

Nilesh Dinkar Paradkar vs State Of Maharashtra on 9 March, 2011

Equivalent citations: AIR 2011 SC (CRIMINAL) 911, 2011 (4) SCC 143, 2011 (3) AIR BOM R 469, (2011) 73 ALLCRIC 360, 2011 CALCRILR 2 269, (2012) 2 ALLCRILR 332, (2011) 3 RECCRIR 533, (2011) 101 ALLINDCAS 158 (SC), (2011) 3 MH LJ (CRI) 1, (2011) 2 CURCRIR 321, (2011) 3 SCALE 473, (2011) 3 BOMCR(CRI) 541, (2011) 2 DLT(CRL) 529, 2011 (2) KLT SN 34 (SC)

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Bench: B. Sudershan Reddy, Surinder Singh Nijjar

REPORTABLE

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IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 537 OF 2009

Nilesh Dinkar Paradkar

... Appellant (s)

VERSUS

State of Maharashtra

...Respondent (s)

J U D G M E N T

SURINDER SINGH NIJJAR, J.

1. This appeal is directed against the judgment and order of the Bombay High Court dated 21st August, 2008 passed in Criminal Appeal No. 1044 of 2006 whereby the High Court dismissed the appeal by confirming the conviction and sentence imposed on the appellant (A5) by the Special

Judge of the Maharashtra Control of Organized Crime Act, 1999 (hereinafter referred to as "MCOC Act") in Special Case No. 3 of 2005.

2. The aforesaid appeal came up for hearing along with Criminal Appeal No. 1040 of 2006 filed by original accused No. 1, Vinod Sitaram Yadav @ Bapu and the original accused No.3, Jagdish Bhaskar Shetty @ Raghu. Criminal Appeal No. 1048 of 2006 has been filed by original accused No.4, Amit Suryakant Dalvi and Criminal Appeal No. 1049 of 2006 has been filed by original accused No.2, Vishwanath Atmaram Jadhav.

PROSECUTION CASE

3. According to the prosecution, accused Nos. 1, 2, 3 and 5 are active members of the organized crime syndicate of Chhota Rajan. Accused No. 4 has aided, abetted and conspired with accused Nos. 1, 2, 3 and 5 in commission of various offences punishable under the MCOC Act. It had come to the notice of the police that there was a conspiracy to eliminate a prominent businessman of Mumbai, namely Bharat Shah. The plan was to kill him at the pan shop near 'Mehta Bhuvan'. The office of Bharat Shah is situated at 'Mehta Bhuvan', Charni Road, Mumbai. In order to successfully carry out the assassination, movements of Bharat Shah were kept under close watch. His office timings were communicated to these accused through telephone no. 0060133402008 by Bharat Nepali. The information about the conspiracy was received on or before 14th October, 2004 by D.C.P. (Detection), Mr. Dhananjay Dattatraya Kamlakar, PW-42 from his sources. He was informed that gangster Chhota Rajan, his gang members, and Bharat Nepali were communicating with the associates and other members of their syndicate on the aforesaid telephone number. According to the information of PW-42, the telephone number was of Malaysian origin. Although, the aforesaid telephone number was under surveillance of P.S.I. Vijay Dalvi (PW-

17) since 1st October, 2004, on receipt of the definite information with regard to the conspiracy, a request was put up to the Additional Chief Secretary (Home) seeking permission to intercept the aforesaid telephone number. The request was made on 14th October, 2004 and it was approved on 20th October, 2004.

4. Although the tapping of the aforesaid telephone had been officially approved since 20th October, 2004, P.S.I. Dalvi (PW-17) did not hear any worthwhile conversation till 28th October, 2004. On that day, he intercepted and recorded a conversation on the aforesaid telephone number. According to the prosecution, this was a conversation between the absconding accused Bharat Nepali on one hand and the accused Nos. 1, 2 and 5 on the other hand. The duration of the conversation recorded was of 9.16 minutes. The recorded conversation revealed a conspiracy to spread terror in the Dawood group in Mumbai. The conversation was also about the nature of the weapons to be used; the manner in which the assassination was to be carried out;

behaviour of the assassin in the completion of the alleged crime; use of the weapons, i.e., one being .45 revolver and the other three being .38 bore revolver. The conversation on the telephone having been recorded, PW-17 noted the date and time of the cassette. He took the cassette to the senior officer, D.C.P. Kamlakar, PW-42. On receipt of cassette, D.C.P. Kamlakar played the cassette and

heard the details about the conspiracy.

5. It is further the case of the prosecution that five accused and Bharat Nepali have contacted each other on their respective cell phones. The entire conspiracy was hatched on the cell phones. The police had, therefore, obtained printouts of the cell phones of the accused from the concerned telephone companies. The numbers of those cell phones of the accused were as follows:-

Accused No.1 9819861417

Accused No.2 9819240297, 38096524

Accused No.3 9890299354

Accused No.4 38950501

Accused No.5 9892849523, 9892367596,

9892296496, 9892295687

Bharat Nepali 0060133402008

(absconding accused)

6. It appears that Amit Dalvi, accused No. 4 had rented a flat on Leave and Licence basis, on the first floor of a building known as 'Ambika Niwas', Girgaum (Mumbai). The room had been taken in the name of Sachin Patil. The Leave and Licence agreement was signed on 17th October, 2004. All the accused were regularly using the aforesaid premises.

7. On 7th November, 2004, P.I. Nagesh Lohar received some reliable information at about 5.00 p.m. that members of Chhota Rajan gang were staying in Girgaum area. He was also informed that they

had planned to kill a prominent businessman in the locality (Bharat Shah) on the directions of Bharat Nepali, who was the henchman of Chhota Rajan.

The Police Inspector Lohar communicated this information to his staff and asked them to assemble at 5.30 a.m. on the next day morning as the informant had told him that he was working on the information and will confirm the same only next morning. On 8th November, 2004, the informant again arrived at the office of P.I. Lohar at about 5.00 a.m. and supplied further information. He stated that about five members of the Chhota Rajan gang were residing in Girgaum and they were in possession of lethal weapons. Name of one of the members was Mr. Bapu, accused No. 1.

8. Police Inspector, Lohar called the officers and staff, who were present in the office and told them that they would have to act upon the information. He told one of the Constable Gaikwad, to go and bring two respectable Panchas. Consequently, PW-1, Hiro Khatri was joined as a Panch witness. He was introduced to the police party as well as the informant. He was told the purpose of raid and why the police party has assembled. On 8th November, 2004, raid was duly conducted at the rented premises. They reached first floor and found the door of the flat was half open. Standing next to the door, P.S.I. Jadhav listened to the conversation within the flat. He had heard one male voice saying the following words:-

"As the game was not hot, Nana and Bharat Nepali were frustrated. That man is going to the office. Nilesh Paradkar (A5) had called us to the spot at 10.00 a.m. He was going to come along with Ajay. So we must finish him today." He heard another male voice saying that "we will finish him today. You cause him to fall down by firing four bullets in his chest and he will fire four five shots in his head."

9. In the mean time, P.I. Lohar also reached the first floor and on signal being given, they entered the room. All the four accused persons were sitting on the mat. They were immediately apprehended. P.I., Lohar disclosed his identity and asked for explanation about their presence in the room. They could not give any satisfactory explanation. Each of the four persons were then searched.

10. Accused No.1 was searched by A.P.I. Pahalwar, PW-38. The search of accused No.1 revealed that he was in possession of one pistol of .45 bore of Colt make which was tucked on the right side waist portion of his pant. On opening its magazine, the pistol was found to contain seven live cartridges. A cell phone was also recovered from the shirt pocket of A1. On being asked, he disclosed his telephone number as 9819862417. A.P.I. Pahalwar opened the cell phone and removed the sim card. On further search of this accused, 13 live cartridges with inscription of .45 were found from the trouser pocket of this accused. The pocket also contained a chit with some mobile phone numbers. The accused was also having two colour photocopies of the photographs of an individual. On the reverse side of the photocopies, some numbers and words BMW Neela (blue), Lexus 25, 123 Kala (black) were written. Search was also conducted of A2, which led to the recovery of .38 bore revolver of Smith and Wesson Company. It had six chambers of the pistol loaded with six live cartridges. One blue colour cell phone of Nokia company model 2100 was recovered from the shirt pocket. His leather wallet also contained a chit with mobile numbers. He was also carrying color photocopies of

photograph of same person. In this photocopy, face of the person was encircled. On the reverse side of the said photographs, words were written in Devnagari script "Charni road station javal, Mehta Bhuvan". He also disclosed his cell phone number as 9819240297.

Similar search of accused No.3 produced .38 bore revolver kept into left side of his pant waist. The revolver was of Smith and Wesson make. It had five chambers loaded with five live cartridges. He was also carrying a silver colour cell phone of Nokia company. This accused disclosed his mobile number as 9890299354. This accused was also carrying a chit with names and phone numbers of Bharat Nepali, Balu Dhokare, Visha and Bapu. He was also carrying photocopies of the colour photograph of the same person as the one found with accused Nos. 1 and 2. Under the photocopy car No. BMW MH01 T125 was written. It also carried the same words 'Mehta Bhuvan', Opera House. The search of accused No.4 similarly produced a cell phone and photograph and the chit.

Number of other articles were also recovered lying in the rented room. The four accused were arrested and brought to the police station.

11. Thereafter formalities of registration of crime under DCB CID were completed. CR No. 258 of 2004 was registered with V.P. Road Police Station, Mumbai for offences punishable under Sections 302, 115, 120 (B) of IPC and under Section 3, 7, and 25 of the Arms Act. Thereafter, approval was also granted on 20th November, 2004 to apply the provisions of MCOC Act.

12. On 25th November, 2004, accused No.2, Vishwanath Jadhav and accused No.4, Amit Dalvi voluntarily made statements before the I.O. Valishetty indicating their willingness to make confession statements. It appears that first part of the confession of accused No.4 was recorded on 29th November, 2004 and the second part on 1st December, 2004. Similarly, the confessional statement of accused No. 2, Vishwanath Jadhav was recorded on 30th November, 2004 and on 1st December, 2004. On 7th December, 2004 the identification parade was held in so far as the accused Nos. 1, 2, 3 and 4 were concerned, PW-2 and PW-12 identified accused No. 4 as the person, who had been seen by them during the time of grant of lease and licence in respect of the rented room in 'Ambika Niwas' belonging to mother of PW-2. Both the confession statements were denied by A2 and A4 on 17th December, 2004 on the ground that it had been obtained under duress and threats that their family members would be falsely involved as accused in the crime.

13. On verification of the sim cards of the accused, it was found that only the sim cards of accused No. 4 stood in his own name. The sim cards allegedly belonging to accused No.2 Vishwanath stood in the name of one Sandeep Mhatre and Ayub Bakar. The names of sim card holders in the cell phones recovered from accused Nos. 3 and 5 were not brought on record. The record also indicates that the print out in respect of telephone No. 9892367596 allegedly used by the appellant, i.e., accused No.5 was received by the police on or about 14th January, 2005. The print out indicates that at about 5.55 p.m., there was a call of about 9.16 minutes on the telephone. The number was allegedly used by absconding accused Bharat Nepali. The print out of Cell No. 0060133402008 was forwarded to the police by the BSNL by letter dated 18th January, 2005(Ex.71).

This print out also confirms that there was a telephone conversation at 5.55 p.m. on 28th January, 2004 of about 9.15 minutes. The number mentioned there was that of the appellant.

14. We may now briefly notice the further facts as brought on record by the prosecution. On 15th January, 2005, PW-41, A.C.P. Vinayak Kadam asked PW-42, D.C.P. (Detection), Mr. Kamlakar as to whether he had intercepted any communication on telephone number 0060133402008. On 17th January, 2005, Mr. Kamlakar, D.C.P. (Detection), PW-42 asked P.S.I. Dalvi, PW-17 to handover the sealed cassette to A.C.P. Kadam on 18th January, 2005. The sealed cassettes were duly handed over to A.C.P. Kadam on 18th January, 2005. A.C.P. Kadam was aware that A.C.P. Tejasingh Chavan, PW-18 had arrested absconding accused Bharat Nepali on 11th February, 1997. He was also aware that Jagdish Kulkarni, PW-19 had earlier arrested the appellant on 2nd March, 2002. The Cassette was, therefore, duly played in the presence of Panchas and the aforesaid police officers. In this manner, the voice test identification was stated to have been conducted. The voice was also said to have been identified as belonging to the appellant and to absconding accused Bharat Nepali by PW-18, ACP Tejasingh Chavan and PW-19, Jagdish Kulkarni. It is also the case of the prosecution that A.P.I. Raut, who was Investigating Officer, identified the voice of A2, Vishwanath Jadhav. A.P.I. Pasalwar, PW-38, is stated to have identified the voice of accused Vinod (A1). The Panchnama was duly prepared.

Transcript of the conversation incorporated in the Panchnama (Ex.45) was proved through Panch Anil Shukla, PW-11.

15. It is further the case of the prosecution that the appellant was arrested on 30th March, 2005 in connection with another case registered at Nerul Police Station. His custody was duly transferred to the present case on 12th April, 2005. After obtaining the custody, a further identification parade was held on 16th April, 2005 in respect of the appellant. It is a matter of record that Vithal Saliyan, PW-7 was the only witness, who was put up as an identification witness. This witness duly identified the appellant as the person who used to visit 'Zunka Bhakar' Stall, situated near the office of the victim, Mr. Bharat Shah. It is however, noteworthy that this witness could not identify the appellant in Court.

16. It is further the case of the prosecution that on 13th May, 2005, the appellant made a voluntary statement to the effect that he had concealed the revolver in Sawantwadi Town in District Sindhudurga. According to the prosecution, the appellant led the police to the house where his cousin sister Afroza was staying. Behind the south side of the house, he dug out a weapon which was kept in a plastic bag and buried in the soil. The revolver so discovered was a .38 bore revolver. It was seized and wrapped in a plastic cover sealed by the police. On completion of the investigation, the Commissioner of Police granted sanction for prosecution of appellant on 6th July, 2005. On receipt of the sanction, additional charge sheet was filed against the appellant on 7th July, 2005.

17. In due course, charges were framed against all the accused on 8th December, 2005 under relevant provisions of MCOC Act, IPC, and Arms Act. Since all the accused had pleaded not guilty, they were all put on trial.

18. The Trial Court convicted all the five accused as under:-

"1) Charge head firstly is not considered as it is repetition in charge heads secondly, thirdly and fifthly.

2). Accused Nos. 1 to 5 are held guilty for the offence punishable under Section 3(1)(iii) r/w Sec. 3(2) of the MCOC Act, 1999 and are sentenced to suffer RI for 5 (five) years and to pay a fine of Rs.5,00,000/-

(Five lacs), each, in default, to suffer further RI for 1 (One) year.

3) Accused Nos. 1, 2, 3 and 5 are held guilty for the offence punishable under Section 3(4) of the MCOC Act, 1999 and are sentenced to suffer RI for 7 (seven) years and to pay a fine of Rs.5,00,000/-

(Five lacs), each, in default, to suffer further RI for 1 (one) year . Accused No.4 is not held guilty U/Sec.3(4) of the MCOC Act and is acquitted from the said charge.

4) Accused Nos. 4 and 5 are held guilty for the offence punishable under Section 3(5) of the MCOC Act, 1999 and are sentenced to suffer RI for 3(three) years and to pay a fine of Rs.2,00,000/-(two lacs), each in default, to suffer further RI for 6(six) months. Accused Nos. 1, 2 and 3 are not held guilty U/Sec.3(5) of the MCOC Act, 1999 and are acquitted from the said charge.

5) Accused Nos. 1, 2, 3, 4 and 5 are held guilty for the offence punishable under Section 120-B r/w Sec.302 r/w Sec.115 of IPC are sentenced to suffer RI for 3 (three) years and to pay a fine of Rs.10,000/-(ten thousand), each. In default, to suffer further RI for 6 (six) months.

6) Accused Nos. 4 and 5 are held guilty for the offence punishable under Section 419 r/w Sec.120-B of IPC and are sentenced to suffer RI for 1 (one) year. Accused Nos.

1, 2 and 3 are not held guilty U/Sec.419 r/w Sec.120-B of IPC and are acquitted from the said charge.

7) Accused Nos. 1, 2 and 3 are held guilty for the offence punishable under Sec.3 r/w Sec. 25 of the Indian Arms Act, 1959 and are sentenced to suffer RI for 3 (three) years and to pay fine of Rs.5,000/-

(five thousand) each, in default, to suffer further RI for 6(six) months. Accused No.4, is not held guilty U/Sec. 3 r/w 25 of the Indian Arms Act and is acquitted from the said charge.

8) Accused No.5 is not held guilty for the offence punishable under Sec.3 r/w Sec.25 of the Indian Arms Act, 1959 and is acquitted from the said charge.

9) Accused No.4 is held guilty for the offence punishable under Sec.36 r/w Sec.30 of the Indian Arms Act, 1959 and is sentenced to suffer RI for 6 (six) months.

10) All the substantive sentences to run concurrently.

11) Accused are entitled to set off for the period already undergone in custody."

19. From the above, it is evident that the trial court acquitted the appellant, herein of charges under Section 3 read with Section 25 of the Indian Arms Act.

20. The aforesaid judgment and order of conviction and sentence was challenged by the accused Nos. 1 and 3 in Criminal Appeal No. 1040 of 2006, by accused No.5 (appellant herein) in Criminal Appeal No. 1044 of 2006, by accused No.4 in Criminal Appeal No. 1048 of 2006 and by accused No.2 in Criminal Appeal No. 1049 of 2006.

21. All the appeals were heard together and disposed off by a common judgment dated 21st August, 2008.

The High Court was pleased to allow the appeals of original accused Nos. 1, 2, 3 and 4. They were acquitted of all the charges leveled against them.

However, the appeal filed by the appellant was dismissed by confirming the conviction and sentence awarded by the Special Court. It may also be noteworthy here that the acquittal of appellant under Section 3 read with Section 25 of the Arms Act was not challenged by the prosecution/State.

Therefore, the findings and acquittal regarding the same have become final and binding.

22. Aggrieved by the judgment of the High Court in Criminal Appeal No. 1044 of 2006, the appellant has filed the present special leave petition.

23. We have heard the learned counsel for parties.

24. Mr. Shekhar Naphade submitted that the High Court disbelieved the prosecution version in so far as the accused A1 to A4 are concerned. Having disbelieved the prosecution version against A1 to A4, the High Court committed a grave error in upholding the conviction of the appellant. He submits that the evidence against A1 to A4 and the appellant is identical. The High Court has made a distinction in the case of appellant only on the basis of the voice identification evidence. Learned counsel further submitted that the High Court has committed a grave error in treating the voice identification evidence as substantive evidence.

Such evidence could at best be used as corroboration of the other independent evidence. In support of the submission, learned counsel relied on the judgments in Mahabir Prasad Verma Vs. Dr. Suri nnder kaur¹, Ram Singh And Ors. Vs. Col. Ram Singh and People's Union for Civil Liberties (PUCL) Vs. Union of India & Ors.³ 1 1982 (2) SCC 258 2 1985 (Supp.) SCC 611 3 1997 (1) SCC 301

25. We are of the considered opinion that there is much merit in the submissions made by Mr. Naphade.

While acquitting accused Nos. 1 to 4, the High Court recorded that the defence had succeeded in creating a grave doubt about the veracity of search and seizure alleged to have taken place on 8th November, 2004. This conclusion has been reached by the High Court on appreciation of the evidence on the record. The High Court disbelieved the prosecution version with regard to the entire sequence of events leading to the raid. The High Court observed as follows:-

"Thus, in my view the defence have succeeded in creating a reasonable doubt about the prosecution case that accused Nos. 1 to 4 were spotted and apprehended at Ambika Niwas building on 8.11.2004. The defence case that the accused were in fact picked up on 3.11.2004 by the police appears to be very probable. Unfortunately, if the defence version is found to be probable, then the entire case of the prosecution regarding the finding of various incriminating articles from the persons of the accused for the first time on 8.11.2004 and the seizure of three loaded revolvers, live cartridges, four zerox copies of the photographs of the victim, four mobiles and four slips are rendered suspect and must also be therefore, disbelieved. It would have been far better for the prosecution if the investigation would have recorded the true and correct facts. It may be mentioned that as regards the search and seizure said to have been carried out on 8.11.2004, not a single independent witness has been examined. Admittedly, there were several neighbours and the statements of some of these persons were alleged to have been recorded but none of these persons were produced as witnesses in herein must therefore, get benefit of doubt as regards the circumstance of finding incriminating articles during the search and seizure of articles said to have been seized by the police on 8.11.2004."

26. The trial court had discarded the voice identification of accused Nos. 1 and 2. The High Court did not see any reason to differ with the aforesaid finding.

The High Court even after personally hearing the conversation between the Bharat Nepali on the one hand and accused Nos. 1 and 2 on the other hand, disbelieved the voice identification. It was held to be not established beyond reasonable doubt.

Similarly, with regard to the alleged confession made by accused Nos. 2 to 4, the High Court observes that "Both these confessions make clear reference to the evidence of search and seizure which according to the prosecution took place on 8th November, 2004 and which does not appear to be true". Both the confessions were rejected as a whole. The High Court even disbelieved the story of the prosecution with regard to accused No.4 taking room at 'Ambika Niwas' on Leave and Licence basis.

As a consequence of the aforesaid facts, accused Nos. 1, 2, 3 and 4 were acquitted.

27. In our opinion, these conclusions recorded by the High Court have destroyed the entire substratum of the prosecution case. Having disbelieved the entire prosecution version, the High Court proceeds to distinguish the case of the appellant. The only additional circumstance relied upon by the High Court against the appellant is that his voice was identified by the officer Jagdish

Kulkarni, PW-19, who had taken him in custody. The voice of Bharat Nepali was also identified by PW-18, A.C.P. Tejasingh Chavan.

28. We are of the considered opinion that the approach adopted by the High Court was wholly erroneous.

Having disbelieved the voice identification in the case of accused Nos. 1 and 2, there was no reason to adopt a different yardstick in the case of the appellant herein. The High Court discarded the evidence of PW-36, A.P.I. Dilip Raut and PW-38, A.P.I. Pasalkar mainly on the ground that they were accompanying the raiding party on 8th November, 2004 and had not heard the voice of accused Nos. 1 and 2 prior thereto. Another reason given by the High Court is that these officers being members of the investigating team were interested in successful completion of the investigation. But the same yardstick was not applied to the voice identification of absconding accused Bharat Nepali by Tejasingh Chavan, PW-

18. He was also attached to DCP CID when the present offence was registered. He would, therefore, also be equally interested in successful completion of the investigation.

29. Similarly, voice identification of the appellant by Jagdish Kulkarni, PW-19 would also suffer from the same weakness as he was also attached to the office of DCP CID. The High Court also ignored the fact that the witnesses were being asked to identify the voice of Bharat Nepali, which they had last heard in the year 1997. Similarly, PW-19, Jagdish Kulkarni had only heard the voice of appellant in the year 2002.

30. In our opinion, the evidence of voice identification is at best suspect, if not, wholly unreliable. Accurate voice identification is much more difficult than visual identification. It is prone to such extensive and sophisticated tampering, doctoring and editing that the reality can be completely replaced by fiction. Therefore, the Courts have to be extremely cautious in basing a conviction purely on the evidence of voice identification. This Court, in a number of judgments emphasised the importance of the precautions, which are necessary to be taken in placing any reliance on the evidence of voice identification. In the case of Ziyauddin Burhanuddin Bukhari Vs. Brijmohan Ramdass Mehra & Ors.⁴, this Court made following observations:-

"We think that the High Court was quite right in holding that the tape-records of speeches were "documents", as defined by Section 3 of the Evidence Act, which stood on no different footing than photographs, and that they were admissible in evidence on satisfying the following conditions:

"(a) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it.

(b) Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record.

(c) The subject-matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act."

(emphasis supplied) 4 (1976) 2 SCC 17 In the case of Ram Singh & Ors. Vs. C ol. Ram Singh⁵ , again this Court stated some of the conditions necessary for admissibility of tape recorded statements, as follows:-

"(1) The voice of the speaker must be duly identified by the maker of the record or by others who recognise his voice. In other words, it manifestly follows as a logical corollary that the first condition for the admissibility of such a statement is to identify the voice of the speaker.

Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.

(2) The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence --

direct or circumstantial.

(3) Every possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.

(4) The statement must be relevant according to the rules of Evidence Act.

(5) The recorded cassette must be carefully sealed and kept in safe or official custody.

(6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances."

In Ram Singh's case (supra), this Court also notices with approval the observations made by the Court of 5 1985 (Supp) SCC 611 Appeal in England in the case of R. Vs. Maqsd Ali⁶ . In the aforesaid case, Marshall, J. observed thus:-

"We can see no difference in principle between a tape-recording and a photograph. In saying this we must not be taken as saying that such recordings are admissible whatever the circumstances, but it does appear to this Court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape- recording is admissible in evidence. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. There can be no question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged."

To the same effect is the judgment in the case of R. Vs. Robson , which has also been approved by this Court in Ram Singh's case (supra). In this judgment, Shaw, J.

delivering the judgment of the Central Criminal Court observed as follows:-

"The determination of the question is rendered more difficult because tape-recordings may be altered by the transposition, excision and insertion of words or phrases and such alterations may escape detection and even elude it on examination by technical experts.

6 (1965) 2 AER 464 7 (1972) 2 AER 699

31. Chapter 14 of Archbold Criminal Pleading, Evidence and Practice⁸ discuss the law in England with regard to Evidence of Identification. Section 1 of this Chapter deals with Visual Identification and Section II relates to Voice Identification. Here again, it is emphasised that voice identification is more difficult than visual identification. Therefore, the precautions to be observed should be even more stringent than the precautions which ought to be taken in relation to visual identification. Speaking of lay listeners (including police officers), it enumerates the factors which would be relevant to judge the ability of such lay listener to correctly identify the voices. These factors include:-

"(a) the quality of the recording of the disputed voice,

(b) the gap in time between the listener hearing the known voice and his attempt to recognize the disputed voice,

(c) the ability of the individual to identify voices in general (research showing that this varies from person to person), 8 2010 edition at pg: 1590-91

(d) the nature and duration of the speech which is sought to be identified and

(e) the familiarity of the listener with the known voice; and even a confident recognition of a familiar voice by a way listener may nevertheless be wrong."

The Court of Appeal in England in R Vs. Chenia and R. Vs. Flynn and St. John¹⁰ has reiterated the minimum safeguards which are required to be observed before a Court can place any reliance on the voice identification evidence, as follows:-

"(a) the voice recognition exercise should be carried out by someone other than the officer investigating the offence;

(b) proper records should be kept of the amount of time spent in contact with the suspect by any officer giving voice recognition evidence, of the date and time spent by any such officer in compiling any transcript of a covert recording, and of any

annotations on a transcript made by a listening officer as to his views as to the identify of a speaker; and

(c) any officer attempting a voice recognition exercise should not be provided with a transcript bearing the annotations of any other officer."

In America, similar safeguards have been evolved through a series of judgments of different Courts. The 9 [2003] 2 Cr. App. R. 6 CA 10 [2008] 2 Cr.App.R.20,CA principles evolved have been summed up in American Jurisprudence 2d (Vol. 29) in regard to the admissibility of tape recorded statements, which are stated as under:-

"The cases are in general agreement as to what constitutes a proper foundation for the admission of a sound recording, and indicate a reasonably strict adherence to the rules prescribed for testing the admissibility of recordings, which have been outlined as follows:

(1) a showing that the recording device was capable of taking testimony; (2) a showing that the operator of the device was competent;

(3) establishment of the authenticity and correctness of the recording; (4) a showing that changes, additions, or deletions have not been made;

(5) a showing of the manner of the preservation of the recording; (6) identification of the speakers; and (7) a showing that the testimony elicited was voluntarily made without any kind of inducement. ... However, the recording may be rejected if it is so inaudible and indistinct that the jury must speculate as to what was said. (emphasis supplied)"

32. This apart, in the case of Mahabir Prasad Verma Vs. Dr. Surinder Kaur¹¹, this Court has laid down that tape recorded evidence can only be used as 11 (1982) 2 SCC 258 corroborative evidence in paragraph 22, it is observed as follows:-

"Tape-recorded conversation can only be relied upon as corroborative evidence of conversation deposed by any of the parties to the conversation and in the absence of evidence of any such conversation, the tape-recorded conversation is indeed no proper evidence and cannot be relied upon. In the instant case, there was no evidence of any such conversation between the tenant and the husband of the landlady; and in the absence of any such conversation, the tape-recorded conversation could be no proper evidence."

33. In our opinion, the High Court has failed to take into consideration any of the precautions indicated above in accepting the evidence of Tejas Singh Chavan, PW-18 and Jagdish Kulkarni, PW-19 with regard to the identification of Bharat Nepali and the appellant. The High Court, in our opinion, has given a wholly erroneous justification by holding that the voice of both the accused are

distinctive, clear and identifiable. It is further observed that the conversation between the two accused is not a short conversation as in the case of accused Nos. 1 and

2. The High Court was also influenced by the fact that accused Bharat Nepali was in the custody of Tejasingh Chavan, PW-18 for a period of two weeks.

Similarly, appellant was in the custody of Jagdish Kulkarni, PW-19 for a substantial period of time.

Therefore, their voice identification was held to be reliable. This reasoning of the High Court is a mere repetition of the reasons given by the trial court.

34. We are of the considered opinion that there is hardly any distinction in the evidence with regard to the voice identification of accused Nos. 1 and 2 on the one hand and Bharat Nepali and the appellant on the other hand.

35. In our opinion, the voice test identification by PW-19, Jagdish Kulkarni is even otherwise unreliable. The voice identification was conducted without taking any precautions similar to the precautions which are normally taken in visual identification of suspects by witnesses. It is a matter of fact that PW-19, Jagdish Kulkarni was informed in advance that he had to identify the voice of the appellant. Similarly, PW-18 was informed that he had to identify the voice of Bharat Nepali. No attempt was made even to mix the voices of Bharat Nepali and the appellant with some other unidentified voices. In such circumstances, the voice identification evidence would have little value.

It appears that the exercise was performed only for the record.

36. This apart, there is no evidence on record to indicate that the mobile No. 0060133402008 was that of the absconding accused Bharat Nepali.

There is also no evidence to indicate that he was using said number except voice identification by Tejasingh Chavan, PW-18. There is no other material on the record to connect the absconding accused Bharat Nepali with the number allegedly used by him. Similarly, there is nothing on the record to indicate that the appellant was having or using any of the following mobile number:-

9892849523, 9892367596, 9892296496 and 9892295687.

37. There is no seizure of any mobile phone or even sim card at the behest of the appellant. The prosecution has failed to produce any evidence from the operators with regard to the registration of the aforesaid phone numbers. In fact, the Investigating Officer, Nagesh Lohar specifically stated in his evidence that "we could not get those four subscription forms and the documents of the company though we enquire. It is true that till today we do not know who are the subscribers of those cell phones".

38. This apart, the High Court erroneously overlooked the infirmities in the evidence with regard to the authenticity of the tape recording produced in Court. The conversation between the appellant

and Bharat Nepali was said to have been recorded on 28th October, 2004 by PW-17, P.S.I. Vijay Dalvi.

According to him, although, he had been monitoring the Malaysian number of Bharat Nepali from 1st October, 2004 till 27th October, 2004, he had heard no incoming or outgoing calls. The incriminating conversation was said to have been recorded on 28th October, 2004. This conversation was relayed to a police telephone and recorded. He put a slip on the recorded cassette indicating the date and time of the conversation as recorded. He then handed the tape over to the D.C.P., Dhananjay Kamlakar. He heard the tape on the same day. Even though the conversation revealed a conspiracy for commission of a serious offence, like murder of an influential personality in Mumbai city, he took no further action. He just sealed the tape and kept it in his personal custody.

39. Even when the accused A1 to A4 were arrested on 8th November, 2004 the cassette was not produced before the Investigating Officer. It was kept by Kamlakar till 17th January, 2005, when he instructed P.S.I. Vijay Dalvi to hand over the tape to the Inspector of Police. It is a matter of record that the tape was received by the Investigating Officer on 18th January, 2005. Even the trial court refers to the inaction on the part of the D.C.P. Dhananjay Kamlakar as shocking. Thereafter, the High Court observed as follows:-

"The evidence of DCP Dhananjay Kamlakar suggest that he had forgotten about the existence of the tape and only when Investigating Officer asked about the tape he remembered, checked his record and then informed the investigating officer that he had such tape in his custody. It is not easy to believe this story given by DCP Dhananjay Kamlakar as he was a highly trained and a Senior IPS Officer. The least which he could had done was to find out from the telephone companies as to who was the recipient of this call from the number under surveillance. He made no efforts to find out as to who had received this call. The conduct of this officer leads me to believe that this tape was suppressed for some reasons which best known to DCP Kamlakar."

40. Having concluded as such, the High Court, however, proceeds to hold that even such lapses cannot enure to the benefit of the appellant. The High Court believed the recording as it had been made upon prior approval by the Home Secretary given on 20th October, 2004.

41. In our opinion, the veracity of the voice identification would not improve merely because a recording has been made after receiving official approval. The crucial identification was of the voice of the person talking on the tape. We are of the considered opinion that the High Court has committed a grave error in confirming the conviction of the appellant as recorded by the trial court only on the evidence of voice identification.

42. Other circumstance relied upon by the High Court in convicting the appellant is the recovery of the alleged revolver from the house of the cousin of the appellant. In our opinion, the recovery from an open space, at the back of the house, which did not even belong to the appellant, could be of little

assistance to the prosecution. Even otherwise it needs to be remembered that the trial court had in fact, acquitted the appellant for the offences under Section 3 read with Section 5 of the Arms Act. This acquittal was never challenged by the prosecution in appeal. Therefore, it was wholly inappropriate by the High Court to reverse the findings of the trial court in the absence of an appeal by the State.

43. In view of the above, we are of the considered opinion that the appellant was entitled to the benefit of doubt as the prosecution has failed to prove its case beyond reasonable doubt.

Consequently, the appeal is allowed. The appellant is acquitted of all the charges levelled against him.

The conviction and sentence imposed by the trial court and confirmed by the High Court are quashed and set aside. The appellant shall be set at liberty forthwith unless wanted in any other case.

.....J. [B.Sudershan Reddy]J. [Surinder Singh Nijjar] New
Delhi;

March 9, 2011.