thus become imminently imperative and imparted by the 1st respondent. We would clarify while saying so that all the prior incidents in the years 1995,

1996 and 1997 amounting to 99 encounters resulting in death of 135 persons, as pointed out by the police, are purely different and out of the purview of the functions and duties of the State Human Rights Commission, if constituted. We are accepting the said contention of the learned Counsel appearing for the petitioners to the prayer in the writ petition particularly only in regard to future incidents. We have heard Mr. Bobade, learned Senior Counsel appearing for and on behalf of the 5th respondent, the Human Right Commission, for the grievance projected by and on behalf of the petitioners with regard to the constitution of the State Human Rights Commission. It seems that he has no objection, so also was expressed by Mr. V.R. Manohar, learned Senior Counsel for the respondents-police. 121. It is, in this context, after having considered the whole gamut of the matter and taken judicial notice of the spurting of the events being happened between the police and the dreaded criminals, a frequent happenings in the present day context, we are fully satisfied and constrained to give a direction to the 1st respondent, viz. State of Maharashtra, to constitute the Maharashtra State Human Rights Commission immediately to perform its pronounced duties in the Act and that, therefore, we have allowed the said prayer of the petitioners in full. 122. In the light of our directives and guidelines and the specific findings given above, though we have heard the arguments of Mr. Singh and Mr. Subhash, learned Counsel appearing for the interveners on behalf of the general public of the Mumbai city, with a view to preserve and maintain the law and order as they are representing the grievances of the general public comprising of various categories of the like, we feel that the said petitions are unnecessary and accordingly we reject the same, with the result we are not allowing the said petitions for the interveners. 123. After having thus considered the whole gamut of the case in so far as the findings given in the final report of the learned Principal City Civil and Sessions Judge, Mumbai, are concerned, we are accepting the findings of the learned Enquiry Judge given on the question of mistaken identity in the First part of his report and we reject the findings of the learned Enquiry Judge on the question of the encounters taken place between the police and the criminals on 28-8-1997 and 26-9-1997 in which both of them were killed by way of retaliation in self-defence by the police. Therefore, in respect of the finding of the learned Enquiry Judge with regard to genuineness or otherwise of the two encounters above referred, we hereby set aside the same. 124. Though before parting, we have to refer and mention the intrinsic co-operation given by the learned Counsel appearing for the respective parties in disposing of these public interest writ petitions with all dexterity we have heard and got the valuable assistance of the learned Counsel from the Bar for the respective parties and we place on record the same. 125. In the result, for all the foregoing reasons and our findings, guidelines and directions, we allow the Writ Petition No. 1146 of 1997 in part and dismiss for the rest. That means with regard to prayers for guidelines to the respondents-police and the direction to the 1st respondent to constitute the Maharashtra State Human Right Commission are concerned, we allow the writ petition. For the rest we dismiss the writ petition. Likewise Writ Petition Nos. 1032 and 1064 of 1997 are dismissed in full. 126. The rule issued already has, thus, been

discharged and disposed off accordingly. Mrs. RANJANA DESAI, J. 1. I am in respectful agreement with the conclusions reached by my brother Arumugham, but my reasons for arriving at them need to be given separately. I do not wish to state all the facts as my learned brother has exhaustively dealt with them and also for fear of making these reasons prolix. However there may be some repetition on account of my anxiety to secure clarity and continuity. 2. These three writ petitions pose a challenge to the incidents of police firings, which have taken place in the city of Bombay in recent years, resulting in deaths of dreaded criminals. They are commonly called encounters. While the petitioners allege that these incidents are not encounters as the police would want to call them, but are merciless killings of the criminals by the police by giving a go-by to their lawful duties of arresting them, it is the case of the respondents that, the criminals were shot dead not because the police wanted to do away with them by adopting a short-cut, but because while police were effecting their arrest, the criminals resisted the arrest by firing at them which created an imminent danger to the lives of the police and in exercise of their right of private defence the police had to open fire. The criminals succumbed to that firing. 3. Criminal Writ Petition No. 1032/97 is filed by the petitioners, who claim to be political activists. The basic grievance of the petitioners is that, an innocent peanut vendor Abu Sayama was killed by the police in a fake encounter on 28-8-97. There is also a reference to 65 to 68 cases of encounters which, it is claimed, are in violation of Article 21 of the Constitution of India. It is, inter alia, prayed that record in connection with the encounter of Abu Sayama be called and a case of murder be registered against the Police Inspector Dhobale, who is responsible for killing Abu Sayama. It is prayed that investigation be ordered in all the 68 cases of encounters through the C.B.I. Upon rule being issued, the Commissioner of Police, Bombay and Inspector Dhobale have filed their affidavits in this petition. 4. Criminal Writ Petition No. 1064/97 is filed by an organisation which, according to it, stands for the rights of Indian citizens guaranteed under the Constitution of India. The grievance made in this petition is similar to the grievance made in Writ Petition No. 1032/97. There is a reference to the killing of Javed Sayama, who, it is claimed, was an innocent peanut vendor. It is prayed that the cases of encounters, which have taken place during the years 1995, 1996 and 1997, be investigated by C.B.I. and those responsible for the same be directed to be charged with murder. In this petition, affida-vit-in-reply is filed by the Commissioner of Police Mr. Mendonsa and Director General of Police Shri Inamdar. 5. Criminal Writ Petition No. 1146/97 is filed by an Organisation, which claims to work for the protection and promotion of human rights. In this petition, there is a similar challenge to all encounters. Initially, it was only prayed that complete particulars about the persons killed in one year be furnished and enquiry be conducted in respect of the same and direction be given to register offence under section 302 against the police officers guilty of the said offence. On 10-12-97 an order came to be passed by Justice A.P. Shah and Justice Patil in all these writ petitions directing that, in two out of all the encounters an informal enquiry be conducted by the Principal Judge of the City Civil and Sessions Court, Bombay and report be submitted to the High Court.

On 17-2-98, a further order was passed by the same Bench whereby it was clarified that the statements made by the Police Officers will not be used against them in any other proceedings. After this order, Petition No. 1146/97 came to be amended. Prayers (c-1), (c-2), (c-3) came to be added. It was prayed that report be called for in respect of all the police encounters which may have taken place in entire Maharashtra and the State of Maharashtra be directed to constitute the State Human Rights Commission and appropriate guidelines be framed governing planning and carrying out of encounters by the police. In this petition, affidavit has been filed by the Commissioner of Police, Bombay. 6. Pursuant to the direction given by the High Court, the Principal Judge of the City Civil and Sessions Court, Bombay submitted his report dated 15th August 1998 holding that the two encounters were fake. He however, gave a finding that there was no mistaken identity as alleged by the petitioners. 7. On 9th November, 1998, three Intervenor Applications came to be filed in these three writ petitions. Criminal Application No. 3397/98 in Writ Petition No. 1146/97 is filed by the Federation of Association of Maharashtra, which is an Apex Federation of about 750 Association of Traders and Small-scale Industrialists, Transporters etc. In short, it is stated in the said Application that, the members of Applicant Organisation are the target and victims of growing gangsterism. There is a steady increase in armed extortions, contract killings and related crimes. Concern of breach of violation of Article 21 must not find expression only in the case of criminals, but also in the case of innocent victims and it is prayed that since the Applicant represents public interest, it may be allowed to intervene in the matter. Criminal Application No. 3432/98 and Criminal Application No. 3433/98 are filed in Criminal Writ Petitions No. 1064/97 and 1146/97. These applications are filed by the Citizens Organisation for Public Opinion, which claims to strive for public cause. A concern is expressed in these applications about the recent spurt in the crime rate in the city of Bombay and the use of sophisticated arms by gangsters. It is stated that, if the policemen, who risk their lives, are prosecuted, that will have a demoralising effect on the police force. The criminals, who have become a threat to the common man, need to be dealt with a firm hand. The encounters are genuine encounters and since the applicants represent public interest, they may be allowed to intervene and assist the Court. 8. In order to appreciate the questions involved in these petitions, it is necessary to see what was the direction given by the High Court in its Order dated 10th December, 1997. In the said Order the High Court directed the Principal Judge of the City Civil and Session Court at Bombay to hold the inquiry into the death of Abu Sayama alias Javed Abu Talib Shaikh @ Javed Fawda in police encounter on 28th August, 1997 and also the identity of the deceased Abu Sayama alias Javed Talib Shaikh who is alleged to have been killed on a mistaken identity as Javed Fawda and in the deaths of (b) Sada Pawle and Vijay Tandel killed in an encounter on 26th of September, 1997, and also to find out whether the encounters in which the said persons died were genuine or stage managed encounters. 9. The learned Sessions Judge was directed to record the evidence of the relevant witnesses and submit a report to the High Court within three months from the date of receipt of the writ of the

High Court. To enable the learned Sessions Judge to appreciate the facts of the case and to identify the witnesses to be summoned, copies of the relevant writ petitions and affidavits alongwith the enclosed documents and affidavits were directed to be forwarded to him. The learned Sessions Judge was directed to examine the deponents of such affidavits as well as the concerned officers. It was made clear that the petitioner-organisations will be entitled to be heard in the inquiry to be conducted by the learned Judge. The respondents were directed to file in the High Court all the original papers pertaining to the encounter deaths and the Registrar was directed to keep them in sealed cover and forward them to the learned Sessions Judge alongwith the copy of the judgment and other relevant papers. 10. In the order dated 17th February, 1998, it was clarified that the inquiry was to be informal inquiry and was intended to facilitate the decision on the three writ petitions pending before the Court. It was further made clear that the statements made by the Police Officers in the inquiry shall not be used against them in any other proceedings including a possible criminal prosecution against them. Whether the examination of petitioners would be necessary or not will be decided by the learned Judge having regard to the propriety of examining the witnesses and particularly having regard to the question whether their evidence will be necessary in order to throw light on the issue whether the encounter in question was genuine or fake encounter and the identity of deceased Abu Sayama. Therefore, the inquiry was nothing more than a fact finding inquiry informal in nature. 11. Accordingly, the learned Judge conducted the inquiry and submitted his report to the High Court on 15th of July, 1998. The learned Judge split the inquiry into two parts i.e. Inquiry No. 1 of 1998 and Inquiry No. 2 of 1998. 12. In Inquiry No. 1 of 1998, the following points were framed for determination: (1) Whether the person killed in the encounter on 28th August, 1997 i.e. Abu Sayama alias Javed s/o Abu Talib Shaikh is the notorious gangster known as "Javed Fawda" as claimed by the police? (2) Whether the encounter on 28th August, 1997 in which the alleged gangster Javed Fawda was killed, was a fake or genuine encounter? 13. In the second inquiry, the point for determination was whether the encounter dated 26th September, 1997, at the junction of Rajawadi and M.G. Road, Ghatkopar, in which Sada Pawle and Vijay Tandel were killed was genuine encounter or not. 14. The learned Judge upon consideration of the evidence adduced before him, held that the case of mistaken identity of Abu Sayama alias Javed s/o Abdul Talib Shaikh as Javed Fawda was not proved. He, however, came to the conclusion that both the encounters were fake encounters. Before us the said report is under challenge. 15. Before, I deal with the evidence and the various legal and factual submissions made by the learned Counsel, it is necessary to outline the arguments which are basic to both the encounters. The basic argument of Mr. Chari, Mr. Sebastian and Mr. Masajid Memon for the petitioners is that the police have committed cold blooded murder of the alleged criminals. They have abdicated their duty of effecting arrest by following due procedure of law and in order to create an impression that law and order situation is maintained in the city of Bombay, they have done away with the alleged criminals by falsely representing to the people, that they were killed in an encounter. The police are

guilty of violating Articles 14 and 21 of the Constitution of India as even the criminals are entitled to the protection guaranteed under the said articles. It is contended that State terrorism is no answer to gangsterism. On the other hand it is the case of the police that they had to open fire in exercise of their right of private defence as they were obstructed in the performance of their duty of arresting criminals which is laid down in the Bombay Police Act. The criminals who were armed with sophisticated weapons, opened fire first and in exercise of their right of private defence the police had to open fire. 16. At this stage, it is necessary to make a reference to the affidavit filed by the Commissioner of Police, Bombay. Mr. Mendonsa, in which, the stand of the respondents is reflected. Mr. Mendonsa, in his affidavit, has inter alia, stated that the encounter is a situation which is forced upon the policeman, who is performing his duties of arresting a wanted criminal. When the criminal by opening fire precipitates the situation, the police officer has no choice but to use force in order firstly, to discharge his lawful duties and, secondly, in the exercise of right of private defence. He has relied upon section 46 of the Criminal Procedure Code, which reads thus: "46. Arrest how made:—(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action. (2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest. (3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life." Mr. Mendonsa has also referred to section 100 of the Indian Penal Code, which speaks of right of private defence. In case of imminent danger to the life of a police officer on account of the criminal resisting arrest by opening fire, the police officer would be justified in causing his death. Section 64 of the Bombay Police Act, 1951 is also relied upon. Section 64(d) says that it shall be the duty of every police officer to apprehend without unreasonable delay persons whom he is legally authorised to apprehend and for whose apprehension there is sufficient reason. In case of breach of this provision, a policeman is liable to face prosecution under section 145(2)(a) & (d) of the Bombay Police Act 1951. Section 161(1) of the said Act is also referred to which says that, suits or prosecutions in respect of the acts done under colour of duty cannot be entertained if instituted more than six months after the alleged act. 17. In my opinion, at this stage, reference will have to be made to the observations of the Supreme Court in the case *People's Union for Civil Liberties v. Union of India & another*, to which, our attention was drawn by Mr. Manohar, learned Counsel for the State of Maharashtra. In that case, certain alleged terrorists were taken in a truck to a distant place and were killed. An enquiry was ordered and the High Court accepted the report of the enquiry conducted by the District and Sessions Judge that the encounter was fake. It was observed by the Supreme Court that: "If the version of the police with respect to the incident in question were true, there could have been no question of any interference by the Court. Nobody can say that the police should wait till they are shot at. It is for the force on the spot to decide when

to act, how to act and where to act. It is not for the Court to say how the terrorists should be fought. We cannot be blind to the fact that even after fifty years of our independence, our territorial integrity is not fully secure. There are several types of separatist and terrorist activities in several parts of the country. They have to be subdued. Whether they should be fought politically or be dealt with by force is a matter of policy for the Government to determine. The courts may not be the appropriate forum to determine those questions. All this is beyond dispute.” Therefore, in case this Court comes to a conclusion that the encounter is genuine, then, the Court shall not say how the terrorists should be fought and it is for the police force on the spot to decide when to act, how to act and where to act. In my view, if the encounters are found to be genuine, then, the interference by the Court, in the light of the above judgment, is very limited. 18. Before I deal with the rival contentions and the findings of the enquiry, it is necessary to observe that in conducting the enquiry, the learned Judge has adopted a totally erroneous approach. The High Court, in its order directing enquiry, made it amply clear that the enquiry was to be an informal enquiry. In fact, the learned Judge has, at many places, observed that he was not bound by the rules of evidence. However, a number of documents have been rejected by him by holding that they are not proved and some documents have been accepted by him though applying his own logic, they are not proved. The contradictory observations made by the learned Judge, to which our attention has been drawn by Mr. Manohar, would make it evident that the learned Judge has adopted a wrong approach and has not applied the same yard-stick to the rival parties. The observations made by the learned Judge in paras a, b, c and d are contradictory to observations made by him in paras e, f, g and h (The numbers are supplied for convenience): a) “By the said order dated 17-2-1998, the time for submitting the report of this Court was extended by one month. By the said order, the Hon’ble High Court clarified that the enquiry was an informal enquiry.” b) “By order dated 17-2-1998, the Hon’ble High Court laid down certain parameters for holding the enquiry such as clarifying that the enquiry was only an informal enquiry, intended to facilitate the decision on the aforesaid writ petitions.” c) “It must be remembered that this is not a trial and we are not bound by strict rules of evidence. The earlier Affidavits were filed to inform the Court in a general sort of way about the incident. It obviously could not be a detailed Affidavit. It is only after this enquiry started that the petitioners got an opportunity to examine the witnesses. The omissions in the Affidavit, therefore, could not be treated as contradictions as long as the basic structure of the petitioners case finds place in the Affidavits as it does in the present Affidavit.” d) “At this stage, it may again be pointed out and it is very important to keep in mind the fact, that this is not a trial. There is no”case” of the petitioners or of the respondents. The question of burden of proof lying on either party, therefore, does not arise. The burden is upon all the parties concerned to adduce all possible material and to render all assistance necessary to enable the Court holding the enquiry to unravel the truth so that a fair and correct report can be made to the Hon’ble High Court. The Affidavits filed by Baldevsingh and his evidence before the Court ought to be appreciated in the

light of the above discussion“. These observations are contrary to the following observations: e) “In fact, the State, being party-respondents to the Writ Petition ought to have taken the initiative in proving the documents of the State-agencies like the post-mortem notes, the C.A. report and the panchanama of the scene of offence.” f) “Needless to point out that the panchanama and the Chemical Analyser’s report have not been proved.” g) “Clearly, the burden if it may be so called, lay more on the respondents to prove the panchanama of the scene of offence drawn by the police and the Chemical Analyser’s report as they seek to rely on them to corroborate the evidence of the police witnesses. Moreover, the State being party-respondents, cannot sit back as mere observers. It is as much obligated as the other parties in assisting the Court to arrive at the truth and therefore ought to have proved these documents which are prepared by the State agencies. Since the panchanama of the scene of offence and the Chemical Analyser’s report are not proved, the respondents cannot rely on them and therefore, the respondents case that Sada Pawle and Vijay Tandel were armed with AK-56 and pistol respectively, remains unproved,” h) “As stated earlier, the respondents claim that certain empties recovered from the scene of offence under panchanama and the same were sent to the Chemical Analyser for report (Ex-EE). According to the Chemical Analyser’s report (Ex-EE), the empties, EX-4-A to Ex-4-E were fired from AK-56 and the empties, Ex. 4-F to Ex. 4-R were fired from 9 m.m. pistol (see Ex-2). However, as stated earlier, the scene of offence panchanama and the Chemical Analyser’s report are not proved. The alleged recovery of these empties from the scene of offence is doubtful and therefore, it cannot be taken as proved that Sada Pawle and Vijay Tandel were armed with AK-56 and pistol respectively.” Mr. Manohar has rightly pointed out that while in paragraph 227 the learned Judge has used the same Chemical Analyser’s report and P.M. notes against the respondents, in paragraphs 234, 235, and 236 he has held that the panchanama of the scene of offence and the Chemical Analyser’s report have not been proved and they cannot be used by the respondents in support of their case that Sada Pawle and Vijay Tandel were armed with AK-56 and pistol respectively. Apart from the fact that this approach is erroneous and unjust, it is contrary to the provisions of section 293 of the Code of Criminal Procedure, which says that reports of Government Scientific experts may be used as evidence in enquiry, trial or other proceedings. The Chemical Analyser’s report and P.M. notes would fall in this category. 19. In his pursuit to find out the facts the learned Judge should have proceeded along the lines indicated by the High Court. The High Court had clearly indicated that it was for the learned Judge to decide the propriety or otherwise of examining a witness. The inquiry was to be an informal inquiry. It should not have been conducted like a trial. In any case from the documentary evidence and from the evidence recorded by the learned Judge it is not difficult to find out the facts and there is no need to multiply witnesses. 20. Inquiry No. 1 pertains to death of Javed Fawda, brother Arumugham, J., has exhaustively narrated the facts hence there is no need to mention them again. This incident is mentioned in two writ petitions namely Writ Petition No. 1032 of 1997 and Writ Petition No. 1064 of 1997. It is contended in these petitions that Abu Sayama alias Javed

Abu Talib Shaikh was an innocent peanut vendor of Bandra and he was killed by the police mistaking him for Javed Fawda. At this stage it is necessary to refer to the relevant averments made in Writ Petition Nos. 1032 and 1064 of 1997. "Writ Petition No. 1032 of 1997 Para-3:—The deceased Abu Sayama, a Muslim, was residing in Maharashtra Nagar Zopadpatti, Slaughter House Compound, Bandra (West) Mumbai 50. He was killed in a fake encounter by the 3rd respondent. The deceased was staying with his mother in the said slum with his mother Shaikh Abu Talib Ferzana Begum and his sister Rubina Begum, wife of Sayed Javed. Para-4:—One Abu Sayama alias Javed, aged about 21 years was found missing from Bandra on 26-8-97. One John Fernandes residing at Shastri Nagar No. 1, Opp. Station Road Masjid, Bandra (West), Mumbai-50, saw him at 2 p.m. returning from Masjid. Three to four policemen in ordinary dress nabbed him and took him into an autorickshaw. The said John Fernandes has declared an affidavit to the effect that he knew the deceased Abu Sayama alias Javed. Para-12—(a) The deceased Abu Sayama Javed was an extremely poor person. He was doing business of selling peanuts and "Chana" near Bandra Railway station. (b) The deceased was physically so weak that he could not have entered into an encounter with the strong police officers. (c) If he was connected with any anti-social gang he would not have lived in impoverished condition in a slum, where there were no basic amenities. Para- 13(11)—The petitioners say that the death of Abu Sayama @ Javed is also a classical example of such a fake encounter. He was totally innocent. He had no criminal record. (xi) The petitioners have come to know that one Javed Fawda, who was required by the police on various serious charges is already in the Arthur Road Prison, and the killing of Abu Sayama is purely under a mistaken identity. Writ Petition No. 1604/97 Paragraph 3 contains the following averment: The investigation reports in the newspaper stated that Javed Sayama was about 22 years old. He was the sole bread-winner of his family and he earned his livelihood by selling peanuts on the western side of the Bandra Railway Station. According to the reports, the police picked him up when he was coming out of the Masjid after Namaz and there were four people who witnessed the picking up of him by the police." 21. In support of their case the petitioners examined three witnesses namely (1) Rubina-P.W. 1 who is the sister of the deceased, (2) Nanu Muchhan Khan-P.W. 2 and (3) Anwar Khan Mehboob Khan-P.W. 3. The respondents examined seven witnesses. 22. After considering the evidence, the learned Judge came to a conclusion that the encounter was fake. However, he recorded a finding that "It is proved by comparison of the finger prints that Rubina's brother Javed Abu Talib Shaikh arrested by the Shivaji Park Police Station in C.R. No. 339 of 1996 is the same person whom the police knew as Javed Fawda and who was shot in the police encounter on the night of 27th & 28th of August, 1997 and whose body was claimed by his sister Rubina P.W. 1". He gave a clear finding that there is no substance in the petitioner's case that the police have killed Abu Sayama @ Javed Abu Talib Shaikh mistaking him for gangster Javed Fawda. There is no case of "mistaken identity". Therefore the positive case with which the petitioners came to the Court was rejected. 23. Surprisingly the petitioners have not filed any objections to the said finding. In the Court initially a half

hearted attempt was made to challenge the said finding but subsequently it was given up by the Counsel Mr. Masajid Memon. 24. In my opinion the reasons given by the Inquiry Judge to discard the evidence of Rubina and disbelieve the case of mistaken identity are perfectly valid. They are: (a) In the missing complaint Exhibit H-1, which is reflected in diary entry Exhibit J-1, Rubina has given the name of her missing brother as Javed Abu Talib Shaikh. She has not used the name Abu Sayama but in the Court she has referred to her brother as Abu Sayama. Only in cross-examination she has admitted that her deceased brother was affectionately referred to as Javed. She does not refer to him in the Court as Javed. This conduct of Rubina is significant. (b) Admittedly Rubina's brother Javed Abu Talib Shaikh was arrested by the Shivaji Park Police Station in C.R. No. 339 of 1996. However, in the police papers the name Abu Sayama does not appear. In fact accused Javed Abu Talib Shaikh has given the name of his brother as Abu Sayama. (c) Ration Card (Ex-A) shows that Abu Sayama and Rubina (P.W. 1) are children of Mohammed Sabir. Name of Abu Talib appears as brother of Mohammed Sabir. The name of Javed Abu Talib Shaikh does not appear in the ration card. Body of Javed Abu Talib Shaikh is claimed by Rubina. Therefore Javed Abu Talib Shaikh son of Abu Talib appears to be a cousin of Rubina. Abu Sayama and Javed Abu Talib Shaikh are two different persons. (d) Finger prints of Javed Abu Talib Shaikh arrested in C.R. No. 339 of 1996 by Shivaji Park Police Station tally with the finger prints of the deceased, obtained by M.R.A. Marg Police Station after the incident. The said deceased according to the police is known as Javed Fawda. The opinion of finger print expert is not challenged by the petitioners. (e) Body of deceased Javed Fawda was claimed by Rubina (P.W. 1). (f) Accused in C.R. No. 339/96 of Shivaji Park Police Station has signed his name on the Vakalatnama and bail bonds as Javed. (g) Rubina has admitted that she used to call her brother affectionately as Javed. Name Fawda is a nick name and indicates protruding teeth. The description of the missing person in Exhibit-1 and Exhibit J-1, is a person with teeth coming out. Rubina has stated that her brother had protruding gums. (h) If Rubina's brother was missing from 26-8-97 she has filed her complaint only on 28-8-97. (i) Witnesses Nanu Muchhan Khan and Anwar Khan Mehboob Khan have not seen Abu Sayama being picked Up by police, as alleged by them, So their evidence is of no use. (j) The only person who is alleged to have seen Rubina's brother picked up by police is John Fernandes who has filed his affidavit in the High Court. However, the petitioners did not examine him. (k) The learned Judge has rightly mentioned that no motive is established by the petitioner for the police to kill an innocent peanut vendor. 25. Thus the learned Judge's conclusion that the petitioners have miserably failed to make out a case of mistaken identity is unassailable, As rightly submitted by Mr. Manohar, the fact that the petitioners have failed to prove their case of mistaken identity and that Rubina their state witness is found to be a false witness has made an irreparable dent in the petitioners' case. They came to the Court with the positive case, as indicated in the averments quoted hereinabove, that a wrong man was killed by the police. This case is undoubtedly linked with their further case that the police are high handed, callous and brutal

and are indulging in merciless killing of people in the name of encounters. The petitioners having failed to prove mistaken identity, their entire case as regards the encounters, in my opinion has become suspect. If all the witnesses of the petitioners stand discredited there is only the uncontroverted testimony of the police officers which is on record. There is no doubt that substratum of the petitioners' case has gone away. 26. Coming to the 2nd part of the inquiry as to whether encounter in which Javed Fawda died is genuine or not, the case put up by the petitioners in Writ Petition No. 1064 of 1997 to the respondents' witness is that two associates of Javed Fawda brought him to the spot in a white Maruti car according to a prearranged plan with the police and then dropped him from the car and then the police shot him dead. There is no evidence in support of this case. 27. According to the respondents, between the night of 27th August 1997 and 28th August 1997 at about 12.15a.m., upon information that Javed Fawda would be coming to the spot two teams of the police, who had taken position at Sprott Road saw one Maruti 800 coming along Sprott Road from Customs House side. It halted near the B.E.S.T. bus stop situate at Sapat building. One person sitting near driver's seat alighted from the car from left side. That person walked a little further upto the front side of the car. A.P.I. Dhobale R.W. 7 realised that he was Javed Fawda. The officers got down from the car. A.P.I. Dhobale and P.S.I. Bhosale Patil proceeded towards Javed Fawda. Mr. Dhobale removed his revolver and pointing it towards Javed Fawda, gave a warning by shouting "Javed Bhaagna Nahi". Immediately Javed Fawda turned towards Dhobale and fired one shot towards the police officers. According to A.P.I. Dhobale, sensing danger he fired in quick succession. In the meanwhile, Javed Fawda fired one more shot. Simultaneously P.S.I. Bhosale Patil fired from his service revolver towards Javed Fawda. At that time, the said white Maruti car sped away. Javed Fawda was seen lying on the road in an injured condition holding a pistol in his hand. In short, the respondents contend that Javed Fawda was given a warning. He was told not to run away but to surrender. It was he who opened fire first endangering their lives and hence the police were left with no option but to fire. The police were obstructed in performance of their duty to arrest. The encounter is thus genuine. 28. Since the arguments advanced by the learned Counsel have been noted in detail by Brother Arumugham, J., I need repeat them. 29. Major portion of the petitioners' case in the form of Rubina's evidence having been completely disbelieved the petitioners have concentrated their attack on the police witnesses. 30. At this stage it is necessary to note certain amazingly contradictory observations made by the learned Judge in his report. In paragraph 47 after considering Rubina's evidence that her so-called missing brother often left home without informing the family and that the family members, including Rubina (P.W. 1) were not aware of his actual activities, the learned Judge has observed that Rubina's brother was well known to the police and that the petitioners' claim that the deceased Javed Abu Talib Shaikh alias Abu Sayama was an innocent peanut vendor stands rebutted. In paragraph 65, the learned Judge has stated that the petitioners have not been able to establish the existence of any person other than the deceased known as Javed Fawda who was a notorious gangster.

In paragraph 80 he has observed that “No person known as Javed Fawda or Abu Sayama or Javed Abu Talib Shaikh is an accused in Gulshan Kumar murder case. The memo Ex. W is a crude attempt by the police to prove that the person whom they referred as Javed Fawda was responsible for the killing of Gulshan Kumar, that he was a dangerous criminal or notorious gangster and therefore, the police sought his arrest resulting in the encounter at Sprott Road.” However, at page 73 he has summed up by saying that it is not established that there is any gangster known as Javed Fawda other than deceased Abu Sayama alias Abu Talib Shaikh. In paragraph 83 he says that there is nothing to show that the police has any definite information about the involvement of Javed Fawda in the crime registers of different police stations. However at page 74 he says that it is established that Javed Abu Talib Shaikh @ Javed Fawda had a criminal background. He was arrested in Shivaji Park Police Station C.R. No. 339 of 96 in a case of attempt to murder and was a wanted accused in C.Rs. of several other police stations such as Kurla, Dadar, Dharavi, Matunga and the D.C.B. C.I.D. as an unknown accused. At page 124, the learned Judge says that the information of the involvement of Javed Fawda in the C.Rs. of several other police stations is unsubstantiated. Accordingly the police were not even aware prior to the encounter of the involvement of Javed Fawda in the Shivaji Park attempt to murder case. There was therefore, no reason for the police to have believed that Javed Fawda was such a dangerous criminal or gangster that his immediate arrest was called for. Surprisingly at page 54 the Judge observes that “Just because the name Javed Fawda does not appear in the proceedings of C.R. No. 339 of 1996 of Shivaji Park Police Station or F.I.R. filed in M.R.A. Marg Police Station of Nagpada Police Station C.R. No. 491 of 1997 or the F.I.R. of Dharavi Police Station C.R. No. 683 of 1997, there is no reason to disbelieve the police when they say that they had definite information that the person whom they later on came to know as Javed Fawda, being involved in several police cases. Javed Fawda was therefore, no bogey raised by the police”. However in para 139 the learned Judge says that “Javed was not a known gangster or known dangerous criminal. There was no reason for the police to have gone to Sprott Road to apprehend or arrest Javed Fawda armed to their teeth”. These inconsistent observations have made this report, in my view, extremely vulnerable. 31. The findings of the learned Judge needs to be examined now. He has held that there is nothing to show that the police had information that Javed Fawda was responsible for the killing of Gulshan Kumar and that his arrest was necessary resulting in the encounter at Sprott Road. The learned Judge has disbelieved the existence of Memo Ex-W dated 21-8-97. In my view the learned Judge has fallen into a serious error in doing this for more than one reason. 32. According to Sr. P.I. Tambvekar whom the police have examined, the Memo Ex-W was issued by A.C.P. Rao to him mentioning that Javed Fawda, Rauf Raja, Wasim and Rashid were involved in Gulshan Kumar murder case. The names of the said persons were disclosed to A.C.P. Rao by one Javed Kalia an accused in Gulshan Kumar murder case when he was arrested in some other case. Javed Kalia informed him that they belonged to Abu Salem gang. 33. Surprisingly, the learned Judge has discarded Ex “W” on the ground that

A.C.P. Rao was not examined. Respondents have examined Tambvekar R. W. 5 who has stated that the letter was addressed to him as he was the Senior Police Inspector. He was familiar with the signatures of Rao. He has identified Rao's signature. The memo was personally handed over to him in the office of A.C.P. Rao by A.C.P. Rao. He has stated that the endorsement at the bottom left of the said memo is signed by him. He has stated that the endorsement is also in his handwriting. 34. P.I. Dhobale R.W. 7 has stated in his evidence that on 21st of August, Tambvekar called him in his office and showed him the memo. He has identified the memo. Therefore there is no reason to disbelieve these officers on the ground that their evidence is hearsay evidence as regards the contents of Memo Ex-"W". 35. Moreover, Ex "W" is acted upon. Tambvekar has stated in his evidence that during the period from 21st August to 27th August his staff made efforts to collect information about Fawda. 36. P.I. Dhobale (R.W. 7) has stated that the names other than that of Javed Fawda appearing in Ex. "W" are the names appearing at Sr. No. 15, 17, and 19 in the chargesheet of Gulshan Kumar Murder case as absconding accused. 37. One more reason why according to the learned Judge Ex. "W" is doubtful is that the story that Javed Fawda was wanted in Gulshan Kumar murder case itself is false. There is no mention of Javed Fawda's name in the chargesheet filed in Gulshan Kumar. murder case. 38. In this context it is significant to note that the incident of killing of Gulshan Kumar took place on 11-8-97, Javed Kalia was arrested in house breaking case on 16-8-97. Javed Kalia during interrogation in that case disclosed that Javed Fawda was involved in Gulshan Kumar murder case. This disclosure was made by Javed Kalia on 21-8-97 and chargesheet in Gulshan Kumar murder case was filed on 28-11-97. Javed Fawda was killed in encounter on 28.8.97. Therefore, Javed Fawda was not alive when chargesheet in Gulshan Kumar murder case was filed and, therefore, non-mentioning of his name in the chargesheet is not fatal. 39. The learned Judge has also held that Ex."W" is doubtful because in the F.I.R. filed by P.I. Dhobale after the encounter there is no mention of Ex. "W" or involvement of Javed Fawda in Gulshan Kumar murder case. 40. No significance can be attributed to the fact that Javed Fawda's name is not found in the chargesheet filed in the Gulshan Kumar murder case or there is no mention of Ex. "W" in the F.I.R. filed by Dhobale because apart from the oral uncontroverted testimony of police officers there is following contemporaneous record which bears out the police version. A) Entire F.I.R. is mentioned in M.R.A. Marg Police Station diary entry dated 21-8-97. B) In the crime report dated 24-8-97 there is a mention of information received by Sr. P.I. Netaji Tambvekar regarding Javed Fawda. C) Station Diary entry of police control room dated 28-8-97 mentions the information received by Tambvekar and the incident in question and the fact that crime is registered by M.R.A. Marg Police Station. D) S.I. Tambvekar has also produced Ex. 18, M.V. seizure of white Maruti Car No. MM-04-126 M.V. seizure is information given by the control room to various police stations and police wireless vans in respect of motor vehicles involved in a crime which are required to be produced. E) The respondents have also produced a copy of 21 point report dated 28-8-97 sent by Sr. Inspector of Police C.I.U. D.C.B. C.I.D. to the Govt. of Maharash-

tra which narrates information received by C.I.U., the incident and its time & place. It is too much to presume that all these documents are fabricated. 41. Sr. P.I. Tambvekar has stated that on the evening of 27-8-97 he had received information from a reliable source that on the night of 27th/28th August 1997 Javed Fawda along with others was to come to Sprott Road at Ballard Pier between 12.00 and 12.30 midnight for the purpose of committing an offence. Sr. P.I. Tambvekar alongwith P.S.I. Tonpe and P.S.I. Bhosale Patil went to Sprott Road for reconnaissance. After visiting the spot they decided upon the place where they would keep a look-out. 42. This entire evidence is rejected by the learned Judge on the ground that Tambvekar made no station diary entry of such a movement nor did he prepare rough sketch and therefore it is not possible for him to explain the topography to the officers in detail. 43. This reasoning of the learned Judge is based on conjectures and surmises. The officers in this case were on a secret and delicate mission. They were dealing with a hard core criminal. As rightly stated by Mr. Manohar such missions are done in a secretive manner for fear of the facts leaking out and one does not expect every minor detail to be noted by officers. Sr. P.I. Tambvekar (R.W. 5) has stated in his evidence that Criminal Intelligence Unit is concerned with confidential enquiries in respect of complaints received by superior police officers. Movement of the police personnel in respect of confidential enquiries is not recorded in the movement diary. In case of secret operations the movement of the police personnel is not recorded. This evidence is overlooked by the learned Judge. Besides the fact that Tambvekar had received secret information is reflected in contemporaneous documents to which reference is already made hereinabove. Thus the police have established that they had definite information about Javed Fawda and had legitimate reason to be at Sprott Road namely to arrest him. 44. The learned Judge has also come to a conclusion that the use of the Ambassador Car by the police is not proved making the police case doubtful. 45. Now Sr. P.I. Tambvekar and A.P.I. Dhobale have deposed about the use of this car which was occupied by Dhobale and his team. Both these officers have stated that the windscreen of this car was shattered in the encounter. Dhobale has stated that it was shattered by the bullet fired by Fawda. However, he has stated that the car was subsequently repaired and is back in operation. The learned Judge has held that the evidence of its involvement is destroyed and its use is not proved. 46. In my opinion, there is no reason why the uncontroverted testimony of both these officers should not be believed. But in any case, the relevant panchanama, C.A. report, letter by which broken pieces of glass were sent to Chemical Analyser establish the use of this car. 47. In the panchanama there is a reference to the Govt. Ambassador car bearing No. B.L.F. 5048 and pieces of glass lying on the said car and in front of the car. It is also stated that the police took charge of the said glass mixed earth for further investigation. The forwarding letter dated 7-10-97 indicates that Ex. D-1 i.e. broken pieces of glass of the windscreen of the Ambassador car were sent to the Chemical Analyser. Surprisingly the learned Judge does not refer to these documents in this context. According to him panchanama is not proved and, therefore, use of Ambassador car is also not proved. However, he uses the same panchanama

while commenting on absence of blood at the spot. In my opinion, panchanama of scene of offence, Chemical Analyser's report, letter to the Chemical Analyser sending glass pieces and the evidence of police officers prove the use of the Ambassador car. 49. The learned Judge has also come to a conclusion that the police have not taken steps to seize the Maruti car which was used by the accused and which sped away. He has stated that no documentary evidence was produced in this behalf. While observing this he has completely lost sight of Ex. 18 which is M.V. seizure entry dated 28-8-97 which gives description and number of the Maruti car. The time and place of the occurrence is also given. The learned Judge has therefore, fallen into a serious error. 50. He has also come to a conclusion that absence of blood at spot and in the car completely disproves the police case. The very spot panchanama which he refuses to look into on the ground that it is not proved and comes to the conclusion that use of Ambassador car is not proved, is relied upon by him for this purpose. In any case and even accepting that the blood was not found at the spot and in the car, that by itself does not disprove the police case. 51. Mr. Manohar has rightly pointed out that there is no case of profuse bleeding made out in the evidence. The doctor has not been asked a single question about it. Drawing our attention to column 20 of the P.M. notes of Javed Fawda, Mr. Manohar urged that in fact 2000 ml of blood and clots were found in the chest cavity suggesting that there was heavy internal bleeding. He stated that no doubt that clothes and chappals of the deceased were stained with blood but that does not establish profuse bleeding. He has drawn our attention to page 177 of the Taylor's Principles & Practice of Medical Jurisprudence (Twelfth Edition). Relevant extract runs thus:— "Internal haemorrhage may equally prove fatal. In incised_wounds the flow externally is commonly abundant. but in crushing stabbed or perforating wounds the bleeding may be entirely internal and rapidly cause death. Blood and fluid may be effused in large quantity beneath the skin and among the muscles; this effusion will operate as fatally as if it had flowed from an open wound. A surprisingly large volume of blood may thus be effused." He has also drawn our attention to the following lines at page 80 & 81 of Modi's Medical Jurisprudence (Twenty First Edition), under the title Haemorrhage. "There will also be signs of spouting of arterial blood on the body, clothing or its vicinity. It should, however be remembered that there will be absence of bleeding following an extensive or fatal wound in the event of death occurring rapidly or immediately." Therefore, absence of blood by itself will not be fatal to the case of the police. 52. The learned Judge has drawn adverse inference from the fact that no empty was found in the Ambassador car though Javed had opened fire. Now the empty in the nature of things cannot travel along with the bullet. So it could not have been found in the car. Non-finding of bullet in the car is also not decisive because it is quite possible that it went out through the window and was not traceable. It could have ricocheted. This is not a circumstance which can disprove the respondents' case. 53. The learned Judge has also found fault with the police for not examining independent eye-witnesses. At the time and place where the incident took place it can hardly be possible to get such an eye-witness. Nothing was pointed out to us indicating availabil-

ity of independent eye-witnesses apart from the police. The learned Judge has found fault with the respondents for not examining P.S.I. Bhosale Patil and S.I. Kalekar. According to the learned Judge, Sr. P.I. Tambvekar says that A.P.I. Dhobale fired four shots, while, A.P.I. Dhobale has stated that he fired in quick succession. Secondly Tambvekar says that Dhobale removed pistol from Javed Fawda's right hand while A.P.I. Dhobale does not specify in which hand Javed Fawda was holding the pistol. This is hardly a reason to insist on corroboration of their evidence. The learned Judge has not been able to notice any glaring inconsistencies in their evidence making them unreliable. In my opinion the evidence of these witnesses establishes the police case and there is no need to multiply witnesses. 54. The observation of the learned Judge that Javed Fawda was unarmed is also surprising. He has completely ignored the evidence of the Chemical Analyser Ramteke and the C.A. report produced by him. P.I. Dhobale (P.W. 7) has stated that he removed the foreign make Star Mark Pistol from Javed Fawda. He unloaded it and found it contained 3 bullets. He says that Javed Fawda fired 2 shots, and two empty cartridges were taken charge of from the spot. Ballistic Expert Ramteke's report Ex. "T" (Colly.) shows that: "Ex-1 is a 7.63 mm pistol. This was in working order. Barrel washings of Ex. 1 showed that it was used for firing prior to its receipt in the lab. Ex-2-A & 2-B are two 7.63 mm. Pistol empties. They are the fired 7.63 mm (30") pistol cartridge cases. The characteristic features of the firing pin impression on the empties in Exh. 2-A & 2-B tally among themselves and with those on the cartridges test fired from the pistol Ex. 1 showing that the empties in Exh. 2-A & 2-B have been fired from the 7.63 mm/ (30") pistol Ex. 1." This is consistent with the evidence of Dhobale that Javed Fawda fired two shots. Exh. 3-A are two intact G.E.L. 7.63. mm. Mauser Pistol cartridges. Exh. 3-B one Gel 7.63 mm Mauser pistol cartridge having light indentation on the cap. The report says that Ex. 3-A were successfully test fired from Ex-1 and Ex-3-B having light indentation on the cap was not suitable for comparison. This is consistent with P.I. Dhobale's evidence that he unloaded the pistol found in the hands of Javed Fawda and found that it contained 3 bullets. Therefore, the learned Judge is entirely wrong when he says that Javed Fawda was unarmed. 55. Unfortunately while reading the testimony of P-1 Dhobale the learned Judge kept in the recesses of his mind prior conviction of P. I. Dhobale forgetting that P.I. Dhobale was acquitted by Bombay High Court. S.L.P. is pending in the Supreme Court, against the said Judgement and therefore, when the Supreme Court is seized of the matter it was not proper for the learned Judge to comment upon it. 56. In the facts of the case therefore it is amply clear that the police has gone to arrest Javed Fawda a wanted criminal. They did not open fire first. P.I. Dhobale gave a warning to Javed Fawda to the effect "Javed Bhagna Nahi" (Javed do not run). Instead of abiding by it and surrendering to the police Javed fired at the police and therefore, police had to open fire in self defence. Evidence of A.P.I. Dhobale and P.I. Tambvekar is consistent and inspires confidence. The post mortem notes, Chemical Analyser's report, spot panchanama and other documents like Ex. "W" the memo issued by A.C.P. Rao to P.I. Tambvekar, M.V. seizure Ex. 18, 21 point report dated 28-8-97 and other contemporaneous

documents to which reference is already made hereinabove lend assurance to the testimony of A.P.I. Dhobale and P.I. Tambvekar. The encounter is thus genuine and hence the contrary finding recorded by the learned Enquiry Judge is liable to be set aside. 57. In the 2nd enquiry which pertains to the deaths of Sada Pawle and Vijay Tandel, the petitioners have examined P.W. 1 Hausabai sister of Sada Pawle, P.W. 2 Anita Pawle, sister in law of Sada Pawle, P.W. 3 Anand Pawle, brother of Sada Pawle and P.W. 4 Baldevsingh Panesar and the respondents have examined P.S.I. Avinash Sawant R.W. 1. Satish Mayekar, R.W. 2, Hemant Desai, R.W. 3, Arun Dada Jadhav, P.C. R.W. 4, Advocate Sarogi R.W. 5 and Ashok Kamble, R.W. 6, Asst. Div. Officer, Mumbai, Fire Brigade. 58. The petitioners's witnesses had filed affidavits in the Court dated 2/3-3-1998 taking a stand that they were in the car in which Sada Pawle was travelling. They wanted to go to Shirdi. Baldevsingh P.W. 4 was at the wheel. At the junction of M.G. Road the car stopped on account of signal. At that time the police came there armed with revolver and shot Sada Pawle and Vijay Tandel. In short they claimed to be eye witnesses. However, by filing affidavits on 27/31-3-98, they retracted their earlier affidavits. In the Court Hausabai, Anita and Anand have turned hostile. The only person who supported the petitioners' case inspite of retracting his earlier affidavit dated 3-3-1998, by filing affidavit dated 31-3-98 is Baldevsingh P.W. 4. 59. The petitioner's Counsel have strenuously contended that the witnesses were pressurised into retracting their statements by the police, and in any case Baldevsingh who is courageous enough to stick to his first affidavit needs to be relied upon as the fact that he has done so indicates that he is a witness of truth. In fact the learned Judge has relied upon this witness on the basis of this logic. 60. In my view the fact that 3 out of 4 witnesses examined by the petitioners have not supported the petitioners gives a severe blow to their case. Besides there is intrinsic evidence to show that Baldevsingh is a liar. Even the learned Enquiry Judge has called him a liar at one stage. If Baldevsingh is found to be a dishonest witness, then there is only the uncontroverted testimony of police officers to reckon with. 61. Baldevsingh is proved to be a liar for following reasons. A) Throughout the evidence he has referred to Sada Pawle as Ajay and Vijay Tandel as Bhaskar to create an impression that he did not know them as dreaded criminals. However, in cross-examination, he has admitted that he attended the marriage of Anand's sister on 19-3-1995 at Adampur. He has also admitted that on 19-6-1997 he attended Anand's marriage and that he came close to members of his family. He has admitted that in the photographs taken in the marriage of Anand and Anand's sister he is present. In one of the photographs he is shown carrying Sada Pawle's son. Therefore, in the Court he has tried to create an impression that he did not know that Sada Pawle & Vijay Tandel were dreaded criminals and that he was not part of their set up but an independent witness. (B) He has stated that he did not know whose car was arranged, for the trip to Shirdi. However, in the cross he has admitted that he and Anand (P.W. 3) had gone to Vicky at Sindhwadi and brought the car. In fact considering these contradictions the learned Trial Judge has in paragraph 188 called him a liar. In paragraph 182 the learned Judge has stated that it is difficult to believe that

Baldevsingh was not aware of Sada Pawle and his nexus with the underworld. The relevant portion reads thus; "It is only when he was confronted with the photograph wherein he is seen carrying a child whom Baldevsingh admits to be the child of Sada Pawle that Baldevsingh's bluff is called. Having mingled with and wined & dined with Sada Pawle, it is difficult to believe that Baldevsingh did not recognise Sada Pawle when he met him at the house of Anand who was proceeding to Shirdi. It is also difficult to believe that Anand Pawle could have introduced Sada Pawle to Baldevsingh as Ajay. In fact, the question of introducing Sada Pawle to Baldevsingh did not and could not have arisen as Sada Pawle was known to Baldevsingh;" After observing this, in paragraph 188, the learned Judge has concluded: "However, it must be pointed out that although Baldevsingh (P.W. 4) has been proved to be a liar so far as these two points are concerned. The reason appears to be that Baldevsingh wanted to distance himself from Sada Pawle and therefore, tried to disassociate himself. . . .".

- C) Baldevsingh has no sanctity for statements made on oath. He has retracted his earlier affidavit by filing another affidavit and in the Court he has not stood by the 2nd affidavit. A witness of this type is not a witness of truth:
- D) Baldevsingh has admitted that he had no licence and that he was only called for driving the car to Shirdi. If he has no licence then his whole story that they wanted to go to Shirdi and he was called for the purpose of driving becomes suspect. The learned Judge has surprisingly complemented him by saying that he has frankly admitted that he has no licence and, therefore, this does not prove that he is a liar.
- E) In his entire evidence this witness makes no mention of the 2nd Maruti car and, therefore, his very presence becomes doubtful. In fact the learned Judge has after considering how he has fared in the Court observed in paragraph 193 of the report that 'the petitioner's witness Baldevsingh has come out of the cross-examination badly scratched and bruised with him image tarnished but not damaged beyond repair"

(Underlining supplied for emphasis).

- F) As rightly pointed out by Mr. Manohar the evidence oral as well as documentary shows that Baldevsingh was very much on duty on the relevant dates. Baldevsingh has stated that on 26th and 27th September, 1997 he was not on duty. He went to Anand Pawle's residence and Anand Pawle asked him to accompany him to Shirdi. They left Anand's place in the car by about 1.30 to 1.45 p.m. The incident of shooting took place at the junction of M.G. Road. After the incident he was asked to sit in the Maruti car. He was taken to Tilak Nagar Police Station. Thereafter the car was taken to Tilak Nagar Colony and he was transferred to a taxi and from there he was taken to Nagpada Police Station. There he was kept for the whole day and next day i.e. 27-9-97 at 5.30 or 6 p.m. he was released

from the lock up. Inspector Desai took him to V.T. Railway Station and made him sign the muster for 2 days 26/27-9-97. Thereafter they took him to the Computer room and Hemant Desai and Salaskar made him prepare receipts for ticketless travel fine collected for 26th and 27th September, 1997. All this was done to create evidence that he attended his duty and he was not eye-witness to the incident. According to him he was made to prepare six or seven receipts for the fine collected on those days. He resumed duty on 1-10-97. He was shown those receipts. He states that the receipts bearing serial numbers D 458825 to 28 are of 26-9-97 and those at serial numbers D 458829 to 31 are of 27-9-97. He has further stated that 8 receipts from 1-10-97 to 6-10-97 are genuine receipts. He has stated that while tendering the amount the T.C. is required to submit a statement by filing Money Receipt book.

According to him M.R. copy dated 9-10-97 is in respect of fine collected from 26-9-97 to 27-9-97. That means the amount was deposited on 9-10-97. He says that he paid the amounts within three days from the date of preparation of receipts. That means receipts were prepared on 6-10-97. If 8 receipts prepared from 1-10-97 to 6-10-97 are genuine, the receipts which he was allegedly made to prepare afterwards i.e. on 6-10-97 must bear serial numbers after those receipts. However, those receipts precede the genuine receipts made from 1-10-97 to 6-10-97 which cannot be, if Baldevsingh's story is to be accepted as true. All the receipts are serially in order. This completely falsified Baldevsingh's story that he was absent on 26th & 27th 9-97 and was made to prepare receipts on 6-10-97 by Inspector Hemant Desai. G) Equally false is the story of Baldevsingh that he was made to sign muster roll for 26th & 27th September, by Hemant Desai though he did not attend the duty on those days. He has admitted that in September 97, Omkarsingh was in charge of muster roll and it could be signed only during office hours. If muster roll has to be taken out, D.C.T.'s permission is necessary. He did not inform Omkarsingh or did not contact him about the signing of the muster. He did not contact any superior officer to inform him that he was pressurised into signing the muster roll. All these admissions make his story inherently improbable. H) Baldevsingh's story that he retracted his affidavit because he came to know that Anand, his wife and sister had retracted their affidavit is false. Threats from the police officers are also not substantiated. He has stated that before he signed the affidavit dated 31-3-97, he told the officer before whom he signed the affidavit that the contents are correct. He has further admitted that he read Anand's draft, translated it in Marathi to Anand and suggested the necessary changes, and then final affidavit was prepared. Therefore, his story that because Anand and others had retracted their affidavit he retracted his affidavit is not correct. Moreover, Anand does not support Baldevsingh on this. I) Baldevsingh has admitted that he is not able to identify anyone who could be called responsible for shooting Vijay Tandel when he was shown eleven policemen in the Court. P.S.I. Mayekar was one of them. His presence is therefore doubtful. J) Baldevsingh goes on improving his story by saying that each officer had two fire arms meaning one in each hand. This is

inherently improbable and is also not made out by the evidence. K) Column 21 of post mortem notes of Sada Pawle & Vijay Tandel show that their stomach contained semi solid food. This disproves the story of Baldevsingh that they had non-vegetarian food at Anand's house and they set off for Shirdi. Admittedly incident took place within 15 minutes thereafter. Medical authorities show that if a person has full meal of non-vegetarian food then under no circumstances within 15 minutes it will be semi-digested. Stomach would have contained undigested food. {(1) Ross & Wilson Anatomy and Physiology in Health and Illness. Sixth Edition. (2) HWV Cox Medical Jurisprudence & Toxicology, Sixth Edition (Page 216)}. Therefore, the whole story of Baldevsingh appears to be untrue. He is not a dependable witness. For all these reason, Baldevsingh's testimony is worthless. The learned Judge has observed that "Baldevsingh has come out of cross-examination badly scratched and bruised and with his image tarnished but not damaged without repair". In any view, the later pan of the observation should read "his image tarnished and damaged beyond repair". 62. The learned Judge has then drawn a conclusion that rough sketch of the scene of offence and panchanama do not bear out the police story. According to him neither Sada Pawle nor Vijay Tandel were shot at T-junction. Therefore, finding of blood at the spot is not consistent with the police case. In this respect, Mr. Manohar has rightly pointed out that it was not open to the learned Judge to rely on the rough sketch of the scene of offence when map Ex. "O" has been admitted by the parties. He brought to our notice Memo dated 17-6-97 (Ex.. 21) made by the learned Judge after visit to the scene of the incident wherein he has observed that Map Ex.. "O" is accepted by the parties as correct. In fact in paragraph 210 the learned Judge has observed that the map at Ex. "O" is admitted by the petitioners as the correct sketch of the scene of incident and there is no dispute about the positioning of the vehicles. Moreover Ex. "O" is completely corroborated by panchanama of scene of offence and the deposition of police witnesses. Therefore, it was not open for the petitioners to rely on rough sketch at page 228. Besides it is not even put to the police witnesses. No questions have been asked to them on that basis. 63. Ignoring section 293 of Criminal Procedure Code the learned Judge has stated that the Chemical Analyser's report is not proved. After rejecting the C.A. report and the panchanama of the scene of offence on the ground that they are not proved he has come to a conclusion that consequently recovery of empties from the scene of offence is not proved. He has held that it cannot be therefore said that Sada Pawle and Vijay Tandel were armed with AK-56 and pistol respectively. In this regard Mr. Manohar took us to the panchanama of the scene of offence dated 26-9-97. It states that at the northern side of M.G. Road, T Junction Road No. 7 on the road there is a round shaped pool of blood. Six empty cartridges and 5 empty cartridges of AK-56 were found at less or more distance from near the said pool of blood. It further states that one white colour Fiat Car is facing east at the said place of offence. From the place where the vehicle is stationery, on the Road No. 7 there is a round shaped fresh pool of blood and 7 empty cartridges are seen lying near the same. Panchanama of production of weapons indicates that one Kadam produced AK-56 make rifle, one empty

magazine of AK-56 Rifle and Nine live cartridges. He stated that they were seized from the injured Sada Pawle. He also produced one 9 mm pistol black in colour of Browning Patent make, one empty magazine of 9 mm pistol and 4 live cartridges. He has stated that they were seized from injured Vijay Tandel. Mr. Manohar then took us to the Chemical Analyser's report which indicates: {(S.P.) Sada Pawle. (V.T.) Vijay Tandel. Initials in brackets supplied for convenience}} Ex. 1 is AK-56 Rifle (S.P.) Ex. 2. 9 mm Pistol (V.T.) Ex. 3-A Nine intact Initials in rifle cartridges of AK-56 (S.P.) Ex. 3-B Three intact 9 M.M. pistol cartridges. Ex. 3-C one 9 mm pistol cartridges (magazine) Ex. 4-A to 4-E Five short rifle empties AK-56. Ex. 4-F to 4-R. Thirteen 9 mm Pistol empties. Chemical Analyser's report says that Ex. 1 (AK-56) is in working condition and barrel washings showed that the rifle was used for firing prior to its receipt. Randomly selected 2 cartridges from Ex. 3-A were successfully test fired from Ex. 1 AK-56. Ex. 2, the 9 mm calibre pistol was in working condition and barrel washings showed that it was used for firing prior to its receipt in the laboratory. All the three 9 mm pistol cartridges from Ex. 3-B were successfully test fired from 9 mm pistol Exh. 2. The empties Ex. 4-A to 4-E have been seized from Ex. 1 AK-56. Empties in Exh. 4-F, 4-N & 4-S have been fired from and the cartridge in Ex. 3-C has been attempted for firing from 9 mm. pistol Exh. 2. Therefore, use of AK-56 and pistol is established. Beside it is not the case of the petitioners that the police had AK-56. 64. Moreover as pointed out by Mr. Manohar there are at least three valid reasons why Sada Pawle and Vijay Tandel would carry AK-56 and pistol respectively. a) There are 4 to 5 rival gangs. There is always apprehended danger of attack. b) These weapons are tools of their business. There are many ransom cases registered against them. They carry weapons as a matter of routine: c) They are always wanted by the police. To prevent arrest these weapons are necessary. 65. Therefore, the conclusion that Sada Pawle and Vijay Tandel did not have weapons is unfounded. 66. The learned Judge has then wrongly observed in para 269 that there is no evidence on record to show why Sada Pawle and Vijay Tandel are considered most dangerous persons. There is no record to show that any offences have been registered against them. He has ignored the document at page 233 which shows that there are a number of cases registered against them at various police stations of Bombay. 67. Another point which is held against the respondents is that Maruti cars have no bullet marks. As rightly pointed out by Mr. Manohar, the witnesses have stated that when Sada Pawle got out of the car AK-56 in his hands was pointing towards the ground. Sada Pawle raised his AK-56 in defiance. 68. In para 158 the learned Judge has stated that the question of AK-56 being raised in defiance could arise only if it is held pointing downwards. In paragraph 156, he has wrongly observed that P.S.I. Sawant and P.S.I. Mayekar have omitted to mention an important fact which P.S.I. Hemant Desai has mentioned namely when Sada Pawle got out of the car he was seen carrying AK-56 and the gun was pointing towards the ground. The observation is factually incorrect as at pages 71 & 76, P.S.I. Sawant has stated that Sada Pawle lifted AK-56 in defiance and in cross-examination he has stated that when Sada Pawle got out of the car he was holding the butt of his AK-56 in

his right hand with its barrel pointing to the ground. P.S.I. Mayekar has stated that Sada Pawle was holding AK-56 pointing towards the ground. P.S.I. Desai has stated that AK-56 held by Sada Pawle was pointing towards the ground. Therefore, the learned Judge has proceeded totally on wrong assumption. R.W. 1 Sawant has in the cross-examination stated that while Sada Pawle was firing the AK-56 was shaking and the barrel was raised up. None of those 4 to 5 shots hit their Maruti cars. P.S.I. Desai has stated that when Sada Pawle was firing with AK-56 it was wobbling and pointing upwards. These statements have come in the cross-examination. There is no challenge to it. Therefore, there is nothing improbable in not finding any barrel marks on the two Maruti cars. 69. It is also important to note that P.S.I. Mayekar and P.C. Jadhav have received injuries. Ex. 14 & 15 respectively are their injury certificates. Therefore, the fact that Sada Pawle and Vijay Tandel had weapons and they were defiant is proved. The observation of the learned Judge that the police live a charmed life is also wrong. 70. Another submission made by the learned Counsel for the petitioners need to be mentioned. By drawing our attention to external injury No. 2 in the post mortem notes of Sada Pawle, Mr. Chari urged that the tattooing of about one and half inches diameter surrounding the entry and singeing of hairs indicate that it was a close shot. He also drew our attention to external injury No. 2 in Vijay Tandel's post mortem notes where tattooing and singeing of hairs is present. He substantiated this contention by taking us to a paragraph at page 264 from Modi's Textbook of Medical Jurisprudence and Toxicology, Twenty-First Edition. The relevant observations are as under: "When there is a close shot that is in the range of powder blast and flame is within 1 to 3 inches for small arms there is a collar of soot and grease (if present on the bullet) around the circular wound of entry. Singed hairs may be seen if the body is not covered with clothing. Partially burnt and unburnt grains of powder are blasted into the skin causing a tattooing which cannot be easily wiped off. Wadding, pieces of clothing or other debris may be found lodged in the wound. The entry wound of a revolver fired very near or in contact with the skin is generally stellate or cruciform in shape instead of being circular. When it is fired beyond a distance of 12 inches there are no powder marks of soot or heat effects around the wound". In this behalf, he also drew our attention to page 58 of the book "THE IDENTIFICATION OF FIREARMS AND FORENSIC BALLISTICS" by Major Sir Gerald Burrard. He also relied on Parikh's Medical Jurisprudence and Toxicology (page 275.) Mr. Chari urged that from this it is clear that there was no encounter. The story of self defence is concocted. 71. In reply to this, Mr. Manohar, learned Counsel appearing for the State has drawn our attention to State of U.P. v. Sudhar Singh & others where the Supreme Court has held that when the direct evidence of eye-witness is available, inconsistencies relating to the distance from which gun shots were fired between the evidence of medical expert and eye-witness is of no significance. Mr. Manohar stated that in the present case, the eye-witness account of police officers is consistent and must prevail over other evidence assuming it helps the petitioners. 72. There is force in this submission. Tattooing and singeing found near the two injuries does not prove that close

shots were fired, because the eyewitness account in that behalf is consistent and negates this suggestion. The sole witness of the petitioners is described as a liar by the learned Judge. We also concur with him on this point. No glaring inconsistencies have been found in the evidence of the eye-witnesses. The ocular account displaces the theory of close shots. 73. Taking an overall view of the matter it is apparent that the encounter was genuine. The petitioners' witnesses inspire confidence. They establish that it was Sada Pawle and Vijay Tandel who opened fire first when the police went to arrest them and in self defence the police had to open-fire. Their actions cannot be weighed in golden scales. Petitioners' witness Baldevsingh is a liar and cannot be believed at all. Their other witnesses have turned hostile but surprisingly in para 159 the learned Judge calls them eye-witnesses. The petitioners have therefore completely failed to make out a case that the encounter was false. That finding of the learned Judge will therefore, have to be set aside. 74. At this stage it is also necessary to touch one more aspect of the matter to which our attention was drawn by Shri Manohar the learned Counsel appearing for the respondents. Section 96 of the I.P.C. says that "Nothing is an offence which is done in the exercise of the right of private defence." Section 102 of the I.P.C. says that "The right of private defence of the body commences as soon as reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed and it continues as long as such apprehension of danger to the body continues. In this regard reliance is rightly placed by the respondents on *Deo Narain v. State of U.P.*. While considering section 102 of the I.P.C. the Supreme Court observed: "To say that the appellant could only claim the right to use force after he had sustained injury by an aggressive wrongful assault is a complete misunderstanding of the law embodied in above section." The Supreme Court further observed: "In such moments of excitement or disturbed mental equilibrium, it is some what difficult to expect parties facing grave aggression to coolly weigh, as if in golden scales, and calmly determine with a composed mind as to what precise kind and severity of blow would be legally sufficient for effectively meeting the unlawful aggression." The judgment of the Supreme Court in the case of *Puran Singh & others v. State of Punjab*, can also be usefully referred to. In this case the Supreme Court has observed: "The right of private defence of property or person where there is real apprehension that the aggressor might cause death or grievous hurt to the victim, could extend to the causing of death also, and it is not necessary that death or grievous hurt should actually be caused before the right could be exercised. A mere reasonable apprehension is enough to put the right of private defence into operation." The Supreme Court quoted the following observation from *Jai Dev & Hari Singh v. State of Punjab*. "But in dealing with the question as to whether more force is used than is necessary or than was justified by the prevailing circumstances, it would be inappropriate to adopt tests of detached objectivity which would be so natural in a Court room, for instance long after the incident has taken place. That is why in some judicial decisions it has been observed that the means which a threatened person adopts of the force which he uses should not be weighed in golden scales." Therefore once

it is established that the police had gone to the spot in question on a definite information to arrest a criminal and the arrest was resisted by the criminal by firing by using sophisticated weapons, the action of police taken in their defence cannot be weighed in golden scales. In this connection a very significant averment in the affidavit of Mr. Mendonsa the Commissioner of Police, Bombay needs to be noted. In his affidavit filed in Criminal Writ Petition No. 1064 of 1997, Mr. Mendonsa has stated that wherever the criminals have surrendered to the command of the police officer for arrest there has been no violence. It is only in cases where the concerned victim opened the initial fire that police had to exchange fire. It is stated that during 1995-1996-1997 similar criminals and gangsters numbering to 248/278/226 respectively, who surrendered to the command of the officers without violence came to be arrested. Instances of sharp shooters Sanjay Kale and Rama Gadale belonging to Arun Gawali Gang who were armed with revolver and pistol respectively have been cited in this behalf. Therefore allegations levelled against the police are indeed unfounded. Brother Arumugham, J., has dealt with all other aspects of the matter and given the necessary directions while dismissing the petitions, to which I do not wish to add anything. 75. Petitions dismissed.