

Bombay High Court The State Of Maharashtra vs Rajesh Alias Kaka Madanlal Soni & ... on 23 September, 1997 Equivalent citations: 1998 BomCR Cri Author: V Sahai Bench: V Sahai, T Chandrashekhara Das ORDER Vishnu Sahai, J. 1. Since these two connected matters arise out of a common incident and impugned judgment we are disposing them off by one judgment. 2. Vide judgment and order dated 25-10-1996 passed in Sessions Case Nos. 1238/ 92 and 609/94 the Additional Sessions Judge, Greater Bombay, convicted and sentenced 1. Rajesh alias Kaka Madanlal Soni, 2. Arif Rafique Ahmed Shaikh, and 3. Abu Armogam Velu Nadar, in the manner stated hereinafter : (1) Under section 302 read with 149 I.P.C., 302 read with 34 I.P.C. and 27(3) of the Arms Act to death; (2) Under section 307 read with 149 I.P.C. and 307 read with 34 I.P.C. to R.I. for life; (3) Under section 144 I.P.C. to R.I. for two years; (4) Under section 148 I.P.C. to R.I. for 3 years; and (5) Under section 25(1)(a) of the Arms Act read with 149 I.P.C. to R.I. for 7 years and to pay a fine of Rs. 5000/- in default to suffer R.I. for 6 months. The substantive sentences of imprisonment were ordered to run concurrently. 3. Confirmation Case No. 3 of 1996 arises out of the reference made by the trial Judge, under section 366 of the Code of Criminal Procedure; for confirmation of the death sentence of the said persons. Criminal Appeal No. 683 of 1996 has been preferred by the said persons against their convictions and sentences. 4. The prosecution case in short is as under : On 30-7-1991 at about 10.30 a.m. Police Constable Bhimrao Patil P.W. 1 along with his friend Prasad Belosey P.W. 6 left his house situated in Ghatkopar Police Lines, to meet his wife who at the said time was staying with her parents in Airoli, District Thane. At about 1.45 p.m. they reached Ghatkopar Railway Station and went to the sweet meat shop of one Mamu, which was at the said railway station and was situated opposite Welcome Hotel, on Jayantilal Vaishnav Marg. They heard the sound of bursting of crackers coming from the direction of the hotel and saw people running helter skelter. They also noticed one person lying on the road in front of the Welcome Hotel and 6 unknown persons with revolvers firing on him. They started running. At that juncture one of them fired at Bhimrao Patil and the shot struck him on his right thigh. Apart from Bhimrao Patil P.W. 1, Prasad Belosey P.W. 6, this incident was seen by constable Pandurang Bankar P.W. 2, Sandip Surve P.W. 3, Ramesh Babu Sutar P.W. 4 and constable Chougule (not examined). All these witnesses are said to have recognized the assailants by their faces. 5. Prasad Belosey P.W. 6 took Bhimrao Patil P.W. 1, in an autorickshaw to Rajawadi Hospital where he was medically examined at 2.35 p.m. by Dr. Akshay Bhagat P.W. 9. Dr. Bhagat found that Bhimrao Patil had sustained one entry wound on anteromedial aspect of right thigh in the lower third region, 1 cm. in diameter with surrounding friction abrasion. He felt the bullet in posteromedial aspect of right thigh at the junction of middle third and lower third portion. For retrieving the bullet he operated upon Bhimrao Patil and extracted the bullet from the right thigh. 6. In the meantime Constable Pandurang Bankar P.W. 2 took the person who was fired upon by the six unknown persons with revolvers and was lying in a pool of blood on the ground, in a taxi, to Rajawadi Hospital. On examination the doctor found him to be dead. The evidence of

Pandurang Bankar P.W. 2 is that from the identity card found in the pocket of the deceased he came to know that he was a Professor in Jhunjhunwala College. 7. The evidence of P.S.I. Shivajirao Bagal P.W. 7 shows that at about 1.45 p.m. on 30-7-1991, while he was on station house duty at Ghatkopar Police Station he received a wireless message that some incident had taken place near Welcome Hotel. Immediately thereafter a telephonic message, from an unknown person was received at the police station that there was firing on one person near New Welcome Hotel, Ghatkopar. Accordingly he made a station diary entry and along with Senior Inspector Ashtekar left for the place of the incident. There he came to know that the person fired upon had been removed to Rajawadi Hospital. Accordingly P.S.I. Shivajirao Bagal P.W. 7 and P.I. Ashtekar and police personnel immediately went to Rajawadi Hospital and there they came to know that the said person was dead and his name was Arun Singh. Constable Pandurang Bankar P.W. 2 informed them that one more person who had sustained injury during the incident was admitted in Ward No. 5. Consequently P.S.I. Shivajirao Bagal P.W. 7 and P.I. Ashtekar went to Ward No. 5 and the former recorded the statement of Bhimrao Patil. 8. The F.I.R. of the incident is the statement of Bhimrao Patil recorded by P.S.I. Shivajirao Bagal at 2.30 p.m. in Ward No. 5 of Rajawadi Hospital. On the basis of the F.I.R., at 3.25 p.m. the same day, C.R. No. 321 of 1991 under sections 143, 145, 147, 148, 302, 307, 149, 34 I.P.C. read with sections 3 and 25 of the Arms Act, was registered against six unknown persons. After recording the F.I.R., P.S.I. Shivajirao Bagal P.W. 7 and P.I. Ashtekar performed the inquest on the dead body of the deceased Arun Singh and thereafter proceeded to the place of the incident and prepared the spot panchanama. Exhibit 18, a perusal of which shows that a large number of empty shells of bullets were recovered from the place of the incident. 9. On 18-1-1992 the investigation was taken over by P.I. Harishchandra Rumade, P.W. 12. His evidence shows that on 6-6-1992, he received a memo from the Inspector of Police, D.C.B., C.I.D., Unit No. III, for taking custody of Rajesh alias Kaka Madanlal Soni. He obtained transfer warrant from Metropolitan Magistrate, 31st Court, Vikhroli and took his custody on 17-6-1992. He brought him to police station Ghatkopar and lodged him in the lock-up. On interrogating him he learnt his involvement, that of Arif Rafique Ahmed Shaikh, Abu Armogam Vein Nadar, Rajendra More, Naru and Anil Patel in the present crime. The evidence of P.I. Rumade shows that Anil Patel and Raju More were killed in police encounter and Naru is absconding. 10. On 24-6-1992 P.I. Rumade called the Special Executive Magistrate Nandkumar Salvi P.W. 5 at Ghatkopar Police Station for conducting the test identification of Rajesh alias Kaka Madanlal Soni. A perusal of the evidence of S.E.M. Salvi evidence shows that on that day at about 3.30 p.m. He reached Ghatkopar Police Station and after completing the formalities put up the said suspect for test identification. In all 6 persons viz. Bhimrao Patil, Prasad Belosey, Sandeep Surve, Ramesh Sutar, Pandurang Bankar and Sakharam Chougale attended the parade. Bhimrao Patil, Prasad Belosey, Sandeep Surve and Ramesh Sutar, correctly identified him. Pandurang Bankar, and Sakharam Chougale failed to identify him. 11. On 24-8-1992 P.I. Rumade submitted charge-sheet against Rajesh alias Kaka

Madantal Soni, in the Court of Metropolitan Magistrate, Vikhroli. On 23-10-1992 the case was committed to the Court of Sessions, Greater Bombay. 12. The evidence of P.I. Rumade shows that on 3-4-1993 he received a memo from Sakinaka Police Station intimating that Arif Rafique Ahmed Shaikh, and Abu Armogam Velu Nadar had been arrested by them. On 1-12-1993 he obtained permission from TADA Court, Mumbai and took their custody on the said day. He brought them to Ghatkopar Police Station and lodged them there as they were to be put up for identification. 13. On 5-12-1993 P.I. Rumade requested S.E.M. Hussain Noor Mohammad Sayyad, to conduct the test identification of Arif Rafique Ahmed Shaikh, and Abu Armogam Velu Nadar. The same day at about 4.30 p.m. S.E.M. Sayyad came to Ghatkopar Police Station and conducted their test identification after completing the formalities enjoined by law. The identification parade was attended by two witnesses viz. constable Pandurang Bankar P.W. 2 and Ramesh Sutar P.W. 4. They correctly identified both the suspects. 14. On 7-12-1993 P.I. Rumade requested S.E.M. Nandkumar Paradkar P.W. 11 to hold the test identification of the said suspects. This was necessitated because four of the identifying witnesses namely Bhimrao Patil, Sakharam Chougale, Sandeep Surve and Prakash Belose had not attended the parade dated 5-12-93. The same day after completing the formalities S.E.M. Paradkar conducted their test identification in which Bhimrao Patil, Sandeep Surve and Prakash Belose correctly identified them. Sakharam Chougale failed to identify them. 15. On 14-12-1993 P.I. Rumade submitted Charge-sheet against Arif Rafique Ahmed Shaikh, and Abu Armogam Velu Nadar in the Court of the Metropolitan Magistrate, 31st Court, Vikhroli and the same day the case was committed to the Court of Sessions. 16. Going backwards the autopsy on the dead body of the deceased Prof. Arun Singh was conducted on 31-7-1991 between 4.20 p.m. to 7 p.m. by Dr. Ashok Shinde, P.W. 8. In all Dr. Shinde found 34 ante mortem injuries on the corpse. Excepting injury 34, which was a contusion on the right arm, upper 1/3 back all others were fire arm injuries. On internal examination Dr. Shinde found massive internal damage. Practically no vital internal organ escaped the wrath of the bullets. In the opinion of Dr. Shinde ante mortem injuries Nos. 8, 11, 12, 13, 25, 26, 27, 29, 30, 31 and 32 were sufficient in the ordinary course of nature to cause the death of the deceased. 17. Although the cases of Rajesh alias Kaka Madanlal Soni, Arif Rafique Ahmed Shaikh, and Abu Armogam Velu Na'dar were committed to the Court of Sessions, vide two committal orders; the first pertaining to Rajesh alias Kaka Madanlal Soni and the second to that of Arif Rafique Ahmed Shaikh and Abu Armogam Velu Nadar but since they arose out of a common incident they were amalgamated by the trial Court and tried as one case. 18. In the trial Court in all the prosecution examined 13 witnesses. Five of them viz., Bhimrao Patil P.W. 1, Pandurang Bankar P.W. 2, Sandip Surve P.W. 3, Ramesh Babu Sutar P.W. 4 and Prasad Belosey P.W. 6, were examined as eye witnesses. The 6th eye witness constable Chougale was not examined. During the course of trial Sandip Surve P.W. 3 and Prasad Belosey P.W. 6 turned hostile. They did not identify any of the accused persons in the Court and disclaimed having identified them at the test identification parade. As regards the other eye witnesses

we find that all the accused persons were identified in Court by Bhimrao Patil and Ramesh Babu Sutar. In addition Arif Rafique Ahmed Shaikh and Abu Armogam Velu Nadar were identified by Pandurang Bankar P.W. 2. During the trial from the side of the prosecution a large number of exhibits were also proved and the genuineness of some of the documents filed by the prosecution was admitted under section 294 Cr.P.C. In defence no witness was examined. 19. The learned trial Judge believed the evidence adduced by the prosecution and convicted and sentenced the accused persons in the manner stated in paragraph 2. As mentioned in para 3, Confirmation Case No. 3/96 arises out of the reference made by the learned trial Judge, under section 366 of Cr.P.C., for confirmation of the death sentence awarded to the three accused persons namely Rajesh alias Kaka Madanlal Soni, Arif Rafique Ahmed Shaikh and Abu Armogam Velu Nadar and Criminal Appeal No. 683/96 has been preferred by the aforesaid persons assailing their convictions and sentences recorded vide the impugned judgment. 20. We have heard Mr. V.T. Tulpule with Mr. Rajiv Patil for the appellant, Mr. Sirish Gupte with Mr. Pradeep Mahajan, Mr. P.O. Naik and Mr. M.K. Kochrekar for the respondents in Confirmation Case No. 3 of 1996, Mr. Sirish Gupte with Mr; Pradeep Mahajan, Mr. P.D. Naik and Mr, M.K. Kochrekar for the appellants and Mr. V.T. Tulpule with Mr. Rajiv Patil for the respondent in Criminal Appeal No. 683 of 1996. We have also perused the depositions of the prosecution witnesses; the material exhibits tendered and proved by the prosecution; the statements of the appellants recorded under section 313 Cr.P.C., and the impugned judgment. After the greatest circumspection we have reached the conclusion that the reference made by the learned trial Judge for confirmation of the death sentence of the three accused persons has to be rejected and the appeal preferred by them deserves to be allowed in entirety. 21. In the instant case the only evidence against the appellants is that of identification. We wish to emphasise that the condition precedent for accepting the evidence of identification is it should be fair and beyond reproach. To secure that it has to be ensured that prior to the test identification the suspect was not shown to the identifying witnesses and the identification was held in the manner stipulated by the Criminal Manual issued by the High Court of Judicature, Appellate Side, Bombay. In the instant case we find that the identification was not held in accordance with provisions of the Criminal Manual, in fact they were observed more in breach; and there is a very high probability of appellants Arif Rafique Ahmed Shaikh and Abu Armogam Velu Nadar of being shown to some of the witnesses prior to their test identification. 22. It is well settled that the plea of shown need not be established to the hilt by the accused persons. They discharge the burden if they can show from circumstances that there was a reasonable possibility of their being shown to the witnesses prior to test identification. We say this on the authority of the magnum opus on the law of identification, *Ashrafi and anr. v. The State*, a Division Bench decision of the Allahabad High Court, . Speaking for the Division Bench James, J., observed in para 35 thus : “..... The law does not require him to do so affirmatively; it is sufficient if he can succeed in creating a reasonable doubt in the mind of the Court. Direct evidence may not be available, but he may discharge his burden

by showing, for example, that he and the witnesses were present in the police - station at the same time, or that he was marched through the village of the witnesses or that Prosecuting Inspector was present when his jail warrant was being prepared.” We are in respectful agreement with the observations of James, J. 23. We begin with the test identification of Rajesh alias Kaka Madanlal Sbni. His parade was conducted on 24-6-1992 at Ghatkopar Police Station by the Special Executive Magistrate, Nandkumar Salvi P.W. 5. We have mentioned earlier that in the said parade Rajesh alias Kaka Madanlal Soni was correctly identified by Bhimrao Patil P.W. 1, Sandip Surve P.W. 3, Ramesh Babu Sutar P.W. 4 and Prasad Belosey P.W. 6. Since Sandip Surve P.W. 3, and Prasad Belosey P.W. 6 turned hostile, did not identify him in Court and disclaimed having identified him at test identification there remain only against him the identifications of Bhimrao Patil P.W. 1 and Ramesh Babu Sutar P.W. 4. We however, feel that the said identifications cannot be relied upon because they were held in derogation of the provisions contained in Criminal Manual issued by the High Court, Bombay, wherein procedure for holding test identification has been laid down. The Criminal Manual provides that the said guidelines are illustrative and not exhaustive. The Criminal Manual stipulates that when a witness arrives to identify the suspects the Magistrate should ascertain from him whether he had any opportunity to see the culprit at any time subsequent to the offence or after the arrest. In para 3 of his statement, S.E.M. Nandkumar Salvi P.W. 5 admitted that he had not asked the witnesses prior to identification whether the suspect had been shown to them. He candidly stated that he admitted his mistake and also made no bones of the fact that he was aware that three of the identifying witnesses were police constables; two belonging to police station, Ghatkopar, (the place where identification was conducted). S.E.M. Nandkumar Salvi P.W. 5 also admitted in paragraph 3 that he was unable to say whether he had seen the suspect prior to his coming in the parade room. He also admitted that he did not mention in the memorandum that he had seen the suspect in the lock-up because it might not have happened. Once it becomes doubtful whether S.E.M. Salvi had seen the suspect prior to the test identification then how could he state that the dummies mixed with the suspect at the identification parade bore similar resemblance? In this connection it will be pertinent to refer to the Criminal Manual which stipulates that it is incumbent for the Magistrate conducting identification to ensure that the dummies are more or less of the same physical appearance and approximately of the same age, as the person to be identified. And this can only be done if prior to the suspect being put up at the parade the Magistrate goes to the lock-up and sees him. Again we find that in the identification memo there is no mention of any identification mark of the suspect. During his cross examination S.E.M. Salvi admitted that he could not tell from memory whether the suspect was having a beard. In paragraph 3 S.E.M. Nandkumar Salvi P.W. 5 further admitted that it is the duty of the Special Executive Magistrate to ask the suspect whether he was shown to the identifying witnesses. He admitted that he had not asked this from the suspect. To top it all whereas S.E.M. Salvi in his examination in chief has stated that the identification memo, Exhibit 24, is in his own hand writing, in his cross ex-

amination, in para 3, he admitted that the said memorandum is not in his hand writing but was in that of his friend Navneet Chavan. In his cross examination he was even suggested that it was the police which had prepared the identification memo and he only affixed his signatures on the same. Of course he denied the said suggestion. Even assuming that the identification memo was not prepared by S.E.M. Salvi at the behest of the police, in view of the said infirmities it would indeed be callous to sustain any sentence; more so a sentence of death, which has been awarded to Rajesh alias Kaka Madanlal Soni. 24. We feel that on account of the said infirmities in the evidence of identification appellant Rajesh alias Kaka Madanlal Soni deserves to be acquitted for all the offences. 25. We now come to the identification parades pertaining to Arif Rafique Ahmed Shaikh and Abu Armogam Velu Nadar. As mentioned earlier they were put up for identification in two different parades held after a highly suspicious gap of two days. On 5-12-1993 the first parade was conducted by S.E.M. Hussatn Noor Mohammad Sayyad P.W. 10. In the said parade two witnesses viz. constable Pandurang Bankar P.W. 2 and Ramesh Babu Sutar P.W. 4, took part. Both of them correctly identified each of them. 26. The identification of Arif Rafique Ahmed Shaikh and Abu Armogam Velu Nadar by Pandurang Bankar P.W. 2 per se shows his having seen them subsequent to their arrest and prior to their being put up for test- identification. In this connection it would be useful to refer to his cross examination wherein he admitted, in para 3, that at the parade held on 24-6-92 (held in connection with Rajesh alias Kaka Madanlal Soni), he had told the Special Executive Magistrate that he would not be able to identify the accused as they were running away through the crowd and he could only see their backs. He had further admitted that "It is true that I have not seen the faces of the accused". In view of this admission the only rational hypothesis on which his identification of these two persons can be explained is that they were shown to him prior to their test identification. His evidence shows that there was a sufficient possibility of the same for he admitted in para 3 that "it was true that accused Nos. 2 and 3 (Arif Rafique Ahmed Shaikh and Abu Armogam Velu Nadar) were in the custody of Ghatkopar Police Station prior to the parade." In the above state of evidence we are not prepared to accept his denial that he had not seen them prior to the parade. 27. In our judgment the circumstance that Pandurang Bankar P.W. 2 had seen Arif Rafique Ahmed Shaikh, and Abu Armogam Velu Nadar prior to their test identification reduces the credibility of the investigation to dust and once the investigation becomes highly tainted, as is the case here, no Court can accept the evidence of identification for the lurking suspicion which constantly haunts the mind of the Court is that if the police can be unscrupulous enough to show the suspects to one witness what is the guarantee that it has not shown them to others. In this connection it would be pertinent to refer to the observations contained in paragraph 21 of the Division Bench decision of the Allahabad High Court in *Anwar v. State*, reported in A.I.R. 1961 Allahabad page 51. The relevant observations are as under : "Where the investigation inspires confidence and the witness was fairly tested before he picked out the suspect the demands of prudence are satisfied and the Court feeling reassured rejects the possibility of a coincidence which becomes

remote. But where the investigation is tainted the performance of the witness cannot be accepted at the face value for the reasonable possibility external aid being given to the witness cannot be eliminated." (emphasis is supplied)." 28. It is because of happenings of the type mentioned in paragraph 26 that the courts look with a needle of suspicion when identifications are held in police stations, as is the case here. The inherent suspicion, to put it candidly, is not without foundation, it is founded on experience of Judges. In some cases, as is the case here, there is evidence to probabalise that suspects were shown to the identifying witnesses prior to the test identification. In others such evidence may be wanting. But all the same the Court has to be extremely cautious and circumspect before accepting the evidence of identification held at police station. This was the reason why a Division Bench of this Court, to which one of us (Vishnu Sahai, J.) was a party in the case of Ramcharan Bhudiram Gupta v. State of Maharashtra, observed in paras 16 and 17, thus: "16, We strongly deprecate the practice of conducting identification at police stations; a practice which we are informed at the Bar is only prevalent in Greater Bombay. The sooner it is abandoned the better it is because, the probability of the suspects being shown to the witnesses prior to the test identification is always there at the police station. At any rate, on account of such a practice, there is always a lurking suspicion in the mind of the Court that the witnesses might have seen the suspects prior to the test identification. 17. In order to make identification evidence beyond reproach, it is high time that an end is put to the practice of holding of identification at police station and identification parades instead are held in jail. This practice would not only enable the police to wash the stigma of showing suspects prior to their identification; a stigma which more than often is unfounded, but has manifold other advantages. Jails have a large population these days. It would be easy there to find persons similar to the suspects sought to be put for identification. Such similar persons have to be mixed with the suspects at the time of identification. The identification in jail would not only actually be free from any taint or suspicion but equally importantly it would also appear to be so. It would instil a sense of confidence both in the minds of the suspects sought to be put for identification as well as the Court". . . . 29. We are informed at the Bar that mercifully the practice of holding test identifications at Police stations has been abandoned in Greater Bombay; a practice which we are told was no where prevalent in Maharashtra. 30. Another circumstance which renders the identification parade dated 15-12-1993 unworthy of acceptance is that the same was conducted in violation of the provisions of the Criminal Manual wherein the procedure of holding identification has been set out. The Special Executive Magistrate Hussain Noor Mohammad Sayyad P.W. 10 who conducted the parade dated 5-12-1993 in his examination-in-chief had stated that he had visited the lock-up and seen the two suspects prior to the test identification. In his cross examination he admitted that it was important to mention this in the memorandum of identification and could assign no reason as to why the same has not been mentioned in the identification memo, Exhibit 49. In his cross examination he answered in the affirmative to the question that the dummies selected should be similar in appearance to the suspects. Since

in the test identification memo it has not been mentioned that he had seen the suspects prior to the identification we feel that it would be hazardous to accept his statement in the trial Court that he had seen them earlier. And if he had not seen them earlier, then obviously he was not in a position to know whether the dummies mixed with the suspects bore similar physical appearance and were approximately of the same age, as the suspects. As mentioned earlier the Criminal Manual provides that the Magistrate should ensure that persons of more or less of the same physical appearance and approximately of the same age, as the person sought to be identified should be mixed in the parade. Again we find that in his cross examination S.E.M. Sayyad admitted that one suspect was having dark complexion and the other was having a shallow complexion. There was difference in their appearance; one suspect was having little hair on his chin and he could not tell as to how many dummies were having little hair on the chin. The capital mistake committed by him was that he should not have put up both the suspects together for identification. In this connection we again refer to the Criminal Manual and this time to Clause 16(2)(h) under the heading of "Identification Parades". The relevant part reads thus: "16. (2)(h) The suspect should be placed among persons (if practicable eight or more) who are as far as possible of the same age, height, general appearance (including standard of dress and grooming) and position in life. Two suspects of roughly of similar appearance should be paraded with atleast twelve other persons. Where, however, the two suspects are not similar in appearance or where there are more than two suspects separate parades should be held using different persons on each parade." Again in his cross examination S.E.M. Sayyad admitted that he had neither asked the identifying witnesses whether the suspects were shown to them prior to the identification nor made an enquiry from the suspects as to whether they were shown to the witnesses. In connection with identification parade of Rajesh alias Kaka Madanlal Soni, we have already observed that the Criminal Manual mandates that before witnesses identify the suspect the Magistrate should enquire from them whether they had any opportunity of seeing them at any time subsequent to the offence or after the arrest. 31. The pathetic part of the cross examination of S.E.M. Sayyad is his admission in terms that "I am not aware about the circular of T.I. parade and I am not aware of High Court manual". Can there be a sadder reflection on the system than this; persons like S.E.M. Sayyad conduct identifications of accused involved in gruesome and broad day light murders committed in the heart of metropolis ! 32. We now come to the identification parade, which as observed earlier was held after a suspicious gap of two days i.e. 7-12-93. We have used the word 'suspicious' advisedly, because, the prosecution could not spell out any reason as to why four witnesses namely. Bhimrao Patil P.W. 1, Sandip Surve P.W. 3, Prasad Belosey P.W. 6, and constable Chougule (not examined) were not sent to the parade dated 5-12-1993. The only reason compatible with common sense and there is no rule that common sense should be put in cold storage, for not sending them to the parade dated 5-12-93 is that the two suspects sought to be identified were not shown to them prior to 5-12-1993. Our hunch is between 5-12-1993 and prior to the holding of the parade on 7-12-1993 three of these

witnesses, namely Bhimrao Patil, Sandip Surve and Prasad Belosey were shown the suspects and only thereafter the identification was conducted. This alone would have been sufficient to render the identification parade dated 7-12-93 valueless. 33. We would like to emphasise that in a situation such as this Police Inspector Rumade P.W. 12 should have furnished an explanation as to why he did not send the four witnesses to the parade held two days earlier. And since he has not done so we have drawn the said inference. In glaring situations such as this the stock argument that since the defence counsel did not put it to the witness does not hold good; it would of course be better if he puts it. 34. Now we propose examining the parade dated 7-12-1993 on merits. It was conducted by Special Executive Magistrate, P.W. 11 Nandkumar Anand Paradkar. As we have mentioned earlier that out of the three witnesses viz. Bhimrao Patil P.W. 1, Sandip Surve P.W. 3, and Prasad Belosey P.W. 6, who correctly identified them Sandip Surve P.W. 3, and Prasad Belosey P.W. 6 turned hostile and did not identify them in Court and disclaimed having identified them at the test identification. Thus the only identification which remains against them is that of Bhimrao Patil P.W. 1. We regret that the same cannot be accepted in view of the flaws in the manner in which the parade was held. Although in his cross examination S.E.M. Paradkar stated that he had asked the identifying witnesses whether the suspects were shown to them and they had replied in the negative but he admitted that he had not mentioned the said fact in the memorandum of identification, Exhibit 51. In our view, in the absence of this being mentioned in the memorandum of identification, it is incredible to believe that S.E.M. Paradkar could remember that he had asked the identifying witnesses whether the suspects had been shown to them. At any rate it would be very dangerous to trust his memory because in between the parade and his statement there was a time-gap of two years and nine months. As we have observed earlier the Criminal Manual mandates that the Magistrate conducting the identification should ask the witness prior to identification whether he had seen the suspects or not. We find that in the Criminal Manual there is a mandatory requirement enjoining the Magistrate conducting the identification to mention at the bottom of the memorandum that the contents of the memorandum were read over to the panchas and they are found to be correct. Although S.E.M. Paradkar states that he had explained the contents to the pan-chas but we find that there is no mention of it in the memorandum of identification, Exhibit 51. To repeat there was a time lag of 2 years and 9 months between the holding of the identification and the date when this witness gave evidence in Court and on account of this efflux of time we are not prepared to believe him when he says that he read over the contents of the memorandum to them. Again in his cross examination he had admitted that he did not ask the suspects whether they were shown to identifying witnesses. We also find that in his cross examination, in para 3, he admitted that he did not mention the identification marks of the suspects in the memorandum. He stated that he does not know whether it is necessary to observe the scar mark or any baldness or any specific marks. It is elementary knowledge that any distinctive mark which a suspect has should be mentioned in the memorandum of identification and it should also be noted that either

the dummies mixed bore similar distinctive marks or precautions were taken to conceal the distinctive marks of suspect. The cavalier manner in which the parade was done is borne out from the fact that in the memorandum, Exhibit 51, there is no mention of even the Crime number in respect of which the parade was done. For the reasons stated above we are not prepared to accept the identification of Bhimrao Patil. 35. We also find that identification of Arif Rafique Ahmed Shaikh and Abu Armugam Velu Nadar was held after an inordinate delay on account of laches of Police Inspector Rumade and this would adversely effect the value to be attached to the identification evidence against them. From the evidence of Police Inspector Harischandra Rumade P.W. 12, (paragraph 4) it is evident that he learnt of the complicity of these accused from Rajesh alias Kaka Madan Lal Soni pursuant to his arrest on 17-6-1992. From his evidence it also transpires that on 3-4-1993 he had received a memo from Sakinaka Police Station that these two accused persons were arrested. In the said para he stated that on 1-12-93 he obtained permission from the T.A.D.A. Court and took them in custody. In our view when he knew that these persons were to be put up for identification there was no justification for his obtaining permission from T.A.D.A. Court as late as 1 -12-1993. If there was some delay in obtaining their custody due to circumstances beyond his control he should have furnished the explanation in his evidence. 36. It is an elementary Principle of identification that it should be held at the earliest. The rationale is that human memory gets blurred with passage of time and may indeed get completely erased if an identification is held after 21/2 years, as is the case here. In our view this delay of 8 months on the part of P.I. Rumade to obtain permission of the T.A.D.A. Court for taking custody of these suspects would prove fatal to the acceptance of identification evidence against them. In this connection it would be pertinent to refer to the observations of James, J., in para 36 in the case (supra). The part relevant in this connection reads thus: "Since human memory is apt to get dulled with the passage of time it is desirable both in the interest of the honest witness and of the suspect himself that the latter be put up for identification without delay." In the same para James, J., observed: "At the same time we must stress that whenever a test identification is discovered to have been held with delay the prosecution should explain it and that the absence of a reasonable explanation will detract from the value of the test" 37. Since the only evidence against Arif Rafique Ahmed Shaikh and Abu Armogam Velu Nadar is that of identification and the same for the reasons mentioned above is blatantly unacceptable the logical imperative would be their acquittal on all the counts. 38. But before we proceed to the operative part of the judgment we would like to express our anguish and consternation regarding the manner in which the identification parades have been held; the investigation conducted; and the judgment written. 39. We find that the S.E.Ms. who have conducted the identification parades were not even aware of the elementary norms, principles pertaining to identification and the provisions contained in the Criminal Manual framed by the High Court pertaining to the manner in which the identification has to be held. In our view the Honorary Magistrates who conduct identification parades should be educated persons; having thorough knowledge regarding the manner

in which the identification is to be held. Their appointments should be made strictly on merit. The State Government should organize work shops wherein the law pertaining to identification should be imparted to them. It should always be borne in mind that identification conducted in a casual manner and in ignorance of the provisions contained in the Criminal Manual may result in the acquittal of those who are being prosecuted in ghastly crimes; as is the case here. When this happens the victim is the society. For those acquitted are doubly emboldened to commit crimes. The painful truth is for no fault of the courts society tends to lose faith in them. Often it is thought that acquittals are for the mere asking in our criminal courts but why they take place, society is not sufficiently well informed. Some of those whys are answered in this judgment.

40. We would also like to observe that the investigation should be conducted in a vigilant and fair manner. It should be free from all suspicion and taint. To our regret this has not happened in the instant case. When Police Inspector Rumade learnt about the complicity of Arif Rafique Ahmed Shaikh and Abu Armogam Velu Nadar, after the interrogation of appellant Soni, pursuant to this arrest on 17-6-1992 and when he received a memo from Sakinaka Police Station on 3-4-1993 that the said accused persons had been arrested he should not have waited as late as 1-12-1993 to obtain permission from T.A.D.A. Court about taking their custody. And if the delay in obtaining their custody from the T.A.D.A. Court was for no fault of his he should have furnished the requisite explanation in his examination in chief. It should be borne in mind that if the identification is inordinately delayed for no fault of the accused the weightage to be attached to identity evidence is grossly minimized. Again in respect of the identification of Arif Shaikh and Abu Nadar the witnesses should not have been split in two different parades; separated by a per se suspicious gap of two days. And if there was a plausible reason for doing so the same should have been spelt out in the evidence of P.I. Rumade. In the instant case such an explanation was all the more necessary because identification on both the dates was held at Police Station Ghatkopar where it was very easy for the prosecution to show the suspects to the witnesses; some of whom were constables attached to that very police station. We wish to emphasise that the duty of the investigator is to investigate in a manner which is free from all suspicion; a manner which is scrupulously fair. He should always bear in mind that if the bona fides of the investigation are beyond reproach it becomes very easy for the Court to accept the evidence of identification. If not, as is the case here.

41. It is a pity that on account of the flaws, in the manner in which the identification was held, the tainted, defective and casual manner in which the investigation was conducted, a brutal murder committed in broad daylight in the metropolis of Bombay wherein SIX unknown persons pumped bullets by firing from revolvers on the Professor of a College is going unpunished. But we cannot be swayed by the mere brutality and the shocking manner in which the crime was committed. What we have to see is whether the evidence against the appellants inspires confidence and this lamentably is lacking here. The regrettable result and the only just one without making any bones in the matter, is that all the accused have to be acquitted.

42. We would also like to observe that much is wanting

in the judgment of the trial Court. We say this because : a) It is well settled that the death sentence should only be restricted to " rarest of rare cases' and the judgment should reflect this awareness and contain reasons as to why a case wherein the death sentence is awarded fell in that category and also as to why a sentence of imprisonment for life would not satisfy the ends of justice. In this case the learned Judge has not examined the question of death sentence from this perspective. He has also not assigned reasons as to why a sentence of Life Imprisonment would not meet the ends of justice. This is evident from a perusal of paragraphs 51 to 55 of the impugned judgment wherein the question of sentence has been considered by the learned trial Judge; b) The learned trial Judge has overlooked the provisions contained in the Criminal Manual regarding the manner in which identification is to be held and has not given proper weightage to the defects in the identification parades which rendered the identification evidence unworthy of acceptance; and c) The learned trial Judge has not carefully and analytically assessed the evidence. This was all the more imperative in the instant case because he awarded death sentence to three persons. Death sentence should only be awarded after the most meticulous examination of the entire material on record. He should have borne in mind that there was no obligation more solemn than that of awarding death sentence. 43. In the result: Confirmation Case No. 3 of 1996 is decided in terms that the reference made by the trial Court for confirmation of the death sentence of accused 1, Rajesh alias Kaka Madanlal Soni, accused 2, Arif Rafique Ahmed Shaikh and accused 3 Abu Armogam Velu Nadar is rejected. Criminal Appeal No. 683 of 1996 preferred by appellants 1, Rajesh alias Kaka Madanlal Soni, 2. Arif Rafique Ahmed Shaikh and 3. Abu Armogam Velu Nadar is allowed. Their convictions and sentences on all the counts namely (1) 302 read with 149 I.P.C., 302 read with 34 I.P.C. and 27(3) of the Arms Act; (2) 307 read with 149 I.P.C. and 307 read with 34 I.P.C. (3) 144 I.P.C.; (4) 148 I.P.C.; and (5) 25(1)(a) of the Arms Act read with 149 I.P.C., are set aside. They are acquitted on the said counts. In case they have paid the fine it shall stand refunded to them. They are in jail. They shall be released forthwith unless required in some other case. Office is directed to send a copy of our judgment to : i) The trial Judge; ii) The Chief Secretary, Government of Maharashtra, Mumbai; iii) The Principal Secretary, Home, Government of Maharashtra, Mumbai; iv) The Principal Secretary, Law and Judiciary, Government of Maharashtra, Mumbai; v) The Advocate General, Government of Maharashtra, Mumbai; vi) The Commissioner of Police, Greater Bombay, Bombay; and vii) The Director General of Police, Maharashtra. In case a certified copy of this judgment is applied for by counsel for the parties it shall be issued on an expedited basis. 44. Criminal appeal allowed.