PETITIONER:
STATE OF TAMIL NADU THROUGH SUPERINTENDENT OF POLICE, CBI/SIT

Vs.

RESPONDENT:
NALINI AND 25 OTHERS

DATE OF JUDGMENT: 11/05/1999

BENCH:
Syed Shah Mohammed Quadri

JUDGMENT:

S.SHAH MOHAMMED QUADRI,J.

I have had the advantage of going through the draft judgments prepared by my noble and learned brethern, Honble Mr.Justice K.T.Thomas and Honble Mr.Justice D.P.Wadhwa. In view of different notes struck by them on some aspects, I am expressing my views separately. The facts are stated somewhat exhaustively in their judgments. To recapitulate briefly, it may be noted that May 21, 1991 witnessed a terrible happening -- explosion of human bomb, an unprecedented event in Sriperambudur (Tamil Nadu) at 10.20 p.m. -- which resulted in extirpation of a National leader, a former Prime Minister of India, Shri Rajiv Gandhi, killing of 18 others and leaving 43 persons seriously injured. This incident was a result of wickedly hatched conspiracy which was skillfully planned and horridly executed. While in office as Prime Minister of India, Shri Rajiv Gandhi, to bring about a settlement of disputes between Tamil-speaking ethnic minority and Government of Sri Lanka, signed Indo-Sri Lankan Accord on July 22, 1987 under which the Government of India took upon itself certain role. A prominent organisation of Tamils - Liberation Tiger of Tamil Elam (LTTE) - was among the signatories to that Accord. In discharge of its obligation under the Accord, Government of India sent Indian Peace Keeping Force (IPKF) to Sri Lanka to disarm LTTE. This fact together with the alleged atrocities of IPKF against Tamilians in Sri Lanka and non-cooperation of Government of India with the LTTE, at what is termed as the hour of their need, gave rise to grouse which culminated in plotting of a conspiracy to assassinate Shri Rajiv Gandhi, which was put through on the fateful day, May 21, 1991. It caused severe blow to the democratic process, sent shock waves throughout the world and the nation had to pass through excruciating time. The investigation of that horrible incident was entrusted to the Central Bureau of Investigation (CBI)/Special Investigating Team (SIT). On June 26, 1992, after a lengthy investigation, the SIT filed charge sheet in respect of offences under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA), Indian Penal Code, 1890 (IPC), Explosive Substances Act, 1908, Arms Act, 1959, Passport Act, 1967, Foreigners Act, 1946 and the Indian Wireless Telegraphy Act, 1933, against 41 persons, 12 of them died (2 in the blast and 10 having committed suicide) and three were declared absconding. The case was thus tried against the following 26 accused persons: A-1 (S.Nalini), A-2 (T.Suthendraraja @ Santhan), A-3 (Sriharan @ Murugan @ Thas @ Indu Master), A-4 (Shankar @ Koneswaran), A-5 (D. Vijayanandan @ Hari Ayya), A-6

(Sivaruban @ Suresh @ Suresh Kumar @ Ruban), A-7 (S. Kanagasabapathy @ Radhayya), A-8 (A.Chandralekha @ Athirari @ Sonia @ Gowri), A-9 (B.Robert Payas @ Kumaralingam), A-10 (S.Jayakumar @ Jayakumaran @ Jayam), A-11 (J.Shanthi), A-12 (S.Vijayan @ Perumal Vijayan), A-13 (V.Selvaluxmi), A-14 (S.Bhaskaran @ Velayudam), A-15 (S. Shanmugavadivelu @ Thambi Anna), A-16 (P.Ravichandran @ Ravi @ Pragasam), A-17 (M.Suseemdram @ Mahesh), A-18 (G.Perarivelan @ Arivu), A-19 (S.Irumborai @ Duraisingam), A-20 (S.Bhagyanathan), A-21 (S.Padma), A-22 (A.Sundaram), A-23 (K.Dhanasekaran @ Raju), A-24 (N.Rajasuriya @ Rangan), A-25 (T.Vigneswaran @ Vicky), A-26 (J.Ranganath). Thirteen of these accused are Sri Lankan and an equal number comprises of Indians. The Designated Court framed as many as 251 charges of which Charge No.1 is common to all the accused for the other 250 charges, accused are charged separately under different heads. For the sake of brevity, all charges can be conveniently classified under three categories - A. Under Section 120-B read with Section 302 IPC; B. Under Sections 3,4 and 5 of the TADA Act; and C. (i) Under various provisions of IPC (ii) Under Sections 3,4 and 5 of the Explosive Substances Act, 1908; (iii) Section 25 of the Arms Act, 1959; (iv) Section 12 of the Passport Act, 1967; (v) Section 14 of the Foreigners Act, 1946; (vi) Section 6(1A) of the Wireless Telegraphy Act, 1933. To bring home the guilt of the accused in respect of the charges framed against each of them, the prosecution placed on record confessions of seventeen accused and also plethora of evidence. It examined 288 witnesses exhibited 1448 documents, marked Exs.P-1 to P1448. The Designated Court, on consideration of the material placed before it, found all the twenty six accused guilty of all the charges framed against them and awarded punishment of fine of varying amounts, rigorous imprisonment of different period and sentenced all of them to death. The Designated Court referred the case to this Court for confirmation of death sentence of all the convicts, numbered as Death Reference No.1 of 1998. The convicts filed appeals, Criminal Appeals 321 to 324 of 1998, against their conviction for various offences and the sentence awarded to them. These cases were heard together. Mr. Natarajan, learned senior counsel for the appellants (except Appellant No.15), assisted by the team of able and thoroughly prepared instructing counsel, Mr. Subramaniam for the appellant No.15 and Mr. Altaf Ahmed, learned Additional Solicitor General for the Prosecution, assisted by competent and proficient advocates and departmental officers, very ably and exhaustively argued the cases for over three months. Regarding conviction of the appellants for offences mentioned in Category C noted above, the learned counsel for appellants submitted that they were not pressing the appeals on that aspect as all the appellants had served out the sentence thereunder. The conviction of appellants under the provisions of TADA Act, noted in category B above, had been found to be unsustainable by my learned brethern in their separate opinions and I am in respectful agreement with the same.

The provisions of sub-sections (2), (3) and (4) of Section 3 of TADA Act would be attracted only when a person accused of the offences under the said provisions, has committed a terrorist act within the meaning of Section 3(1) of the TADA Act. Section 3(1) reads as under:

3(1). Punishment for terrorist acts - Whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or fire-arms or other lethal weapons or poisons or

noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act.

A perusal of the provision, extracted above, shows that it embodies the principle expressed in the maxim actus non facit reum nisi mens sit rea; both mens rea and a criminal act are the ingredients of the definition of Terrorist Act. The mens rea required is the intention (i) to overawe the Government as by law established; or (ii) to strike terror in the people or any section of the people; or (iii) to alienate any section of the people; or (iv) to adversely affect the harmony amongst different sections of the people. The actus reus should comprise of doing any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or fire-arms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detaining any person and threatening to kill or injure such persons in order to compel the Government or any other persons to do or abstain from doing any act. Mr.Altaf Ahmed, learned Additional Solicitor General, has developed an ingenious argument that as the acts which are committed by the accused persons have the potentiality to overawe the Government and to strike terror in the people or any section of the people, the required mens rea has to be inferred. A perusal of the charges discloses that the intention to overawe the Government is not mentioned therein. However, Mr.Altaf Ahmed relying upon the provisions of Sections 211, 212, 215, 464 and 465 of the Criminal Procedure Code has submitted that omission to mention the ingredient of the charge did not result in misleading the accused persons and though the words to overawe the Government were not mentioned in the charge, the charge is not bad in law. He relied on Tulsi Ram vs. State of U.P. (1963) Suppl. 1 SCR 382; Willie (William) Slaney vs. The State of Madhya Pradesh (1956) 2 SCR 1140; R.S.Pandit vs. State of Bihar (1963) Suppl. 2 SCR 652; Chittaranjan Das vs. State of West Bengal (1964) 3 SCR 237; and Jaswantri Manilal Akhaney vs. The State of Bombay (1956) SCR 483 in support of his contentions. In my view, the question here does not relate to defect in the charge but to the content of the charge and without the said germane words in the charge, it cannot be said that the charge includes the intention to overawe the Government. The charge framed is confined only to those acts which are referred to therein. This is also the view expressed by my learned brethern. Therefore, the conviction recorded by the Designated Court in the judgment under appeal for offences noted in Category B under the TADA Act cannot be maintained. The appellants are accordingly acquitted of the charges under TADA Act. Now remains the charge under Section 120-B read with Section 302 IPC noted in Category A above, which is substantial and important. Brother Thomas,J. in his precise and well considered opinion found A-1 (Nalini), A-2 (Santhan), A-3 (Murugan), A-9 (Robert Payas), A-10 (Jayakumar), A-16 (Ravichandran) and A-18 (Arivu) guilty of offence under Section 120-B read with Section 302 IPC and sentenced A-1, A-9, A-10 and A-16 to life imprisonment and A-2, A-3 and A-18 to death, while brother Wadhwa,J., on very

exhaustive consideration, held A-1 (Nalini), A-2 (Santhan), A-3 (Murugan) and A-18 (Arivu) guilty of the said offence and sentenced them to death. There is no controversy about the horrible occurrence of human bomb blast in Sriperumbudur in the night of May 21, 1991 causing death of Shri Rajiv Gandhi and eighteen others and grevious injuries to 43 persons. The controversy is about who are responsible for this horrendous crime? The question is whether the conviction of the appellants or any of them under Section 120-B r/w 302 IPC is sustainable in law and in respect of whom the punishment of death sentence can be confirmed. To record conviction under Section 120-B, it is necessary to find the accused guilty of criminal conspiracy as defined in Section 120-A of IPC which reads as under : 120A. Definition of criminal conspiracy - When two or more persons agree to do, or cause to be done -

(1) an illegal act, or (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy :

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation - It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

The ingredients of the offence of criminal conspiracy are: (i) an agreement between two or more persons; (ii) the agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means. The proviso and the explanation are not relevant for the present discussion. Though the meeting of minds of two or more persons for doing/or causing to be done an illegal act or an act by illegal means is a sine qua non of the criminal conspiracy, yet in the very nature of the offence which is shrouded with secrecy no direct evidence of the common intention of the conspirators can normally be produced before the Court. Having regard to the nature of the offence, such a meeting of minds of the conspirators has to be inferred from the circumstances proved by the prosecution, if such an inference is possible. In Sardar Sardul Singh Caveeshar vs. State of Maharashtra [(1964) 2 SCR 378], Subba Rao,J. speaking for himself and his learned colleagues, observed : The essence of conspiracy is, therefore, that there should be an agreement between persons to do one or other of the acts described in the section. The said agreement may be proved by direct evidence or may be inferred from acts and conduct of the parties.

In Shivnarayan Laxminarayan Joshi & Ors. vs. State of Maharashtra [(1980) 2 SCC 465], S.Murtaza Fazal Ali,J., speaking for a two-Judge Bench, observed: It is manifest that a conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the same. The offence can be only proved largely from the inferences drawn from acts or illegal omission committed by the conspirators in pursuance of a common design which has been amply proved by the prosecution as found as a fact by the High Court.

In Mohammad Usman Mohammed Hussain Maniyar & Ors. vs. State of Maharashtra, [(1981) 2 SCC 443], another two-Judge Bench of this Court pointed out : For an offence under Section 120-B, the prosecution need not necessarily prove that the perpetrators expressly agreed to do and/or caused to be done the illegal act;

the agreement may be proved by necessary implication. In this case, the fact that the appellants were possessing and selling explosive substances without a valid licence for a pretty long time leads to the inference that they agreed to do and/or caused to be done the said illegal act, for, without such an agreement the act could not have been done for such a long time.

In State of Himachal Pradesh vs. Krishan Lal Pardhan & Ors. [(1987) 2 SCC 17[, Natarajan,J. observed : In the opinion of Special Judge every one of the conspirators must have taken active part in the commission of each and every one of the conspiratorial acts and only then the offence of conspiracy will be made out. Such a view is clearly wrong. The offence of criminal conspiracy consists in a meeting of minds of two or more persons for agreeing to do or causing to be done an illegal act or an act by illegal means, and the performance of an act in terms thereof. If pursuant to the criminal conspiracy the conspirators commit several offences, then all of them will be liable for the offences even if some of them had not actively participated in the commission of the offences.

In State of Maharashtra & Ors. vs. Somnath Thapa & Ors. [(1996) 4 SCC 659], Hansaria,J., speaking for a three-Judge Bench of this Court after elaborate discussions of the various judgments of this Court, concluded thus : To establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself. This apart, the prosecution has not to establish that a particular unlawful use was intended, so long as the goods or service in question could not be put to any lawful use. Finally, when the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do, so long as it is known that the collaborator would put the goods or service to an unlawful use.

From a survey of cases, referred to above, the following position emerges: In reaching the stage of meeting of minds, two or more persons share information about doing an illegal act or a legal act by illegal means. This is the first stage where each is said to have knowledge of a plan for committing an illegal act or a legal act by illegal means. Among those sharing the information some or all may form an intention to do an illegal act or a legal act by illegal means. Those who do form the requisite intention would be parties to the agreement and would be conspirators but those who drop out cannot be roped in as collaborators on the basis of mere knowledge unless they commit acts or omissions from which a guilty common intention can be inferred. It is not necessary that all the conspirators should participate from inception to the end of the conspiracy; some may join the conspiracy after the time when such intention was first entertained by any one of them and some others may quit from the conspiracy. All of them cannot but be treated as conspirators. Where in pursuance of the agreement the conspirators commit offences individually or adopt illegal means to do a legal act which has a nexus to the object of conspiracy, all of them will be liable for such offences even if some of them have not actively participated in the commission of those offences. The agreement, sine qua non of conspiracy, may be proved either by direct evidence which is rarely available in such cases or it may be inferred from utterances, writings, acts, omissions and conduct of the parties to the conspiracy which is usually done. In view of Section 10 of the Evidence Act anything said, done or

written by those who enlist their support to the object of conspiracy and those who join later or make their exit before completion of the object in furtherance of their common intention will be relevant facts to prove that each one of them can justifiably be treated as a conspirator. Section 10 of the Evidence Act recognises the principle of agency and it reads as follows: 10. Things said or done by conspirator in reference to common design.- Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

To apply this provision, it has to be shown that (1) there is reasonable ground to believe that two or more persons have conspired together; and (2) the conspiracy is to commit an offence or an actionable wrong. If these two requirements are satisfied then anything said, done or written by any one of such persons after the time when such intention was entertained by any one of them in furtherance of their common intention, is a relevant fact against each of the persons believed to be so conspiring as well as for the purpose of proving the existence of conspiracy and also for the purpose of showing that any such person is a party to it. To establish the charge of conspiracy to commit the murder of Shri Rajiv Gandhi, reliance is placed mainly on seventeen confessional statements made by the accused persons. The confessions of the accused persons have been recorded under Section 15(1) of the TADA Act. Before adverting to the confessional statements, it is necessary to consider the incidental questions as to whether they can be used against the appellants for the charge under Section 120-B read with Section 302, IPC when the accused are found to be not guilty of various offences under the TADA Act. Mr.Natarajan has referred to the judgment of this Court in Bilal Ahmed Kaloo vs. State of Andhra Pradesh [(1997) 7 SCC 431], in support of his contention that the confession recorded under Section 15(1) of the TADA Act cannot be made use of to record the conviction of appellants under Section 120-B read with Section 302 IPC.
Mr.Altaf Ahmed, however, submitted that that case could not be treated as authority for the proposition canvassed by the learned counsel for appellants as Section 12 of the TADA Act has not been considered in that case by this Court. Here, it would be necessary to refer to Section 12 of the TADA Act, which is reproduced herein : 12. Power of Designated Courts with respect to other offences - (1) When trying any offence, a Designated Court may also try and other offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with such other offence.

(2) If, in the course of any trial under this Act of any offence, it is found that the accused person has committed any other offence under this Act or any rule made thereunder or under any other law, the Designated Court may convict such person of such other offence and pass and sentence authorised by this Act or such rule or, as the case may be, such other law, for the punishment thereof.

Section 12(1) authorises the Designated Court to try offences under the TADA Act along with another offence with which the accused may be charged, under the Cr.P.C., at the same trial. The only limitation on the exercise of the power is that the

offence under the TADA Act is connected with the offence being tried together. Sub-section (2) provides that the Designated Court may convict the accused person of offence under that Act or any rule made thereunder or under any other law and pass any sentence authorised under that Act or the rules or under any other law, as the case may be, for the punishment thereof if in the course of any trial under the TADA Act the accused persons are found to have committed any offence either under that Act or any rule or under any other law. A perusal of the judgment in Kaloos case (supra) shows that Section 12 of the TADA Act was not brought to the notice of this Court and moreover the point was conceded by the learned counsel for the State. I concur with my learned brethern that Kaloos case does not lay down the correct law. It follows that confessions recorded under Section 15 of the TADA Act and admitted in the trial of offences under the TADA Act and under Section 120B read with Section 302 IPC can be relied upon to record conviction of the appellants for the said offences under IPC even though they are acquitted of offences under the TADA Act. The next question that arises for consideration is the ambit of Section 15 of the TADA Act, which is in the following terms: 15. Certain confessions made to police officers to be taken into consideration - (1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person or coaccused, abettor or conspirator for an offence under this Act or rules made thereunder.

Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused.

(2). The police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily.

Sub-section (1) of Section 15 opens with a non obstante clause -notwithstanding anything in the Code of Criminal Procedure or in the Indian Evidence Act -- and says that subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under that Act or the Rules made thereunder. The admissibility of the confession of an accused in the trial of a coaccused, abettor or conspirator is subject to the condition that the coaccused, abettor or conspirator is charged and tried in the same case together with the accused. Sub-section (2) incorporates safeguards for the person whose confession is to be recorded under sub-section (1) and it is not necessary to refer to it for the present discussion. Having regard to the provisions of Section 12 of the TADA Act, the confession recorded under Section 15 will be admissible in the trial of a person, co-accused, abettor or conspirator for an offence under the TADA Act or the rules made thereunder and such other offence with which such a

person may be charged at the same trial under the provisions of the Criminal Procedure Code provided the offence under the TADA Act or the Rules made thereunder is connected with such other offence. An analysis of sub-section (1) of Section 15 shows that it has two limbs. The first limb bars application of provisions of the Code of Criminal Procedure and the Indian Evidence Act to a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by him in any of the modes noted in the section. The second limb makes such a confession admissible, de hors the provisions of the Evidence Act in the trial of such person or co-accused, abettor or conspirator for an offence under the TADA Act or rules made thereunder provided the co-accused, abettor or conspirator is charged and tried in the same case together with the accused. The import of Section 15(1) is that insofar as the provisions of the Cr.P.C. and the Evidence Act come in conflict with either recording of a confession of a person by a police officer of the rank mentioned therein, in any of the modes specified in the section, or its admissibility at the trial, they will have to yield to the provision of Section 15(1) of the TADA Act as it is given overriding effect. Thus, Sections 162, 164, 281 and 463 of the Code of Criminal Procedure which have a bearing on the question of recording of statement/confession of a person and Sections 24 to 30 of the Evidence Act which deal with various aspects of confession of an accused stand excluded vis-a-vis Section 15(1) of the TADA Act and cannot be called in aid to invalidate recording of confession of an accused by a police officer of the specified rank and/or its admissibility in the trial of the, coaccused, abettor or conspirator charged and tried in the same case together with the accused for an offence under the TADA Act or rules made thereunder. It must be made clear that the non obstante clause in Section 15(1) of the TADA Act does not exclude the application of all the provisions of the Cr.P.C. and the Indian Evidence Act in the trial of offences under TADA Act. What remains to be examined is what is the evidential value of a confession recorded under Section 15 of the TADA Act against the maker thereof and as against a co-accused, abettor or conspirator? Thomas,J. took the view that the confession of an accused is a substantive evidence as against the maker thereof but it is not so as against the co-accused, abettor or conspirator against whom it can be used only as corroborative evidence. Wadhwa,J. took the contrary view; according to him, confession of an accused is a substantive evidence against himself as well as against co-accused, abettor or conspirator. Section 3 of the Indian Evidence Act defines, inter alia, the term evidence to mean and include all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under the inquiry (which is called oral evidence) and all documents produced for the inspection of the court (which is called documentary evidence). The plea of guilty by the accused at the trial cannot, therefore, be treated as falling within the meaning of evidence as it is not a statement made by a witness before the Court. The extra judicial confession made to any person which is allowed to be proved by the Court will be a part of the statement of a witness made before the Court, so it will be evidence within the meaning of that term. A confession recorded by a Magistrate under Section 164 Cr.P.C. also satisfies the requirements of the definition of the term evidence. A confession recorded under Section 15(1) of the TADA Act is also within the ambit of evidence under Section 3(1) of the Evidence Act and there is no dissension on this. The expression substantive evidence is not employed in the Evidence Act. It connotes evidence of a fact in issue or a relevant fact. In Blacks Law Dictionary (at P.1597), the following meaning is noted: SUBSTANTIVE EVIDENCE. That adduced

for the purpose of proving a fact in issue, as opposed to evidence given for the purpose of discrediting a witness, (i.e., showing that he is unworthy of belief,) or of corroborating his testimony. Best, Ev.246,773,803.

In Words and Phrases (Vol.40), substantive evidence is defined as follows: SUBSTANTIVE EVIDENCE. Although subordinate feature of case, certain types of evidence, such as character evidence or prior criminal acts, can be considered as substantive evidence on question of guilt or innocence. State v. Wallace, N.C.A. pp.283 S.E.2d. 404, 407.

Substantive evidence is that offered for purpose of persuading trier of fact as to truth of proposition on which determination of tribunal is to be asked, whereas impeachment evidence is that evidence designed to discredit the witness, i.e. to reduce effectiveness of his testimony by bringing forth evidence explaining why jury should not put faith in his testimony. Zimmerman v. Superior Court In and For Maricopa County, 402, P.2d. 212, 215, 98, Ariz 85, 18 A.L.R. 3d. 900.

Thus, plea of guilty by an accused at the commencement of the trial or in his statement under Section 313 Cr.P.C. will not be substantive evidence but extra judicial confession and confession recorded by a Magistrate under Section 164 Cr.P.C. of an accused will be substantive evidence. So also a confession of a person recorded under Section 15 of the TADA Act; I shall elaborate this point presently. In regard to evidential value of confessions both academicians and Judges have expressed conflicting opinions. Blackston described confession as the weakest and most suspicious of all evidence. In Wigmore on Evidence, para 866, third edition, it is noted : Now, assuming the making of a confession to be a completely proved fact - its authenticity beyond question and conceded, - - then it is certainly true that we have before us the highest sort of evidence. The confession of crime is usually as much against a mans permanent interests as anything well can be; and, in Mr.Starkies phrase, no innocent man can be supposed ordinarily to be willing to risk life, liberty, or property by a false confession. Assuming the confession as an undoubted fact, it carries a persuasion which nothing else does, because a fundamental instinct of human nature teaches each one of us its significance.

(Emphasis supplied)

Similar view is expressed in Treatise on the Law of Evidence, Volume 1, Twelfth Edition, by Taylor in para 865 : Indeed, all reflecting men are now generally agreed that, deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in the law, their value depending on the sound presumption that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience.

In Principles and Digest of the Law of Evidence, Volume 1, New Edition, by Chief Justice M.Monir, after noticing conflicting views and discussing various authorities, the learned author stated the rule as follows : The rule may, therefore, be stated to be that whereas the evidence in proof of a confession having been made is always to be suspected the confession, if once proved to have been made and made voluntarily, is one of the most effectual proofs in the law.

There is a plethora of case law holding that confession of an

accused recorded in the manner provided under Cr.P.C. and admissible under the provisions of the Evidence Act, even if retracted later, is substantive evidence as against the maker thereof. Section 30 of the Evidence Act which deals with consideration of proved confession affecting person making it and others jointly under trial for same offence, is quoted below:

30. Consideration of proved confession affecting person making it and others jointly under trial for same offence - When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

Explanation -- Offence as used in this section, includes the abetment of, or attempt to commit, the offence."

This Section says that when more persons than one are being tried jointly for the same offence and a confession, made by one of such persons affecting himself and some other of such persons, the Court may take into consideration such confession against the maker of the confession as well as against such other person when such a confession is proved in Court. Speaking for a two-Judge Bench of this Court in Kalpnath Rai vs. State (Through CBI) [(1997) 8 SCC 732], Thomas,J. observed: confession made admissible under Section 15 of TADA can be used as against a co-accused only in the same manner and subject to the same conditions as stipulated in Section 30 of the Evidence Act.

A plain reading of Section 30 of the Evidence Act discloses that when the following conditions exist, namely, (i) more persons than one are being tried jointly; (ii) the joint trial of the persons is for the same offence; (iii) a confession is made by one of such persons (who are being tried jointly for the same offence); (iv) such a confession affects the maker as well as such persons (who are being tried jointly for the same offence); and (v) such a confession is proved in Court, the Court may take into consideration such confession against the maker thereof as well as against such persons (who are being jointly tried for the same offence). It has been noticed above that Section 15(1) of the TADA Act enacts that a confession recorded thereunder shall be admissible in the trial of the maker of the confession, or co-accused, abettor or conspirator provided the co-accused, abettor or conspirator is charged and tried in the same case together with the accused. The difference between Section 30 of the Indian Evidence Act and Section 15(1) of the TADA Act may also be noticed here. Whereas the former provision requires that the maker of the confession and others should be tried jointly for the same offence, the latter provision does not require that joint trial should be for the same offence. Another point of distinction is that under Section 30 of the Evidence Act, the Court is given discretion to take into consideration the confession against the maker as well as against those who are being tried jointly for the same offence, but Section 15(1) of TADA Act mandates that confession of an accused recorded thereunder shall be admissible in the trial of the maker of confession or co-accused, abettor or conspirator, provided the coaccused, abettor or conspirator is charged and tried in with the accused the same case. Both Section 30 of the Evidence Act as well as Section 15 of the TADA Act require joint trial of the accused making confession and co-accused, abettor or conspirator.

Having excluded the application of Sections 24 to 30 of the Evidence Act to a confession recorded under Section 15(1) of the TADA Act, a self-contained scheme is incorporated therein for recording confession of an accused and its admissibility in his

trial with co-accused, abettor or conspirator for offences under the TADA Act or the rules made thereunder or any other offence under any other law which can jointly be tried with the offence with which he is charged at the same trial. There is thus no room to import the requirements of Section 30 of the Evidence Act in Section 15 of the TADA Act. Under Section 15(1) of the TADA Act the position, in my view, is much stronger, for it says, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person or coaccused, abettor orconspirator for an offence under this Act or rules made thereunder, Provided that the co-accused, abettor or conspirator is charged and tried in the same case together with the accused. On the language of sub-section (1) of Section 15, a confession of an accused is made admissible evidence as against all those tried jointly with him, so it is implicit that the same can be considered against all those tried together. In this view of the matter also, Section 30 of the Evidence Act need not be invoked for consideration of confession of an accused against a co-accused, abettor or conspirator charged and tried in the same case along with the accused. Therefore, with great respect to the learned Judges, I am unable to agree with the above-quoted observations made in Kalpnath Rais case (supra) and the view of brother Thomas,J. in his judgment in this case. In support of the said view, Thomas,J. pointed out, in his judgment, that (i) a confession can be used as relevant evidence against its maker under and subject to conditions mentioned in Section 21 of the Evidence Act; (ii) there is no provision in the Evidence Act except Section 30 which authorises consideration of confession against co-accused and posed a question that if Section 30 is to be excluded by virtue of nonobstante clause in Section 15(1) of the TADA Act, under what provision could a confession of one accused be used against another co-accused at all? With great respect to my learned brother, I am not persuaded to adopt that view. On analysis of Section 15(1) of the TADA Act and Section 30 of the Evidence Act, I have reached a different conclusion, noted above. It is true that Section 21 of the Evidence Act declares that admission is relevant and permits its proof against the person who makes it. Even when confessions which are species of admissions are not hit by Sections 24, 25 or 26 and are relevant or when they became relevant under Sections 27, 28 and 29, they can only be proved against the maker thereof. Admittedly, there is no provision in the Evidence Act for making confession of an accused relevant or admissible against the co-accused. In the setting of those provisions Section 30 of the Evidence Act is enacted which is a clear departure from the principles of English Law. It permits taking into consideration of a confession made by one of the persons being tried jointly for the same offence as against the co-accused. It is in such a case a confession of an accused, recorded in accordance with the provisions of the Cr.P.C. and the Evidence Act, has to satisfy the requirements of Section 30 of the Evidence Act for using it against the coaccused. It is now well settled that the expression the court may take into consideration such confession means to lend assurance to the other evidence against the co-accused. Sir John Beaumont, speaking for the Privy Council, in Bhuboni Sahu vs. The King [AIR (1949) PC 257], an oft-quoted authority, observed in regard to Section 30 of the Evidence Act, thus : Section 30 seems to be based on the view that an admission by an accused person of his own guilt affords some sort of sanction in support of the truth of his confession against others as well as himself. But a confession of a

co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of evidence contained in Section 3. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by crossexamination. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of those infirmities. Section 30, however, provides that the Court may take the confession into consideration and thereby, no doubt, makes it evidence on which the Court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence. The confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction.

About the nature of the evidence of an accomplice, it was pointed out therein : The danger of acting upon accomplice evidence is not merely that the accomplice is on his own admission a man of bad character who took part in the offence and afterwards to save himself betrayed his former associates, and who has placed himself in a position in which he can hardly fail to have a strong bias in favour of the prosecution; the real danger is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue.

In Kashmira Singh vs. State of Madhya Pradesh [1952 SCR 526] this Court approved the principles laid down by the Privy Council in Bhuboni Sahus case (supra) and observed: But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.

In Hari Charan Kurmi and Jogia Hajam vs. State of Bihar [(1964) 6 SCR 623], a Constitution Bench of this Court after referring to Bhuboni Sahus case (supra) and Kashmira Singhs case (supra), observed : Normally, if a statement made by an accused person is found to be voluntary and it amounts to a confession in the sense that it implicates the maker, it is not likely that the maker would implicate himself untruly, and so, s.30 provides that such a confession may be taken into consideration even against a co-accused who is being tried along with the maker of the confession.....When Section 30 provides that the confession of a co-accused may be taken into consideration, what exactly is the scope and effect of such taking into consideration, is precisely the problem which has been raised in the present appeals.

It was held that technically construed, the definition of the term evidence in Section 3 would not apply to confession. It was observed : Even so, s.30 provides that a confession may be taken into consideration not only against its maker, but also against a co-accused person; that is to say, though such a confession may not be evidence as strictly defined by s.3 of the Act, it is an element which may be taken into consideration by the criminal court and in that sense, it may be described as evidence in a nontechnical way. But it is significant that like other evidence which is produced before the Court, it is not obligatory on the court to take the confession into account. When evidence as defined by the Act is produced before the Court, it is the duty of the Court to consider that evidence. What weight should be attached to such evidence, is a matter in the

discretion of the Court. But a Court cannot say in respect of such evidence that it will just not take that evidence into account. Such an approach, can, however, be adopted by the Court in dealing with a confession, because s.30 merely enables the Court to take the confession into account.

In the cases referred to above, it was held that the confession of a co-accused is not evidence as defined in Section 3 of the Evidence Act and that Section 30 enables the Court to take into consideration the confession of a co-accused to lend assurance to other evidence against the co-accused. The expression may take into consideration means that the use of the evidence of confession of an accused may be used for purposes of corroborating the evidence on record against the co-accused and that no conviction can be based on such confession. The amendments effected in Section 15(1) and Section 21(1) of the TADA Act by Act 43 of 1993 may be noticed here. The words co-accused, abettor or conspirator and the proviso are added in sub-section (1) of Section 15; clauses (c) and (d) of sub-section (1) of Section 21 are deleted. Before the amendment of Sections 15 and 21, the sweep of the legal presumption contained therein was that in a prosecution for any offence under sub-section (1) of Section 3 of the TADA Act on proof of the facts mentioned in clauses (a), (b), (c) and (d) of sub-section (1) of Section 21, it was mandated that the Designated Court shall presume, unless the contrary is proved, that the accused had committed such offence. Clauses (c) and (d), which are deleted from sub-section (1) of Section 21 by Act 43 of 1993, related to a confession made by a co-accused that the accused had committed the offence and to the confession made by the accused of the offence to any person other than a police officer. The effect of the said clauses was that in the event of the co-accused making confession inculpating the accused or in the event of the accused himself making an extra-judicial confession to any person other than a police officer the legal presumption that the accused had committed such offence would arise. Section 4 of the Evidence Act defines shall presume as follows : Shall presume.whenever it is directed by this Act that the court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

The presumption is, however, rebuttable so the burden of showing that the offence was not committed would shift to the accused. The normal presumption in criminal cases is that till it is proved to the contrary the accused will be deemed to be innocent and that position is altered by Section 21(1). After deletion of clauses (c) and (d) by Act 43 of 1993 the statutory presumption under Section 21(1) will not apply to situations where a confession is made by a co-accused that the accused had committed the offence (clause (c)) or where the accused himself made a confession of the offence to any person other than a police officer (clause (d)) and the normal rule of presumption of innocence of the accused will apply. What was in the realm of as proved has after the amendment become only substantive evidence admissible as against the co-accused. I have already pointed out the difference in the phraseology of Section 15 of the TADA Act. The Parliament used the expression shall be admissible in the trial of such person or co-accused, abettor or conspirator in Section 15 which is different from the language employed in Section 30 of the Evidence Act which says that the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. It has to be presumed that the Parliament was aware of the interpretation placed by the courts including Privy Council and Supreme Court on Section 30 of the Evidence Act but

chose to frame Section 15 differently obviously intending to avoid the meaning given to the phrase the court may take into consideration such confession as against such other person.... used in Section 30 of the Evidence Act. On the language of Section 15(1), it is clear that the intention of the Parliament is to make the confession of an accused substantive evidence both against the accused as well as the co-accused. Brother Thomas,J. proceeded on the assumption that under unamended Section 21(1), the confession of an accused as against a coaccused was to be treated by the court as substantive evidence. But in view of the use of the expression shall presume in Section 21(1) of the TADA Act, the confession of one accused as against the other co-accused cannot be said to be substantive evidence; such a confession will be regarded as proof of the fact that the accused had committed such offence unless the contrary is proved. In my view, substantive evidence of a fact by itself does not amount to proof of that fact. There is no presumption in law that substantive evidence of a fact has to be treated as proof of that fact. After the amendment of Section 21(1), the confession of an accused recorded by the police officer under Section 15(1) of the TADA Act is in the same position as that recorded by a Magistrate under Section 164 Cr.P.C. and that it cannot be placed on a higher pedestal in regard to its evidential value. If that be so, in a trial under the TADA Act when there are two categories of confessions one a judicial confession recorded by a Magistrate under Section 164 Cr.P.C. and the other by a police officer under Section 15(1) of the TADA Act, the court will have to give the same evidential value to such confessions as against the co-accused. If the expression substantive evidence is understood in the sense of evidence of a fact in issue or a relevant fact and not proof of what it contains and that it has to be evaluated by the Court like any other category of evidence no difficulty arises. The difficulty will, however, arise if substantive evidence is equated with the position flowing from the application of legislative mandate by incorporating shall presume as Brother Thomas,J. has indicated in his judgment as that will, in my view, nullify the effect of legal presumption in Section 21(1) of the TADA Act. I, therefore, respectfully differ from the view taken by the Bench in Kalpnath Rais case (supra) and brother Thomas,J. in his judgment in this case and in respectful agreement with the view expressed by brother Wadhwa,J. in his judgment that a confession of an accused under Section 15(1) of the TADA Act is substantive evidence against the coaccused, abettor or conspirator jointly tried with the accused. But I wish to make it clear that even if confession of an accused as against co-accused tried with accused in the same case is treated substantive evidence understood in the limited sense of fact in issue or relevant fact, the rule of prudence requires that the court should examine the same with great care keeping in mind the following caution given by the Privy Council in Bhuboni Sahus case which has been noted with approval by this Court in Kashmira Singh (supra) and I quote: This tendency to include the innocent with the guilty is peculiarly prevalent in India, as Judges have noted on innumerable occasions, and it is very difficult for the Court to guard the danger.

It is also to be borne in mind that the evidence of confession of coaccused is not required to be given on oath, nor is given in the presence of the accused, and its veracity cannot be tested by cross examination. Though the evidence of an accomplice is free from these shortcomings yet an accomplice is a person who having taken part in the commission of offence, to save himself, betrayed his former associates and placed himself on a safer plank - a position in which he can hardly fail to have a strong bias in favour of the prosecution the position of the accused

who has given confessional statement implicating a co-accused is that he has placed himself on the same plank and thus he sinks or sails along with the co-accused on the basis of his confession. For these reasons, in so far as use of confession of an accused against a co-accused is concerned, rule of prudence cautions the judicial discretion that it cannot be relied upon unless corroborated generally by other evidence on record. Now adverting to merits of the appeals, learned brother Thomas,J. having considered the confession of A-20 (S.Bhagyanathan) Exh.P-69, A21 (S.Padma) Exh.P-73, A-1 (S.Nalini) Exh.P-77, A-3 (V.Sriharan) Exh.P81. A-9 (Robert Payas) Exh.P-85, A-18 (Arivu) Exh.P-87, A-10 (Jayakumar) Exh.P-91, A-8 (Athirai) Exh.P-97, A-12 (Vijayan) Exh.P-101, A-2 (Santhan) Exh.P-104, A-24 (Rangan) Exh.P-109, A-23 (Dhanasekaran) Exh.P-113, A19 (Irumborai) Exh.P-117, A-16 (Ravichandran) Exh.P-121, A-17 (Suseendran) Exh.123, A-25 (Vigneswara) Exh.P-127, A-15 (Thambianna @ Shanmugavadivelu) Exh.P-139, meticulously examined other oral and documentary evidence in support of such confessional statement and found A-1 (Nalini), A-2 (Santhan), A-3 (Murugan), A-9 (Robert Payas), A10 (Jayakumar), A-16 (Ravichandran) and A-18 (Arivu) guilty of offences under Section 120-B read with Section 302 IPC and altered death sentence of A-1, A-9, A-10 and A-16 to life imprisonment while confirming death sentence of A-2, A-3 and A-18. Brother Wadhwa,J. on consideration of all the aforementioned confessions and other evidence against the appellants confirmed conviction of only A-1, A-2, A-3 and A-18 under Section 120-B read with Section 302 I.P.C. and confirmed death sentence of all of them while acquitting all other appellants. In the view I have taken in the light of the above discussions and on examining the said statements of confession and the evidence, both oral and documentary, on record, it would be duplication to record here the same reasoning over again on the question of confirmation of conviction of appellants, A-1,A-2, A-3, A-9, A-10, A-16 and A-18. In so far as the conviction of any other appellant is concerned it would serve no practical purpose and will be only of academic interest and an exercise in futility. I, therefore, consider it appropriate to record my respectful agreement with the reasoning and conclusion arrived at by Thomas,J. in confirming the conviction of A-1, A-2, A-3, A-9, A-10, A-16 and A-18 for the aforementioned offences. The last crux in these cases is the question of punishment. The Indian Penal Code gives a very wide discretion to the Court in the matter of awarding punishment. The maximum and the minimum punishments are prescribed under the IPC and awarding of appropriate punishment is left to the discretion of the court. There are no general guidelines in the IPC but in the exercise of its discretion the Courts have to take into consideration the aggravating and mitigating circumstances of each case to determine appropriate sentence commensurate with the gravity of the offence and role of the convict. On the question of awarding the sentence for the offences for which the punishment prescribed is life imprisonment or the death sentence, there has been a complete change in the legislative policy which is reflected in sub-section (3) of Section 354 of the Code of Criminal Procedure. It enjoins that in the case in which the court awards sentence of death, the judgment shall state special reasons for such sentence. In Bachan Singh vs. State of Punjab, [AIR 1980 SC 989], the constitutional validity of Section 354(3) Cr.P.C. was considered by a Constitution Bench of this Court. The change in the policy of sentencing is pointed out thus: Section 354(3) of the Code of Criminal Procedure, 1973, marks a significant shift in the legislative policy underlying the Code of 1898, as in force immediately before April 1, 1974, according to which both the alternative sentences of death or imprisonment of life provided for murder and for certain other capital

offences under the Penal Code were normal sentences. Now, according to this changed legislative policy which is patent on the face of Section 354(3), the normal punishment for murder and six other capital offences under the Penal Code, is imprisonment for life (or imprisonment for a term of years) and death penalty is an exception.

It will be useful to note the principles for awarding punishment contained in the following observations: .. ..for making the choice of punishment or for ascertaining the existence or absence of special reasons in that context, the Court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case..In many cases, the extremely cruel and beastly manner of the commission of murder is itself a demonstrated index of a depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water-tight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that special reasons can legitimately be said to exist.

(Emphasis supplied)

In Machhi Singh & Ors. vs. State of Punjab [(1983) 3 SCR 413] the following observations of Thakkar,J., speaking for a three-Judge Bench of this Court, are worth noticing. The very existence of the rule of law and the fear of being brought to book operates as a deterrent to those who have no scruples in killing others if it suits their ends. In such a situation the community feels that for the sake of self preservation the killer has to be killed and it may withdraw the protection afforded to him from being killed. It might do so in rarest of the rare cases. When its collective conscience is so shocked, it would expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards the desirability or otherwise of retaining death penalty. The learned Judge catalogued various factors which would bring a case in the rarest of the rare cases. Among them is included the case where the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons. In Kehar Singh & Ors. vs. State (Delhi Administration) [(1988) 3 SCC 609], the security guards of Smt.Indira Gandhi, the then Prime Minister of India, assassinated her. This Court confirmed the death sentence of Satwant Singh who actually committed the murder as well as of Kehar Singh who conspired and inspired for commission of the crime. Applying the principles laid down in Bachan Singhs case (supra) and Machhi Singhs case (supra) that case was classified as a rarest of the rare case, inter alia, on the ground that the convicts were involved in assassinating a great daughter of India and the Prime Minister of India and that the act of the accused not only took away the life of the popular leader but also undermined our democratic system which had been working so well for the last 40 years. To determine the rarest of the rare case it was suggested that the answers to the following questions would be helpful : (a) Is there something uncommon about the crime which renders sentence of the imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no

alternative but to impose death sentence after according maximum weightage to the mitigating circumstances which speak in favour of the offender.

The leading cases on the subject suggest that discretion of the Court in awarding punishment when conviction is for an offence punishable with death or with imprisonment for life is controlled by Section 354(3) Cr.P.C. so if the Court proposes to impose capital punishment it must record special reasons for so doing. What constitutes special reasons cannot be stated with any precision and that has to be determined having regard to the facts and circumstances of each case. If a case falls in the category of rarest of the rare case it would justify the requirement of special reasons. But again in deciding whether a case falls within rarest of the rare case, the Court has to consider both aggravating as well as the mitigating circumstances in each case in the light of the abovenoted principles. In numerous cases these principles are being applied. There is no need to multiply the cases here. It is now time to address to the facts of the case. On applying the well-settled principles laid down by this Court, Brother Thomas,J. felt that the confirmation of death sentence awarded by the Designated Court to A-2, A-3 and A-18 is justified whereas brother Wadhwa,J. on the same principles confirmed the death sentence awarded by the Designated Court to A-1, A-2, A-3 and A-18. So far as the confirmation of death sentence of A-2. A-3 and A-18 is concerned both the learned brethern concur and I record my respectful agreement with their conclusions. The difference of opinion between them is with regard to confirmation of death sentence of A-1. It is now my view which determines the result of this issue. I may express my feelings that ill behoves a person to order the death of another. He who gives life alone has the authority to take life. In dispensing justice a Judge is not only discharging a sovereign function but he is also doing a divine function. Even so the most difficult task for a Judge is to choose the punishment of death in preference to the punishment of life imprisonment for he is conscious of the fact that once the life of a person is taken away by a judicial order it cannot be restored by another judicial order of the highest authority in this world. Having taken upon himself the onerous responsibility of doing justice according to Constitution and the laws the Judge must become independent of his conviction and ideology to maintain the balance of scales of justice. Mr.Natarajan pleaded for not confirming the death sentence of A-1 highlighting the mitigating circumstances. She is a woman and is mother of a small girl who was born during the period of her confinement in jail. She is very young. She has also subsequently regretted her act and her participation was the result of indoctrination by A-3. She did not play any major role. These are indisputably the mitigating circumstances and I am not unmindful of these facts. Indeed the dilemma whether sentence of death should be pronounced upon a woman has been troubling my mind for a considerable time. Surely in our culture a woman has to be treated with beneficence and kindness. But then in this case the person Dhanu who opted to become a human bomb was a woman. Subha who gave moral support to sacrifice her life on the anvil of some ideology and to end up by annihilating others lives, was also a woman. About the role of A-1 (Nalini), it is not a case where she was caught up in a sudden situation and became a mute comrade, the mind not towing the body. It was indeed the other way round. On her own saying she had developed a strong feeling against Shri Rajiv Gandhi and decided that the lesson should be taught for the mass killings and rapes in Sri Lanka and particularly in view of the death of eleven LTTE leaders by consuming cyanide and thought that she was justified for taking

any retaliatory action. She admitted that she was mentally prepared by Sivarasan, Murugan, Dhanu and Subha for any kind of retaliatory action including killing of leaders. Even on May 2, 1991, she felt that the said persons were going to assassinate the leaders and she voluntarily participated thereafter and attended the meeting addressed by Shri V.P. Singh on the night of 7th May, 1991 in Madras. She had never been free from the feeling that Sivarasan, Murugan, Dhanu and Subha had come for a dangerous mission and after the meeting of Mr.V.P.Singh it had become clear to her that Dhanu and Subha had come for a dangerous mission. She was, however, closely associated with them. On 19th May itself, according to her Sivarasan came to her house along with a clipping of an evening newspaper of Tamil Nadu in which there was news of the visit of Shri Rajiv Gandhi to Tamil Nadu for election campaign. He said that they had come only for that and that they would attend the meeting. She entertained strong feeling about the danger ahead after briefing of Sivarasan about attending the meeting of Shri Rajiv Gandhi at Sriperumbudur on 21st May, 1991. On 21st May, 1991 at about 3.45 p.m. Subha told her that Dhanu was going to create history that day by assassinating Shri Rajiv Gandhi and that they would be very happy if she also participated in that and she agreed. Before leaving for Sriperambudur she was aware of the fact that Dhanu was concealing an apparatus inside her dress. Nonetheless she went along with Subha and Dhanu to provide cover to them as planned by Sivarasan for which she had already agreed earlier. She did accompany them and provided the required cover. Without her providing cover to Dhanu and Subha, perhaps they would not have the confidence for attending the meetings including the fateful meeting. She was actually present at the scene of occurrence along with Dhanu and Subha when Dhanu exploded herself as a human bomb as a result of which Shri Rajiv Gandhi and 18 other persons died and 43 persons were seriously injured which included police officers and innocent persons. Brother Thomas,J. noted that in the confessional statement of A-20 (Baghyanathan) it is stated A-1 (Nalini) had confided to him that she realised only at Sriperumbudur that Dhanu was going to kill Shri Rajiv Gandhi. He appears to have been impressed by that statement and observed that perhaps that might be a true fact and if that be so, she would not have dared to retreat from the scene as she was tucked into the tentacles of the conspiracy octopus from where it was impossible for a woman like A-1 (Nalini) to get extricated herself would have been justified. From the facts pointed out above which strongly suggest her participation was not the result of helplessness but a well designed action with her free will to make her part of the contribution to the unholy plan and wicked conspiracy so I am not inclined to place any reliance on that confessional statement of her brother A-20 which is referred to by my learned brother Thomas,J. I am convinced that the facts of this case are uncommon. A crime committed on Indian soil against the popular national leader, a former Prime Minister of India, for a political decision taken by him in his capacity as the head of the executive and which met with the approval of the Parliament, by persons running political organisation in a foreign country and their agents in concert with some Indians for the reason that it did not suit their political objectives and of their organisation, cannot but be a rarest of the rare case.
In such a case the part played by A-1 (Nalini) is a candid participation in the crime of conspiracy to assassinate Shri Rajiv Gandhi who was himself a young popular leader so much loved and respected by his fellow citizens and had been the Prime Minister of India. The conspirators including A-1 (Nalini) had nothing personal against him but he was targeted for the political decision taken by him as the Prime Minister of India. She inspite of being an Indian citizen joined the gang of

conspirators and engaged herself in pursuit of common intention to commit the crime only because she was infatuated by the love and affection developed for A-3 (Murugan), and thus played her part in execution of the conspiracy which resulted in the assassination of Shri Rajiv Gandhi and death of many police officers and innocent citizens including a small girl. For a person like A-1, taking into consideration all the mitigating circumstances, in my view, there is no room for any leniency, kindness and beneficence. On the facts of this case, discussed above, once A-1 (Nalini) is found to fall in the rarest of the rare case, declining to confirm the death sentence will, in my view, stultify the course of law and justice. It is apt to quote here the following observations of this Court in Mahesh vs. State of Madhya Pradesh [(1987) 3 SCC 80], with which I am in respectful agreement : It will be a mockery of justice to permit these appellants to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the appellants would be to render the justicing system of this country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon.

Thus, I conclude that the sentence of imprisonment for life is inadequate and there is no alternative but to confirm the death sentence awarded by the Designated Court to A-1 (Nalini). Therefore, with respect I concur with brother Wadhwa,J. in confirming the death sentence of first appellant A-1 (Nalini) awarded by the Designated Court. In the result I agree with brother Thomas,J. and set aside the conviction of all the appellants recorded by the Designated Court for offences under the TADA Act mentioned in category B and also the conviction A-4 (Shankar @ Koneswaran), A-5 (D. Vijayanandan @ Hari Ayya), A-6 (Sivaruban @ Suresh @ Suresh Kumar @ Ruban), A-7 (S. Kanagasabapathy @ Radhayya), A-8 (A.Chandralekha @ Athirari @ Sonia @ Gowri), A-11 (J.Shanthi), A-12 (S.Vijayan @ Perumal Vijayan), A-13 (V.Selvaluxmi), A-14 (S.Bhaskaran @ Velayudam), A-15 (S. Shanmugavadivelu @ Thambi Anna), A-17 (M.Suseemdram @ Mahesh), A-19 (S.Irumborai @ Duraisingam), A-20 (S.Bhagyanathan), A-21 (S.Padma), A-22 (A.Sundaram), A-23 (K.Dhanasekaran @ Raju), A-24 (N.Rajasuriya @ Rangan), A-25 (T.Vigneswaran @ Vicky), A-26 (J.Ranganath) for the offences under Section 120-B read with Section 302 IPC. Their appeals are accordingly allowed. Agreeing with brother Thomas,J. I confirm the conviction of A-1 (Nalini), A-2 (Santhan) and A-3 (Murugan), A-9 (Robert Payas), A-10 (Jayakumar), A-16 (Ravichandran) and A-18 (Arivu) finding them guilty of offences under Section 120-B read with Section 302 IPC. On the facts and in the circumstances, I am also of the same view as expressed by brother Thomas,J. that it is not a fit case to confirm the death sentence awarded to A-9 (Robert Payas), A-10 (Jayakumar) and A16 (Ravichandran) and their death sentence is commuted to life imprisonment and their appeals are allowed to this extent. The death sentence awarded to A-1 (Nalini), A-2 (Santhan), A-3 (Murugan) and A-18 (Arivu) is confirmed the death sentence of A-2 (Santhan), A-3 (Murugan) and A-18 (Arivu) agreeing with Thomas,J. as well as Wadhwa,J. and the death sentence of A-1 (Nalini) agreeing with Wadhwa,J. Their appeals are dismissed and Death Reference is accordingly answered.