Supreme Court of India
The State Of Gujarat vs Anirudhsing & Anr on 10 July, 1997
Bench: K. Ramaswamy, D.P. Wadhwa

PETITIONER:
THE STATE OF GUJARAT

Vs.

RESPONDENT:
ANIRUDHSING & ANR.

DATE OF JUDGMENT: 10/07/1997

BENCH:
K. RAMASWAMY, D.P. WADHWA

ACT:

HEADNOTE:

JUDGMENT:

THE 10TH DAY OF JULY, 1997 Present:

Hon'ble Mr. Justice K. Ramaswamy Hon'ble Mr. Justice D.P. Wadhwa B.V.Desai, Mrs. H. Wahi and Ms. S. Hazarika, Advs. for the appellant Sushil Kumar, Sr. Adv., Deepak H. Raval, Shailendra N. Singh, Ms. Neelam Kalsi and Vimal Dave, Advs. with him for the Respondents.

O R D E R The following Order of the court was delivered:

WITH CRIMINAL APPEAL NO. 1919 OF 1996 O R D E R Delay condoned.

Leave granted.

Every criminal trial is a voyage in quest of truth for public justice to punish the guilty and restore peace, stability and order in the Society. Every citizen who has knowledge of the commission of cognizable offence has duty to lay information before the police and cooperate with the investigating officer who enjoined to collect the evidence and if necessary summon the witnesses to give evidence. He is further enjoined to adopt scientific and all fair means to unearth the real offender, lay the chargesheet before the court competent to take cognizance of the offence. The chargesheet needs to contain the facts constituting the offence's charged. The accused is entitled to as fair trial. Every

citizen who assists the investigation is further duty- bound to appear before the court of session or competent criminal court, tender his ocular evidence as dutiful and truthful citizen to unfold the prosecution case as given in his statement. Any betrayal in that behalf is a step to testability social peace. order and progress.

Popatbhai, a sitting Member of Legislative Assembly was done to death in the public gaze when full ceremonial Independence Day function was in progress. The Chief dignitary of the event, the Deputy Collector and Sub- Divisional Magistrate, Mr. J.P. Dave who was sitting beside the deceased, witnessed the occurrence of shooting of deceased, witnessed the occurrence of shooting of deceased from behind; however, when culprit was caught, it would be obvious that he saw him, yet he has turned hostile to the prosecution and even refused to identify the respondent in the Court sabotaging the prosecution case. Thus, he betrayed his duty as a reasonable officer and as a worthy citizen and has denied himself to hold an office of trust and responsibility. His own unworthiness is writ large in the present case. Similar is the case of many a dignitary including the Mamlatdar, PW-36 , a leading private doctor and Chief officer of the municipality and a host of others numbering 45 in all. It would speak volumes of unworthy conduct forsaking their responsibility as dutiful citizens driving the prosecution to fall back upon the circumstantial evidence.

Mr. Jhala, the Assistant Commandant, Special Reserved Police, PW-4 and I.B. Shekhawat, PW-58 another officer on duty from the same force, displayed high degree of responsibility, courage and sense of duty in assistance of the prosecution by swinging into action immediately. PW-4 caught the culprit; PW-58 secured the weapon of the offence, lodged the FIR and handed over the accused and the weapon with material particulars mentioned in that behalf in the Fir to the Station House Officer. Everyone needs to take leaf out of their books of service. It is seen that in some cases of recent origin terror by the accused or at his behest, has instilled in the mind of the weightiness the instinct of self-preservation and inclined them to avoid their extermination or reprisal. The state should extend protection to them. this case is a classic illustration of how the prosecution case gets sabotaged by the material witnesses turning hostile and creating a disbelief in the efficacy of criminal justice system which needs urgent attention and appropriate remedial action on the part of the legislature and the executive, in that behalf.

This appeal under Section 25 of the Terrorist and Disruptive Activities (Prevention) Act, 1987) (for short, the "TADA ACT") arises out of a charge laid against two accused, namely, Anirudhsing Mahipat Singh Jadeja, resident of Rabidly Ta. Gondal District, Rajkot (for the short "Accused No. 1") and Nilesh Kumar @ Limbabhai s/o Mansukhlal under Sections 3 and 5 of the TADA Act, section 114 of the Indian Penal Code (IPC) for causing terror; for having in possession unauthorised fire arms and for causing death of Popatbhai Lakhabhai Sorathiya, sitting M.L.A. of Gondal Constituency (for short, the "deceased"). The Designated Court acquitted the respondents of all the charges in Sessions case No. 23 of 1989 through the special Judge , Rajkot appointed under TADA Act.

The substratum of the prosecution case against the respondents was that on August 15, 1988, in Sagramsinghji High School, Gondal, flag hoisting ceremony (State function) was performed by PW - 38, J.P. Dave, the Deputy Collector and sub-Divisional Magistrate, Gondal; when distribution of the

prizes was about to conclude, suddenly at about 9.30 a.m. a sound of cracker was heard from behind the deceased who was siting next to J.P. Dave. People got panicky and started running helter-skelter. PW-4 who was sitting left to the deceased got up on the chair and looked around and saw the Accused No. 1 attempting to run away. He jumped over the chair and caught him. PW-58, I.B. Shekhawat saw that some arm wrapped in handkerchief was thrown over his head from behind. He ran into that direction and caught hold of it; he found it to be a pistol. he took them into possession, By the time, he came back, Jhala handed over Accused No.1 to Shekhawat and asked him and A.N. Tiwari, PW- 46 PSI to go to the police station, lodge a complaint and hand over Accused No.1 and the pistol (Ex. 1-4) to the police. since the deceased had fallen by the side with blood profusing from his head, he was taken to Rajkot Hospital where he succumbed due to the head injury, later in the day Shekhawat, PW-58 went to the police station at about 9.55 a.m. and lodged the FIR, Ex-301/1. Therein, the had narrated thus:

> "I was present with may SRP Group along with officers at Sangramsingji High Saheb, Mamlatdar Saheb and other important persons were present. During Jhalasaheb, Dy. S.P. etc. were Government officials, After the parade programme for school was going on when bursting of a fir cracker from behind at where we have seated which was believed to have been done by boys from behind. But on people running helter, skelter, during that I felt some arm thrown or my head, i want towards and a handkerchief with it. That pistol was loaded and trigger was raised which I immediately took in my possession and other officers who were there apprehended one person who were there apprehended one person who had thrown this pistol and who when asked his name replied that he was Anirudhsingh Mahipatsingh Jadeja of Ribada. At this time, Popatbhai Sorathyiya was bleeding from his head, immediately he was laid in Jeep and sent to hospital. I and other officers have brought this Anirudhsing to the police Station at this time an produce a loaded pistol with this. with me are A.M. Tiwari of SRP, R.S. Sharma , and the driver of Government Jeep 9929, hence this complaint to do as per law."

This first information report was received by the Magistrate at 12.15 p.m. on the same day. Rawat the senior Inspector had initiated the investigation and at around 12.30 p.m. Bhattacharya, DIG had arrived at the scene and took over the investigation and recorded the statements of the witnesses, conducted the investigation and then laid the charge sheet against the respondents for the charge sheet against the respondents for the charges referred to hereinbefore. At the trial, many witnesses were examined of which 45 witnesses turned hostile including J.P. Dave; Chief Officer of the Municipality, D.P. Taraiya, PW-40; V.P. Sojitra, PW-37, local leading doctor, the Mamlatdar etc. The trial Court found that there is no direct evidence adduced inculpating the respondents into the crime. The circumstantial evidence adduced by the prosecution is as under:

> " The extra-judicial confession made by Accused No. 1 to Jhala, PW-
>
> 4; S.R.P.; apprehending of Accused NO.1 on the spot; recovery of the firearm (Ex.A-1) and the handkerchief (Ex-18) thrown by Accused No. 1 the homicidal death of the deceased due to the firing of the of the fire arm behind his head."

The Designated Court after considering the entire evidence reach the conclusion that:

1. the prosecution has totally failed to prove that Accused No. 1 was present at the place of incidence with the pistol:

2. the prosecution has failed to prove that Accused No. 1 had thrown the muddammal pistol and handkerchief from the left back side of the sitting eminent persons immediately after the incidence:

3. the prosecution has failed to prove as to at what distance Accused No.1 was standing from the chair of the deceased;

4. the prosecution has also failed to produce any circumstantial evidence regarding Accused No.1 firing at the decease.

The learned Judge observed thus;

"In my opinion, the prosecution has failed to produce any legally believable circumstantial evidence so as to connect the accuse No.1.

with the crime."

Thus, he has given the benefit of doubt to the accused. Thus, this appeal.

The question, therefore, is: whether the prosecution has proved the case against the respondents beyond reasonable doubt? As far as the second respondent is concerned we have carefully considered the evidence. We find that there is absolutely no worthmentioning evidence, connecting the second accused with the commission of the crime. His acquittal, therefore, gets confirmed.

The question then is; whether the prosecution has proved the case as against Accused No.1, Anirudhsing, beyond reasonable doubt?

The entire prosecution case hinges upon circumstantial evidence. Witnesses may be prone to speak falsehood but the circumstances will not. The circumstantial evidence consists of the oral confession said to have been made to Jhala, PW-

4. The immediate question that arises is: whether P.W.4 is a police officer and whether such a confession is hit by Section 25 of the Evidence Act?

In Balkishan A. Devidayal etc. vs. State of Maharashtra etc. [(1981) 1 SCC 107], this Court was to consider whether an officer of the Railway protection Force making an enquiry under the Railway Property (Unlawful Possession) Act, 1966, is a police officer within the meaning of section 25 of the Evidence Act. After elaborate consideration of the provisions of the Code of Criminal Procedure (for short, the 'Cr.P.C. the Railway property (Unlawful possession) Act and Article 20 (3) of the Constitution, this Court came to conclude that R.P.F. Officer is not a police officer within the

meaning of section 25 of the Act and , therefore, a confession made to that officer is admissible in evidence.

In Romesh Chandra Mehta vs. State of West Bengal [(1969) 2 SCR 461 the confession made to a Customs officer under the Sea Customs Act was held to a be not hit by Section 25 of the Evidence Act and it was held that they are not police officers within the meaning of section 25. The entire controversy was considered by a bench of three Judges in K.I. Pavunni vs. Assistant Collector (HQ), Central Excise Collectorate, Cochin [(1997) 3 SCC 721) at page 738, para 17]. It was held thus:

> " It would thus be clear that the object of the Act empowering customs officers to record the evidence under Section 108 is to collect information of the contravention of the provisions of the Act or concealment of the contraband or avoidance of the duty of excise so as to enable them to collect the evidence of the proof of contravention of the provisions of the Act so as to initiate proceedings for further action of confiscation of the authority of law, the officer exercise the powers under the Act is an authority within the meaning of Section 24 of the Evidence Act," but they are not police officers within the meaning of section 25 of the Act."

Accordingly, the confession made to them was held to be admissible.

In Raj Kumar Karwal vs. Union of India [1990) 2 SCC 409], the question arose: whether the officers of the Department of Revenue Intelligence (DRI) invested with powers of officer-in-charge of police station under Section 53 of the narcotic Drugs and psychotropic substances Act, 1985 are police officers within the meaning of Section 25 and whether the confession made to them is inadmissible in evidence? In this behalf, this Court had Court had held that the officers of the Revenue Department, who have been invested with the powers given to the in-charge of the police station were not police officers within the meaning of section 25 of the Evidence Act and, therefore, the confessional Statement recorded by such officers in the course of investigation of the persons accused of an offence under the Act, is admissible in evidence as against him. Officer appointed under Section 53, other than a police officer is not entitled to exercise " all the powers" under Chapter XII of the Cr. P.C. including the power to submit charge-sheet under Section 173, Cr. P.C. This Court in paragraph 5 at page 413 has stated thus:

> " What impelled the interaction of this provision was the overwhelming evidence the police under the Code were often issued and abused by police officers investigating crimes for extorting a confessional statement from the accused with a view to earning credit for the prompt solution of the crime and/or to secure himself against allegations of supineness or neglect of duty. It was also realised that once a police officer succeeds in extorting a confession from the person accused of the commission of the Crime by threats, inducements, etc. the real offender becomes more or less immune from arrest. Therefore, the purpose of the restriction under Section 25 of the Evidence Act is, broadly speaking, twofold, namely, (ii) to ensure a proper and scientific investigation of the Crime with a view to bringing the real culprit to book."

It would, thus, be seen that the object of Section 25 is to ensure that the person accused of the offence would not be induced by threat, coercion or force to make a confessional statement and the officers also would make every effort to collect the evidence of the commission of the crime de hors the confession to be extracted from the accused while they are in the custody of the police. The question, therefore, 1st whether Jhala, PW-4 is a police officer.

In this behalf, it is relevant to note the provisions of the Bombay State Reserve Police Force Act, 1951 (for short, SRPF Act). Section 2(a) of the Act defines "active duty" to mean a duty to prevent or investigate offences involving a breach of peace or danger to life or property and to search for and apprehend persons concerned in such offences and who are so desperate and dangerous so as to render their being at large hazardous to the community etc. Section 2(b) defines "Commandant and Assistant Commandant" to mean respectively persons appointed to those offices by the state Government under Section 5. Section 2(h) defines reserve police Force established under the Act. Section 5 postulates appointment of Commandant and Assistant Commandant and an Adjutant. It provides that "The state Government may appoint for each group commandant who shall be a person eligible to hold the post of a Superintendent and an Assistant Commandant and an Adjutant who shall be persons eligible to hod the post of an Assistant or a Deputy Superintendent." Section 10 enumerates general duties of the personnel of the State Reserve police Service. It postulates that "Every reserve police officer shall for the purpose of this Act be deemed to be always on duty in the State of Bombay, and any reserve police officer and any member or body of reserve police officers, may, if the State Government or the Inspector-General of police so directs. be employed on active duty for so long as and wherever the services of the same may be required". Under sub-section (3), "[A] reserve police officer employed on active duty under sub-section(1), or when a number or body of reserve police officers are so employed, the officer in charge of such number or body, shall be responsible for the efficient performance of that duty and all police officers who, but for the employment of one or more reserve police officers or body of reserve police officers or body of reserve police officers, would be responsible for the performance of that duty, will, to be best of their ability, assist and cooperate with the said reserve police officer or officers in charge of a number or body of reserve police officers. Section 19 of the Act empowers every reserve police officer to be the " police officer" as defined in Bombay police Act, 1951; the details thereof are not material for the purpose of this case. Section 11 of the Act postulates that reserve police officer shall be deemed to be in charge of a police station. Sub-section (1) envisages that " when employed on active duty at any place under sub-section (1) of section 10, the senior reserve police officer of highest rank, not being lower than that of a Naik present, shall be deemed to be an officer in charge of a police station for the purposes of Chapter IX of the Code of Criminal procedure, 1898, Act 5 of 1898 , which is equivalent to chapter X of the Cr. P.C. Chapter X deals with "maintenance of public order and tranquility". The Chapter relating to investigation is chapter XII of the Cr.P.C. starting with Section 154 dealing with laying of the First Information Report etc. It would, thus be clear that a senior reserve police officer appointed under the SRPF Act, though is a police officer under the Bombay police Act and an officer in charge of a police station, he is in charge only for the purpose of maintaining law and order and tranquility in the society and the powers of investigations envisaged in chapter XII of the Cr. P.C. have not been invested with him.

Shri Sushil Kumar, learned senior counsel appearing for the respondents, has relied upon the judgment of this Court in Kartar Singh vs. State of Punjab [(1994) 3 SCC 569 at 719, placitum b and at 720, placitum C). He contends that the object of giving protection to the accused is that he will not be put to lose his liberty by making a confession to a police officer and to keep away the accused from the threat or inducement which may be administered to the suspect in the custody of the police officer. The accused will not be in a position to distinguish as to who is or is not a police officer invested with the power of investigation. But will assume the person seen in the uniform to be the police officer. Therefore, all the officers performing the police duty, may be required to be treated to be police officers within the meaning of Section 25 of the Evidence Act so that the liberty and protection granted to an accused under Article 19 and Article 20(3) of the Constitution would be safe guarded. Though the argument of Shri Sushil Kumar is prima face attractive, on deeper prove, we find it difficult to give acceptance to the same.

It is undoubted that in Kartar Singh vs. State of Punjab [(1994) 3 SCC 569], one of us (K. Ramaswamy, J.) in a separate but concurrent judgement, had held thus; "moreover, the imbalance between the State an the defendant begins with arrest and detention, for experiences influence the detenue in ways analogous to interrogation, the negative implications of silence, the self-mortification or extreme humiliation at being arrested, the desire to shield the self from potentially. humiliating questioning and the emotional stress caused by the symbols of the law's authority even in persons of higher status would get lost. " Similar , observations came to be made that the police interrogation can produce trance like state of heightened suggestibility so that truth and falsehood become hopelessly confused in the suspect's mind at that it will be due to hypnosis the suspect lose initiative and in the heightened fantasy, confabulation and distortion get mixed up due to leading question. As a result , the power of recording confession by the police officer should be excluded.

These statements of law came to be made in the context of empowering the police officer to record the confessional statements of the accused under TADA Act while in custody. That ratio has no application to the facts in this case.

It is already seen that PW-4 , Jhala, was not an investigating officer within the meaning of Chapter XII of Cr. P.C. and that he did not even conduct any investigation. it is true , as rightly pointed out by Shri Sushil Kumar, that even after the incidence, PW-4 remained present at the scene of occurrence till evening, as admitted by him in the cross-examination . But his explanation offered by him was that since he occurrence had taken place, law and order situation was likely to arise. So he remained on duty till in the evening until the DOSP had come and started investigation and thereafter he left the place. it would be seen that as a dutiful officer on duty, he had performed the duty as a higher officer of the division in the parade and, therefore, it cannot be gainsaid that he was an investigating officer.

The question, thus, would emerge: whether Anirudhsing, the first respondent had made any confession to Jhala, PW-4? In this behalf, we have to state that in the First Information Report lodged by I.B. Shekhawat there is a sentence made that the Accused No. 1 made a statement to PW-4 that he had committed the crime. We will examine whether it would be treated as substantive

evidence at a later stage; suffice it to state here that except this piece of evidence, there is no categorical statement given by PW-4 in that behalf for the obvious reason that when he was being examined as a witness and was going to state it, an objection was raised as to the admissibility of the confession made by the Accused No. 1 to PW-4. The trial judge allowed the objections and ruled that he being a police officer under the Act. the confession made was not admissible. Against that order, special leave petition has been filed. we have granted leave and also held that PW-4 is not a police officer, for the provisions of the Chapter XII of the Cr.P.C and Section 25 of the Evidence Act do not get attracted. In view of the finding recorded earlier, the appeal is allowed and it must be held that he not being a police officer, he was a witness to the occurrence.

It is now well settled position of law vide this Court's decision in Nizar Ali vs. State of U.P. [1957 SCR 657] that the first information report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under Section 157 of the Evidence Act or to contradict it under section 145 of that Act. it cannot be used as evidence against the maker at the trial, if he himself becomes an accused; nor to corroborate or contradict other witnesses. In Dharma Rama Bhagare vs. The State of Maharashtra [(1973) 1 SCC 537], the same principle was reiterated. it was held therein that the first information report is never treated as a substantive piece of evidence. It can only be used for corroborating or contradicting its maker when he appears in court as a witness. Its value must always depend on the facts and circumstances of a given case. The first information report can only discrediting the other witnesses who obviously could not have any desire to spare the real culprit and to falsely implicate an innocent person. Prosecution case cannot be thrown out on the mere ground that in the first information report an altogether different version was given by the informant.

It is seen that in the light of the evidence given by I.B. Shekhawat, PW-58 that Anirudhsing made a confession to someone, it is a hearsay evidence and, therefore, the statement made in the FIR is not a substantive evidence to corroborate the evidence of PW-4 and, therefore, that piece of evidence stands excluded. As regards the evidence of PW-4 Jhala, as seen, that part of the statement has not come on record. Two courses are open , namely, either to set aside the judgment of acquittal and remand the case for retrial on that issue or to consider the case for retrial on that issue or to consider the case of other evidence, if available on record. We think on the evidence, if available on record. We think on the facts and circumstances of the case, that it would not be desirable to set aside the judgement of the designated court and remand the matter for retrial on that issue. On the other hand, we are of the considered view that the matter can be disposed of on that issue. On the other hand, we are of the considered view that the matter can be disposed of on the basis of the evidence on record. Accordingly, we hold that piece of evidence of oral confession made by Anirudhsing, to Jhala, PW-4, is not available to the prosecution.

The next question is: whether the evidence that Anirudhsingh was apprehended on the scene of evidence immediately after the occurrence is proved? In this behalf, though the prosecution sought to examine member of witness, unfortunately, most of them turned hostile to the prosecution. What is the weight or acceptability of the evidence of hostile witnesses has been considered by this Court in some decisions. In Khujji vs. State of M.P. [(1991) 3 SCC 627 at 635] this Court said that:

> "The evidence of PW-3 Kishan Lal and PW-4 Ramesh came to be rejected by the trial court because they were declared hostile to the prosecution by the learned public prosecutor as they refused to identify the appellant and assailants of the deceased. But counsel for the State is right when he submits that the evidences of a witness, declared hostile, is not wholly effaced from the which is otherwise acceptable can be acted upon. It seems to be well settled by the decisions of this Court- Bhagwan Singh v. State of Haryana [(1976) 1 SCC 389], Rabindra Kumar Dev v. state of Orissa [(1976) 4 SCC 233], and Syad Akbar v. State of Karnataka [(1980) 1 SCC 30]- that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof."

In that case, the evidence of a hostile witness was scanned by this Court and found to be accepted and relied on. In State of U.P. vs. Ramesh Prasad Misra [(1996) 10 SCC 360 at 363, para 7], it was held thus:

> " It is rather unfortunate most unfortunate that these witnesses, one of whom was an advocate, having given the statements about the facts within their special knowledge, under section 161 record during investigation, have realised from correctness of the versions in the statements. They have not given any reason as to why the investigating officer could record statements contrary to what they had disclosed. It is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted."

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

like the present ghastly crime and would endeavour to evaluate the evidence on record. Therefore, it is the duty of the trial judge or the appellate Judge to scan the evidence, test it on the anvil of human conduct and reach a conclusion whether the evidence brought on record even of the turning hostile witnesses would be sufficient to bring home the commission of the crime. Accordingly, we under take to examine the evidence in this Case.

It is true that PW-4, PW-58 and PW-46 are police officers; but they are not investigating officers. They happened to present at the scene by virtue of their duty. They being high ranked officers in the State were required to be present on the Independence Day parade as per our official conduct and rules. Merely because they are police officers, their evidence cannot and must not be rejected outrightly as unreliable or unworthy of acceptance. It requires to be subjected to careful evaluation like any other witness of occurrence.

We have the evidence of PW-4, Jhala, pw-58, I.B. Shekhawat and PW-46, Atma Ram, on duty apart from PW-40, the Chief Officer of the Municipality, who was conducting the proceedings in the flag hoisting ceremony, though he turned hostile, and also the evidence of PW-36, private Medical Practitioner at Gondal and also EX- M.L.A., who had also turned hostile.

At the outset, we would notice the contention of Shri Sushil Kumar that the entire record of the prosecution has not been prepared and a copy has not been given to the accused and that therefore, he was handicapped to place before the Court certain aspects relating tot he investigation conducting by Rawat and Bhattacharya. In the absence of scene of offence marked in two sketches and the evidence of witness, Kuber Singh in proof of fire arms; omission to examine other medical evidence and the relevant photographs wherein the first respondent could be properly identified to be the person at the scene of offence. We had given direction to the designated Judge to send the record duly translated; he sent a report stating that it is a voluminous record and would take considerable time for translation and accordingly he sought time. We have carefully scanned the evidence of the witnesses which is already on record with the assistance of the counsel for the state and the accused and have gone through the relevant portions relied upon; thereafter we have ourselves minutely examined the evidence. The other evidence are not of material consequence in these case for the reasons we are going to give. Under these circumstances, the objections of Shri Sushil Kumar in our considered view are not of material relevance. He also referred to order XX-E, Rule 1(v) of the Supreme Court Rules in this behalf. Normally, in a case where the material evidence is necessary for the prosecution or the defence, certainly we adjourn the case to enable the respondents to get the entire record prepared. However, since in our view that evidence is not material for the purpose of this case, we have not adjourned the case.

Though PW-38, the Deputy Collector and executive Magistrate has spoken of the accident and also that Accused No. 1 was caught, as admitted in cross-examination, we were not relying upon that evidence for the reason that he acted as an Executive Magistrate and issued remand order to the accused. In that perspective, we are not placing any reliance on the evidence of that witness, PW-36, A private practitioner, through he turned hostile, has also given the evidence that at the scene of offence Anirudhsing was caught by the police. Similarly, PW-40, the Chief place immediately after the prize distribution was over and while PW-46 was announcing that some more programme was

in the offing.

Let us first see whether the three circumstances, namely, the homicidal death of the decease popatbhai, the apprehension of the first respondent at the scene of occurrence and recovery of pistol and handkerchief said to have been thrown over the head of PW-58, have been proved to the satisfaction of the Court before considering whether these proved facts are sufficient to bring the offence beyond reasonable doubt against the first respondent.

It is seen that PW-58, I.B. Shekhawat, was the first informant, who gave the report. In this behalf, the contention of Shri Sushil Kumar is that the first information report was given by the doctor at Rajkot as to the death of the deceased and it constitutes FIR and, therefore, the FIR, Ex. 203/1, is not the FIR and, therefore, it is not admissible in evidence. We don not accept the contention of Shri Sushil Kumar as correct. It is seen that under Ex. 203/1, FIR, the offence charged is under Section 307 but not under Section 302 and the FIR has already reached the judicial magistrate at 12.15 p.m. The information conveyed by the doctor under Ex. 201 was the intimation of the death of the deceased. Consequently. in the FIR the offence under Section 307 was converted into an offence under Section 302 and the converted FIR was issued, which was marked as Ex. 202/3. Under these circumstances, the FIR given by Shekhawat under Ex. 203/1 was the first information report. As extracted earlier, it does contain wealth of material particulars regarding the apprehension of Anirudhsingh on the spot. The only commission therein was of the apprehension of the accused by Jhala, PW-4. As regards the factum of apprehension of the first respondent on the spot, his identify and name, being brought by PW-58 , PW-46 and others find place in the first information report itself. Therefore, the evidence of PW-58 that he had brought the Accused No.1, Anirudhsingh from the scene of the offences and handed him over to police Rawat, Inspector to record the FIR gets corroboration from Ex. 203/1.

The first question at the outset is dealt with this that whether the prosecution has proved that the deceased died due to homicidal death. Dr. Buch who conducted the post-mortem examination along with Dr. Trivedi had given his ocular evidence and he has sated as per the post-mortem report as under:

> " External Injury., Wound of entry:- roughly rounded 1-1/2 c.m. in diameter, Rugged and irregular border with charring around wound inverted situated 1 inch postero superior to right mastoid tip. No smell or deposition of gun powder. No signeing of hair. Haetoma underneath; dark red in colour, No wound of exit, Vane section both lower limbs and venu puncture both upper limb. These were treatment wounds. Fracture of right mastoid and temporal bones ."

According to him the death was due to injury by fire arm and it is a homicidal death. The Designated also in that behalf recorded a finding as under;

> "I come to the conclusion that the prosecution has proved beyond reasonable doubt that deceased Popatbhai Lakhabhai Sorathia died a homicidal death and, therefore, decide point No.1 in affirmative."

Shri Sushil Kumar contends that though Dr. Trivedi was available in this Court. the prosecution has not examined him and the notes of the post-mortem report under Ex.P-38 have not been properly proved and, therefore, prosecution has not proved the case beyond reasonable doubt that the deceased died due to homicidal death. We are unable to agree with the learned counsel. A reading of the post-mortem report which is a part of the record and the evidence recorded in the judgment of the Sessions Court, Correctness of which even was not commented upon, does indicate that the post-mortem was conducted jointly by DR. Buch and Dr. Trivedi and the major work was does by Dr. Buch. It is also the evidence of Dr. Buch. In view of that positive evidence, as per the post-mortem report which is a part of the record, the injury to the head have been caused due to the firm arm and, therefore, there is no doubt that the homicidal death and was not due to any other cause. That was not even the case of the accused. The omission to examine Dr. Trivedi is not of relevance. In this regard, it is also contended by Shri Sushil Kumar that the prosecution has failed to Connect the injury caused by the fire arm, EX.1A. There is a dispute whether the pistol produced before the Court is the one that was seized by PW-58, I.B. Shekhawat when it was alleged to have been thrown and it was not established beyond doubt that it was the same weapon that was used in the commission of the crime. It is also contended that there is no evidence that it was the weapon that was used by Accused No. 1 in Commission of the Crime . It is also contended that if the prosecution case is accepted that Accused No.1 hit the deceased from behind his head where the deceased was sitting in the front row, there would have been entry and exist wounds and in the absence of that, it would be difficult to believe that the A-1 had caused such a death within the short range without any exist wound. we find that there is no force in the contention. As regards the identification of the weapon, there is evidence of PW-58, I.B.Shekhawat who is also an officer admittedly on duty at that time and in his evidence he categorically stated that he saw that a fire arm was thrown above his head, he immediately swung into action and fan towards the direction where it had fallen; he took it in his hand, identified it to be pistol wrapped up with hand-kerchief. That fact finds express mention in the FIR, Ex. 203/1. That was also spoken to by PW-46. another officer on duty and also spoken to by PW-46, another officer on duty and also spoken by PW-4, Jhala, As regards the pistol which was seized, we have unimpeachable evidence on record of Bharat Virji S/o Kapilari Mistry, Senior Scientific Forensic Officer, PW-55, wh had done the analysis after the receipt of the pistol from the ballistic expert, that it is the pistol that was placed before the Court. In his evidence, PW-55 in Ex. 217 has stated in examination-in-chief that he received a pistol wrapped with hand-kerchief and he analysed it; and when he was subjected to cross-examination, he has specifically stated that the pistol was found wrapped in a cover. He opened it in his presence and in the presence of his servant; opened it and found iron rusting on the hand- kerchief. Iron rusting was also analysed. In that behalf, a great deal of extensive cross-examination was conducted by the defence counsel but nothing came out to suggest it was weapon other than the one that was sent to him for examination. In this evidence, PW-4 has categorically stated which has also remained unchallenged in the cross- examination, that the pistol that was produced in the Court was the one that was seixed at the place of occurrence immediately after it was thrown. Thus it could be held that the prosecution has established that the weapon which was thrown over the head of PW-58, I.B. Shekhawat, was the one that was seized by him and placed before the police under FIR, Ex. 203/1; mention thereof was made in the custody of the court immediately at 12.15 p.m. on that date. Thus the prosecution has conclusively proved that the firm-arm Ex. 1- A, was recovered from the scene. It is true that the empty cartridge was discharged from the pistol It is also true, as pointed out by Shri

Sushil Kumar, that the magazine contained an empty one and one loaded cartridge was found in the chamber but it depends upon the velocity with which it is used. It is in the evidence of PW-4, Jhala and PW-58 , I.B. Shekhawat, that they heard the sound like cracker from behind them and immediately they saw the people running helter-skelter and when PW-4 got up on the chair and looked around, he saw Anirdusingh, Accused No. 1 attempting to run away. As a consequence, he immediately jumped from the chair and caught him. He has stated in his evidence thus:

> "I and Shekhawat stood up and I saw on my left a weapon wrapped in cloth being thrown from my left side to right side. Shri Shekhawat went to the right side where the weapon was thrown towards temple side and I stood up on my chair and to may left side behind where many people were standing. one person was trying to run away, hence. I jumped from the chary and caught hold of this suspected person. At that time, I saw popatbhai bleeding from his nose and he lay on right side with his head below". In Paragraph 7, he stated thus: " I and Shekahawat took the apprehended boy next to the stage where P.S.I. Rawat and other police officials were standing. The boy whom I apprehended is present in the court and is accused No. 1 whom I identify. Muddamal article no.1 A pistol, and handkerchief, article no.2 are shown to me, but if they are two or there I cannot identify. Muddamal article no.1-A pistol is shown to me and it is the same. I can identify the handkerchief if it is shown to me. I am shown Muddamal article no.2-A handkerchief, it is the same and I identify it."

In the cross-examination, though he was subjected to gruelling in the cross-examination, he withstood the cross- examination, he withstood the cross-examination and stated thus:

> "It has happened when I stood up at that time Shekhawat ran towards the direction where the thing was thrown up which appeared to have been wrapped in a cloth . It is true that i saw the thing thrown wrapped in a cloth as pistol when Shekhawat came to me with it. I saw Shekhawat running at a distance of 10 to 15 feet away. The thing thrown up passed opposite me from the upper side. This landed in the front line of chair. I did not feel that it was thrown from the stage side. I have not seen Shekhawat picking up that thing from the earth."

It is true, as contended by Shri Sushil Kumar, that the sketches relating to the scene of offence and various places were notes and photos have not been placed before us. but the absence of placing the sketches and photos makes little difference if we accept the evidence of PW-58 and PW-4 that the pistol and handkerchief were identified by them which was the one thrown over the head of PW-58 immediately after the occurrence. if it were a case that there is a time gap between the time of occurrence and of the recovery, certainly that would be a matter to be established with reference to the identify of the place at which the articles were thrown and the place from which they were thrown. When PW-58 and PW-4 were present at the scene of occurrence, it was their duty to swing into action as dutiful citizens and officers; to catch hold of the pistol without being blown causing damage to the others; and PW-58 had taken them into custody. He found that the pistol was kept in the position for further firing. It would appear that one Kuber Singh, the Fire Arm Expert has stated

that he was called to the police station and there he defused the weapon. It is true that the evidence of Kuber Singh has not been placed before us but that omission does not make much difference he being an expert and his opinion being hypothetical opinion, so long as the identify of the weapon is the surmise of the ballistic exert that the pistol was not the one that was used in the commission of the crime. It does not create any inescapable doubt. In view of the unimpeachable evidence of PW-58 who seized the weapon thrown immediately after the commission of the offence over his head and in view of further corroboration in that behalf received from the evidence of PW-4 and PW-46, another officer on duty, the omission to place on record the sketch of the scene of the offence or fire arm except, is not of material consequence. As regards photographs, their relevance will be considered while examining the evidence of Anirudhsingh having been caught on the spot.

From the reading of the evidence of Forensic expert, PW-55, the evidence Of PW-58, PW-4 and PW-46, it can safely be concluded that the pistol with which the murder of Popatbhai was committed was recovered immediately after the occurrence by PW-58 which was thrown wrapped in the handkerchief. It is true that there is no exist wound; but pullet was found inside the brain and the evidence of Dr. Buch clearly indicates that it was on account of the hit from the pistol with which the deceased sustained injuries which resulted in the homicidal death. Therefore, the prosecution has established that the weapon, Ex.1A was the one used for committing the murder of the deceased.

The Designated Court is obviously in error in recording the finding that the muddamal pistol was not the one that was used at the time of the commission of the crime and something was planted. In view of the unchallengeable and unimpeachable evidence of PW-55, the Forensic Doctor who has spoken of the pistol and handkerchief in the Court , and in view of the acceptable evidence of PW-58 and of PW-4 and PW- 46, another officer on duty, we have no hesitation to hold that the muddamal pistol, Ex.1A was the one that was used to hit the deceased, popatbhai, It is true that it depends upon the velocity with which the trigger was operated that would generate the speed for causing the wound and it is difficult for the prosecution to established in that behalf the speed but the fact remains that the pellet having ben found in the head of the deceased, it is clear that pistol was used in causing the death of the deceased and the deceased was shot dead from behind.

The next question is: whether the death was caused by Anirudhsing? That is the crucial area in which one has to carefully scan the evidence. No doubt the Designated Court has pointed out four circumstances enumerated hereinabove which prosecution has failed to bring on record. If those circumstances are brought on record , certainly that would constitute direct evidence connecting Anirudhsing with the commission of the evidence. The need to fall back upon circumstantial evidence does not arise. The absence thereof would not be a ground t throw over board the prosecution case. Learned Additional Judge of the Designated Court did not make any attempt to analyses the evidence in correct perspective. we have the evidence of PW-4, PW-58 and PW-46 in this behalf. Undoubtedly, they are police officer. Their presence cannot be disputed for the reason that they were deployed on duty at the time of flag hoisting ceremony.

Accused No.1 was caught on the spot at the scene of the crime. Infect, the trial judge also has accepted his presence at the scene of occurrence. It has been proved beyond reasonable doubt. Shri Sushil Kumar, learned senior counsel in fairness has also not seriously disputed in that behalf. From

this perspective, the omission to place on record the photographs is not at all relevant. The photographer normally concentrates on high dignitaries and it is not the case that the photographer had clicked any photograph of the actual commission of the crime. Perhaps, if the Accused No.1 was taken into police custody long after the incident, then the photos become relevant evidence. It is an admitted position that in one of the photographs Accused No.1 was seen at the time of flag hoisting ceremony.

The question then is: whether Anirudhsing, the first respondent alone has committed the crime or someone has committed or assisted him? It is true that PW-4 stated in his cross-examination that apart dram Anirudhsing, others were also taken into custody. Perhaps to investigate whether there was any conspiracy behind the commission of the crime or the first respondent alone has independently committed the crime, They are the officers of special Reserve Police and had given categorical statement in the ocular evidence that they were on duty. The fact of their being on duty has not been impeached in the cross-examination. When the occurrence had taken place and to see that no further untoward event would occur. In this background, one has to consider the evidence of PW-4, PW-58 and PW-46 . It is seen that PW-4, Jhala had no axe to grind by speaking falsehood against Anirudhsing. Being the officer on duty, he swung into action instantly and apprehended Accused No.1 on the spot immediately while he was trying to run away. We have already noted that in the First Information Report the identity of the first respondent was specifically mentioned and he was produced within 25 minutes after the time of occurrence. The occurrence had taken place at 9.30 a.m. and he was produced before the police at 9.55 a.m. The Report contained the material particulars that Anirudsingh was caught; handed over to and was kept in the custody of the police. Fir was in the custody of the court at 12.15 p.m. even before Bhattacharya, D.I.G. had started real investigation into the matter. Thus we hold that Anirudhsing, some others were taken it no custody. Merely because others were taken into custody, it cannot lead one to conclude that others committed the cream and that the first respondent has been falsely implicated in the crime. No other ground was even suggested to make any false implication of Anirudhsingh. The fact that immediately after Ex. A-1, the pistol wrapped in Ex.A-2, the handkerchief was thrown over the head of PW-58, Shekhawat, PW-4 Jhala had looked behind after getting on the chair and on finding the first respondent attempting to run away, he ran and caught him immediately. When the first respondent was caught immediately, necessarily this mental faculty would be disturbed as was found but it s not sufficient base to conclude that he has not committed the crime. That is also a relevant fact to be taken into account in PW-4 to reach the conclusion that he is the suspect in the commission of the crime. It can in fairness, be said that PW-4 has not stated in his evidence that Accused No.1, Anirudhsing has committed the crime by throwing it. Therefore, the conduct of PW-4 in instantly swinging into action and the manner in which he acted upon and gave the evidence in the Court, creates an unmistakable impression in our mind that PW-4 is a truthful witness. That evidence was also corroborated from the evidence of PW-58 and PW-46, Special Reserve Police officer on duty. It would thus be seen that throwing of the handkerchief and catching of Anirudhsing have been established beyond doubt.

When the pistol and the handkerchief were thrown from being and when Anirudhsing was caught when he was at the back of the deceased, the necessary conclusion to be drawn unmistakably is that it was Anirudhsing who hit the deceased and thereafter he had thrown the pistol over the head of

Shekhawat, PW-58 so as to avoid his being identified and he made an attempt to run away from the scene. Therefore, we hold that Anirudhsingh, Accused No.1 alone has done Popatbhai to death.

It is then contended by Shri Sushil Kumar that Accused No.1 had no notice and the prosecution has failed to prove it. We find no force in the contention. The motive gets locked upon into mind of the makers and it is difficult to fathom it. The evidence of Acharya P.A. to the deceased, who too turned hostile to the prosecution speaks of motive. Equally, others have spoken but their evidence is not on record. If motive is proved that would supply a chain of links but absence thereof is not a ground to reject the prosecution case. So we reject the contention of the learned counsel in that behalf too.

Thus considered in the light of the circumstances. we have no hesitation to hold that the prosecution has established the case that Anirudhsing and none else, has committed the murder of the deceased. Papatbhai. The learned designated Court has not correctly appreciated the evidence in the proper perspective. Accordingly, we hold that the prosecution has proved its case beyond reasonable doubt that Anirudhsing, the first respondent was in possession of a fire arm which was not proved to be licensed one. Therefore, it is an unauthorised weapon. Accordingly, the first respondent, Anirudhsing has committed the offence under Section 5 of the TADA Act and also the offence of murder punishable under Section 302, IPC.

Accordingly, the judgment and order of acquittal, passed by the Designated Court stand set aside. Instead, the first respondent having committed the offence of murder of Popatbhai, is convicted under Section 302, IPC and is sentenced to undergo imprisonment for life. Since more than nine years have elapsed from the date of the commission of the crime, we do not think it appropriate to impose capital sentence of hanging, through he has committed an heinous and a gruesome crime of killing a responsible Member of Legislative Assembly who was attending flat hoisting ceremony on the Independence Day. He is alls convicted for an offence under section 5 of the TADA Act and is sentenced to undergo imprisonment for three years, Both the sentence are directed to run concurrently. The appeal against the first respondent is allowed accordingly Appeal against the second respondent is dismissed.

Bail bond of the first respondent stands cancelled. The Superintendent of Police, Rajkot is directed to take the first respondent into custody immediately to serve out the sentence. He is also directed to report compliance of the said direction to the Registry of this Court. The bail bond of the second respondent is discharged.

Before parting with the matter, we place on record our appreciation for the excellent and efficient service rendered by Mrs. N. Anapurna, Senior Stenographer who has always taken long dictation of heavy matters in the Court and transcribed accurately as was dictated to her. Accordingly, we place on record our commendation for her excellent work.

REPORTABLE-563/97 SECTION-IIA
SUPREME COURT OF INDIA
No.F. 3/Ed/B.J.145/97
New Delhi
Dated: 30.7.97

CORRIGENDUM

This Court's Order in
Crl. A. NO. 626 of 1997
State of Gujarat v.
Anirudhsing & Anr.
(Dated : 10.7.1997

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