RABINDRA KUMAR PAL @ DARA SINGH

v.

REPUBLIC OF INDIA

Criminal Appeal No. 1366 of 2005

JANUARY 21, 2011

[P. SATHASIVAM AND DR. B. S. CHAUHAN, JJ.]

Penal Code, 1860 – s. 302 – Rioting, arson and murder of three persons – Christian Missionary from Australia, engaged in propagating and preaching Christianity in the tribal area, burnt to death alongwith his two minor sons by 50-60 miscreants – Victims also prevented from escaping from the vehicle – Conviction and sentence of 14 accused – High Court modifying death sentence awarded to A-1 to life imprisonment and upheld life imprisonment imposed on A-3 and acquitted the others – On appeal, held: Letters addressed by A-3 to the trial judge wherein he confessed his guilt, in the course of trial lend ample corroboration to his identification before the trial court by PW-23, even though no TIP was conducted by Judicial Magistrate – A-3 also addressed a letter to his sister-in-law, inculpating himself and A-1 – A-3 though denied the letters but it amounts to confession and lend support to the evidence in identification before the trial court for the first time – Testimony of witnesses that miscreants raised slogans in the name of A-1 which corroborates the identification before the trial court for the first time – All the witnesses mentioned about the blowing of whistle by A1 – A-3 in his statement u/s. 313 Cr.P.C. admitted to have set fire to the vehicles and confessed his guilt – Abscondence of A-3 soon after the incident and avoiding of arrest, is a relevant conduct to prove his guilt – Death of the victims by setting fire by the miscreants cannot be ruled out – Even in the midst of uncertainties, witnesses specified the role of A-1 and A-3 – However, more than 12 years having elapsed since the act

A *was committed, life sentence awarded by the High Court not enhanced – Conviction of A-1 and A-3 and the sentence of life imprisonment imposed on them by the High Court, maintained – As regards the other accused, testimony of the eye-witnesses about their identification before the trial court* B *for the first time without corroboration by previous Test Identification Parade, not credible – In view of absence of acceptable materials and various infirmities in the prosecution case, order of acquittal of accused other than A-1 and A-2 upheld – Sentence/Sentencing – Evidence – Test* C *identification parade.*

Identification – Photo identification and identification of the accused by the witnesses done for the first time before the trial court without being corroborated by Test Identification Parade or any other material – Evidentiary value – Held: D *Though such identification is permissible but cannot be given credence without further corroborative evidence – On facts, for many days, eye-witnesses never came forward before the IOs and the police personnel claiming that they had seen the occurrence – As such, their testimony about the identification* E *of the accused other than A-1 and A-3 before the trial court for the first time without corroboration by previous TIP, not credible –As regards A-1 and A-3, they were identified which was also corroborated by the evidence of slogans given in their name and each one of the witnesses asserted the said* F *aspect, thus, their identification can be relied upon – Test identification parade*

Code of Criminal Procedure, 1963 – s. 164 – Recording of confessions and statements – Procedure to be followed by G *the Magistrate – Reiterated – On facts, procedural lapse on the part of the Judicial Magistrate in recording confessional statements – Accused in their confessional statements, made exculpatory statements – Thus, confessional statements with regard to accused other than A-1 and A-3, not admissible.*

H *Appeal – Appeal against acquittal – When two views are*

possible, the one in favour of the accused should be accepted – Presumption of innocence is a fundamental principle of criminal jurisprudence – On facts, absence of definite assertion from the prosecution side, about the specific role and involvement of the acquitted accused who are all poor tribals – Thus, not safe to convict them – Order of acquittal of these accused upheld – Criminal jurisprudence.

Sentence/Sentencing – Conviction u/s. 302 IPC – Award of Punishment – Held: Normal rule is to award punishment of life imprisonment – Punishment of death should be resorted to only for the rarest of rare cases which is to be examined with reference to the facts and circumstances of each case – Court to take note of the aggravating as well as mitigating circumstances – Penal Code, 1860.

Secularism – Concept of – Held: State will have no religion – It shall treat all religions and religious groups equally and with equal respect without in any manner interfering with their individual right of religion, faith and worship –There is no justification for interfering in someone's religious belief by any means – Constitution of India, 1950.

The prosecution case was that 'GS', a Christian Missionary from Australia, was engaged in propagating and preaching Christianity in the tribal area of Orissa. On the fateful day, the Missionary team conducted different programmes in the village near the church and retired for the day. 'GS' and his two minor sons slept in a vehicle. At mid-night, a mob of 60-70 people set fire to the vehicle and prevented 'GS' and his sons to escape from vehicle. As a result GS' and his two sons were burnt to death. The local police and the State Crime Branch failed to conduct the investigation satisfactorily and as such the investigation was transferred to CBI. The charge sheet was filed against 14 accused persons. The prosecution examined 55 witnesses and the defence examined 25 witnesses. The trial court convicted all the accused and

A sentenced them for offences punishable under various Sections. 'DS'- A-1 was awarded death sentence and the others were awarded sentence of life imprisonment. The High Court holding that the witnesses are not trustworthy and no credence should be given to their statement and B confessional statements were procured by the investigating agency under threat and coercion, modified the death sentence awarded to A-1 into life imprisonment and upheld the sentence of life imprisonment awarded to 'MH'-A-3 and acquitted the other accused. Therefore, the C instant appeals were filed by A-1, A-3 and CBI.

Dismissing the appeals, the Court

HELD: 1. The analysis of entire materials clearly shows that the High Court was right in arriving at its D conclusion. In the instant case, there is no material to prove conspiracy charge against any of the accused. Even in the midst of uncertainties, the witnesses have specified the role of A-1 and A-3 which is accepted and confirmed. The conviction of the appellant A-1 and A-3 E and the sentence of life imprisonment imposed on them, is maintained. In the absence of acceptable materials and in view of the various infirmities in the prosecution case as pointed out by the High Court, the order of acquittal of others who are all poor tribals is concurred with. [Para F 48] [995-G-H; 996-A-B]

2.1 In the absence of any independent corroboration like Test Identification Parade held by judicial Magistrate, the evidence of eye-witnesses as to the identification of the appellants/accused for the first time before the trial G court generally cannot be accepted. If the case is supported by other materials, identification of the accused in the dock for the first time would be permissible subject to confirmation by other corroborative evidence, which are lacking in the instant H case, except for A-1 and A-3. The High Court rightly

observed that for a long number of days, many of these eye-witnesses never came forward before the IOs and the police personnel visiting the village from time to time, claiming that they had seen the occurrence. Thus, no importance need to be attached on the testimony of these eye-witnesses about their identification of the appellants other than A1 and A-3 before the trial court for the first time without corroboration by previous TIP held by the Magistrate in accordance with the procedure established. [Para 11] [960-C-G]

2.2 Showing photographs of the miscreants and identification for the first time in the trial court without being corroborated by TIP held before a Magistrate or without any other material may not be helpful to the prosecution case. The evidence of witness given in the court as to the identification may be accepted only if he identified the same persons in a previously held TIP in jail. It is true that absence of TIP may not be fatal to the prosecution. In the instant case, A-1 and A-3 were identified and also corroborated by the evidence of slogans given in his name and each one of the witnesses asserted the said aspect insofar as they are concerned. None of these witnesses named the offenders in their statements except few recorded by IOs in the course of investigation. Though an explanation was offered that out of fear they did not name the offenders, the fact remains, on the next day of the incident, Executive Magistrate and top level police officers were camping the village for quite some time. Inasmuch as evidence of the identification of the accused during trial for the first time is inherently weak in character, as a safe rule of prudence, generally it is desirable to look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the *form of earlier* TIP. Though some of them were identified by the photographs except A-1 and A-3, no other corroborative

A material was shown by the prosecution. Thus, it is clear that identification of accused persons by witness in dock for the first time though permissible but cannot be given credence without further corroborative evidence. Though some of the witnesses identified some of the accused in B the dock without corroborative evidence, the dock identification alone cannot be treated as substantial evidence, though it is permissible. [Paras 12 and 15] [960-H; 961-A-E; 966-D-E]

Manu Sharma vs. State (NCT of Delhi) (2010) 6 SCC 1 C – relied on.

Umar Abdul Sakoor Sorathia vs. Intelligence Officer, Narcotic Control Bureau AIR 1999 SC 2562; *Jana Yadav vs. State of Bihar* (2002) 7 SCC 295 – referred to.

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3. If the witnesses are seen through microscope, it is true that the contradictions would be visible and clear but by and large they explained the prosecution case though they could not identify all the accused persons with clarity except A-1 and A-3. By virtue of these minor E contradictions, their testimony cannot be rejected in toto. But, by and large, there are minor contradictions in their statements. In the face of the difference in the evidence of prosecution witnesses with regard to light, clothing, number of accused persons, fog, faces covered or not, F it is not acceptable in toto except certain events and incidents which are reliable and admissible in evidence. [Para 17] [967-D-F]

4.1 The following principles emerge with regard to G Section 164 Cr.P.C.:-

(i) The provisions of Section 164 Cr.P.C. must be complied with not only in form, but in essence.

(ii) Before proceeding to record the confessional

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statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution.

(iii) A Magistrate should ask the accused as to why he wants to make a statement which surely shall go against his interest in the trial.

(iv) The maker should be granted sufficient time for reflection.

(v) He should be assured of protection from any sort of apprehended torture or pressure from the police in case he declines to make a confessional statement.

(vi) A judicial confession not given voluntarily is unreliable, more so, when such a confession is retracted, the conviction cannot be based on such retracted judicial confession.

(vii) Non-compliance of Section 164 Cr.P.C. goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence.

(viii) During the time of reflection, the accused should be completely out of police influence. The judicial officer, who is entrusted with the duty of recording confession, must apply his judicial mind to ascertain and satisfy his conscience that the statement of the accused is not on account of any extraneous influence on him.

(ix) At the time of recording the statement of the

A **accused, no police or police official shall be present in the open court.**

(x) Confession of a co-accused is a weak type of evidence.

B **(xi) Usually the Court requires some corroboration from the confessional statement before convicting the accused person on such a statement. [Para 29] [980-G-H; 981-A-H; 982-A]**

C *Bhagwan Singh and Ors. vs. State of M.P.* **(2003) 3 SCC 21;** *Shivappa vs. State of Karnataka* **(1995) 2 SCC 76;** *Dagdu and Ors. vs. State of Maharashtra* **(1977) 3 SCC 68;** *Davendra Prasad Tiwari vs. State of U.P.* **(1978) 4 SCC 474;** *Kalawati and Ors. vs. State of Himachal Pradesh* **1953 SCR 546;** *State* D *thr. Superintendent of Police, CBI/SIT vs. Nalini and Ors.* **(1999) 5 SCC 253;** *State of Maharashtra vs. Damu* **(2000) 6 SCC 269 – relied on.**

4.2 The analysis of evidence of Judicial Magistrates – PW-29 who recorded the confessional statement of E **'RS' and 'TH' and PW-34 who recorded the confessional statement of 'MM', 'UK' and 'DP', shows that many of the confessional statements were recorded immediately after production of the maker after long CBI custody and in some cases after such statements were made and** F **recorded by the Judicial Magistrate, the maker was remanded to police custody. Though the Magistrates have deposed that the procedure provided under Section 164 Cr.P.C. has been complied with, various warnings/ cautions required to be given to the accused before** G **recording such confession, have not been fully adhered to by them. The High Court strongly observed about the procedural lapse on the part of PWs-29 and 34. Their statements and requirements in terms of Section 164 Cr.P.C. are verified. In the certificate, there is no specific** H **reference about the nature of the custody from which**

these persons were produced nor about the assurance that they would not be remanded to police custody if they declined. Section 164 Cr.P.C. requires strict and faithful compliance of sub-sections 2 to 4, the failure to observe safeguards not only impairs evidentiary value of confession but cast a doubt on nature and voluntariness of confession on which no reliance can be placed. No exceptional circumstances could be brought to the notice by the prosecution in respect of the appellants other than A-1 and A-3. [Paras 32 and 33] [983-H; 984-A-H]

4.3 Under sub-section (3) of Section 164 Cr.P.C., if any accused refuses to make any confessional statement, such Magistrate shall not authorize detention of the accused in police custody. Remanding 'RS' to police custody after his statement was recorded under Section 164 Cr.P.C. is not justified. The High Court rightly observed that the possibility of coercion, threat or inducement to the accused 'RS' to make the confession cannot be ruled out. In the same manner, confession of accused 'TH' was also recorded by the very same Magistrate. The High Court pointed out that he was not cautioned that if he made any confession, same may be used against him in evidence and on that basis he may be sentenced to death or imprisonment for life; and that if he refused to make the confessional statement, he would not be remanded to police custody. Both of these accused, in their confessional statements, made exculpatory statements. PW-34, Judicial Magistrate, recorded the confessional statement of accused 'MM' immediately after his production before him from the police custody. It was noted that he was given only 10 minutes' time for reflection after his production from police custody. The other accused who made the confessional statement is 'DP' whose statement was recorded by PW-34. The High Court, on corroboration of

A the confessional statement, had found that the entire confessional statement is exculpatory and he also retracted from the confession. It was further found that this confessional statement was made long after the charge-sheet was filed. [Paras 31 and 32] [983-D-H; 984-
B A-C]

5. The procedure adopted by the investigating agency with regard to taking of the signature/writings of A-3 or examination by the expert was analyzed and approved by the trial court and confirmed by the High
C Court, and cannot be faulted with. In view of oral report of PW-4 which was reduced into writing, the evidence of PW-23, two letters dated 01.02.2002 and 02.02.2002 addressed by A-3 to the trial judge facing his guilt coupled with the other materials, the submission that
D there is deficiency in the prosecution case insofar as A-3, cannot be accepted and the conclusion arrived by the High Court is confirmed. [Para 35] [989-B-C]

The State of Bombay vs. Kathi Kalu Oghad and Ors.
E (1962) 3 SCR 10; *M.P. Sharma and Ors. vs. Satish Chandra, District Magistrate, Delhi and Ors.* (1954) SCR 1077 – relied on.

6.1 With regard to the role of A-3, the prosecution
F very much relied on the letters by A-3 addressed to the Sessions Judge wherein he confessed his guilt. Though a serious objection was taken about the admissibility of these two letters, the contents of these two letters in the course of trial lend ample corroboration to his identification before the trial court by PW-23 and the same
G could be safely relied upon. Even in his case, it is true that there was no TIP conducted by Judicial Magistrate. [Para 36] [989-E-F]

6.2 The prosecution also relied on a letter said to
H have been addressed by A-3 to PW-9, his sister-in-law.

The said letter is a confessional statement of accused A-3 inculpating himself and A-1. A-3 in said letter confessed that he along with A-1 burnt the 'Jisu' (Christian Missionary). All the ocular witnesses have testified that after setting fire to vehicles and burning 'GS' and his two sons alive, the miscreants raised slogans "Jai Bajrang Bali" and "Dara Singh Zindabad". The entire contents of letter were used by the trial judge which was rightly accepted by the High Court. [Paras 38 and 41] [990-F-G; 992-D]

6.3 A-3 in his statement recorded under Section 313 Cr.P.C. on 04.02.2002, admitted to have set fire to the vehicles and in his statement recorded under Section 313 Cr.P.C. on 24.03.2003 has admitted to have filed petitions pleading guilty and to have stated in his earlier examination under Section 313 Cr.P.C. that he had set fire to the vehicles. There is no impediment in relying on a portion of the statement of the accused and finding him guilty in consideration of the other evidence against him as laid by the prosecution. [Para 39] [991-B-C]

6.4 It is clear that A-3 though denied the letters written by him, the contents of the said two letters amount to confession, or in any event admission of important incriminating materials. He had been identified before the trial court by PW-23 as a participant in the crime. The High Court rightly observed that the contents of the two letters lend support to the evidence in identification before the trial court for the first time as narrated by PW-23. In this way, his identification for the first time in the trial court is an exceptional case and even in the absence of further corroboration by way of previously held TIP, his involvement in the crime is amply corroborated by the said letters written by him. [Para 40] [991-D-F]

6.5 Though an objection was raised as to the manner

A in which the trial judge questioned A-3 with reference to contents of his letters dated 01.02. 2002 and 02.02.2002, addressed to the Sessions Judge wherein he confessed his guilt, it is relevant to point out that when the person facing trial insisted to look into the contents of his letters, B the presiding officer concerned has to meet his requirement subject to the procedure established. The trial judge accepted the entire contents of the admission made by A-3 and affording reasonable opportunity and by following the appropriate procedure coupled with the C corroborative evidence of PW-23, upheld his involvement and participation in the crime along with A-1 which resulted in rioting, arson and murder of three persons. Also A-3 absconded soon after the incident and avoided arrest and this abscondence being a conduct under D Section 8 of the Evidence Act, 1872 should be taken into consideration along with other evidence to prove his guilt. The fact remains that he was not available for quite sometime till he was arrested which fact has not been disputed. Before accepting the contents of the two letters and the evidence of PW-23, the trial Judge afforded him E required opportunity and followed the procedure which was rightly accepted by the High Court. [Para 41] [992-A-F]

7.1 Though several inconsistencies were noticed in F the prosecution evidence and the accused persons were not specifically identified except A-1 and A-3, the fact remains that the Van in which 'GS' and his two children were sleeping were set on fire and burnt to death due to the cause of the miscreants. The death of these three G persons by setting fire by the miscreants cannot be ruled out. There is no material to conclude that the fire emanated from inside of the vehicle and then spread to rest of the vehicle after the fuel tank caught fire. There is no basis for such conclusion though the prosecution

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witnesses could not pin-point and identify the role of each accused. [Para 34] [985-C-E]

7.2 All the eye-witnesses examined by the prosecution consistently stated that during occurrence the miscreants raised slogans in the name of A-1 as "Dara Singh Zindabad". The story of this slogan was also mentioned in the first information report lodged soon after the occurrence. This slogan is in the name of A-1, corroborates the identification before the trial court for the first time. In addition to the same, some of the witnesses identified A-1 by photo identification. In addition to the same, all the witnesses mentioned about the blowing of whistle by A-1. [Para 42] [992-G-H; 993-A-C]

8. The submission that only after the intervention of PW-55, I.O. from CBI, several persons made a confessional statement by applying strong arm tactics that were used by the investigating agency, the entire case of the prosecution has to be rejected, cannot be accepted. Some of the witnesses did not mention anything about the incident to the local police or the District Magistrate or the higher level police officers who were camping from the next day of the incident. However, regarding the fresh steps taken by the Officer of the CBI, particularly, the efforts made by PW-55, though there are certain deficiencies in the investigation, the same cannot be under estimated. The young children were being coerced into being witness to the occurrence whereas the elder family members were never joined as witness by the prosecuting agency. The prosecution could have examined elders and avoided persons like PW-5 who was a minor on the date of the incident. [Para 44] [993-H; 994-A-E]

9. On conviction under Section 302 IPC, the normal rule is to award punishment of life imprisonment and the punishment of death should be resorted to only for the

A **rarest of rare cases. Whether a case falls within the rarest of rare case or not, has to be examined with reference to the facts and circumstances of each case and the court has to take note of the aggravating as well as mitigating circumstances and conclude whether there was** B **something uncommon about the crime which renders the sentence of imprisonment for life inadequate and calls for death sentence. However, more than 12 years has elapsed since the act was committed, the life sentence awarded by the High Court need not be enhanced in view** C **of the factual position. [Para 43] [993-E-G]**

Bachan Singh vs. State of Punjab **AIR 1980 SC 898;** *Machhi Singh vs. State of Punjab* **(1983) 3 SCC 470;** *Kehar Singh vs. State (Delhi Administration)* **(1988) 3 SCC 609 – relied on.**

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10.1 Insofar as the appeals filed by the CBI against the order of acquittal by the High Court in respect of certain persons, it was pointed out that when two views are possible, the one in favour of the accused should be E **accepted. The presumption of innocence is a fundamental principle of criminal jurisprudence. Further, presumption of innocence is further reinforced, reaffirmed and strengthened by the judgment in his favour. [Para 45] [994-E-F]**

F *State of Uttar Pradesh vs. Nandu Vishwakarma and Ors.* **(2009) 14 SCC 501;** *Sambhaji Hindurao Deshmukh & Ors. Vs. State of Maharashtra* **(2008) 11 SCC 186;** *Rahgunath vs. State of Haryana* **(2003) 1 SCC 398;** *Allarakha K. Mansuri vs. State of Gujarat* **(2002) 3 SCC 57 – relied on.**

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10.2 In the absence of definite assertion from the prosecution side, about their specific role and involvement of the acquitted accused who are all poor tribals, as rightly observed by the High Court, it is not safe H **to convict them. The reasoning and conclusion of the**

High Court insofar as the order relating to acquittal of certain accused persons, is concurred with. [Para 45] [995-A-B]

11. In a country like India where discrimination on the ground of caste or religion is a taboo, taking lives of persons belonging to another caste or religion is bound to have a dangerous and reactive effect on the society at large. It strikes at the very root of the orderly society which the founding fathers of our Constitution dreamt of. The concept of secularism is that the State will have no religion. The State shall treat all religions and religious groups equally and with equal respect without in any manner interfering with their individual right of religion, faith and worship. It is hoped that the vision of religion playing a positive role in bringing India's numerous religion and communities into an integrated prosperous nation be realized by way of equal respect for all religions. There is no justification for interfering in someone's religious belief by any means. [Paras 46 and 47] [995-C-F]

Case Law Reference:

(2010) 6 SCC 1	Relied on	Para 11
AIR 1999 SC 2562	Referred to	Para 14
(2002) 7 SCC 295	Referred to	Para 15
(2003) 3 SCC 21	Relied on	Para 22
(1995) 2 SCC 76	Relied on	Para 23
(1977) 3 SCC 68	Relied on	Para 24
(1978) 4 SCC 474	Relied on	Para 25
1953 SCR 546	Relied on	Para 26
(1999) 5 SCC 253	Relied on	Para 27

A	(2000) 6 SCC 269	Relied on	Para 28
	(1962) 3 SCR 10	Relied on	Para 35
	(1954) SCR 1077	Relied on	Para 35
B	AIR 1980 SC 898	Relied on	Para 43
	(1983) 3 SCC 470	Relied on	Para 43
	(1983) 3 SCC 609	Relied on	Para 43
	(2009) 14 SCC 501	Relied on	Para 45
C	(2008) 11 SCC 186	Relied on	Para 45
	(2003) 1 SCC 398	Relied on	Para 45
	(2002) 3 SCC 57	Relied on	Para 45

D CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1366 of 2005.

From the Judgment & Order dated 19.05.2005 of the High Court of Orissa at Cuttack in Criminal Appeal No. 239 of 2003.

E

WITH

Crl. Appeal Nos. 1259 of 2007 & 1357-1365 of 2005.

Vivek K. Tankha, KTS Tulsi, Katnakar Dash, A. F Mariyaputham, Mrinmayee Sahu, Sibo Sankar Mishra, Raj Kumar Parashar, Priyanka Agarwal, Sumeer Sodhi, Pratul Shandilya, Vaibhav Srivastava, D. Kumanan, R. Sancheti, K. Sudhakar, S. Wasim, A. Quadri, Arvind Kumar Sharma for the appearing parties.

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The judgment of the Court was delivered by

P. SATHASIVAM, J. 1. These appeals relate to a sensational case of triple murder of an Australian Christian H Missionary - Graham Stuart Staines and his two minor sons,

namely, Philip Staines, aged about 10 years and Timothy Staines aged about 6 years.

2. Criminal Appeal No. 1366 of 2005 is filed by Rabindra Kumar Pal @ Dara Singh against the final judgment and order dated 19.05.2005 passed by the High Court of Orissa at Cuttack in Criminal Appeal No. 239 of 2003 whereby the High Court dismissed the appeal of the appellant upholding the conviction and commuting the death sentence passed by the trial Court into that of life imprisonment. Against the same judgment, Criminal Appeal No. 1259 of 2007 is filed by Mahendra Hembram challenging his life imprisonment awarded by the trial Court and confirmed by the High Court. Against the acquittal of rest of the accused by the High Court, the Central Bureau of Investigation (in short "the CBI") filed Criminal Appeal Nos. 1357-1365 of 2005. Since all the appeals arose from the common judgment of the High Court and relating to the very same incident that took place in the midnight of 22.01.1999/ 23.01.1999, they are being disposed of by this judgment.

3. **The case of the prosecution is as under:**

(a) Graham Stuart Staines, a Christian Missionary from Australia, was working among the tribal people especially lepers of the State of Orissa. His two minor sons, namely, Philip Staines and Timothy Staines were burnt to death along with their father in the midnight of 22.01.1999/23.01.1999. The deceased-Graham Staines was engaged in propagating and preaching Christianity in the tribal area of interior Orissa. Manoharpur is a remote tribal village under the Anandapur Police Station of the District Keonjhar of Orissa. Every year, soon after the Makar Sankranti, the said missionary used to come to the village to conduct the Jungle Camp. Accordingly, on 20.01.1999, the deceased-Staines, along with his two minor sons Philip and Timothy and several other persons came to the village Manoharpur. They conducted the camp for next two days by hosting a series of programmes.

A (b) On 22.01.1999, the Missionary Team, as usual conducted different programmes in the village near the Church and retired for the day. Graham Staines and his two minor sons slept in their vehicle parked outside the Church. In the mid-night, a mob of 60-70 people came to the spot and set fire to B the vehicle in which the deceased persons were sleeping. The mob prevented the deceased to get themselves out of the vehicle as a result of which all the three persons got burnt in the vehicle. The local police was informed about the incident on the next day.

C (c) Since the local police was not able to proceed with the investigation satisfactorily, on 23.04.1999, the same was handed over to the State Crime Branch. Even the Crime Branch failed to conduct the investigation, ultimately, the investigation was transferred to CBI.

D (d) On 03.05.1999, the investigation was taken over by the CBI. After thorough investigation, charge sheet was filed by the CBI on 22.06.1999. On the basis of charge sheet, as many as 14 accused persons were put to trial. Apart from these E accused, one minor was tried by Juvenile Court.

(e) The prosecution examined as many as 55 witnesses whereas in defence 25 witnesses were examined. Series of documents were exhibited by the prosecution. By a common F judgment and order dated 15.09.2003 and 22.09.2003, Sessions Judge, Khurda convicted all the accused and sentenced them for offences punishable under various sections. The death sentence was passed against Dara Singh-appellant in Criminal Appeal No. 1366 of 2005 and others were awarded sentence of life imprisonment.

G (f) The death reference and the appeals filed by the convicted persons were heard together by the High Court and were disposed of by common judgment dated 19.05.2005 concluding that the witnesses are not trustworthy and no H credence should be given to their statements and confessional

statements were procured by the investigating agency under threat and coercion. The High Court, by the impugned judgment, modified the death sentence awarded to Dara Singh into life imprisonment and confirmed the life imprisonment imposed on Mahendra Hembram and acquitted all the other accused persons. Questioning the conviction and sentence of life imprisonment, Dara Singh and Mahendra Hembram filed Criminal Appeal Nos. 1366 of 2005 and 1259 of 2007 respectively and against the acquittal of rest of the accused, CBI filed Criminal Appeal Nos. 1357-65 of 2005 before this Court.

4. Heard Mr. KTS Tulsi and Mr. Ratnakar Dash, learned senior counsel for the accused/appellants and Mr. Vivek K. Tankha, learned Addl. Solicitor General for the CBI.

5. Mr. K.T.S. Tulsi, learned senior counsel appearing for Rabindra Kumar Pal @ Dara Singh (A1) and other accused in the appeals against acquittal filed by the CBI, after taking us through all the relevant materials has raised the following contentions:-

(i) Confessions of various accused persons, particularly, Rabi Soren (A9), Mahadev Mahanta (A11) and Turam Ho (A12) under Section 164 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') cannot be considered to be voluntary on account of the fact that all the co-accused persons were produced before the Magistrate from the police custody and were remanded back to police custody. Similarly, Dayanidhi Patra @ Daya (A14) was produced from the police custody for confession while Umakant Bhoi (A13) made his statement while on bail. Besides all confessions being exculpatory and made after conspiracy ceased to be operative and inadmissible.

(ii) Inasmuch as recording of confessions of various accused persons was done after the investigation was taken over by Jogendra Nayak (PW 55), I.O. of the CBI which shows

A the extent to which strong arm tactics were used by the investigating agency.

(iii) The statements of eye-witnesses are contradictory to each other on all material points.

B (iv) There are several circumstances which are inconsistent with the fire started by arson from outside and several circumstances consistent with the fire emanating from inside of the vehicle and then spread to rest of the vehicle after fuel tank caught fire.

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(v) This Court in cases of appeals against acquittal has held that when two views are possible, one in favour of the accused should be accepted.

6. Mr. Dash, learned senior counsel appearing for the D accused Mahendra Hembram (A3) reiterating the above submissions of Mr. Tulsi also pinpointed deficiency in the prosecution case insofar as (A3) is concerned.

7. Mr. Vivek Tankha, learned Addl. Solicitor General, after E taking us through oral and documentary evidence, extensively refuted all the contentions of the learned senior counsel for the accused and raised the following submissions:-

(i) The High Court committed an error in altering the death F sentence into life imprisonment in favour of (A1) and acquitting all other accused except (A3). He pointed out that the appreciation of the evidence by the High Court is wholly perverse and it erroneously disregarded the testimony of twelve eye-witnesses.

G (ii) The High Court failed to appreciate the fact that the three accused, namely, Mahendra Hembram (A3), Ojen @ Suresh Hansda (A7) and Renta Hembram (A10) belonging to the same village were known to the eye-witnesses and, therefore, there is no requirement to conduct Test Identification H Parade (in short 'TIP').

(iii) The High Court erred in acquitting 11 accused persons on the sole ground that TIP was not conducted and, therefore, identification by the eye-witnesses was doubtful. A

(iv) The evidence of identification in Court is substantive evidence and that of the identification in TIP is of corroborative value. B

(v) The High Court committed a serious error in law in disregarding the confessional statements made under Section 164 of the Cr.P.C. as well as the extra-judicial confessions made by Dara Singh (A1) and Mahendra Hembram (A3). C

(vi) The High Court wrongly held inculpatory confessional statements as exculpatory and on that ground rejected the same. The High Court failed to appreciate that in their confessional statements (A9), (A11), (A12), (A13) and (A14) have clearly admitted their plan for committing the crime. D

(vii) The adverse observations against (PW 55) the Investigating Officer of CBI, by the High Court are not warranted and in any event not supported by any material. E

(viii) Inasmuch as it was Dara Singh (A1) who originated and organized the heinous act and also prevented the deceased persons from coming out of the burning vehicle, the High Court ought to have confirmed his death sentence.

(ix) The reasons given by the High Court in acquitting 11 persons are unacceptable and the judgment to that extent is liable to be set aside. F

8. We have considered the rival submissions and perused all the oral and documentary evidence led by the prosecution and defence. G

9. With the various materials in the form of oral and documentary evidence, reasoning of the trial Judge and the ultimate decision of the High Court, we have to find out whether H

A the conviction and sentence of life imprisonment imposed on Dara Singh (A1) and Mahendra Hembram (A3) is sustainable and whether prosecution has proved its case even against the accused who were acquitted by the High Court.

B **Eye witnesses**

10. According to the learned senior counsel for the accused, the statements of eye-witnesses are contradictory to each other on all material points. It is his further claim that exaggerated and improved version of the incident makes it C difficult to place implicit reliance on the statements of any of those witnesses. On the other hand, it is the claim of the prosecution that the statements of eye-witnesses are reliable and acceptable and it was rightly considered by the trial Court and erroneously rejected except insofar as against Dara Singh D (A1) and Mahendra Hembram (A3) by the High Court.

(i) PW2, Basi Tudu, one of the prime eye-witness, identified in dock the previously known accused of her village Ojen Hansda. She was not examined by local police, however, examined by the CID on 04.02.1999 and by the CBI on E 05.06.1999. In her evidence, she stated that she is a Christian by faith. Before the court, she deposed that her house is located near the place of occurrence. She also stated that Graham Staines along with his two sons came at Manoharpur church after Makar Sankranti and stayed there in the night. He F along with his two sons slept inside the vehicle. Inside the court, during her deposition, she first wrongly identified accused Rajat Kumar Das as accused Ojen Hansda. However, when she had a better view of the accused in the court, she correctly identified Ojen Hansda as the person whom she saw among 60 persons G holding torch lights and lathis going towards the church. She stated that in the midnight, on hearing barking of dogs, she woke up from sleep and came out of the house. She found about 60 persons going towards the church where the vehicles of Graham Staines were parked. Those persons did not allow H her to proceed further. Therefore, she went to the thrashing floor

from where she found that people had surrounded the vehicle of Graham Staines. Thereafter, she found the vehicle on fire. The wheels of vehicle in which Graham Staines and his two sons were sleeping, bursted aloud, and they were burnt to death. The people who surrounded the vehicles raised slogans "Jai Bajarang Bali" and "Dara Singh Zindabad". It is clear that she could identify only Ojen @ Suresh Hansda by face for the first time before the trial Court. No TIP was held to enable her to identify him. It shows that her identification of Ojen @ Suresh Hansda by face during trial was not corroborated by any previously held TIP. It is also clear that though she was examined by the State Police/CID, she never disclosed the name of Ojen @ Suresh Hansda. Though she claims to have identified Ojen @ Suresh Hansda by the light of the lamp (locally called Dibri) which she had kept in the Verandah, it must be noted that it was midnight during the peak winter season and there is no explanation for keeping the lamp in the Verandah during midnight. In her cross-examination, she admitted that she could not identify any of the persons who had surrounded the vehicle of Graham Staines and set it ablaze.

(ii) The next eye-witness examined on the side of the prosecution is PW3, Paul Murmu. He admitted that he was converted to Christianity in the year 1997. He identified accused Dara Singh in dock. He was examined by the local police on 23.01.1999, by CID on 10.02.1999 and by the CBI on 20.04.1999. He used to accompany Graham Staines at different places. He last accompanied Graham Staines on his visit to Manoharpur on 20.02.1999. He stated that Graham Staines with his two sons was in a separate vehicle and the witness along with other three persons was in another vehicle. In the night of 22.01.1999, Graham Staines along with his two sons slept in his vehicle, which was parked in front of the church. The witness slept in a hut, which was raised behind the church. In the midnight, Nimai Hansda (driver of vehicle) woke him up. He heard the sound of beating of the vehicles parked in front of the church. He along with Nimai Hansda went near the

A chruch and found 60-70 persons putting straw beneath the vehicle of Graham Staines and setting it on fire. Three persons broke the glass panes of the vehicle in which Graham Staines and his two sons were sleeping and gave strokes to them with sticks. They were focusing the torch into the vehicles. One of
B them was having a beard. The witness pointed out to the accused Dara Singh (A1) on the dock saying that the bearded man resembled like him. The witness was unable to identify the other two persons who were in the dock. However, he also asserted the hearing of slogans saying "Dara Singh Zindabad"
C which corroborates his identification.

(iii) The next eye-witness examined by the prosecution is PW4, Rolia Soren. It was he who lodged FIR. He was examined by the local police on 23.01.1999, by the CID on 03.02.1999 and by the CBI on 09.04.1999. He is a resident
D of Manohapur Village (the place of occurrence) and Graham Staines was well known to him. He stated that Graham Staines along with his two sons and other persons visited Manoharpur on 20.01.1999. In the night of 22.01.1999, Graham Staines and his two sons slept in the vehicle bearing No. 1208 which was
E parked in front of the church. Another vehicle No. 952 was also parked in front of the church. The house of witness was situated in the south of church, four houses apart and the vehicles parked in front of church were visible from the road in front of his house. In the night of 22.01.1999, his wife woke him up and said that
F she found large number of people with lathis and torches going towards the church. After walking about 100 ft. towards the vehicles, he found a large number of people delivering lathis blow on the vehicle in which Graham Staines and his two sons were sleeping and the other vehicle bearing No. 952 was
G already set on fire. Three-four persons belonging to the group caught hold of him by collar and restrained him from proceeding towards the vehicle. The witness could not recognize them as their heads were covered with caps and faces by mufflers. The witness went towards the village and called Christian people.
H When along with these persons, the witness reached near the

church, he found both the vehicles burnt. Graham Staines and his two sons were also burnt to death. The next day, at about 9 P.M., the Officer-In-Charge (OIC) Anandpur PS showed his written paper and said that was the FIR and he had to lend his signature and accordingly, he lend his signature thereon. The witness had identified his signatures during his deposition in the court. Though he mentioned large number of miscreants, but they were not chargesheeted. In the FIR itself it was stated by this witness that at the time of occurrence miscreants raised slogans saying "Bajrang Bali Zindabad" and "Dara Singh Zindabad".

(iv) Singo Marandi (PW5) was examined as next eye-witness. Though he named accused Ojen Hansda, in his deposition stated that he belonged to his village and in the dock he could not identify him with certainty. His statement was not recorded by the local police but recorded by the CID on 03.02.1999 and by the CBI on 07.06.1999. This witness is a resident of Manoharpur (the place of occurrence). He stated that on Saraswati Puja day of 1999, after witnessing the Nagin dance along with his mother, he slept in Verandah of Galu and her mother was sitting by his side. At about midnight, his mother woke him up. He saw something was burning near the church and found a vehicle moving towards the road. Ojen and Chenchu of his village carrying torch and lathis came to them and warned them not to go near the fire as some people were killing the Christians there. Thereafter, he heard sounds of blowing of whistles thrice and raising slogans saying "Dara Singh Zindabad". It is seen from his evidence that at that time he was prosecuting his studies at Cuttack and his mother was working as a labourer in Bhadrak. It is also not clear as to what was the need for him to sleep in Verandah of another person with his mother sitting beside him till midnight during peak of the winter.

(v) The next eye-witness examined by the prosecution is Nimai Hansda (PW10). He was examined by the local police

A on 23.01.1999, by the CID on 11.02.1999 and by the CBI on 20.04.1999. He did not identify any of the accused.He was the driver of Graham Staines. Vehicle No. 1208 was driven by him. He along with Graham Staines and others came to the place of occurrence on 20.01.1999. Graham Staines and his two B sons used to sleep in the said vehicle. He stated that in the midnight of 22.01.1999, on hearing bursting sounds, he woke up. He heard the sound of beating the vehicles parked in front of church in which Graham Staines and his two sons were sleeping. He ran towards the vehicles and found some people C beating the vehicles with lathis. They first broke the glass pane of vehicle No. 952. Thereafter, a boy set the vehicle on fire. Before setting the vehicle on fire, he put bundle of straw at front right wheel of vehicle. When the witness raised a noise of protest, those people assaulted him. He went to call the people D but nobody came. When he came back to the place of occurrence, he found both the vehicles on fire. The witness stated that there were about 30-40 people armed with lathis and holding torches. They raised slogan 'Jai Bajarang Bali' and 'Dara Singh Zindabad. The fire was extinguished at 3 a.m. By that time, both the vehicles were completely burnt. Graham E Staines and his two sons were completely charred and burnt to death. The witness could not identify any of the miscreants who set the vehicles on fire.

(vi) PW11, Bhakta Marandi was next examined on the F side of the prosecution as eye-witness. He identified accused Dara Singh and Rajat Kumar Das in dock. His statement was neither recorded by local police nor by the CID but recorded by the CBI on 05.06.1999. He belongs to Village Manoharpur (the place of occurrence). His house is situated two houses G apart from the church. He stated that the deceased Graham Staines was known to him. He last visited Manoharpur on 20.01.1999 along with his two sons and others in two vehicles. Graham Staines and his two sons used to sleep in the night inside the vehicle parked in front of the church. As usual in the H night of 22.01.1999, Graham Staines and his two sons had

slept in a vehicle. In the midnight, the witness was woken up by his wife on hearing bursting sounds. He came out of his house and found 4/5 persons standing in front of his house holding torches and lathis. They were threatening that they will kill the persons who will dare to come in their way. One of them threw a baton like stick at him. He retreated to his house and went to the house of another person situated one house apart from the church. A slim and tall man was holding an axe. They set on fire one of the vehicles. Some of them brought straw and put the same on the vehicle. They set fire both the vehicles and both the vehicles were burnt. They raised the slogans "Jai Bajarang Bali" and "Dara Singh Zindabad". The witness pointed accused Dara Singh (A1) and accused Rajat Kumar Das in the dock as two of those persons beating the vehicles and setting fire on the vehicles. The witness identified accused Dara Singh (A1) as slim and tall fellow holding the axe and guiding the miscreants. The witness further stated that the CBI while interrogating him showed photographs of some persons and he had identified two of the photographs as that of miscreants. He had signed on those photographs. About the admissibility of the identification of the accused persons with the photographs can be considered at a later point of time. He did not report the incident to the Collector or any other police officer camping at the site.

(vii) The next eye-witness examined was Mathai Marandi (PW15). He identified accused Uma Kant Bhoi (A 13) in the TIP. He also identified accused Dara Singh (A1), Dipu Das (A2), Ojen @ Suresh Hansda and Mahadev. Out of these accused, Ojen Hansda was previously known to him, belonging to the same street of his village. In his evidence, it is stated that he is native of Manoharpur village and the church (Place of occurrence) is located adjacent to his house. Deceased Graham Staines was well known to him as he used to visit his village for the last 15-16 years. He stated that Graham Staines last visited their village on 20.01.1999. He along with his two sons and other persons came there in two vehicles. He further

A stated that in the night of 22.01.1999, on hearing bursting sound, his wife woke him up. After coming out of the house, he found 40-50 persons gathered near the vehicles parked in front of the church and beating the vehicles by lathis. Those miscreants were holding lathis, axe, torches, bows and arrows. B He heard cries raised by the minor sons of Graham Staines. He went near the vehicle, but 3 to 4 persons threatened him with lathis and, therefore, he retreated to his house. Thereafter, he went to the huts raised behind the church and called the persons staying there and went to the place of occurrence and C found the vehicles set on fire. The miscreants put the straw inside the vehicle and set it on fire. They first set the empty vehicle on fire and thereafter the vehicle in which Graham Staines and his sons were sleeping. Both the vehicles caught fire and were burnt. The witness identified accused Dara Singh (A1), Dipu Das (A2), Ojen @ Suresh Hansda and Mahadev as D the miscreants present at the scene of occurrence and taking part in the offence. The witness further stated that Ojen Hansda and Mahendra Hembram belonged to his village. He had identified accused Uma Kanta Bhoi in the TIP conducted at Anandpur Jail as one of the persons setting fire on the vehicle. E He further stated that after the vehicles were burnt, the miscreants blew whistle thrice and raised slogan "Jai Bajarang Bali" and "Dara Singh Zindabad". However, it is relevant to note that his omission to mention all important aspects in his evidence including names of the appellants and his previous F statements recorded by three Investigating Officers creates a doubt about his veracity.

(viii) Joseph Marandi (PW23) was examined as another eye-witness to the occurrence. He belonged to village G Manoharpur (Place of occurrence) and his house is located near the church. He identified accused Renta Hembram, Mahendra Hembram, Dara Singh and Rajat Kumar Dass @ Dipu. Out of these, two accused - Renta Hembram and Mahendra Hembram, were previously known to him as they H belonged to his village. He was examined by the local police

on 02.02.1999, by the CID on 06.02.1999 and by the CBI on 03.06.1999. He stated that Graham Staines along with his two sons and other persons came to Manoharpur on 20.01.1999 on two vehicles. On 22.01.1999 deceased Graham Staines and his two sons slept in a vehicle parked in front of the church and other persons slept in the huts raised behind the church. In the mid-night, he heard the sound of beating of vehicles and woke up. When he came out of the house, 3 to 4 persons holding lathis and torches restrained and threatened him to assault if he proceeds further. Thereafter, he stood in a lane between his house and the church. He saw that about 20-22 persons had surrounded the vehicle in which deceased Graham Staines and his two sons were sleeping. Some people were setting the vehicle on fire by putting straw beneath it and igniting it by match sticks. After the vehicle caught fire and was burnt, somebody blew whistle thrice and they shouted slogan "Jai Bajarang Bali" and "Dara Singh Zindabad". The other vehicle was not visible to the witness. The witness identified accused Renta Hembram and Mahendra Hembram of his village who were among the miscreants. The witness also identified accused Dara Singh (A1) and accused Rajat Kumar Das @Dipu (A2) as the miscreants who among others had set fire to the vehicles. The witness further stated that the CBI officers had shown him 30-40 photographs out of which he identified the photographs of the accused Renta Hembram, Mahendra Hembram, Dara Singh (A1) and Rajat Kumar Das @ Dipu (A2). He is also a witness to the seizure of some articles seized from the place of occurrence and he has proved the seizure list. Admittedly, he did not disclose the names of these persons before either of the aforesaid three I.Os.

(ix) Raghunath Dohari (PW36), one of the eye-witnesses, identified accused Dara Singh, Harish Chandra, Mahadev and Turam Ho. His statement was not recorded by local police and the CID but it was recorded by the CBI on 04.12.1999. He belongs to village Manoharpur (place of occurrence). He stated that about 3 years before his deposition (1999) during

A Saraswati puja, Graham Staines visited their village. In the night, he heard the sound of beating. He got up and went to the church, where there was a gathering of 60-70 persons in front of the Church and they were beating the vehicles with sticks. They brought straw and set fire to the vehicles by burning straw. B The witness identified accused Dara Singh (A1), Harish Chandra, Mahadev and Turam Ho as the miscreants who were in the gatherings and set fire to the vehicles. It is relevant to point out that apart from the police party, the Collector and other Police Officers though were camping at the place of C occurrence, the fact remains that this witness did not report the incident either to the concerned Investigating Officer or to the Collector for about four months. However, the fact remains that he identified some of the appellants before the trial Court for the first time. As stated earlier, the legality or otherwise of dock D identification, for the first time, would be dealt with in the later part of the judgment.

(x) Another eye-witness PW39, Soleman Marandi identified accused Dara Singh, Rajat Kumar Dass, Surtha Naik, Harish Chandra, Ojen Hansda and Kartik Lohar. Out of these E accused, Ojen Hansda was known to him being resident of his village. His statement was not recorded by the local police but recorded by the CID on 03.02.1999 and by the CBI on 30.05.1999. He is a resident of village Manoharpur (place of occurrence). He stated that Graham Staines visited Manhorpur F last time about 3 years back i.e. in the year 1999 after Makar Sankranti. He came there with his two sons and other persons in two vehicles. In the third night of his stay, he along with his two sons slept in the vehicle during night. The vehicles were parked in front of the church. In the midnight, the witness heard G the sound of beating of vehicles. He came out of the house and went near the church. He found that about 30-40 persons had surrounded the vehicles and some of them were beating the vehicles in which Graham Staines along with his two sons was sleeping. He heard the cries of two sons of Graham Staines H coming from the vehicle. These people set fire to the second

vehicle parked near the vehicle of Graham Staines. When the vehicle caught fire, the vehicle moved towards the road. Three of those miscreants put a log of wood preventing the vehicle moving further. The witness identified accused Dara Singh as (A1), Rajat Kumar Das, Suratha Naik, Harish Mahanta, Ojen Hansda and Kartik Lohar amongst the accused persons in the dock as the miscreants who had set fire to the vehicles. Accused Ojen Hansda belonged to his village. The witness further stated that CBI showed him number of photographs among which he identified photographs of 5 persons who had taken part in the occurrence. He identified Dara Singh (A1) without any difficulty and it is also corroborated by the slogan he heard which miscreants raised in the name of Dara Singh.

(xi) The last eye-witness examined on the side of the prosecution is PW43, Lablal Tudu. He identified accused Dara Singh, Turam Ho, Daya Patra and Rajat Kumar Das. His statement was not recorded by local police and by the CID but recorded by the CBI on 03.06.1999. He is also a resident of Manoharpur village and his house is located near the Church (the place of occurrence). He stated that Graham Staines visited their village about three years before his deposition in the Court (January, 1999). He came there on Wednesday and stayed till Friday. On Friday night, Graham Staines and his two sons slept in a vehicle parked in front of the church. In the midnight, his mother (PW2) heard the beating sounds of vehicle and woke him up. He found 50-60 persons beating the vehicle by lathis in which Graham Staines and his two sons had slept. Three-four of them put the straw beneath the empty vehicle and lit the straw by matchsticks. After setting the empty vehicle ablaze, those persons put straw beneath the vehicle of Graham Staines and his two sons and ignited the same. Those two vehicles caught fire and began to burn. The witness identified four persons, namely, Dara Singh (A1), Turam Ho (A12), Daya Patra (A14) and Rajat Das (A2) as the persons beating the vehicle and setting on fire. The fact remains that admittedly

A he did not report the incident to his mother about what he had seen during the occurrence. He also admitted that there was a police camp from the next day of the incident. However, he did not make any statement to the State Police and only for the first time his statement was recorded by the CBI i.e., five months
B after the occurrence.

11. It is relevant to note that the incident took place in the midnight of 22.01.1999/23.01.1999. Prior to that, number of investigating officers had visited the village of occurrence. Statements of most of the witnesses were recorded by PW 55,
C an officer of the CBI. In the statements recorded by various IOs, particularly, the local police and State CID these eye witnesses except few claim to have identified any of the miscreants involved in the incident. As rightly observed by the High Court, for a long number of days, many of these eye-
D witnesses never came forward before the IOs and the police personnel visiting the village from time to time claiming that they had seen the occurrence. In these circumstances, no importance need to be attached on the testimony of these eye-witnesses about their identification of the appellants other than
E Dara Singh (A1) and Mahendra Hembram (A3) before the trial Court for the first time without corroboration by previous TIP held by the Magistrate in accordance with the procedure established. It is well settled principle that in the absence of any independent corroboration like TIP held by judicial
F Magistrate, the evidence of eye-witnesses as to the identification of the appellants/accused for the first time before the trial Court generally cannot be accepted. As explained in *Manu Sharma vs. State (NCT of Delhi)* (2010) 6 SCC 1 case, that if the case is supported by other materials, identification
G of the accused in the dock for the first time would be permissible subject to confirmation by other corroborative evidence, which are lacking in the case on hand except for A1 and A3.

12. In the same manner, showing photographs of the
H

miscreants and identification for the first time in the trial Court without being corroborated by TIP held before a Magistrate or without any other material may not be helpful to the prosecution case. To put it clear, the evidence of witness given in the court as to the identification may be accepted only if he identified the same persons in a previously held TIP in jail. It is true that absence of TIP may not be fatal to the prosecution. In the case on hand, (A1) and (A3) were identified and also corroborated by the evidence of slogans given in his name and each one of the witnesses asserted the said aspect insofar as they are concerned. We have also adverted to the fact that none of these witnesses named the offenders in their statements except few recorded by IOs in the course of investigation. Though an explanation was offered that out of fear they did not name the offenders, the fact remains, on the next day of the incident, Executive Magistrate and top level police officers were camping the village for quite some time. Inasmuch as evidence of the identification of the accused during trial for the first time is inherently weak in character, as a safe rule of prudence, generally it is desirable to look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier TIP. Though some of them were identified by the photographs except (A1) and (A3), no other corroborative material was shown by the prosecution.

13. Now let us discuss the evidentiary value of photo identification and identifying the accused in the dock for the first time. Learned Addl. Solicitor General, in support of the prosecution case about the photo identification parade and dock identification, heavily relied on the decision of this Court in *Manu Sharma* (supra). It was argued in that case that PW 2 Shyan Munshi had left for Kolkata and thereafter, photo identification was got done when SI Sharad Kumar, PW 78 went to Kolkata to get the identification done by picking up from the photographs wherein he identified the accused Manu Sharma though he refused to sign the same. However, in the court, PW 2 Shyan Munshi refused to recognise him. In any

A case, the factum of photo identification by PW 2 as witnessed by the officer concerned is a relevant and an admissible piece of evidence. In para 254, this Court held:

> "Even a TIP before a Magistrate is otherwise hit by Section
> B 162 of the Code. Therefore to say that a photo identification is hit by Section 162 is wrong. It is not a substantive piece of evidence. It is only by virtue of Section 9 of the Evidence Act that the same i.e. the act of identification becomes admissible in court. The logic behind TIP, which will include
> C photo identification lies in the fact that it is only an aid to investigation, where an accused is not known to the witnesses, the IO conducts a TIP to ensure that he has got the right person as an accused. The practice is not borne out of procedure, but out of prudence. At best it can be brought under Section 8 of the Evidence Act, as evidence
> D of conduct of a witness in photo identifying the accused in the presence of an IO or the Magistrate, during the course of an investigation."

It was further held:

> E It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court.
> F The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character.
> G The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is, accordingly, considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who
> H are strangers to them, in the form of earlier identification

proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration.

It was further held that "the photo identification and TIP are only aides in the investigation and do not form substantive evidence. The substantive evidence is the evidence in the court on oath".

14. In *Umar Abdul Sakoor Sorathia vs. Intelligence Officer, Narcotic Control Bureau,* AIR 1999 SC 2562, the following conclusion is relevant:

"12. In the present case prosecution does not say that they would rest with the identification made by Mr. Mkhatshwa when the photograph was shown to him. Prosecution has to examine him as a witness in the court and he has to identify the accused in the court. Then alone it would become substantive evidence. But that does not mean that at this stage the court is disabled from considering the prospect of such a witness correctly identifying the appellant during trial. In so considering the court can take into account the fact that during investigation the photograph of the appellant was shown to the witness and he identified that person as the one whom he saw at the relevant time"

15. In *Jana Yadav vs. State of Bihar,* (2002) 7 SCC 295, para 38, the following conclusion is relevant:

> "Failure to hold test identification parade does not make the evidence of identification in court inadmissible, rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form the basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check valve to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law.

It is clear that identification of accused persons by witness in dock for the first time though permissible but cannot be given credence without further corroborative evidence. Though some of the witnesses identified some of the accused in the dock as mentioned above without corroborative evidence the dock identification alone cannot be treated as substantial evidence, though it is permissible.

16. Mr. Tulsi, learned senior counsel for the accused heavily commented on the statements of eye-witnesses which, according to him, are contradictory to each other on material points. He highlighted that exaggerated and improved version of the incident makes it difficult to place implicit reliance on the statements of any of these witnesses. He cited various instances in support of his claim.

(a) As regards the number of persons who have allegedly attacked the vehicles, it was pointed out that PW 23 - Joseph Marandi (brother of PW 15)/Christian/15 years at the time of incident) has stated that 20-22 persons surrounded the vehicle. On the other hand, PW 39 - Soleman Marandi and PW 10 - Nimai Hansda deposed that 30/40 persons surrounded the

vehicle. PW 15 - Mathai Marandi found 40/50 persons were beating with lathis. PW 43 - Lablal Tudu (son of PW 2) deposed that 50/60 persons were beating the vehicle whereas PW 2 - Basi Tudu found 60 persons going towards the church. PW 3, Paul Murmu found 60/70 persons putting straw beneath the vehicle and setting fire. PW 36 – Raghunath Dohal mentioned that about 60-70 people gathered in front of the church.

(b) As regards straw being kept on the roof of the vehicle to prevent cold, PWs 3, 10, 11, 15, 36, 39, 43, 45 and 52 mentioned different versions.

(c) With regard to whether there was a light or not which is vital for identification of miscreants prior to vehicle caught fire, PW 2 has stated that Moon had already set and he identified Chenchu and A 7 in the light of lamp (dibri) put in the verandah. On the other hand, PW 5, who was 11 years old at the time of evidence has mentioned that it was dark night. PW 11 has stated that he had not seen any lamp burning in the verandah of neighbours but saw some miscreants due to illumination of fire. PW 43 has stated that there is no electricity supply in the village and stated that they do not keep light in verandah while sleeping inside the house during night.

(d) About chilly wintry night, PW3 has stated it was chilly night with dew dropping whereas PW15 has stated that he cannot say whether there was fog at the night of occurrence and PW 36 has stated it was wintry night and PW52 has stated fog occurs during the month of December and January and he could not say if there was any fog at the night of occurrence.

(e) With regard to clothes worn by attackers, PW36 has stated that A1 was wearing a Punjabi Kurta, A3 and A12 were wearing a banian. PW19 has stated that he saw 9 persons out of which 8 were wearing trousers and shirts and one person who was addressed as Dara was wearing a lungi and Punjabi Kurta. PW39 has stated that during winter season people

usually come with their body covered. PW52 has stated that usually people wear winter clothing during December and January.

(f) With regard to the aspect whether the accused persons had covered their faces, PW 4 who is the informant has stated that the faces of the accused were covered. On the other hand, PWs 11, 15 and 36 have asserted that none covered their faces.

(g) As regard to who lit the fire, PW3 has stated that a short person lit fire. PW10 has mentioned that he did not see anyone whereas PW11 has stated that number of people set fire. PW32 has mentioned that there was no gathering near the vehicles when they caught fire. PW 36 has stated not seen any villager in between the house of the PW4 and the Church and PW39 has stated he had not seen any female near the place of occurrence.

(h) As regard to whether Nagin dance was over or not, PW 32 had deposed that when the vehicle caught fire, Nagin dance was being performed whereas PW 39 has deposed that dance continued throughout the night.

(i) Whether Nagin dance was visible from the place of occurrence, PW 3 has stated that it was not visible due to darkness. PW 4 has stated the distance between Nagin dance and Church is 200 ft. PW 5 has stated that Church was not visible from the place of Nagin dance and the distance was 200 ft. PW 6 has mentioned that Church was visible from the place of Nagin dance and distance was 200 ft and finally PW 32 has stated the church was visible from the place of Nagin dance.

(j) With regard to distance between place of occurrence and Nagin dance, PW 15 has mentioned the distance is 200 ft. PW 32 has stated that vehicles were visible from the place of Nagin dance, PW 36 has stated Nagin dance staged 10-12

houses apart from Church at front side whereas PW 39 has stated Nagin dance staged 4 houses apart from Chruch and PW 43 has stated that it was staged 5 houses apart from church and he admitted that he was not sure of the distance between church and the place of Nagin dance.

(k) With regard to their arrival at the place of occurrence, PW 11 has stated that PWs 4, 15 and 23 came to the place of occurrence an hour after the miscreants left the place whereas they deposed that they were present there from the beginning. PW 10 has stated that he woke up on hearing bursting and beating sound. PW 15 has deposed that he went to the huts behind the church and called PWs 10, 3 and others. PW 3 has stated that he was woken up by PW 10.

17. By pointing out these contradictions, Mr. Tulsi submitted that the presence of these witnesses becomes doubtful. However, if we see these witnesses through microscope, it is true that the above mentioned contradictions would be visible and clear but by and large they explained the prosecution case though they could not identify all the accused persons with clarity except Dara Singh (A1) and Mahendra Hembram (A3). By virtue of these minor contradictions, their testimony cannot be rejected in toto. But, by and large, there are minor contradictions in their statements as demonstrated by Mr. Tulsi. In the face of the above-mentioned difference in the evidence of prosecution witnesses with regard to light, clothing, number of accused persons, fog, faces covered or not, it is not acceptable in toto except certain events and incidents which are reliable and admissible in evidence.

CONFESSIONS:

18. It was submitted that confessions of various accused persons, namely, A9, A 11 and A 12 under Section 164 Cr.P.C. cannot be considered to be voluntary on account of the fact that all the co-accused persons were produced before the Magistrate from police custody and were remanded back to

police custody. It was further highlighted that accused No. 14 was produced from police custody for recording his confession while A 13 made his statement when he was on bail and in no case the Magistrate ensured the accused persons that if they decline they would not be sent to police custody. It was further highlighted that illiterate accused persons cannot be expected to have knowledge of finest nuances of procedure. It was pointed that besides all confessions being exculpatory and made after conspiracy ceases to be operative are inadmissible. Finally, it was stated that Section 164 Cr.P.C. requires faithful compliance and failure impairs their evidentiary value.

19. Section 164 Cr.P.C. speaks about recording of confessions and statements. It reads thus:

> **"164. Recording of confessions and statements.** (1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any, time afterwards before the commencement of the inquiry or trial:
>
> Provided that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence:
>
> Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.
>
> (2) The Magistrate shall, before recording any such confession, 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 the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is bear, made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorize the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect.

> "I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.
>
> (Signed) A.B.
>
> Magistrate

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried. "

20. While elaborating non-compliance of mandates of

A Section 164 Cr.P.C., Mr. Tulsi, learned senior counsel appearing for the accused cited various instances.

(a) Accused No. 9, Rabi Soren, was arrested by the investigating agency and remanded to police custody for 7 days
B i.e. from 20.05.1999. It is their claim that on 18.05.1999, Accused No.9 made a statement under Section 164 Cr.P.C. and thereafter remanded back to police custody. It was also pointed out that in his statement under Section 313 Cr.P.C. the accused person stated that he was beaten by the investigating
C agency.

(b) Another instance relates to Mahadev Mahanta, Accused No. 11 who was arrested on 01.07.1999 by the investigating agency and he was remanded to police custody. However, on 08.07.1999, Accused No. 11 made a statement under Section
D 164 Cr.P.C. PW 55, I.O. has stated that the statement of the accused was recorded under Section 164 Cr.P.C. that he was under police custody and he was remanded back to police custody. In his statement under Section 313 Cr.P.C. he also stated that he was beaten by the investigating agency.

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(c) In the case of Turam Ho Accused No. 12, he was arrested on 13.05.1999 by the Investigating Agency and from 19.05.1999 to 23.05.1999 the accused person was in custody of the investigating agency. While so, on 21.05.1999, the
F accused No. 12 made a statement under Section 164 Cr.P.C and thereafter remanded back to police custody. It was pointed out that he also stated in his statement under Section 313 Cr.P.C. that he was beaten by the investigating agency.

(d) The next instance relates to Umakanta Bhoi, Accused
G No. 13 who refused to make a statement under Section 164 Cr.P.C prayed by I.O. to be put for 16.03.1999 for recording statement. It was directed to jail authority to keep the accused under calm and cool atmosphere. A 13 was produced from Judicial Custody for recording statement under Section 164

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Cr.P.C. and he refused to make a statement. However, on 31.08.1999, he made a confessional statement.

(e) In the case of Dayanidhi Patra, Accused No. 14, on 21.09.1999, he was arrested by the Investigating Agency. On 24.09.1999, Learned ASJ granted police remand for 7 days i.e. on 01.10.1999 and that on that day A 14 made a statement under Section 164 Cr.P.C. It was pointed out that in his statement under Section 313 Cr.P.C. the accused person stated that he was beaten by the investigating agency.

21. Before analyzing the confessional statements of various accused persons and its applicability and the procedure followed by the Magistrate in recording the statement, let us consider various decisions touching these aspects.

22. In *Bhagwan Singh and Ors. vs. State of M.P.* (2003) 3 SCC 21, while considering these issues, it was held:

> **"27**.....The first precaution that a Judicial Magistrate is required to take is to prevent forcible extraction of confession by the prosecuting agency (see State of U.P. v. Singhara Singh, AIR 1964 SC 358). It was also held by this Court in the case of Shivappa v. State of Karnataka, (1995) 2 SCC 76 that the provisions of Section 164 CrPC must be complied with not only in form, but in essence. Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution.
>
> **28.** It has also been held that the Magistrate in particular should ask the accused as to why he wants to make a statement which surely shall go against his interest in the trial. He should be granted sufficient time for reflection. He

A should also be assured of protection from any sort of apprehended torture or pressure from the police in case he declines to make a confessional statement. Unfortunately, in this case, the evidence of the Judicial Magistrate (PW 1) does not show that any such precaution B was taken before recording the judicial confession.

29. The confession is also not recorded in questions-and-answers form which is the manner indicated in the criminal court rules.

C **30.** It has been held that there was custody of the accused Pooran Singh with the police immediately preceding the making of the confession and it is sufficient to stamp the confession as involuntary and hence unreliable. A judicial confession not given voluntarily is unreliable, more so D when such a confession is retracted. It is not safe to rely on such judicial confession or even treat it as a corroborative piece of evidence in the case. When a judicial confession is found to be not voluntary and more so when it is retracted, in the absence of other reliable E evidence, the conviction cannot be based on such retracted judicial confession. (See *Shankaria v. State of Rajasthan,* (1978) 3 SCC 435 (para 23)"

23. In *Shivappa vs. State of Karnataka* (1995) 2 SCC 76, while reiterating the same principle it was held:-

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"**6.** From the plain language of Section 164 CrPC and the rules and guidelines framed by the High Court regarding the recording of confessional statements of an accused under Section 164 CrPC, it is manifest that the said G provisions emphasise an inquiry by the Magistrate to ascertain the voluntary nature of the confession. This inquiry appears to be the most significant and an important part of the duty of the Magistrate recording the confessional statement of an accused under Section 164 CrPC. The H failure of the Magistrate to put such questions from which

he could ascertain the voluntary nature of the confession detracts so materially from the evidentiary value of the confession of an accused that it would not be safe to act upon the same. Full and adequate compliance not merely in form but in essence with the provisions of Section 164 CrPC and the rules framed by the High Court is imperative and its non-compliance goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence. Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution still lurking in the mind of an accused. In case the Magistrate discovers on such enquiry that there is ground for such supposition he should give the accused sufficient time for reflection before he is asked to make his statement and should assure himself that during the time of reflection, he is completely out of police influence. An accused should particularly be asked the reason why he wants to make a statement which would surely go against his self-interest in course of the trial, even if he contrives subsequently to retract the confession. Besides administering the caution, warning specifically provided for in the first part of sub-section (2) of Section 164 namely, that the accused is not bound to make a statement and that if he makes one it may be used against him as evidence in relation to his complicity in the offence at the trial, that is to follow, he should also, in plain language, be assured of protection from any sort of apprehended torture or pressure from such extraneous agents as the police or the like in case he declines to make a statement and be given the assurance that even if he declined to make the confession, he shall not be remanded to police custody.

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A **7.** The Magistrate who is entrusted with the duty of recording confession of an accused coming from police custody or jail custody must appreciate his function in that behalf as one of a judicial officer and he must apply his judicial mind to ascertain and satisfy his conscience that
B the statement the accused makes is not on account of any extraneous influence on him. That indeed is the essence of a 'voluntary' statement within the meaning of the provisions of Section 164 CrPC and the rules framed by the High Court for the guidance of the subordinate courts.
C Moreover, the Magistrate must not only be satisfied as to the voluntary character of the statement, he should also make and leave such material on the record in proof of the compliance with the imperative requirements of the statutory provisions, as would satisfy the court that sits in
D judgment in the case, that the confessional statement was made by the accused voluntarily and the statutory provisions were strictly complied with.

8. From a perusal of the evidence of PW 17, Shri Shitappa, Additional Munsif Magistrate, we find that
E though he had administered the caution to the appellant that he was not bound to make a statement and that if he did make a statement that may be used against him as evidence but PW 17 did not disclose to the appellant that he was a Magistrate and that the confession was being
F recorded by him in that capacity nor made any enquiry to find out whether he had been influenced by anyone to make the confession. PW 17 stated during his deposition in court: "I have not stated to the accused that I am a Magistrate" and further admitted: "I have not asked the accused as to
G whether the police have induced them (Chithavani) to give the statement." The Magistrate, PW 17 also admitted that "at the time of recording the statement of the accused no police or police officials were in the open court. I cannot tell as to whether the police or police officials were present
H in the vicinity of the court". From the memorandum

prepared by the Munsif Magistrate, PW 17 as also from his deposition recorded in court it is further revealed that the Magistrate did not lend any assurance to the appellant that he would not be sent back to the police custody in case he did not make the confessional statement. Circle Police Inspector Shivappa Shanwar, PW 25 admitted that the sub-jail, the office of the Circle Police Inspector and the police station are situated in the same premises. No contemporaneous record has been placed on the record to show that the appellant had actually been kept in the sub-jail, as ordered by the Magistrate on 21-7-1986 and that he was out of the zone of influence by the police keeping in view the location of the sub-jail and the police station. The prosecution did not lead any evidence to show that any jail authority actually produced the appellant on 22-7-1986 before the Magistrate. That apart, neither on 21-7-1986 nor on 22-7-1986 did the Munsif Magistrate, PW 17 question the appellant as to why he wanted to make the confession or as to what had prompted him to make the confession. It appears to us quite obvious that the Munsif Magistrate, PW 17 did not make any serious attempt to ascertain the voluntary character of the confessional statement. The failure of the Magistrate to make a real endeavour to ascertain the voluntary character of the confession, impels us to hold that the evidence on the record does not establish that the confessional statement of the appellant recorded under Section 164 CrPC was voluntary. The cryptic manner of holding the enquiry to ascertain the voluntary nature of the confession has left much to be desired and has detracted materially from the evidentiary value of the confessional statement. It would, thus, neither be prudent nor safe to act upon the confessional statement of the appellant....."

24. In *Dagdu and Others vs. State of Maharashtra,* (1977) CC 68, the following paragraph is relevant:-

A "**51.** Learned Counsel appearing for the State is right that the failure to comply with Section 164(3) of the Criminal Procedure Code, or with the High Court Circulars will not render the confessions inadmissible in evidence. Relevancy and admissibility of evidence have to be B determined in accordance with the provisions of the Evidence Act. Section 29 of that Act lays down that if a confession is otherwise relevant it does not become irrelevant merely because, inter alia, the accused was not warned that he was not bound to make it and the evidence C of it might be given against him. If, therefore, a confession does not violate any one of the conditions operative under Sections 24 to 28 of the Evidence Act, it will be admissible in evidence. But as in respect of any other admissible evidence, oral or documentary, so in the case of confessional statements which are otherwise admissible, D the Court has still to consider whether they can be accepted as true. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the Court may refuse to act upon the confession even if it E is admissible in evidence. That shows how important it is for the Magistrate who records the confession to satisfy himself by appropriate questioning of the confessing accused, that the confession is true and voluntary. A strict and faithful compliance with Section 164 of the Code and F with the instructions issued by the High Court affords in a large measure the guarantee that the confession is voluntary. The failure to observe the safeguards prescribed therein are in practice calculated to impair the evidentiary value of the confessional statements."

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25. *Davendra Prasad Tiwari vs. State of U.P.* (1978) 4 SCC 474, the following conclusion arrived at by this Court is relevant:-

"**13**..... It is also true that before a confessional statement

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made under Section 164 of the Code of Criminal Procedure can be acted upon, it must be shown to be voluntary and free from police influence and that the confessional statement made by the appellant in the instant case cannot be taken into account, as it suffers from serious infirmities in that (1) there is no contemporaneous record to show that the appellant was actually kept in jail as ordered on September 6, 1974 by Shri R.P. Singh, Judicial Magistrate, Gorakhpur, (2) Shri R.P. Singh who recorded the so called confessional statement of the appellant did not question him as to why he was making the confession and (3) there is also nothing in the statement of the said Magistrate to show that he told the appellant that he would not be remanded to the police lock-up even if he did not confess his guilt. It cannot also be gainsaid that the circumstantial evidence relied upon by the prosecution must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused."

26. In *Kalawati & Ors. vs. State of Himachal Pradesh,* 53 SCR 546 at 631, this Court held:

"...In dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right."

27. In *State thr. Superintendent of Police, CBI/SIT vs. lini and Others* (1999) 5 SCC 253 at 307, the following agraphs are relevant which read as under:-

A "**96.** What is the evidentiary value of a confession made by one accused as against another accused apart from Section 30 of the Evidence Act? While considering that aspect we have to bear in mind that any confession, when it is sought to be used against another, has certain inherent B weaknesses. First is, it is the statement of a person who claims himself to be an offender, which means, it is the version of an accomplice. Second is, the truth of it cannot be tested by cross-examination. Third is, it is not an item of evidence given on oath. Fourth is, the confession was C made in the absence of the co-accused against whom it is sought to be used.

97. It is well-nigh settled, due to the aforesaid weaknesses, that confession of a co-accused is a weak type of evidence. A confession can be used as a relevant D evidence against its maker because Section 21 of the Evidence Act permits it under certain conditions. But there is no provision which enables a confession to be used as a relevant evidence against another person. It is only Section 30 of the Evidence Act which at least permits the E court to consider such a confession as against another person under the conditions prescribed therein. If Section 30 was absent in the Evidence Act no confession could ever have been used for any purpose as against another co-accused until it is sanctioned by another statute. So, if F Section 30 of the Evidence Act is also to be excluded by virtue of the non obstante clause contained in Section 15(1) of TADA, under what provision can a confession of one accused be used against another co-accused at all? It must be remembered that Section 15(1) of TADA does G not say that a confession can be used against a co-accused. It only says that a confession would be admissible in a trial of not only the maker thereof but a co-accused, abettor or conspirator tried in the same case.

98. Sir John Beaumont speaking for five Law Lords of the H

Privy Council in Bhuboni Sahu v. R., AIR 1949 PC 257 had made the following observations:

"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, Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. 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."

99. The above observations had since been treated as the approved and established position regarding confession vis-à-vis another co-accused. Vivian Bose, J., speaking for a three-Judge Bench in *Kashmira Singh v. State of M.P.,* AIR 1952 SC 159 had reiterated the same principle after quoting the aforesaid observations. A Constitution Bench of this Court has followed it in *Haricharan Kurmi v. State of Bihar,* AIR 1964 SC 1184."

28. In *State of Maharashtra vs. Damu* (2000) 6 SCC 269, same principles had been reiterated which read as under:-

"19. We have considered the above reasons and the arguments addressed for and against them. We have

realised that those reasons are ex facie fragile. Even otherwise, a Magistrate who proposed to record the confession has to ensure that the confession is free from police interference. Even if he was produced from police custody, the Magistrate was not to record the confession until the lapse of such time, as he thinks necessary to extricate his mind completely from fear of the police to have the confession in his own way by telling the Magistrate the true facts.

25. We may make it clear that in Kashmira Singh this Court has rendered the ratio that confession cannot be made the foundation of conviction in the context of considering the utility of that confession as against a co-accused in view of Section 30 of the Evidence Act. Hence the observations in that decision cannot be misapplied to cases in which confession is considered as against its maker. The legal position concerning confession vis-à-vis the confessor himself has been well-nigh settled by this Court in Sarwan Singh Rattan Singh v. State of Punjab as under:

"In law it is always open to the court to convict an accused on his confession itself though he has retracted it at a later stage. Nevertheless usually courts require some corroboration to the confessional statement before convicting an accused person on such a statement. What amount of corroboration would be necessary in such a case would always be a question of fact to be determined in the light of the circumstances of each case."

This has been followed by this Court in *Kehar Singh v. State (Delhi Admn.)*"

29. The following principles emerge with regard to Section 164 Cr.P.C.:-

(i) The provisions of Section 164 Cr.P.C. must be complied with not only in form, but in essence.

(ii) Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution.

(iii) A Magistrate should ask the accused as to why he wants to make a statement which surely shall go against his interest in the trial.

(iv) The maker should be granted sufficient time for reflection.

(v) He should be assured of protection from any sort of apprehended torture or pressure from the police in case he declines to make a confessional statement.

(vi) A judicial confession not given voluntarily is unreliable, more so, when such a confession is retracted, the conviction cannot be based on such retracted judicial confession.

(vii) Non-compliance of Section 164 Cr.P.C. goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence.

(viii) During the time of reflection, the accused should be completely out of police influence. The judicial officer, who is entrusted with the duty of recording confession, must apply his judicial mind to ascertain and satisfy his conscience that the statement of the accused is not on account of any extraneous influence on him.

(ix) At the time of recording the statement of the accused, no police or police official shall be present in the open court.

(x) Confession of a co-accused is a weak type of evidence.

A (xi) Usually the Court requires some corroboration from the confessional statement before convicting the accused person on such a statement.

Judicial Magistrates (PWs-29 & 34)

B 30. Ashok Kumar Agrawal, PW29 and Tojaka Bharti, PW34, Judicial Magistrates recorded the confessional statements of some of the accused. Judicial Magistrate, PW29 recorded the confessional statement of Rabi Soren and Turam Ho and PW34, Judicial Magistrate recorded the confessional C statement of Mahadev Mahanta, Uma Kant Bhoi and Dayanidhi Patra. It is the claim of Mr. K.T.S. Tulsi, learned senior counsel for the accused, that the evidence of PW29 and PW34, Judicial Magistrates shows that they were blissfully unaware of the stringent responsibility cast on them by Section 164 Cr.P.C. D According to him, their evidence create an impression that they were not aware of the difference between the police custody and judicial custody nor do they seem to understand the significance of Section 164 Cr.P.C. He pointed out that why the first four pages in case of each of the accused persons is E not signed by the accused is not explained. They neither asked any searching questions regarding the nature of custody either from the accused persons or from police nor did they scrutinize the records to ascertain the same from remand orders. He also pointed out that none of the accused who have confessed had F been given the assurance that if they refuse to make any confession, they would not be remanded to police custody. This assurance is required for an accused to make an informed decision being fully aware of the consequences of refusing.

31. It is seen from the evidence of PW29, who recorded G the confession of Rabi Soren, that at the relevant time the accused was in the custody of CBI and from that custody he was produced before the Addl. Chief Judicial Magistrate on 18.05.1999. Though PW29 had asked the accused many things about the voluntariness, the High Court, on analysis of H his entire evidence, came to a conclusion that only a routine

statutory certificate as required under Section 164 Cr.P.C. was given by him. The High Court also pointed out that he did not caution that if the accused Rabi Soren refused to make any confession, he would not be remanded to C.B.I. or Police custody. He was not informed that if he confessed, such confession may be used in evidence against him and on that basis there was possibility of his being sentenced to death or life imprisonment. It was also pointed out that his body was not checked to find out as to whether he was subjected to torture when he was in police custody. It was also pointed out by the High Court that five hours' time was given for reflection during which period he was in the custody of his Bench Clerk in his Chamber. PW29, after recording confessional statement of Rabi Soren on 18.05.1999, again remanded him to the custody of police, i.e. C.B.I. till 20.05.1999. This is clear from the evidence of PW55 (I.O.). It is relevant to point out that under sub-section (3) of Section 164 Cr.P.C. that if any accused refuses to make any confessional statement, such Magistrate shall not authorize detention of the accused in police custody. Remanding Rabi Soren to Police custody after his statement was recorded under Section 164 Cr.P.C. is not justified. As rightly observed by the High Court, possibility of coercion, threat or inducement to the accused Rabi Soren to make the confession cannot be ruled out. In the same manner, confession of another accused Turam Ho was also recorded by the very same Magistrate. Here again, the High Court pointed out that he was not cautioned that if he made any confession, same may be used against him in evidence and on that basis he may be sentenced to death or imprisonment for life. Equally he was not cautioned by PW29 that if he refused to make the confessional statement, he would not be remanded to police custody. It is further seen that both of these accused, in their confessional statements, made exculpatory statements.

32. PW34, Judicial Magistrate, recorded the confessional statement of accused Mahadev Mahanta on 08.07.1999

A immediately after his production before him from the police custody. PW34 was directed by the Addl. C.J.M. to record the confessional statement of Mahadev Mahanta. It was noted that he was given only 10 minutes' time for reflection after his production from police custody. The other accused who made
B the confessional statement is Dayanidhi Patra whose statement was recorded by PW34. The High Court, on corroboration of the confessional statement, had found that the entire confessional statement is exculpatory and he also retracted from the confession. It was further found that this confessional
C statement was made long after the charge-sheet was filed i.e. on 22.06.1999. The analysis of evidence of PWs 29 & 34 – Judicial Magistrates shows that many of the confessional statements were recorded immediately after production of the maker after long CBI custody and in some cases after such
D statements were made and recorded by the Judicial Magistrate, the maker was remanded to police custody. Though the Magistrates have deposed that the procedure provided under Section 164 Cr.P.C. has been complied with, various warnings/ cautions required to be given to the accused before recording
E such confession, have not been fully adhered to by them.

33. Apart from the strong observation of the High Court about procedural lapse on the part of PWs 29 & 34, we also verified their statements and requirements in terms of Section 164 Cr.P.C. In the certificate, there is no specific reference
F about the nature of the custody from which these persons were produced nor about the assurance that they would not be remanded to police custody if they declined. We have already pointed out that Section 164 Cr.P.C. requires strict and faithful compliance of sub-sections 2 to 4, the failure to observe
G safeguards not only impairs evidentiary value of confession but cast a doubt on nature and voluntariness of confession on which no reliance can be placed. As rightly observed by the High Court, no exceptional circumstances could be brought to our notice by the prosecution in respect of the appellants other than
H A1 and A3.

34. It was next argued that the incident could not have been happened as suggested by the prosecution. According to the learned senior counsel for the accused the reason of possibility of the incident which took place in the dead of the night as a result of the accident from burning of the stove etc. for generating heat on cold wintry night cannot be ruled out. In support of the above contention, he pointed out several circumstances which are inconsistent with the fire starting by arson from outside. On going through the entire materials, we are unable to accept the said contention. Though we noticed several inconsistencies in the prosecution evidence and the accused persons were not specifically identified except A1 and A3, the fact remains that the Van in which Graham Staines and his two children were sleeping were set on fire and burnt to death due to the cause of the miscreants. In other words, death of these three persons by setting fire by the miscreants cannot be ruled out. There is no material to conclude that the fire emanated from inside of the vehicle and then spread to rest of the vehicle after the fuel tank caught fire. There is no basis for such conclusion though the prosecution witnesses could not pin-point and identify the role of each accused.

35. Another question which we have to consider is whether the Police (CBI) had the power under the Cr.P.C. to take specimen signature and writing of A3 for examination by the expert. It was pointed out that during investigation, even the Magistrate cannot direct the accused to give his specimen signature on the asking of the police and only in the amendment of the Cr.P.C. in 2005, power has been given to the Magistrate to direct any person including the accused to give his specimen signature for the purpose of investigation. Hence, it was pointed out that taking of his signature/writings being per se illegal, the report of the expert cannot be used as evidence against him. To meet the above claim, learned Addl. Solicitor General heavily relied on a 11-Judge Bench decision of this Court in *The State of Bombay vs. Kathi Kalu Oghad and Ors.*, (1962) 3 SCR 10 = AIR 1961 SC 1808. This larger Bench was

A constituted in order to re-examine some of the propositions of law laid down by this Court in the case of *M.P. Sharma and Ors. vs. Satish Chandra, District Magistrate, Delhi and Ors.*, (1954) SCR 1077. After adverting to various factual aspects, the larger Bench formulated the following questions for B consideration:

> "2. ... ... On these facts, the only questions of constitutional importance that this Bench has to determine are; (1) whether by the production of the specimen handwritings - Exs. 27, 28, and 29 - the accused could be said to have C been 'a witness against himself' within the meaning of Article 20(3) of the Constitution; and (2) whether the mere fact that when those specimen handwritings had been given, the accused person was in police custody could, by itself, amount to compulsion, apart from any other D circumstances which could be urged as vitiating the consent of the accused in giving those specimen handwritings. ... ...
>
> 4. ... ... The main question which arises for determination E in this appeal is whether a direction given by a Court to an accused person present in Court to give his specimen writing and signature for the purpose of comparison under the provisions of section 73 of the Indian Evidence Act infringes the fundamental right enshrined in Article 20(3) F of the Constitution.
>
> The following conclusion/answers are relevant:
>
> 10. ... ... Furnishing evidence" in the latter sense could not have been within the contemplation of the Constitution-G makers for the simple reason that - though they may have intended to protect an accused person from the hazards of self-incrimination, in the light of the English Law on the subject - they could not have intended to put obstacles in the way of efficient and effective investigation into crime H and of bringing criminals to justice. The taking of

impressions or parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice. ... .

11. ... ... When an accused person is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony'. The giving of a 'personal testimony' must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness'.

12. ... ... A specimen handwriting or signature or finger impressions by themselves are no testimony at all, being wholly innocuous because they are unchangeable except in rare cases where the ridges of the fingers or the style of writing have been tampered with. They are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable. They are neither oral nor documentary evidence but belong to the third category of material evidence which is outside the limit of 'testimony'.

16. In view of these considerations, we have come to the following conclusions :-

(1) An accused person cannot be said to have been compelled to be a witness against himself simply because

A he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to
B make the statement, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.

C (2) The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not 'compulsion'.

(3) 'To be a witness' is not equivalent to 'furnishing
D evidence' in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt innocence of the accused.

E (4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression 'to be a witness'.

F (5) 'To be a witness' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court or otherwise.

(6) 'To be a witness' in its ordinary grammatical sense
G means giving oral testimony in Court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of an offence, orally or in writing.

H (7) To bring the statement in question within the prohibition

of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made."

In view of the above principles, the procedure adopted by the investigating agency, analyzed and approved by the trial Court and confirmed by the High Court, cannot be faulted with. In view of oral report of Rolia Soren, PW 4 which was reduced into writing, the evidence of PW 23, two letters dated 01.02.2002 and 02.02.2002 addressed by Mahendra Hembram (A3) to the trial Judge facing his guilt coupled with the other materials, we are unable to accept the argument of Mr. Ratnakar Dash, learned senior counsel for Mahendra Hembram (A3) and we confirm the conclusion arrived by the High Court.

Additional factors-Mahendra Hembram (A3).

36. Coming to the role of Mahendra Hembram A3, the prosecution very much relied on his letters dated 01.02.2002 and 02.02.2002 addressed to the Sessions Judge wherein he confessed his guilt. Though a serious objection was taken about the admissibility of these two letters, the contents of these two letters addressed to the Sessions Judge in the course of trial lend ample corroboration to his identification before the trial Court by Joseph Marandi, PW 23. Even in his case, it is true that there was no TIP conducted by Judicial Magistrate. However, inasmuch as when he was facing trial, he sent the above-mentioned two letters to the Sessions Judge which lend corroboration to his identification in the trial court by PW 23 and rightly observed by the High Court, the same can be safely relied upon. The evidence reveals that Rolia Soren (PW 4) accompanied by PW 23 soon after the incident proceeded to inform the same to the police and finding the police to have already left for Manoharpur, returned back and finally on the oral report of PW 4, the Officer In-charge of Anandapur P.S. (PW 52) prepared FIR (Ext. 1/1) and registered a case under Sections 147, 148, 435, 436 and 302 read with 149 IPC against

A Dara Singh (A 1) and five others. The prosecution has also relied on a letter (Ext.2 after it was translated to English marked as Ext. 49) said to have been addressed by Mahendra Hembram (A3) to Kapura Tudu (PW 9) which, according to the prosecution, contains his admission of involvement in the B incident.

37. An excerpt from the letter of Mahendra Hembram may be translated into English as under:-

> "You may be knowing the Manoharpur incident. No one C ever thought that such a thing will happen in the village. I had not told any of my family members that such a work will be done. Dara Singh stayed in our house and did the work. I also did the work as I had quarrel with the 'Jisu'. I had not disclosed the identity of Dara Singh even to my D mother. The conspiracy to kill Manoharpur 'Jisu' was hatched at HOROHND for which I took leave during training period and stayed in our house with Dara Singh for five days and went to the forest thereafter. The villagers know that I have done this work as I have got cordial relationship E with Dara Singh."

This is a confessional statement of accused Mahendra Hembram (A3) inculpating himself and Dara Singh (A1).

38. Accused Mahendra Hembram, in his letter dated F 10.02.1999 (Ex. 2) addressed to his sister-in-law, Kapura Tudu (PW9), confessed that he along with Dara Singh burnt the 'Jisu' (Christian Missionary). All the ocular witnesses have testified that after setting fire to vehicles and burning Graham Staines and his two sons alive, the miscreants raised slogans "Jai G Bajrang Bali" and "Dara Singh Zindabad".

39. Joseph Marandi, PW23 has testified that accused Mahendra Hembram amongst others set fire to the vehicles. Mahendra Hembram, in his statement recorded under Section 313 Cr.P.C., on 04.02.2002 has stated that he may be the H

short statured person. Accused Mahendra Hembram in his letter dated 10.02.1999 (Ex. 2) addressed to his sister-in-law, Kapura Tudu (PW9) had confessed to have burnt the Christian missionary along with Dara Singh. In the course of trial, he filed petitions on 01.02.2002 and 02.02.2002 pleading guilty and confessing to have set fire to the vehicles. In his statement recorded under Section 313 Cr.P.C. on 04.02.2002, he has admitted to have set fire to the vehicles and in his statement recorded under Section 313 Cr.P.C. on 24.03.2003 has admitted to have filed petitions pleading guilty and to have stated in his earlier examination under Section 313 Cr.P.C. that he had set fire to the vehicles. There is no impediment in relying on a portion of the statement of the accused and finding him guilty in consideration of the other evidence against him as laid by the prosecution.

40. It is clear that the letters marked as (Ex. 213) were written by Mahendra Hembram though denied by him, contents of the said two letters amount to confession, or in any event admission of important incriminating materials. He had been identified before the trial Court by Joseph Marandi (PW23) as a participant in the crime. As rightly observed by the High Court, contents of these two letters lend support to the evidence in identification before the trial Court for the first time as narrated by PW23. In this way, his identification for the first time in the trial Court is an exceptional case and even in the absence of further corroboration by way of previously held TIP, his involvement in the crime is amply corroborated by the above said letters written by him.

41. Learned Addl. Solicitor General has pointed out that insofar as Mahendra Hembram is concerned, three types of evidence are available against him: a) Confession; b) testimony of eye-witnesses/identification in court/PW 23 Joseph Marandi; and c) absconding of the accused. Learned Addl. Solicitor General while advancing his argument besides referring to the evidence of PW 23 laid more emphasis on the statement of

A the appellant. Though an objection was raised as to the manner in which the trial Judge questioned A3 with reference to contents of his letters dated 01.02. 2002 and 02.02.2002, it is relevant to point out that when the person facing trial insisted to look into the contents of his letters, the presiding officer concerned B has to meet his requirement subject to the procedure established. The learned trial Judge accepted the entire contents of the admission made by A3 and affording reasonable opportunity and by following the appropriate procedure coupled with the corroborative evidence of PW 23, C upheld his involvement and participation in the crime along with A1 which resulted in rioting, arson and murder of three persons. Though learned senior counsel appearing for A3 was critical on relying upon the letter Ex. 49 said to have been written by A3 to his Sister-in-law PW 9, it shows that A3 confessed to D have participated in the incident along with A1. It is seen that the entire contents of letter were used by the trial Judge which was rightly accepted by the High Court. The other circumstance urged by the prosecution was that A3 absconded soon after the incident and avoided arrest and this abscondence being a conduct under Section 8 of the Indian Evidence Act, 1872 E should be taken into consideration along with other evidence to prove his guilt. The fact remains that he was not available for quite sometime till he was arrested which fact has not been disputed by the defence counsel. We are satisfied that before accepting the contents of the two letters and the evidence of F PW 23, the trial Judge afforded him required opportunity and followed the procedure which was rightly accepted by the High Court.

Additional factors – Dara Singh (A1)

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42. In addition to what we have highlighted and elicited from the materials placed, it is relevant to point out that all the eye-witnesses examined by the prosecution consistently stated that during occurrence the miscreants raised slogans in the name of Dara Singh as "Dara Singh Zindabad". The story of this

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slogan was also mentioned in the first information report lodged soon after the occurrence. This slogan is in the name of Dara Singh, corroborates the identification before the trial Court for the first time. In addition to the same, some of the witnesses identified Dara Singh by photo identification. We have already highlighted the evidentiary value of photo identification and identifying the person in the dock. In other words, we have pointed out that those materials coupled with the other corroborative evidence are permissible. In addition to the same, all the witnesses mentioned about the blowing of whistle by Dara Singh.

43. Though the trial Court awarded death sentence for Dara Singh, the High Court after considering entire materials and finding that it is not a rarest of rare case, commuted the death sentence into life imprisonment. The principles with regard to awarding punishment of death have been well settled by judgments of this Court in *Bachan Singh vs. State of Punjab* AIR 1980 SC 898, *Machhi Singh vs. State of Punjab* (1983) 3 SCC 470, *Kehar Singh vs. State (Delhi Administration)* (1988) 3 SCC 609. It is clear from the above decisions that on conviction under Section 302 IPC, the normal rule is to award punishment of life imprisonment and the punishment of death should be resorted to only for the rarest of rare cases. Whether a case falls within the rarest of rare case or not, has to be examined with reference to the facts and circumstances of each case and the Court has to take note of the aggravating as well as mitigating circumstances and conclude whether there was something uncommon about the crime which renders the sentence of imprisonment for life inadequate and calls for death sentence. However, more than 12 years has elapsed since the act was committed, we are of the opinion that the life sentence awarded by the High Court need not be enhanced in view of the factual position discussed in the earlier paras.

44. Though an argument was advanced that only after the

A intervention of PW 55, I.O. from CBI, several persons made a confessional statement by applying strong arm tactics that were used by the investigating agency, the entire case of the prosecution has to be rejected, we are unable to accept the same for the reasons stated by the trial Court and the High B Court. We have ourselves in the earlier paras adverted to the fact that some of the witnesses did not mention anything about the incident to the local police or the District Magistrate or the higher level police officers who were camping from the next day of the incident. However, regarding the fresh steps taken by C the Officer of the CBI, particularly, the efforts made by PW 55, though certain deficiencies are there in the investigation, the same cannot be under estimated. Likewise, it was pointed out that young children were being coerced into being witness to the occurrence whereas the elder family members were never D joined as witness by the prosecuting agency. It is true that the prosecution could have examined elders and avoided persons like PW 5 who was a minor on the date of the incident. We have already discussed about the veracity of witnesses and found that certain aspects have been established and accepted by the trial Court as well as the High Court. E

45. Finally, insofar as the appeals filed by the CBI against the order of acquittal by the High Court in respect of certain persons, it was pointed out that when two views are possible, the one in favour of the accused should be accepted. It is true F that the presumption of innocence is a fundamental principle of criminal jurisprudence. Further, presumption of innocence is further reinforced, reaffirmed and strengthened by the judgment in his favour. [Vide *State of Uttar Pradesh vs. Nandu Vishwakarma & Ors.*, (2009) 14 SCC 501 (Para 23), *Sambhaji* G *Hindurao Deshmukh & Ors. Vs. State of Maharashtra,* (2008) 11 SCC 186 (Para 13), *Rahgunath vs. State of Haryana,* (2003) 1 SCC 398 (Para 33) and *Allarakha K. Mansuri vs. State of Gujarat,* (2002) 3 SCC 57 (Paras 6 & 7)]. In the earlier paragraphs, we have highlighted the weakness and infirmities H of the prosecution case insofar as acquitted accused who are

all poor tribals. In the absence of definite assertion from the prosecution side, about their specific role and involvement, as rightly observed by the High Court, it is not safe to convict them. We entirely agree with the reasoning and conclusion of the High Court insofar as the order relating to acquittal of certain accused persons.

Conclusion

46. In a country like ours where discrimination on the ground of caste or religion is a taboo, taking lives of persons belonging to another caste or religion is bound to have a dangerous and reactive effect on the society at large. It strikes at the very root of the orderly society which the founding fathers of our Constitution dreamt of. Our concept of secularism is that the State will have no religion. The State shall treat all religions and religious groups equally and with equal respect without in any manner interfering with their individual right of religion, faith and worship.

47. The then President of India, Shri K R. Narayanan once said in his address that "Indian unity was based on a tradition of tolerance, which is at once a pragmatic concept for living together and a philosophical concept of finding truth and goodness in every religion". We also conclude with the hope that Mahatma Gandhi's vision of religion playing a positive role in bringing India's numerous religion and communities into an integrated prosperous nation be realised by way of equal respect for all religions. There is no justification for interfering in someone's religious belief by any means.

48. The analysis of entire materials clearly shows that the High Court is right in arriving at its conclusion. In the case on hand, there is no material to prove conspiracy charge against any of the accused. However, as pointed out by the High Court which we also adverted to in the earlier paras even in the midst of uncertainties, the witnesses have specified the role of (A1) and (A3) which we agree with and confirm the same and we

A also maintain the conviction of the appellant Dara Singh (A1), Mahendra Hembram (A3) and the sentence of life imprisonment imposed on them. In the same way, in the absence of acceptable materials and in view of the various infirmities in the prosecution case as pointed out by the High Court, we B confirm the order of acquittal of others who are all poor tribals.

49. In the result, Criminal Appeal No. 1366 of 2005 filed by Rabindra Kumar Pal @ Dara Singh, Criminal Appeal No. 1259 of 2007 filed by Mahendra Hembram and Criminal Appeal Nos. 1357-1365 filed by CBI are dismissed.

C

N.J. Appeals dimissed.

Ed. Note: The last part of paragraph 43 (on page 993) and of paragraph 47 (on page 995) of the abovesaid Judgement dated 21.01.2011 replaced in terms of the subsequent Order dated 25.01.2011 in the same matter.