A SIMON AND ORS.

v.

STATE OF KARNATAKA

JANUARY 29, 2004

B [Y.K. SABHARWAL AND B.N. AGARWAL, JJ.]

Penal Code, 1860; Sections 143, 148, 307, 302, 332, 333, 324, 120(B) & 149—Terrorist and Disruptive Activities (Prevention) Act, 1987; Sections 3,
C *4 & 5—Police convoy attacked by landmine blast and subsequent attack by firearms resulting in the death of 22 people and injuries to several others—Accused identified in Court by witnesses who survived the attack—Designated Court awarding the accused life imprisonment—Main plea of accused that test identification parade not conducted—Held, on facts and evidence, test identification parade is not required—Designated Court has rightly convicted*
D *the accused—However on notice to the accused, life imprisonment enhanced to death penalty owing to seriousness of the crime—Evidence Act, 1872; Section 9.*

Pursuant to an information received about the place of hiding of a notorious criminal gang, a Police party with forester watchers and
E **informants went in two buses to nab them. One of the buses got exploded due to a landmine blast resulting in the death of 22 persons and injuries to several others. After the explosion, there were exchange of fire also. The police registered criminal cases against 50 persons which included the four appellants. Trial Court convicted the appellants for offences under**
F **Sections 3, 4 and 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987; under Sections 143, 148, 307, 302, 332, 333, 324, 120(B) & 149 IPC; under Section 3 of the Explosive Substances Act and under Section 25 of the Indian Arms Act, 1959. The appellants were sentenced to undergo rigorous imprisonment for life besides fine and further imprisonment in default of payment of fine. Lesser punishment has been inflicted for**
G **offences under the Indian Arms Act and Explosive Substances Act.**

In appeal to this Court, the appellants contended that the prosecution has not been able to establish beyond reasonable doubt that the appellants were present at the place of occurrence and involved in the crime; that PW 89 has wrongly identified all the appellants except one; that the
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deposition of PW 97, who is the Superintendent of Police, is vitally interested in securing the conviction of the appellants; that it is highly improbable that PW 97 has identified the appellants even after suffering manifold injuries in the blast and in subsequent dust arising from the blast; that the identification by the witnesses for the first time in court without a test identification parade after a long period of the incident is a weak piece of evidence and cannot be made the basis of conviction; that the names of the appellants were not mentioned in the FIR; that the testimony of PWs. 63, 65 and 66 should be discarded on the ground that they relied on PW 89 in identifying the appellants; that after the blast of land mines, there was no exchange of fire; and that PWs. 63 to 66 and PW 97, who had seen the appellants at the place of occurrence, could not identify the appellants except by going near them in the Court hall.

In response to the notices of this Court to the appellants as to why the punishment be not enhanced from life imprisonment to death penalty, the appellants contended that the crime was committed under duress from the main accused and hence a mitigating circumstance for not awarding the death penalty; and that this Court has already dismissed the Special Leave Petition of the State for enchancement of sentence.

Dismissing the appeals and enhancing the sentence of life imprisonment to death sentence, the Court.

HELD: 1.1. Mere wrong identification by one of the eyewitnesses by itself cannot be fatal to the case of the prosecution. The wrong identification made by PW 89 of all the accused except one by itself would not be fatal if the case of the prosecution on the basis of other evidence adduced by it stands proved. [1172-D-E]

1.2. None of the injuries of PW 97 were such as would hamper the witness spotting and seeing the accused. Moreover, PW 97 was a senior officer who had worked for nearly one and half years as in-charge of the Task Force that had been constituted to Nab Veerapan and his gang. Regarding the witness being shattered and perplexed, PW 97 explained that he was perplexed for two or three minutes. He has deposed to have seen the accused persons on earlier occasions as well. He has given valid reasons for not apprehending them earlier. He had the opportunity to see the accused from close distance. The witness had in his possession documents regarding the accused. If PW 97 was to falsely implicate, he

A would not identify the four appellants only and leave the remaining accused. Though PW 97 has stated that after the blast there was dust but, at the same time, he has also stated that the dust had cleared in two minutes. He has further explained that the smoke, that had emanated as a result of the blast, was not very thick. Despite lengthy cross-examination, the testimony of PW 97 could not be shaken. The testimony of PW 97 is B reliable and trustworthy and can safely be made the basis of conviction. [1173-D-G]

1.3. The principle that in the absence of a test identification parade, it would be extremely risky to place implicit reliance on identification made C for the first time in court after a long lapse of time, will apply to the case of total strangers. PW 97 knew the accused. The question of identification arises when accused are not known. Since the appellants were known, the holding of a test identification parade, on the facts of the case, would have been wholly unnecessary. [1174-B-C]

D *State of Maharashtra through CBI* v. *Sukhdev Singh alias Sukha and Ors.*, [1992] 3 SCC 700, referred to.

1.4. Under Section 9 of the Indian Evidence Act, 1872, the identity of the accused persons is a relevant fact. The purpose of a prior test identification is to test and strengthen the trustworthiness of that evidence. E Courts generally look for corroboration of the sole testimony of the witnesses in court so as to fix the identity of the accused who are strangers to them in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions. The aspect of identification parade belongs to the stage of investigation and there is no provision in F the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. Mere failure to hold a test identification parade would not make inadmissible the evidence of identification in court. What weight is to be attached to such identification is a matter for the courts of fact to examine. This is a case where appellants were known to PW 97 and he has identified G them in court and other witnesses corroborated the testimony of PW 97, though the conviction could be sustained on the sole testimony of PW 97. [1174-G-H, 1175-A-D]

Budhsen and Anr. v. *State of U.P.*, [1970] 2 SCC 128; *Shaikh Umar Ahmed Shaikh and Anr.* v. *State of Maharashtra* [1998] 5 SCC 103 and H *Malkhansingh and Ors.* v. *State of M.P.* [2003] 5 SCC 746, referred to.

1.5. The FIR was not recorded on the information of PW 97. PW97 had already been shifted to the hospital before recording FIR and, therefore, non-mentioning of the names of the accused in the FIR is of no consequence. The lapse of the time between the date of the incident and the date of identification by PW 97 is also of no consequence. Out of 50 accused, PW 97 deposed only about presence of four appellants who were earlier known to him. It cannot be said that the appellants were strangers to PW 97 or that this witness had only a fleeting glimpse of the side face of the appellants. The criticism levelled in respect of other witnesses that they identified the accused for the first time in court would not apply to PW 97. [1174-C-E]

1.6. There is considerable amount of substance in the contention of the appellants that the appellants were not known to PWs. 63, 65 and 66 except PW 89 who is said to have shown the accused to the witnesses but its effect and applicability to the facts of the case is a different matter. The conviction of the appellants is not based on the testimony of these witnesses. It is based on the testimony of PW 97 and aforesaid witnesses have lent corroborative support. [1175-E-F-G]

1.7. It is not possible to accept the contention that after the blast of land mines, there was no fire. The firing from both sides after the blast of land mines stands proved from the testimony of PWs. 63, 64, 65 and 66. [1176-A-B]

1.8. The reason for going near the accused was that out of a large number of 50 accused present in the court, only the four appellants were identified and it was proper to identify them by going near them. It is quite difficult to identify an accused from a distance in a court hall by pointing out a finger towards the accused by the witness when the accused are large in number. It is in this context that the trial court has recorded that after going near the accused, the witness has identified them. It does not mean that testimony of witnesses in court becomes doubtful on their having identified the accused after going near them. [1176-F-H]

2.1. The question of enhancement of sentence to award death penalty can be considered where the facts are such that to award any punishment less than maximum would shock the conscious of the Court. The fact of dismissal of special leave petition filed by the State seeking enhancement of sentence on the ground of limitation does not take away the power of this Court to make an order enhancing the sentence in these appeals if

A the facts call for such an order being made. [1177-H; 1178-A-B]

2.2. The fact that there was no administration in the area and that it had totally collapsed; that no police officer could go in the area without police escorts; that as many as eight vehicles were required to escort one vehicle; that each escort party consisted of minimum three platoons each B containing thirty-three persons; that no summons could be served in many villages in the area; that no government official could move freely in that area are all factors which are aggravating circumstances against the appellants instead of being mitigating circumstances in their favour. The factors show the nature of crime and the criminals. There is nothing to C show that the appellants acted on account of these factors. It is evident that aforesaid factors cannot be the handy work of one person. In absence of any evidence, it cannot be said that persons/accused responsible for aforesaid state of affairs in the area because of these criminal activities, joined and continued the said criminal activity on account of any duress, domination or compulsion. Further it may be one of the mitigating factors D but had to be considered in the light of all circumstances. The accused are responsible for such a situation. In a pre-meditated planned manner, land mines were laid enroute the police party. There were firing also after the blast of landmines. The appellants are members of notorious gang. Their prime target is police personnel of the State and the Special Task E Force constituted to stop their activities, with a view to terrorise the people. The appellants are members of the gang led by the main accused. They do not deserve any sympathetic consideration. There is no evidence or foundation for the conclusion that they acted under the duress of the main accused. The facts of the present case do not show that the appellants were compelled to fall in line with the criminal activity of the main accused or F that they joined his group on account of any duress or compulsion. The manner in which the crime was committed clearly shows that any person can contemplate the disastrous effect of blasting of landmines. It is evident that the crime was diabolically planned. The appellants are threat and grave danger to society at large. They must have anticipated that their G activity would result in elimination of large number of lives. As a result of criminal activities, the normal life of those living in the area has been totally shattered. It would be mockery of justice if extreme punishment is not imposed. Thus, on consideration to all the circumstances aggravating and mitigating, there can hardly be a more appropriate case than the present one to award maximum sentence. This Court has to perform this H onerous duty for self-preservation, i.e., preservation of persons who are

living and working in the area where appellants and their group operate. A
[1183-E-H; 1184-A-D]

Major R.S. Budhwar **v.** *Union of India and Ors.*, **(1996) Crl.L.J. 2862;** *State of Rajasthan and Anr.* **v.** *Kartar Singh and Anr.*, **[1970] 2 SCC 61;** *Kannan and Anr.* **v.** *State of Tamil Nadu,* **[1982] 2 SCC 350;** *Ronny @ Ronald James Alwaris and Ors.* **v.** *State of Maharashtra,* **[1998] 3 SCC 625;** *Bachan* B *Singh etc.* v. *State of Punjab etc.*, **[1980] 2 SCC 684;** *Rajendra Prasad etc. etc.* **v.** *State of Uttar Pradesh and Anr.*, **[1979] 3 SCC 646;** *Machhi Singh and Ors.* **v.** *State of Punjab,* **[1983] 3 SCC 470;** *Krishna Mochi and Ors.* **v.** *State of Bihar,* **[2002] 5 SCC 81 and** *Devender Pal Singh* **v.** *State of NCT of Delhi and Anr.*, **[2002] 5 SCC 234, referred to.** C

Director of Public Prosecutions for Northern Ireland **v.** *Lynch* **(1975) Appeal Cases 653 and** *Regina* **v.** *Howe etc.*, **(1987) Appeal Cases 417;** *Regina* **v.** *Gotts.*, **(1992) Appeal Cases 412, referred to.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. D
149-150 of 2002.

From the Judgment and Order dated 29.9.2001 of the Special Designated TADA Court at Mysore in Case Nos. Spl. C. 67/94 and 12 of 1997.

Colin Gonsalves, John Vincent, P. Ramesh Kumar and Ms. Aparna E
Bhat for the Appellants.

Sudhir Walia, Anil K. Mishra and Sanjay R. Hegde for the Respondent.

The Judgment of the Court was delivered by

Y.K. SABHARWAL, J. The challenge in these appeals is to the F
conviction of the appellants in relation to killings in occurrence which took place on 9th April, 1993. On Police receiving information about the place of hiding of notorious criminal Veerappan and his gang, a Police party headed by Superintendent of Police, K. Gopalakrishnan (PW97), on 9th April, 1993, proceeded to nab them. The party comprising of police personnel, forester G
watchers and informants went in two buses. As a result of blasting of land mines that had been laid, the bus which was in front exploded. The explosion resulted in injuries to many and death of 22 persons. The incident took place at about 11.00 a.m. For treatment, the injured were shifted to hospital by transporting them in the second bus. After the explosion of the land mines, there were exchange of fire also. The FIR was recorded at 2.45 p.m. on the H

A date of the occurrence. The case was filed against 121 persons, 50 persons were arrested and prosecuted. The trial resulted in conviction of the appellants who are four in number. The first appellant is Simon (accused No.18), second appellant is Gnana Prakash (accused No.30), the third is Madhiah (accused No.31) and the fourth is Bilavendra (accused No.32). The remaining accused have been acquitted.

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The Special Judge, TADA Court, Mysore, by the impugned judgment and order, has convicted the appellants for offence under Sections 3, 4, 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short 'the TADA Act'), Sections 143, 148, 307, 302, 332, 333, 324, 120(B) and 149 Indian Penal Code, Section 3 of the Explosive Substances Act and Section 25 of the Indian Arms Act. In respect of the main offences, the appellants have been sentenced to undergo rigourous imprisonment for life besides fine and further imprisonment in default of payment of fine. The lesser punishment has been inflicted for offences under the Indian Arms Act and Explosive Substances Act.

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These appeals have been filed under Section 19 of the TADA Act. The prosecution to prove the case against the appellants has examined a large number of witnesses and has produced various documents. We have heard learned counsel for the parties and have perused the record.

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Having regard to the evidence produced, the occurrence, its time and place and the presence of the witnesses at the place of occurrence as per case of the prosecution can neither be questioned nor has it been questioned by counsel for the appellants. These facts have been fully established. The main question that has been raised on behalf of the appellants by their learned counsel is about the identity and presence of the appellants at the place of occurrence. It has been vehemently contended that the prosecution has not been able to establish beyond reasonable doubt that the appellants were present at the place of occurrence and were involved in the crime.

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The FIR was recorded on the information of M. Ashok Kumar (PW45) who was working in the Jungle Patrol as Inspector of Police in the task force of Tamil Nadu for nabbing Veerappan and his men. He was travelling in the second bus which was at a distance of about 100 to 150 ft. from the first bus. PW45 has deposed about the explosion of the first bus as a result of land mine blast, the attempt to chase Veerappan and his gang and opening of fire towards them. Number of persons who were travelling in the second bus are prosecution witnesses who have identified the appellants apart from those

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persons from the first bus who received injuries but were lucky to survive. A

The most important witness on whose testimony the result of these appeals hinge to a large extent is PW97-an occupant of the first bus and one of few fortunate to survive. The prosecution heavily relies upon the testimony of PW97. The trial Judge has believed the testimony of PW97. Learned counsel for the appellants, however, contends that it is not safe to base B conviction on the testimony of this witness who is vitally interested in securing the conviction of the appellants.

Many witnesses have deposed to have seen the appellants at the place of occurrence. The contention urged by the learned counsel, however, is that C there are various contradictions and infirmities in the depositions of these witnesses and, thus, the conviction of the appellants is not liable to be sustained. It has been submitted that the identification by these witnesses for the first time in court after nearly 8 years of the incident is of no avail in the absence of test identification parade. The contention is that not holding of test identification parade is fatal to the case of the prosecution. D

Whether the identification of an accused for the first time in court in absence of any test identification parade can be made the basis of the conviction depends upon the facts and circumstances of the case. No hard and fast rule can be laid down. We have been taken through the testimony of PW63 (Achutananda). The main criticism that has been levelled by Mr. Gonsalves E to the deposition of PW-63 who was working in the Special Task Force and was travelling in the second bus and who identified accused Nos.18, 30 and 31 is that these accused even as per testimony of PW63 were pointed out to him at the place of occurrence by another witness PW89 (Alageshan) who was working at the relevant time as a Forest Guard and had claimed that he F knew the accused. It is further pointed out that PW63 does not claim that he knew these accused earlier. Further submission of learned counsel is that at best PW63 only had the opportunity of getting a fleeting glimpse of the accused from a distance and that too when the accused were running away and the said glimpse was also only of the side face. Similar criticism has been made of PW64 who identified accused Nos.30 and 31. This witness was G travelling in the first bus and had received injuries. PW65 who was travelling in the second bus also identified accused Nos.18 and 31. He was also a member of the Special Task Force. The learned counsel has on similar grounds assailed the testimony of all the witnesses who have identified the appellants. Appellant Simon has been identified by 16 witnesses, Gnana Prakash has H

A been identified by 4 witnesses, Madhiah has been identified by 9 witnesses and Bilavendra has been identified by one witness. We may, however, note that it is not the quantity which matters but the quality of witnesses that matters. Further, learned counsel for the appellants submits that PW89 who at the relevant time was working as the Forest Guard has wrongly identified all the appellants except Simon. It is contended that this star witness of the B prosecution who is alleged to have pointed out and shown the appellants to the other witnesses who identified them in court having himself wrongly identified all accused except Simon, the testimony of other witnesses deserves to be discarded on this ground itself and this is said to be fatal to the case of the prosecution. The conviction, it is contended, based on identification of C such witnesses cannot be sustained.

We are unable to accept the contention that wrong identification by one witness by itself would be fatal to the case of the prosecution. A case is required to be decided on the examination of entire evidence. Mere wrong identification by one of the eye-witnesses by itself cannot be fatal to the case D of the prosecution. There can be variety of reasons for wrong identification. The witness may be won over. There may be loss of memory or any other reason. The wrong identification made by PW89 of the accused other than that of Simon, without anything more, by itself would not be fatal if the case of the prosecution on the basis of other evidence adduced by it stands proved. E At this stage, we may notice that the FIR records that PW89 saw some persons running from the top of a nearby hills and he identified them as Veerappan and his brother Arjuna, Ayyandorai and about 10 others.

Firstly, let us examine the deposition of PW97. He was the Superintendent of Police under whom the Police personnel and others went F to nab Veerappan and his gang. It has been proved from evidence that earlier for nearly one and a half years from January 1990 to May 1991, PW97 was working as a Superintendent of Police, Jungle Patrol, Head Quarters at Mettur Dam. The Jungle Patrol was constituted to nab Veerappan and his gang. In 1993 also he was Superintendent of Police in the Task Force constituted for the specific purpose. The witness has given detailed account as to how he G received information about the hideout of Veerappan and his gang, how accompanied with other Police Officers and Foresters, he proceeded to the place of occurrence. PW97 was standing on the front footboard of the first bus. The bus, as a result of the blast of land mines, went into pieces but PW97 on being on footboard was thrown out of the bus and, thus, survived. H He fell into a small ditch and sitting from the said place, he was able to see

as to what happened to inmates of the bus, some having sustained serious injuries and some having died. He has further deposed that immediately Mahendran, Selvam and Mhonadas who were also in first bus got up from there with small injuries and came to him and they saw that few people on the northern side and firing towards them. He has deposed to have seen the appellants, accused No.1 and accused Arjunan and some other people coming towards them by firing. He also ordered his people to fire at them. PW97 sustained injuries on the left leg, left hand and on the face. Immediately after the occurrence, when the accused went into the forest and the firing came to stop, the witness was sent to the hospital for treatment. That was before the FIR was recorded. Out of all the accused persons, he identified the four appellants. It is also in evidence that he had seen the appellants earlier to this incident as well.

We have critically examined the testimony of PW97. The contention of the learned counsel for the appellants, however, is that PW97 would have been completely shattered as a result of manifold injuries be received because the bus in which he was travelling was hit by land mines and, therefore, it is highly improbable that he would have seen the appellants. There is no substance in the contention. None of the injuries, it may be noticed, were such as would hamper the witness spotting and seeing the accused. Moreover, it has to be borne in mind that PW97 was a senior officer who had worked for nearly one and half years as in-charge of the Task Force that had been constituted to nab Veerappan and his gang. Regarding the witness being shattered and perplexed, he has explained that he was perplexed for two or three minutes. He has deposed to have seen the accused persons on earlier occasions as well. He has given valid reasons for not apprehending them earlier. He had the opportunity to see the accused from a close distance. The witness had in his possession documents regarding the accused. If PW97 was to falsely implicate, he would not identify the four appellants only and leave remaining accused. There were 50 accused in all. Learned counsel also contends that because of dust as a result of blast of land mines, it was not possible to see the accused. Though PW97 has stated that after the blast there was dust but, at the same time, he has also stated that the dust had cleared in two minutes. He has further explained that the smoke that had emanated as a result of the blast was not very thick. Despite lengthy cross-examination, the testimony of PW97 could not be shaken. In our view, the testimony of PW97 is reliable and trustworthy and can safely be made the basis of conviction.

The next contention urged is that not holding of test identification

A parade, identifying the accused is fatal to the case of the prosecution in the present case. The submission is that by very nature, the identification of the accused for the first time in court is a weak piece of evidence and cannot be made the basis of conviction. Reliance has been placed on *State of Maharashtra through CBI* v. *Sukhdev Singh alias Sukha and Ors.*, [1992] 3 SCC 700 in support of the contention that in absence of test identification parade, it would be extremely risky to place implicit reliance on identification made for the first time in court after a long lapse of time. But it has to be kept in mind that this principle will apply to case of total strangers. In this contention, it has to be kept in view that PW97 knew the accused as stated hereinbefore. The question of identification arises when accused are not known. Since the appellants were known in the manner above stated, the holding of a test identification parade, on the facts of the case, would have been wholly unnecessary. Regarding the contention about the names of the appellants not being mentioned in the FIR, it has been explained that the FIR was not recorded on the information of PW97. PW97 had already been shifted to the hospital before recording FIR and, therefore, non-mentioning of the names of the accused in the FIR is of no consequence. On facts of the case, the lapse of the time between the date of the incident and the date of identification by PW97 is also of no consequence. As already noticed, out of fifty accused, PW97 deposed only about presence of four appellants who were earlier known to him.

It cannot be said that the appellants were strangers to PW97 or that this witness had only a fleeting glimpse of the side face of the appellants. The criticism levelled in respect of other witnesses that they identified the accused for the first time in court would not apply to PW97.

Relying upon *Budhsen and Anr.*, v. *State of U.P.*, [1970] 2 SCC 128, it was contended that evidence as to identification deserves to be subjected to a close and careful scrutiny by the court. The decision in *Shaikh Umar Ahmed Shaikh and Anr.*, v. *State of Maharashtra*, [1998] 5 SCC 103 was relied for the proposition that when the accused were already shown to the witnesses, their identification in court by witnesses was meaningless and such identification lost all its value and could not be made the basis for rendering conviction. The legal position on the aspect of identification is well settled. Under Section 9 of the Indian Evidence Act, 1872, the identity of the accused persons is a relevant fact. We have no difficulty in accepting the contention that evidence of mere identification of an accused person at the trial for the first time is from its very nature inherently of a weak character.

The purpose of a prior test identification is to test and strengthen the trustworthiness of that evidence. Courts generally look for corroboration of the sole testimony of the witnesses in court so as to fix the identity of the accused who 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. It has also to be borne in mind that the aspect of identification parade belongs to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. Mere failure to hold a test identification parade would not make inadmissible the evidence of identification in court. What weight is to be attached to such identification is a matter for the courts of fact to examine. In appropriate cases, it may accept the evidence of identification even without insisting on corroboration (See *Malkhansingh & Ors.* v. *State of M.P.* [2003] 5 SCC 746). These well settled principles, however, have no applicability to facts of the instant case. This is a case where appellants were known to PW97 and he has identified them in court and other witnesses, as we would presently notice, corroborated the testimony of PW97, though, in our view, conviction could be sustained on the sole testimony of PW97.

With reference to PWs63, 65 and 66 and other similar witnesses who have deposed to have seen the appellants at the place of occurrence, it was contended that basically the principles that the accused were unknown to these witnesses shall apply and not that they had known and seen the accused at the place of occurrence. The basis of this submission is that these accused were not known to the witnesses except PW89 who is said to have shown the accused to the aforesaid witnesses. There is considerable amount of substance in the submission of the learned counsel but its effect and applicability to the facts of the case is a different matter. We have no hesitation in accepting the contention that if the conviction was based on the testimony of PWs63, 65 and 66 and other such witnesses who saw the accused for the first time on date of occurrence, it would have required corroboration. But the conviction of the appellants is not based on the testimony of these witnesses. It is based on the testimony of PW97 and aforesaid witnesses have lent corroborative support.

We have noticed hereinbefore number of witnesses who identified each of the appellants in court. Referring to the testimony of PWs 63 to 67, 72 and

A 73, contention urged is that the entire area was engulfed with dust and nothing could be seen as a result of the blast of land mines; the first vehicle was shattered in pieces and thrown upto height of 20-30 ft. and that the assailants ran away after the blast and there was no firing after blasting of land mines which shows that the assailants were not seen at all. It is not possible to accept the contention that after the blast of land mines, there was no fire. The B firing from both side after the blast of land mines stands proved from the testimony of PWs63, 64, 65 and 66. PW63 deposed that 'at the same time we were hearing the firing sound, then we also started firing to that direction and followed'. The witness also deposed that he had fired 16 rounds and that there was entry in the ledger for having the fire arm and for returning it. C Likewise, PW64 deposed that he heard firing sound and returned back the firing. PW65 deposed that while firing was coming from the side of hillock, he instructed 15 policemen to also fire. To the similar effect is the testimony of PW66. Regarding the contention that the area being engulfed with the dust and nothing could be seen, we have already referred to the testimony of PW97 that such condition prevailed only for about two minutes. It is correct D that the first vehicle was shattered in pieces as a result of land mines but, at the same time, PW97, as a result of being on the footboard of the bus, was thrown in a ditch from where he had ample opportunity to see the appellants after the blast of the land mines. The presence of these witnesses at the place of occurrence cannot be doubted. Under these circumstances, we are unable E to accept the aforenoticed contention of the learned counsel.

Another contention urged is that though PWs63 to 66 and other similar witnesses have deposed to have seen the appellants at the place of occurrence about 8 years back, but none of them including PW97 could identify them, except by going near them in the court all. It was pointed out that the F evidence of these witnesses shows that each of the witness had to go close to the accused and then alone it was possible to identify them. We find no substance in the contention. The reason for going near the accused was that out of a large number of 50 accused present in the court, only the four appellants were identified and it was proper to identify them by going near them. It is quite difficult to identify an accused from a distance in a court hall G by pointing out a finger towards the accused by the witness when the accused are large in number. It is in this context that the trial court has recorded that after going near the accused, the witness has identified them. It does not mean that testimony of witnesses in court becomes doubtful on their having identified the accused after going near them. Regarding the contention that H the accused were shown to the witnesses, we may only note that no such

suggestion was given to the investigating officer during the course of cross-examination. It further deserves to be noticed that though the evidence commenced on 7th February, 2001, such complaint was made to the court for the first time on 15th March, 2001 by which time a large number of witnesses had already been examined. A

There is no merit in any of the contention urged on behalf of the appellants. The trial court has rightly convicted the appellants. For main offences, the appellants have been sentenced to undergo rigorous imprisonment for life. Considering the number of killings and brutal manner thereof, we had issued notice to the appellants to show cause why the punishment be not enhanced from life imprisonment to death penalty. We have heard learned counsel for the parties on that question. B C

Facts in brief may be recapitulated to examine the question of sentence. There was a reign of terror in the area. Even Police had to move about with escort party. The crime has been committed in a brutal manner by use of land mines. The blast of mines has resulted in 22 persons losing their lives and many receiving grievous injuries. D

The trial court held that it is a rarest of the rare case for imposing capital punishment. At the same time, it has been further held that the appellants do not deserve the said punishment for the reasons that it is not the case of prosecution that the accused had started their career as criminals and developed such notoriety; and that it was accused No.1, Veerappan, who alone started his criminal activity which reached such notoriety that by creating terror in the mind of the people he took inhabitants from surrounding areas to his assistance and compelled them to fall in his line. The trial court has also observed that it appears that these accused are some such people joining the gang of Veerappan involved in the criminal act as directed by him. E F

True, the grant of life imprisonment is the rule and death penalty an exception in rarest of rare cases by stating 'special reasons' for awarding it but, at the same time, it is also true that the punishment awarded must commensurate with the crime committed by the accused. It is also true that ordinarily the sentence is not enhanced by the Appellate Court unless it is such a gross case that nothing but maximum sentence stipulated in law deserves to be awarded. G

We are conscious of the fact that the power to enhance death sentence from life should be very rarely exercised and only for strongest possible H

A reasons and not only because the appellate court is of that view. The question of enhancement of sentence to award death penalty can, however, be considered where the facts are such that to award any punishment less than maximum would shock the conscious of the court. The fact of dismissal of special leave petition filed by the State seeking enhancement of sentence on the ground of limitation does not take away the power of this Court to make B an order enhancing the sentence in these appeals if the facts call for such an order being made.

The court has to consider the nature of the crime as well as the accused. The trial court has rightly come to a definite conclusion that the case falls in C the category of rarest of rare cases for imposing capital punishment. The reasons given by the trial court for not awarding it have been stated above. In support of the reason stated by the trial court that it appears that the first accused Veerappan compelled the appellants to join his gang, learned counsel for the appellants contends that if a crime is committed under duress, it would be a mitigating circumstance for not awarding death penalty. In support D of the contention learned counsel relies upon a decision of House of Lords in *Director of Public Prosecutions for Northern Ireland* v. *Lynch,* (1975) Appeal Cases 653 stating at page 695 "So contemporarily aware a written on the criminal law as Professor Glanville Williams, Criminal Law, 2nd ed. (1961) p.751 quotes the phrase "coactus volui" as descriptive of the mental E state of an actor under duress according to our criminal law. I hope, indeed, to have demonstrated that duress is not inconsistent with act and will, the will being deflected not destroyed; so that the intention conflicts with the wish. The actor under duress has performed an act which is capable of full legal effect : if he is to have relief it should be discretionary. Translated into terms of the criminal law, he is guilty of the crime, but he may at discretion be F relieved against its potential penal consequences when it comes to sentencing."

Lynch says that it shall be remembered that if someone is forced at a gunpoint either to be inactive or do something positive he was so doing because the instinct and perhaps the duty of self-preservation is powerful and natural, the law would be censorious, inhuman if did not recognize the G appalling plight of a person who perhaps suddenly finds his life in jeopardy unless he submits and obeys as it was said that where there have been threats of the nature that have compelled a person to act in a particular way and he is only acting in furtherance because of that the approach should be to excuse th... person.

H

The Lynch came up for consideration by House of Lords in *Regina* v. *Howe etc.*, (1987) Appeal Cases 417. In Howe's case after noticing that prior to Lynch there was heavy pre-ponderous of authority against the availability of the defence of duress in case of murder, the prior law has been restored and, thus, Lynch case stands overruled. The *Howe's* case has been noticed with approval by House of Lords in *Regina* v. *Gotts,* (1992) Appeal Cases 412. In this decision, it was held that the defence of duress is not available to a charge of murder.

Reliance has also been placed by Mr. Gonsalves on a decision of this Court in Major *R.S. Budhwar* v. *Union of India and Ors.*, (1996) CRL.L.J. 2862 - a case in which sentence of death was commuted and imprisonment of life imposed. In the said case Commanding Officer and Second-in-Command in Army were murdered. Holding that murders were diabolically planned and committed in cold blood, but it was by exploiting the religious feelings of the accused who had initially declined to commit the offence but ultimately succumbed to the threat, command and influence of their superiors. Another mitigating factor found in favour of accused was that Major Budhwar, who along with another Officer (since dead) masterminded the two murders were awarded life imprisonment whereas the appellants who carried out their orders had been sentenced to death. Yet, another factor which weighed in favour of the accused was their post murder repentance. The accused not only surrendered before the authorities within two days but also spoke out the truth in their confessional statements. Since none of these mitigating circumstances had been taken into consideration by the High Court which was obliged to consider both the aggravating and mitigating circumstances, this Court balancing the two, imposed life imprisonment instead of death penalty.

In *State of Rajasthan and Anr.* v. *Kartar Singh and Anr.*, [1970] 2 SCC 61 instead of death sentence, life imprisonment was imposed as on facts it was held that the part played by the accused was secondary. Similarly in *Kannan and Anr.* v. *State of Tamil Nadu,* [1982] 2 SCC 350 the sentence of imprisonment for life was substituted for the sentence of death finding that the accused were really 'junior partners' in the perpetration of the crimes. Their appearance on the scene was itself at a late stage and they were instruments in the hand of and under the domination of their fellow accused.

In *Ronny alias Ronald James Alwaris and Ors.* v. *State of Maharashtra,* [1998] 3 SCC 625 instead of death, life imprisonment was inflicted noticing

A that it was not possible, on the facts of the case, to predict as to who played which part and, therefore, it was not possible to say whose case falls within the rarest of rare cases category.

In *Bachan Singh etc.* v. *State of Punjab etc.*, [1980] 2 SCC 684 rejecting the challenge to the constitutional validity of awarding death penalty and B holding that death penalty should not be imposed except in rarest of rare cases, some of the mitigating and aggravating circumstances required to be kept in view while considering the aspect of sentence have been noticed. The question of sentence is to be decided on well-settled and recognized legal principles balancing all circumstances in relation to the crime and the criminal. C The decision in *Rajendra Prasad etc.etc.* v. *State of Uttar Pradesh and Anr.*, [1979] 3 SCC 646 wherein it was held that after the enactment of Section 354(3), CrPC 'murder most foul' is not the test and the shocking nature of crime or number of murders committed is also not the criterion and that the focus had completely shifted from the crime to the criminal was overruled in *Bachan Singh's* case. In *Bachan Singh's* case, it was emphasized that for D ascertaining the existence or absence of 'special reasons', the court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of E other. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments. The Constitution Bench said that though all murders are cruel but cruelty may vary in its degree of culpability and it is only then the F culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist.

In *Bachan Singh's* case, some of the aggravating circumstances in which the Court may impose penalty of death in its discretion noticed are :-

G (a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exception depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant H and was committed -

(i) while such member of public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.

Some of the mitigating circumstances, the court shall take into account in the exercise of its discretion that are noticed in *Bachan Singh's* case are:-

(i) That the offence was committed under the influence of extreme mental or emotional disturbance.

(ii) That age of the accused. If the accused is young or old, he shall not be sentenced to death.

(iii) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(iv) The probability that the accused can be reformed and rehabilitated.

The State shall by evidence prove that the accused does not satisfy the conditions (iii) and (iv) above.

(v) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(vi) That the accused acted under the duress or domination of another person.

(vii) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

None of the aforesaid circumstances can be taken into consideration in isolation. The circumstance of duress or domination of another person is required to be taken into consideration as a relevant circumstance but that has

A to be considered on the facts of a particular case while considering and balancing all other aggravating and mitigating circumstances. That alone is not the determining factor.

In *Machhi Singh and Ors.* v. *State of Punjab,* [1983] 3 SCC 470 this Court has observed that one of the categories of rarest of rare case may be B when the collective conscience of the community is so shocked that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is committed in an extremely brutal, grotesque, diabolical, revolting C or dastardly manner so as to arouse intense and extreme indignation of the community. Further, when the crime is enormous in proportion. For instance, when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community or locality are committed. It was observed that in order to apply the guidelines, *inter alia,* the following questions may be asked and answered:-

D

"(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative E but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"

The Court further said :

F "If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."

G In *Krishna Mochi and Ors.* v. *State of Bihar,* [2002] 5 SCC 81, a three Judge Bench of this Court (to which one of us B.N. Agrawal, J. was a member), having regard to the law laid down in *Bachan Singh* and *Machhi Singh* cases, and considering the case in hand where pursuant to the conspiracy hatched up, the militants from different groups went to different localities in police uniforms armed with fire arms and explosive substances, broke open H the doors of the house of members of a particular community and also set fire

to their houses, came to the conclusion that there cannot be any amount of doubt that the villagers were done to death in extremely diabolical, revolting and ghastly manner and it affected the normal tempo of life in locality. The crime was not only dastardly but also enormous in proportion as 35 persons were massacred. Considering the balance-sheet of aggravating and mitigating circumstances it was held that the culpability of the accused persons assumes the proportion of extreme depravity that the special reasons can legitimately be said to exist within the meaning of Section 354(4) of the Code of Criminal Procedure and it would be a mockery of justice if extreme penalty is not imposed.

In *Devender Pal Singh* v. *State of NCT of Delhi and Anr.*, [2002] 5 SCC 234 a decision of this Court by a Bench of three Judges in which one of us (B.N. Agrawal, J.) was a member, it was said that 'Terrorist', who are sometimes described as 'death merchants' have no respect for human life and innocent people lose their lives because of mindless killing by them and any compassion for such person would frustrate the purpose of enactment of TADA and would amount to misplaced and unwarranted sympathy.

Now, the factors in the present case which are relied upon as mitigating factors by learned counsel for the appellants that there was no administration in the area and that it had totally collapsed and at that time no police officer could have proceeded beyond Hanur towards MM Hills without police escorts and as many as eight vehicles were required to escort one vehicle and further that each escort party consisted of minimum three platoons; each platoon containing thirty-three persons; no summons could be served in many villages; no government official could move freely in that area, are all factors which, in our view, are aggravating circumstances against the appellants instead of being mitigating circumstances in their favour. The factors show the nature of crime and the criminals. There is nothing to show that the appellants joined Veerappan on account of these factors. It is evident that aforesaid factors cannot be handy work of one person. In absence of any evidence, it cannot be said that persons/accused responsible for aforesaid state of affairs in the area because of these criminal activities, joined and continued the said criminal activity on account of any duress, domination or compulsion. Further it may be one of the mitigating factors but had to be considered in the light of all circumstances. The accused are responsible for such a situation. In a pre-meditated planned manner land mines were laid enroute the police party. There were firing also after the blast of landmines. The appellants are members of notorious gang. Their prime target is police personnel of the State and the

A Special Task Force constituted to stop their activities with a view to terrorise the people. The appellants are members of the gang led by A-1. They do not deserve any sympathetic consideration. There is no evidence or foundation for the conclusion that they acted under the duress of Accused No.1.

The facts of the present case do not show that the appellants were
B compelled to fall in line with the criminal activity of accused No.1 or that they joined his group on account of any duress or compulsion. The manner in which the crime was committed clearly shows that any person can contemplate the disastrous effect of blasting of landmines. It is evident that the crime was diabolically planned. The appellants are threat and grave danger
C to society at large. They must have anticipated that their activity would result in elimination of large number of lives. As a result of criminal activities, the normal life of those living in the area has been totally shattered. It would be mockery of justice if extreme punishment is not imposed. Thus, having given anxious consideration to all the circumstances aggravating and mitigating, in our view, there can hardly be a more appropriate case than the present one
D to award maximum sentence. We have to perform this onerous duty for self-preservation, i.e., preservation of persons who are living and working in the area where appellants and their group operate.

In view of the aforesaid, while dismissing the appeals and confirming the conviction of the appellants, we enhance the sentence of each of them
E from life imprisonment to death penalty.

B.S. Appeals dismissed.