

Excerpts from the Division Bench Judgement in the Haren Pandya Murder Case....

‘14. In view of the aforesaid evidence on record, the conclusions drawn by the trial Court were challenged as perverse, irrational and illegal and since the trial Court has, in the impugned judgment, found support from confessions of the accused persons, their admissibility, reliability and probative value will have to be examined before re-appreciating the evidence as a whole for arriving at the final conclusion as to culpability of the accused persons, as far as murder of Mr.Haren Pandya is concerned.

‘14.1 However, as far as the evidence referred to and discussed hereinabove is concerned, it is difficult to endorse the conclusions drawn by the trial Court, for the following reasons:

(a) The sole eye witness (PW.55) has contradicted himself in his own cross-examination by changing his version in material particulars. Firstly, he deposed that he saw Shri Pandya's car drive upto its parking place and that the assailant walked upto the car and shot him. Then, in cross-examination, he said that some cars were already present when he was talking to Kanaiya and one of those cars was the car of Mr.Pandya. He confirmed that position by again saying that no car had come when he was talking to Kanaiya. After moving away from the car, he just sat for half-an-hour and then straightway told Shukla Chacha that Shri Pandya had been killed. He deposed that he had seen the assailant and stated his features and height, whereas he had not seen the face of Shri Pandya inside the car. While his stand-point was admittedly 20 to 30 degrees from the car of Shri Pandya, and the distance was approximately 16 to 18 feet by all accounts, he could not have seen anything inside the car from the tinted glasses on the left side of the car, but he deposed that he saw from the front windscreen that Shri Pandya was wearing white kurta with red lining in it. He also categorically deposed that he had seen that Shri Pandya had died. Thus, without ever claiming to have even peeped through the opening of the glass on the driver side of the car or having stood in front of the front windscreen, he sought to describe the killing of the victim with such precision as if the victim had collapsed on his left side in front of him. Not only that he had admittedly not seen the face of Shri Pandya, even his presence at the gate at sharp 7:30 a.m., as claimed by him, was doubtful, and his subsequent behaviour of neither running away nor calling anyone nor going nearer the car was unnatural behaviour of an eye witness.

(b) After sitting for half-an-hour on the other side of the Hall, in a state of shock, he stated to have straightway informed Shukla Chacha to call Nanubhai and Shukla Chacha himself also did not care to go near the car to see if Shri Pandya was there. Again, Shukla Chacha taking him to the place of Nanubhai, which was within 3 kms, could not have taken more than half-an-hour despite traffic, traffic signals or traffic police. That would have made his entry at Nanubhai's place at around 9.00 a.m. By

such calculation of time, if PW.55 met CW.1 at 9.30 a.m., the time of offence will have to be around 8.30 a.m. and not 7.30 a.m. as claimed by PW.55 and accepted by the prosecution. Even after taking tea and staying at Nanubhai's place for 45 minutes, he would have returned to the place of offence by 10:30 a.m., but he claimed to have returned at 11.00 a.m. when the police was removing Shri Pandya to hospital. However, again his claim of having seen Shri Pandya being taken away to the hospital in a reclining position is contradicted by specific evidence of PW.85 (Exh.509), who was categorical about Shri Pandya having been carried in sitting position on the front seat of the jeep. While CW.1 sought to corroborate the testimony of PW.55, the initial statement of CW.1 recorded on the same day was not produced. Even his statement recorded later by CW.2 (Exh.880) revealed that PW.55 had told him that when he (PW.55) was sitting on the bench, he had seen one man running away. Such oral testimony of PW.55 and identification by him of A-1 with apparent hesitation could not inspire such confidence as to draw a firm conclusion about the veracity of his version. Coupled with omission to examine the other witnesses, namely Kanaiya and Ramesh, the sweeper, who were deposed to be in the immediate vicinity at the time of the incident and complete absence of investigation into availability of other witnesses such as regular morning walkers, created a cloud of doubt around the manner and timing of firing at Mr.Pandya. It was, in that context, vehemently and rightly argued for the appellants, without any satisfactory explanation from the prosecution, that all the persons who had seen Mr.Pandya immediately before and after his laying in the car were kept away from the witness box to protect the fragile testimony of PW.55 and to ensure that the timing of the incident emerging from statement of PW.55, recorded by CBI after three days, remained intact at 7.30 a.m. to tally with the timing of the call supposed to have been made by A-1 from Law Garden area at 7.33 a.m. It may be noted here that the prosecution and the impugned judgment has heavily relied upon the mobile phone record of the phone supposed to have been held by A-1 on 25th and 26th of March 2003 to conclude that none of the few alleged active participants in the offence having residence in the Law Garden area, it was strong incriminating circumstance corroborating with other evidence; although the mobile phone attributed to A-1 had disappeared from muddamal and the mobile phones attributed to A-6, A-7, A-8 and A-9 did not show their location and had no significant activity on 25th and 26th of March, 2003.

(c) Remarkably, all the prosecution witnesses concerned had to confirm that opening of the glass on driver's side of Mr.Pandya's car was just as it appeared in the photograph (Exh.617). The opening of glass having been scientifically measured to be hardly 3 inches and PW.55 having confirmed that Mr.Pandya was fired upon from outside the car, the version of the sole eye witness was practically improbabilised by medical evidence and FSL reports which clearly indicated that at least injury No.7 was impossible to be caused from the height and angle of the weapon attributed to the assailant while the victim would be seated in the driver's seat or even while he was

sliding onto the adjoining seat, within seconds of the first fatal shot. The order in which the shots were fired is not indicated by any evidence or opinion on record, and hence could only be a matter of surmise.

(d) Even as PW.55 claimed to have at least seen the clothes of Shri Pandya, his description of the colour of stripes of kurta turned out to be incorrect. While his first narrative of the incident was before Nanubhai (CW.1), he appeared to have failed to mention time of the killing, description of the assailant or presence of Kanaiya and Ramesh, the sweeper, at the place of the incident. Unfortunately, CW.1's first statement made on 26.3.2003 which could have thrown some light on what information he had received from PW.55, was not brought on record by the prosecution. Even as the I.O. had deposed (PW.120 Exh.728) that a sketch (Exh.620) of the assailant was prepared with the help of PW.55, he denied any knowledge of such sketch and that sketch was found and held by the trial Court to be not at all matching with the face and features of A-1. While the statement of PW.55 was stated by him to have been recorded at 2.00 p.m., the I.O. (Exh.101) deposed that it was recorded around 6.00 p.m.; which means that PW.55 remained at the spot till late evening as a person interested in assisting the investigation. However, the mobile forensic team did not take notice of his presence or take his help. The initial rough map of the site (Exh.615) drawn by PW.101 at 2.00 p.m. has no reference to the eye witness. That belied PW.101's claim that around 2.00 p.m. he had enquired whether anyone had seen anything and had chanced upon PW.55 as an eye witness. On the one hand P.I. Shri Shaikh (PW..101) was supposed to be investigating at 2.00 p.m. on 26.3.2003 at the scene of offence and, on the other hand, the same officer was present at the post-mortem at 2.15 p.m. Another map prepared by CBI on 29.3.2003 (Exh.387) was stated by PW.120 to have been drawn by pencil and signatures and thumb impressions of supposed eye witnesses were taken on it. Then, it was stated to have been finalized by a sketch pen; and in the note below that map, name of A-1 was mentioned and then scored off to show the place of the assailant with the date of 26.3.2003, although the identity of the assailant was not known to anyone till early April, 2003. The I.O. of CBI Dr.Gupta (PW.120) however, deposed that the note below the map was added 'at the time of charge'. He also clearly admitted that in the statement before him PW.55 had not stated that he had seen the boy coming and firing and cried "Bhago Bhago" or that a boyish person had come from the same direction as the car of Shri Pandya had come and he had fired four or five shots while Shri Pandya was rolling up the glass. He also deposed that he did not record statements of any of the persons who had reached the scene of offence on 26.3.2003 even before the complainant.

All these factors put into serious doubt the veracity of the version of PW.55 and therefore, he could hardly be relied upon as a reliable eye witness to the incident of

firing upon Shri Pandya. Even the investigating agencies do not seem to have initially treated him as an eye witness. His remaining available for the initial 4 to 5 days without running his business and then going away to his native place far away for nearly a month further strengthens the doubt about the investigating agency having put him to the use of an eye witness to the exclusion of other possible witnesses who could have thrown some light on the timing of Shri Pandya's movement on 26.3.2003, place and manner and motive of killing him and on the position of his body in the car; and better explained the gun-shot wounds. It may be pertinent to note here that exact time of firing upon Shri Pandya was crucial for the prosecution to link A-1 with the incident by virtue of the call supposed to have been made by him from Law Garden area at 7:33 a.m. and any evidence indicating arrival of Shri Pandya's car at only 15 minutes before or after 7:30 a.m. of 26.3.2003 would have completely overturned the case of the prosecution. PW.1 who stated to have made many calls to Shri Pandya in the morning of 26.3.2003 was not examined for timing of his calls and the FIR lodged by him (Exh.167) mentioned the time of offence to be 10.30 a.m., time of lodging the FIR to be 11.30 a.m., and it was stated therein that Shri Pandya had died during treatment at the hospital, while the doctors at the hospital had declared him dead at 12.00 noon.

‘15. The number of bullet injuries as recorded in the post-mortem report, three holes on the right-hand sleeve of kurta of Shri Pandya and description of injury No.5 and 6 clearly indicated that injury No.5 and 6 could not have been communicating in absence of track having been mentioned in the post-mortem report. There were no fractures and there was no track in the palm or wrist, but there was separate blackening at the wrist and corresponding blackening on the kurta's sleeve. In fact, the examining doctor (PW.19) had made a sketch showing a horizontal injury on the wrist which would rule out the possibility of injury No.6 being an exit wound. Again, the same bullet which caused injury No.5 between the junction of index and middle fingers, even if communicated with injury No.6 on front of forearm, could hardly have re-entered the body to cause injury No.1 at lower part of front neck with the track passing through opical right of right lung and pleura in lateral aspect of left chest wall muscles. Such downward track of injury No.1, if it were a re-entry wound after the bullet having exited from the forearm, would have required a unique position of right hand for which there would be no space in closed setting of a small car. That would lead to the inference that injury No.1, 5 and 6 were caused by different bullets of which two were never traced. Not only that, firing of two more bullets, total seven bullets, would require another weapon, and arguably another assailant, and it would falsify the whole case of the prosecution that only five bullets were fired as indicated by all the supporting evidence. The careful and meticulous mention of only five gunshots throughout the relevant evidence for the prosecution and even in the retracted confessions of A-1 and A-6 made the whole prosecution case a possibly

well-orchestrated concoction of a story away from the whole truth of the matter. The discussion of ocular, ballistic and medical evidence and the ham-handed rejection of the expert's opinion as discussed in para 13 hereinabove, only strengthened the argument for the appellants that the conclusions drawn by the trial Court were perverse and illogical.

‘16. The mystery of the murder is deepened by the facts, borne out from the record, that no blood was found in Shri Pandya's car except a negligible spot on the seat near the driver's seat even as his clothes bore tell-tale signs of profuse bleeding from injuries on the neck and forearm; and mobile phone and keys lying on the floor of the car below that seat had stains of blood. No proper map of the scene of offence was made, position of the eye-witnesses was not ascertained and shown (Exh.615) and assessment of visibility from the position of the sole eye-witness at around 7.30 a.m. was not made. After recovering within hours the mobile phone of Mr.Pandya from the scene of offence, no effort was made to investigate into recent calling from and to that phone even to find out the time since Mr.Pandya had ceased to answer or open SMS messages. On the contrary, I.O.Mr.Gupta (PW.120, Exh.728) admitted that when he received the mobile phone (Article 16) from Ellisbridge Police Station, it was not in a sealed condition, and as he did not find “any significant” calls, he did not even prepare a memo of such calls. No finger-prints were stated to have been lifted either from the car or from the weapon recovered afterwards. The shoes worn by Mr.Pandya on the fateful day could have provided some clue as to whether he had already walked in the garden. They were mysteriously missing from the hospital and it could not be known whether it had bloodstains on them. Although Mufti Sufian and Sohailkhan (absconding accused, who are not parties herein) were all through the investigation found or projected as masterminds or kingpins and co-ordinators who inspired, financed and supervised alleged terrorist acts, were not arrested and the trail of their mobile phones went cold immediately before the other accused were arrested from a public place pursuant to some secret information. Towards the end of investigation, red-corner notices and warrants under section 70 of Cr.P.C. were issued and it was stated before the Court that they were suspected to have sneaked into Pakistan. On the other hand, as for the appellants herein, no evidence with regard to anyone of them going to Pakistan via Bangladesh or Dubai was unearthed in spite of some indication in their emails that they were in touch with someone outside India and clear admission of taking training in Pakistan in some of the confessional statements supposed to have been made by them.

‘17. Since the prosecution has heavily relied upon confession of the appellants as substantive evidence providing the missing links in the prosecution case and as

conclusive evidence of hatching and execution of criminal conspiracy within the larger conspiracy to strike terror, it would be necessary to deal with that part of evidence; particularly where it relates to the offence of murder. It has to be noted at the outset that confessions were recorded under the provisions of Section 32 of POTA after it being applied on 02.06.2003 in the case of murder of Shri Pandya. Before the confessions were recorded all the accused persons, except A-9 and A-11, were already in prolonged custody of the police for nearly two months or more. The time taken in taking down the statements and number of pages of hand-written confessions of each accused, recorded by the same officer, may be tabulated as under:

After hours

as under Hours of of prelimi-

Accused Date of Time taken No. of record- nary pro- No Confession From To Pages
ing duction_____

A-7 06.06.03 17.00 23.25 19 03.25 48

A-9 07.06.03 04.00 16.50 20 12.50 60

A-6 07.06.03 17.00 23.15 13 06.15 72

A-8 07.06.03 12.00 04.00 12 04.00 78

Midnight (08.06.03)

A-11 15.06.03 14.00 18.45 12 04.45 47

A-10 16.06.03 15.00 18.30 13 03.30 70

A-2 20.06.03 15.00 15.15 08 00.15 46

A-3 20.06.03 18.00 20.20 09 02.20 48

A-1 21.06.03 12.00 15.00 12 03.00 65

A-12 22.06.03 11.00 13.15 06 02.15 19

A-5 23.06.03 15.00 17.40 10 02.40 24

A-4 24.06.03 12.00 13.40 10 01.40 44

‘17.1 The Superintendent of Police (CBI) (PW.21 - Exh.226) who recorded all the statements in Hindi, inter alia, deposed that he had strictly instructed the guard not to allow any person from CBI or otherwise to meet or talk to the accused during reflection time. He had physically inspected the body of the accused for any mark of physical violence and satisfied himself about voluntariness and then recorded the confessional statements of each accused in the same language as spoken by him and obtained his signatures on each page of the statement after reading it over to him; and put each confessional statement in sealed envelope and directed the CBI officer to further comply with the provisions of law. From the time the accused were produced before him till the time of their production before Judicial Magistrate, they were kept at CBI office at Gandhinagar but during reflection time they were not kept in lock-up, even as a guard was kept outside the place where the accused were kept during reflection period. And, none was allowed to talk or meet the accused during reflection

time and there was no question of accused having any legal advise during that period. He deposed that as and when he got time to record the confessional statement, he had called the accused. He asserted that none else entered or exited and there was no interruption of any kind during recording of the confessions. When asked about difference in duration of recording of each statement with reference to pages thereof, he replied that recording depended upon speed of narration, speed of reducing it into writing, time of day or night during which it was recorded and such other factors. He denied that back to back recording of statements indicated pre-fabrication of record or of confessional statements. He could not remember any accused to have asked for even a glass of water during recording of statement in the month of June and asserted that not asking for glass of water had nothing to do with genuinely free and voluntary atmosphere. He admitted that Hindi was never his medium during education. He admitted that his basic educational qualification was Commerce Graduate and Cost Accountant, and he had never recorded any confessional statements under TADA. He denied that the confessional statements were not recorded on a mechanical device as they were not voluntary. The following question, note of the Court and answer of the witness need to be reproduced:

“Q: Are you aware as to how in Hindi language the word “Abhiyukt” can be written?

Note: At this juncture, the Court has pointed out to the LA for the defence that time and again this word has appeared in the confessional statement of the accused which has been exhibited and yet, since he has insisted on asking this question, the witness has been asked to reply the same.

A: In the word “Abhiyukt” the words “a”, “bh”, “u”, “k” & “t” of Hindi language will be used”.

‘17.2 Contents of the confessional statements generally are narration of minute details of meetings of the accused persons and talks of taking revenge for the atrocities committed on Muslims during riots of the year 2002 and expression in clear and similar terms of the object of killing some Hindu leaders for spreading terror among Hindus. Ramarkably, A-4, A-5, A-6, A-8 and A-12 have also narrated the details of the tiffin bomb case although that was not the charge pursuant to which they were being interrogated. And A-6, A-8 and A-12 have in fact been acquitted in that case. As for selection of Shri Pandya for killing, it is stated to be the absconding accused A-14 (Sohel) who dropped his name and a few of the accused reiterated that as Shri Pandya had played an active part during riots and in demolishing a masjid at Paldi he was a fit target for taking revenge and striking terror. A-9 was specific in his statement (Exh.232) that on 25.3.2003 he had gone to Law Garden with A-1 and Shri Pandya had come there around 7.30 a.m. When A-1 approached him near parking area, Shri Pandya had come out and A-1 dropped the idea of killing him as people in the

garden were watching him. On 26.3.2003, he reached near H.A.College and saw Yunus (A-6) on a black motorcycle near Thakorebhai Hall and saw A-1 standing at the corner. At around 7.30 a.m., he saw the car and Shri Pandya as glass of the car was half-open. He specifically stated that A-1 fired on Shri Pandya four or five bullets from revolver held by him and at that time half of the glass on the driver-side was open. A-1 has stated in his statement (Exh.253), inter alia, that as Rasulkhan (A-18) (an absconding accused) wanted to strike terror in Gujarat he was being sent to Gujarat for that purpose. He thought that after staging a big event he may be called to Pakistan forever and then he could live in peace, away from the cases pending against him. After describing in detail the attempt on the life of Shri Tiwari and the places of his stay in Ahmedabad, he stated that on 25.3.2003 he gave up the idea of firing at Shri Pandya. On 26.3.2003, he went to the house of A-14 in coffee-colour shirt and upon a sign from Yunus, collected a loaded revolver from the toilet of Jaliwali Masjid and went to Law Garden as pillion rider to Yunus (A-6). As Shri Pandya opened a bottle for drinking water after parking his car, he fired five bullets from the opening of the glass. Then he went to Yunus and boarded his motorcycle. On his way he asked Yunus how many bullets were fired by him and when Yunus told four, he told him, not four but five bullets were fired. He stayed at Royal Apartment for three days thereafter and then, after staying at somebody's shop, he was given a bicycle to go to Kanodar village. He went there and on the next evening he was brought back to Ahmedabad in a Maruti car by A-13.

‘17.3 Important parts of the above statements, related to the murder of Shri Pandya, without mention of any particular time, were inconsistent with the deposition of the eye-witness insofar as the accused concerned stated that the glass of the window of Shri Pandya's car was already half-open and he was shot when he was opening a water-bottle which was nowhere mentioned or found during investigation. Kanodar village was stated to be about 140 kms. away from Ahmedabad and it was practically impossible to reach there on a bicycle in 12 to 18 hours. Moreover, the dialogue regarding number of bullets fired by him is so apparently artificial and unnatural that it appears to have been calculated to buttress the prosecution case in its most controversial aspect. The confessions simply did not mention or explain the gunshot wound on the scrotum of Shri Pandya. The confessions were of course retracted at an early opportunity before the POTA Court, orally and in writing (Exh. 9 to 17), though not before learned Magistrate during confirmation proceeding. There was no material whatsoever to substantiate that Shri Pandya had, in fact or in perception of the victims of riots, played a leading role in the riots or caused in any way demolition of any masjid. Therefore, the object and intent of taking revenge and striking terror through his murder was provided with no basis except the dialogues narrated in the confessional statements.

‘17.4 Learned counsel Mr.B.M.Gupta, appearing for A-1, A-2 and A-3, pointed out that the SP, CBI (PW.21 – Exh.226) had clearly admitted in his Answer No.113 that the confessional statements of A-1, A-2 and A-3 were recorded in the case of attack on Shri Jagdish Tiwari and not in Shri Haren Pandya murder case. I.O. Shri Gupta (PW.120 – Exh.728) had also admitted in his cross-examination that no confessional statement of A-1, A-2 and A-3 was taken while they were in his custody pursuant to the case of murder of Shri Haren Pandya. It was also pointed out by learned counsel Mr.Gupta that, as admitted by I.O. (PW.120 – Exh.728), in all the applications made for police custody of the accused after 01.6.2003 and application of POTA, he had never filed any affidavit stating reasons for the request for police custody, which amounted to violation of mandatory provisions of Sec.49 (2) of POTA. In fact, the remand report (Exh.754) dated 12.6.2003 for A-1, A-2 and A-3 clearly mentioned only the case of attempt of murder on Shri Jagdish Tiwari and conspiracy. But thereafter, their confessions were recorded in which admissions of involvement in the case of murder of Shri Haren Pandya were obtained, according to the submission. It was also submitted that the accused persons were nowhere shown to have been told or advised that they would be free of police custody after recording and confirmation of their confessional statements; and hence, under the fear of further police custody, the accused persons who were already in police custody for inordinately long period could not be expected to make any complaint before learned Judicial Magistrate.

‘17.5 In the impugned judgment, it is recorded that S.P., CBI had no reason to fabricate any confessional statement and had not only done all that was required under the law but also safeguarded the interest of the accused. Although he had “not explicitly asked the accused of their right to meet the lawyers, but that cannot take away the truthfulness of the confessional statement”. The Court relied upon State of Maharashtra v. Bharat Chhaganlal Raghani to hold that the Apex Court had not found any requirement of opening by the Magistrate of the sealed envelope containing confession and to read out the same to the accused, and as the sealed envelopes were sent directly to the POTA Court, no prejudice was caused. The subsequent retraction and complaints by some of the accused about torture, threats and forcible extraction of confessions were brushed aside by the Court as after-thought or under legal advice. Accordingly, the confessional statement of A-1 was found by the Court to have been given voluntarily and it was further found to be truthful as there was “sufficient general corroboration available to the same.”

‘18. Even as the narration of events in the confessional statements of each accused with minute details of names, addresses, ten-digit phone numbers and dates read with the deposition of the recording officer (PW.21 Exh.226) do not inspire sufficient confidence about voluntariness and veracity of the statements, the issue of their admissibility and reliability was taken more on the legal plain.

‘19. Learned counsel Mr.Y.N.Ravani, appearing for CBI, and learned Sp. P.P. Mr.J.M.Panchal, addressed elaborate arguments with written notes to defend the impugned judgment. It was submitted that the sole eye witness (PW.55) was a truthful, trustworthy and uninterested witness whose testimony could not be disregarded on account of his being rustic in his deposition or in view of the medical and ballistic evidence. It was submitted that his presence at the spot on 26.3.2003 was quite natural and he had deposed about the event of firing and features of the assailant with clarity and certainty. He had also immediately narrated the incident to Shuklachacha and CW.1. He had also identified A-1 during test identification parade as well as before the trial Court. He had also demonstrated before the Court, the position of the deceased inside the car, and his deposition corroborated injuries No.1, 2, 3 and 4 of which track was going downward and right to left. It was argued that injury No.7 which had a track going upward and left to right was also explained by the witness by deposing that the legs of the deceased had come up while being shot. They relied upon judgment of the Apex Court in *State of Himachal Pradesh v. Mastram* [AIR 2004 SC 5056] to submit that in case of conflict between ocular version and medical evidence, the ocular evidence of the eye witness has to be preferred. Similar view is expressed by the Apex Court in *Sunil Dattatraya Vaskar v. State of Mahatrashttra* [AIR 2009 SC 210].

‘19.1 As for the ballistic evidence, it was submitted for the respondent that custody of bullets was proved from the stage of recovery by the doctor till their receipt by the expert. Thus, the bullets were found by the ballistic expert to be matching with the revolver recovered at the instance of A-1 (Exh.444) and blood present on the bullets recovered from the body of the deceased and blood present on his clothes was of the same group (Ex.458). The post-mortem doctor had also identified the bullets in the Court as the same which were recovered during post-mortem (Exh.176). On the one hand, the ballistic expert (PW.75) had opined that the bullets were fired from single standard weapon having 7/7 land and groove with right hand side twist, it was further opined that the crime bullets were fired from the revolver sent by CBI, as per the work-sheet (Exh.452). It was only when third opinion was sought after recovery of four empty cartridge cases that the expert asked for the revolver and he found tampering in the shape of firing pin impression on the percussion cap. He had not checked the firing pin on the earlier occasion as he was not required to opine on crime cartridge cases.

‘19.2 As for recovery and discovery of the weapons, A-1 had disclosed the fact of concealment of the revolver used in killing of Shri Haren Pandya in the flat at Shahpur before PW.110 (Exh.656); and discovery of revolver and pistol from the flat under section 27 of the Evidence Act in presence of PW.13 (Panchnama Ex.196) had

connected A-1 to the crime.

‘19.3 It was further submitted that the appellants were in possession of mobile phones and were in constant touch with each other before, during and after commission of the crime through their mobile or land-line phones, as depicted in the call detail records, in order to execute the conspiracy. As mobile phone No.9825491421 was used by A-1, his location at 7.33 a.m. on 26.3.2003 in the area near Law Garden and A-14 providing three new BSNL SIMs to A-7, A-8 and A-9 on 25.3.2003 and their location on 25.3.2003 and 26.3.2003 near Law Garden were strong corroborative evidence of the presence of some of the accused in the Law Garden area. The printouts of email sent by A-1, A-2 and A-18 revealed that they were operating in furtherance of a common object as also presence of some of them in Udaipur and Ahmedabad; even as the text of email messages did not reveal any specific plan of committing any particular crime.

‘19.4 The evidence regarding A.10 purchasing a motorcycle from PW.54 and giving it to A-1 in the first week of February 2003 and thereafter handing over of that bike to PW.45 while fleeing from Ahmedabad on 4.4.2003 and thereafter PW.45 parking the same in the parking of Kalupur Railway Station, proved the provision of logistical support for commission of crime pursuant to a common object and conspiracy. It has also come in evidence that fake number plates were prepared by A-7 and A-8 from PW.52 and were used after commission of crime.

‘19.5 It was submitted that it was proved beyond reasonable doubt that A-1 had reached Udaipur on 31.12.2002 and returned to Hyderabad due to paucity of fund; and again he had returned to Udaipur on 20.01.2003. On 25/26.01.2003, he was brought to Ahmedabad by A-11, A-14 and PW.49 and his stay at various places in Ahmedabad was proved by cogent evidence. Thereafter he had left for Mumbai on 07.4.2003, which showed his attempt to escape after commission of the crime.

‘19.6 Learned counsel relied upon the following judgments of the Apex Court and two unreported Division Bench judgments of this Court, in support of the submission that the confessions of the appellants were required to be relied upon in aid of the corroborative pieces of substantive evidence. It was vehemently argued that high ranking officers of an independent investigating agency like CBI had no reason and could not be presumed to have manipulated or pressurized the accused to make confessional statements which were recorded and confirmed in compliance with all the statutory requirements. It was emphasized that the appellants had not retracted the confessional statements at the first available opportunity when they were produced with their statements in sealed cover before learned Chief Metropolitan Magistrate. Retraction of the confessions after more than one month was rightly regarded as an

after-thought on legal advice. The appellants had given different reasons for retraction when they retracted them orally, in writing and during recording of their statements under section 313 of Cr.P.C. It was also pointed out that the appellants were represented by lawyers at the time of their production in Court for police custody remand. It was submitted that A-1, a native of Andhra Pradesh, had no legitimate business or reason to be in Ahmedabad except for executing the conspiracy. The evidence of A-1, A-4, A-5 and A-12, absconding from Ahmedabad after commission of the crime, indicated their guilty mind. It was also submitted that the Central POTA Review Committee had come to the conclusion that provisions of POTA were duly attracted against the appellants. Thus, there was overwhelming material in the form of oral, documentary, circumstantial and scientific evidence against each of the appellants so as to uphold their conviction and sentence, according to the submission.

‘22. As discussed earlier in para 14 and 15, the material evidence on record could not support the conclusions drawn in the impugned judgment as far as killing of Mr.Haren Pandya by A-1 was concerned. In the facts of the present case, the medical and ballistic evidence could, by no stretch, square with the ocular evidence which is found to be very weak and fragile. In fact, by the inherent contradictions and improbabilities contained in the version presented by the so-called sole eye-witness, his very status and presence as an eye-witness to the incident of firing upon Mr.Haren Pandya have to be seriously doubted. And the medical and ballistic evidence having made the ocular version utterly improbable and injury No.7 having completely ruled out the possibility of firing upon Mr.Haren Pandya from the small opening of the window of his car, the ocular evidence has to be discarded as untrustworthy and unbelievable. It is unfortunate that the investigating officer has hazarded his own guess in respect of injury No.7 and it is accepted and adapted in the impugned judgment, preferring it over the expert's opinion to the contrary. Similar is the case with injury No.5, 6 and 1 wherein the total number of bullets fired by the assailant is believed and accepted to be restricted to five only because there was no possibility of any bullet going anywhere except the car itself and such additional bullets could not have escaped the meticulous checking of the car. The circumstances enumerated in para 16 herein further strengthen reasonable doubt about the proof of firing upon Shri Haren Pandya by A-1 in the manner in which the prosecution has projected its case. No support could be lent to the weak and doubtful substantive evidence by the confessional statement of A-1 insofar as reliability of that piece of evidence is shaken both by its lack of veracity and voluntariness. The prosecution case is further weakened, as far as the murder of Shri Haren Pandya is concerned, by the fact that the bullets recovered from his body may or may not be the same bullets which were examined by the ballistic expert in view of the discrepancies found in their description by the post-mortem doctor and the ballistic expert. The opinion of the ballistic expert (PW.75) has been already discredited and practically discarded in the impugned judgment (See

para 13.12). Assuming that the confessional statements of the accused persons have any evidentiary value, it is found to be unsafe to rely upon them as far as the facts stated therein are not corroborated by other independent evidence. Under such circumstances, one set of weak and doubtful evidence of the sole eye-witness and the ballistic expert could not find corroboration and support from other weaker pieces of evidence in the form of confessional statements. In fact, the investigation clearly appears to have been so botched up and misdirected that the confessional statements recorded during police remand, before any police officer, could not be safely relied for convicting any of the appellants for commission of, abetment or conspiracy to commit, murder.

‘23. In view of the concession made for the appellants, as recorded in para 6 herein, and in view of the voluminous record and number of controversies about each piece of important evidence, it was found to be unnecessary to deal with and discuss each and every argument addressed by learned counsel on both sides. However, it is clarified that we are unable to endorse the general conclusions drawn in para 32 of the impugned judgment, as reproduced in para-4 herein. It may be pertinent to note here that A-6, A-7, A-8 and A-9, only after whose arrest in April 2003 various POTA cases sprang up, were acquitted in the first tiffin bomb case and no appeal was filed from their acquittal. What clearly stands out from the record of the present case is that the investigation in the case of murder of Shri Haren Pandya has all throughout been botched up and blinkered and has left a lot to be desired. The investigating officers concerned ought to be held accountable for their inaptitude resulting into injustice, huge harassment of many persons concerned and enormous waste of public resources and public time of the Courts.

‘24. For the reasons stated hereinabove, the charge for the offence punishable under section 302 of the Indian Penal Code is held to have not been proved beyond reasonable doubt and hence the conviction for the offence punishable under section 120-B read with section 302 of the IPC and the charge for the offence under section 3[1], punishable under section 3[2][a] of the POTA could not survive in respect of any of the appellants and upon being acquitted of those charges, the orders of sentence based on those charges are set aside and to that extent, the appeals are partly allowed.

In view of the concession recorded in para 6 herein, the continuous incarceration of the appellants concerned for more than 8 years, all the appellants except A.1 having no criminal background and having regard to the age and role attributed to the other appellants, the following orders and directions are issued:

[A] In Criminal Appeal No. 986 of 2007, the conviction of the appellant – Mohd. Asgarali S/o. Mohd. Wajirbhai [original accused No. 1] for the offences punishable under section 307 read with section 120-B of the Indian Penal Code and section 4 read with section 3[2] [b] of the POTA and section 25[1-B][a] and section 27[1] of the

Arms Act is confirmed and maintained. The sentence awarded to him by the trial Court in impugned judgment and order dated 25th June, 2007 for these offences is also maintained and upheld. Since he is not separately sentenced for the offence punishable u/s.3[2][b] of POTA by the trial Court, he shall also undergo R.I. for seven years and pay fine of Rs.7,000/- and in default of payment of fine, he shall undergo R.I. for eight months. All the sentences of imprisonment shall run concurrently and he shall be entitled to the benefit of set-off.

[B] In Criminal Appeal No. 984 of 2007, the conviction of the appellant – Mohd. Rauf Kedar [original Accused No. 2] for the offence punishable under section 3[3] of the POTA is confirmed and maintained. Maintaining the order of fine awarded by the trial Court, the sentence of RI for 7 years is modified and reduced to the period already undergone by him in jail. Since his sentence came to be suspended and he was released on bail pending this appeal by the order of Hon'ble the Apex Court, he shall not be required to surrender to jail, provided he has already paid the fine awarded by the trial Court. He shall be permitted to pay the amount of fine within 15 days, if it is not already paid.

[C] In Criminal Appeal No. 985 of 2007, the conviction of the appellant – Mohamed Shafiuddin [original accused No. 3] for the offences punishable under section 307 read with section 120-B of the IPC is maintained and upheld. As he has already undergone the punishment awarded to him, the appeal does not survive for any consequential order.

[D] In Criminal Appeal Nos. 977, 978, 979, 975, 1049 and 1188 of 2007 of appellants, namely Kalim Ahmed alias Kalim Mulla, Rehman Punthawala, Mohamed Riyaz, Mohamed Parvez Shaikh, Parvezkhan Pathan and Mohamed Faruq respectively [original accused no. 4 and accused nos. 7 to 11], their conviction for the offence punishable under section 3[3] of the POTA is maintained and confirmed and the period already undergone by them in jail by now shall be their sentence of imprisonment with fine of Rs.5,000/- each, and in default of payment of fine, they shall undergo RI for 6 months. The benefit given by the trial Court under section 427 of the Cr. P.C., to appellant – Kalim Ahmed @ Kalim Mulla [original accused no. 4] is not interfered with.

[E] In Criminal Appeal Nos. 980 and 981 of 2007 of appellants Anas Machiswala and Mohamed Yunus Sareshwala [original accused nos. 5 and 6], their conviction recorded by the trial Court for the offences punishable under section 4 of the POTA and section 25[1-B][a] of The Arms Act and sentence awarded to them thereunder is confirmed and maintained. Their sentences of imprisonment shall run concurrently and shall be entitled to the benefit of set-off. The benefit given by the trial Court under section 427 of the Cr. P.C., to appellant Anas Machiswala [original accused no. 5] is not interfered with.

[F] In Criminal Appeal No. 976 of 2007, conviction recorded by the trial Court of the appellant Shah Navaz Gandhi [original accused No. 12] for the offence punishable under section 3[3] of the POTA is maintained and upheld. As he has already undergone the sentence awarded by the trial Court, the appeal does not survive for any consequential order.

(D.H.Waghela, J.)

(J.C.Upadhyaya, J.)
(KMG Thilake)