



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**CRIMINAL APPEAL NO. 68 OF 2019
WITH CRIMINAL APPLICATION NO. 281 OF 2019**

Shaikh Irshad Shaikh Ibrahim
Age: 25 years, Occu.: Labour,
R/o Babar Colony, Opp. I.P. Mess,
Sawarkar Chowk, Aurangabad

..APPELLANT

VERSUS

1. State of Maharashtra
2. Shaikh Hasina w/o Shaikh Rafiq
Age: Major, Occu.: Household,
R/o H.No.3-11-514, Galli No. 25,
Indira Nagar, New Baijipura,
Aurangabad

..RESPONDENTS

**WITH
CRIMINAL APPEAL NO. 906 OF 2024**

State of Maharashtra
Through : Police Inspector,
Police Station, Jinsi, Aurangabad

..APPELLANT

VERSUS

1. Shaikh Irshad Shaikh Ibrahim
Age: 25 years, Occu.: Labourer,
R/o Babar Colony, Opp. I.P. Mess,
Sawarkar Chowk, Aurangabad
2. Shaikh Ejaj shaikh Ibrahim
Age: 28 years, Occu.: Labour,
R/o Babar Colony, Opp. I.P. Mess,
Sawarkar Chowk, Aurangabad
3. Shaikh Ismail Shaikh Ibrahim
Age: 34 years,
R/o Babar Colony, Opp. I.P. Mess,
Sawarkar Chowk, Aurangabad
4. Shaikh Shoeb Shaikh Riyaz
Age: 23 years, Occu.: Labourer,

R/o Baijipura, Indiranagar,
Lane No.23, Aurangabad

..RESPONDENTS

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Mr. N.S. Ghanekar, Advocate for appellant in APEAL/68/2019 and for respondents in APEAL/906/2024

Mrs. S.N. Deshmukh, A.P.P. for State in both the appeals

Mr. A.R. Shaikh, Advocate for respondent no.2 in APEAL/68/2019 (appointed)

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**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ.**
RESERVED ON : 18th NOVEMBER, 2024
PRONOUNCED ON : 22nd NOVEMBER, 2024

JUDGMENT (PER : R.G. AVACHAT, J.) :

1. Mr. N.S. Ghanekar, learned counsel waives for the respondents in Criminal Appeal No. 906 of 2024.

2. Both these appeals are taken up for decision together since the challenge therein is to a judgment and order passed by the Special Court, Aurangabad ('trial Court'), constituted for trial of offences under the Maharashtra Control of Organised Crime Act, 1999 ('MCOC Act'), in Special Case (MCOC Act), No. 3 of 2016 on 29th December, 2018.

3. Criminal Appeal, No. 68 of 2019 has been preferred by convict – Shaikh Irshad ('appellant'), who has been convicted for the offence punishable under Section 302 of the Indian Penal Code ('I.P.C.'), and therefore, sentenced to suffer imprisonment for life and to pay a fine of Rs.25,000/- with default stipulation. Alongwith this appellant, three more then accused (Respondent Nos.2 to 4 in Criminal Appeal, No. 906 of 2024)

('respondents') were put on trial for various offences under Sections 302, 143, 144, 148 and 149 the I.P.C., under Sections 4 read with Section 25 of the Arms Act and for under Sections 3(1)(ii), 3(2) and 3(4) of the MCOC Act. There was one more person involved in the crime alongwith these persons. He was juvenile in conflict with law. He was, therefore, separately tried by the Juvenile Justice Board.

4. The trial Court, on appreciation of the evidence in the case, convicted the appellant – Irshad as stated above and acquitted rest of the then accused i.e. respondents. The State has, therefore, preferred appeal under Section 12 of the MCOC Act against acquittal of the respondents of the offences they were charged with and also against the appellant's acquittal of rest of the offences.

5. The facts, in brief, giving rise to the present appeals are as follows:-

Munnabi (PW 1) was the distant aunt of Rafiq (deceased), who was residing in lane no.25, Baijipura, Aurangabad, along with his wife, Hasina (PW 2). By 07.30 pm., on 04th June, 2016, both, Rafiq and his wife Hasina left the house to buy grocery and milk bag. She was supposed to return her house with those articles since Rafiq was to proceed for prayer (Namaz). On the way, Rafiq went to the house of Munnabi (PW 1) for a while. Hasina (PW 2) stayed outside. Rafiq returned within five minutes. Then, both Rafiq and Hasina proceeded towards the milk dairy. Rafiq went

to fetch milk bag. Hasina was standing by the side of the road. There was a *naan* shop. Hasina (PW 2) saw appellant – Irshad along with Shoeb and Imran (son of Advocate Latif) (both acquitted) standing in front of the *naan* shop. They were eating *naan*. Rafiq mistakenly dashed appellant – Irshad. As a result, *naan* in his hand, fell on the ground. Irshad got annoyed. He abused Rafiq. Rafiq told him that the dash took place inadvertently. He even tendered him apology. Irshad did not listen. The trio – Shoeb, Imran and Irshad started beating him. They took him to lane no.16, near Johra Masjid. Near Johra Masjid, brothers of Irshad namely, Ejaj and Ismile came shouting. They shouted, “Who dashed to their brother and whether, he wants to die”. Hasina intervened to rescue her husband. The assailants pushed her. Shoeb (since acquitted) caught hold of hands of Rafiq and the appellant – Irshad and Imran stabbed him with knife. Ismile and Ejaj (since acquitted) were brandishing knife, so as to prevent the people from intervening to save Rafiq. Hasina, therefore, went to lane no.25 for seeking help. None came forward. She returned back to Johra Masjid. On the way, she met Munnabi (PW 1). By that time, somebody rushed Rafiq to MGM Hospital, for treatment. Both Munnabi (PW 1) and Hasina (PW 2) went to the hospital. Rafiq was in I.C.U. The relatives gathered at the hospital. Considering the condition of Hasina to have been in distress, she was asked to go home. She left for home.

6. Munnabi (PW 1) had learned from the people gathered there that Irshad and others had assaulted Rafiq with knife. After Hasina (PW 2) went

her own home, Munnabi (PW 1) went to Jinsi police station and lodged the FIR. It was by little past 02.00 am., on 05.06.2016, the crime came to be registered vide C.R. No. 230 of 2016, for the aforesaid offences.

7. The appellant and the respondents were arrested. There was fifth accused as well. He was below 18 years of age. On arrest of the appellant and the respondents (acquitted accused), clothes on their persons were seized. The crime-scene panchnama was drawn. Inquest and autopsy were held on the mortal remains of the deceased. Clothes of the deceased also were taken charge of under panchnama. Statements of the persons acquainted with the facts and circumstances the case were recorded. On arrest of the appellant – Irshad, he made disclosure statement, pursuant to which the knife came to be seized. All the seized articles were submitted to R.F.S.L., Aurangabad.

8. During investigation, it was found that number of crimes were registered against appellant - Irshad and some others. An approval for invoking provisions of MCOC Act was obtained. On completion of the investigation, sanction for prosecution of the appellant and the respondents for the offences under the provisions of the MCOC Act was granted by the competent officer. Charge-sheet, thereafter, was filed before the Special Court.

9. The Special Court framed Charge (Exh. 9) for various offences. The accused pleaded not guilty. Their defence was of false implication. To

bring home the charge, the prosecution examined sixteen witnesses and produced in evidence number of documents. On appreciation of the evidence adduced in the case, the trial court convicted appellant – Irshad and acquitted the others (respondents in Criminal Appeal No.906 of 2024). A separate proceedings was filed against the accused, juvenile-in-conflict with law.

10. Learned counsel for appellant – Irshad would submit that the case is based on the evidence of the so-called sole eye witness, Hasina (PW 2) (widow of Rafiq). Her statement was recorded two days after the incident. She claimed to have witnessed the incident. She even went to MGM Hospital along with Munnabi (PW 1). Hasina (PW 2) was said to have not been keeping well for two days. She felt giddiness on having seen her husband in the injured condition. She was not in the mental frame. This is said to be the reason for delay in recording of her statement. According to learned counsel, there was no evidence at all to indicate that PW 2 – Hasina was, in fact, in the company of the deceased when the incident took place. The Investigating Officer has planted her as an eye-witness. No independent witness has been examined. Munnabi's evidence is hit by hearsay. The panch witnesses to the so called disclosure statement and recovery of knife did not stand by the prosecution. He relied on the judgment of the Division Bench in the case of ***Mahesh Sanjay Bansode and Anr. Vs. State of Maharashtra, Criminal Appeal No. 1116 of 2006***, as regards delay in recording of the statement. According to learned counsel, the evidence of

Hasina (PW 2) was not that of sterling quality for sustaining conviction for the serious offence like murder.

Turning to the confessional statement made by appellant – Irshad, learned counsel would submit that no sooner he was produced before the C.J.M., the appellant had retracted the same. The police officials had promised him that his two brothers would not be prosecuted. There is no evidence to indicate that none of the police officials relating to the investigation of the crime was in fact allowed to meet him while he was in the custody of CIDCO Police Station. He would further submit that the appellant did not understand Marathi language. Our attention was drawn to his arrest panchanama and particularly column no. 9 suggesting that the appellant was conversant with Hindi language. The appellant has stated that the police officials had simply obtained his signatures on the written document. Learned counsel would further submit that the confessional statement and reliability thereof are two different factors. Unless corroborated with any material particulars, the confessional statement cannot be acted upon. He, therefore, urged for allowing the appeal.

11. Learned APP and learned counsel representing respondent no.2 would, on the other hand, submit that one has to be in the armchair of a widow whose husband has been murdered in her presence. Same would suggest, in what kind of mental frame she would have been. She had accompanied her husband for purchasing of grocery and milk bag. She had witnessed the incident. In spite of it being a crowded place, nobody came to

rescue of Rafiq or help him out. Hasina (PW 2) had rightly named the assailants on having seen them assaulting her husband. She even attempted to intervene to rescue her husband. She made efforts to get help. She went to the nearby lane. At the time she returned to the crime-scene, somebody had shifted her husband to the hospital. Having seen the scenario at the hospital, Hasina (PW 2) felt giddiness. She had to return to her home. Next day was spent in funeral and other rituals. On the following day, her statement was recorded by the police. She narrated therein how the incident took place. Appellant – Irshad, on arrest, made disclosure statement, pursuant to which a knife came to be seized. Learned APP adverted our attention to the C.A. reports to indicate the knife to have blood stains, however the blood group cannot be determined as the results were inconclusive. Both, learned APP and learned counsel for respondent no.2 meant to say that the same reinforces the prosecution case. The clothes on the person of appellant – Irshad too were stained with blood. According to them, it is not that the conviction cannot be based on the testimony of a sole eye-witness. It is the quality and not the quantity of evidence is to be seen. Both of them relied on the following authorities:-

- (1) ***Shankar alias Gauri Shankar and Ors. Vs. State of Tamil Nadu, 1994 AIR SCW 2083***
- (2) ***Dayal Maroti Lakhote and Anr. Vs. State of Maharashtra, 2004 (1) Bom.C.R. (Cri.) 603***
- (3) ***State of U.P. Vs. Satish, AIR 2005 SC 1000***
- (4) ***Manohar Singh Vs. State of Rajasthan and Ors., Criminal Appeal No. 99 of 2015, Dt. 16th January, 2015 (Supreme Court)***

They would further rely on the confessional statement of the appellant, recorded under Section 18 of the MCOC Act.

12. Let us turn to the evidence in the case and appreciate the same.

Admittedly, Rafiq succumbed to the injuries suffered in the incident on 04th June, 2016. Inquest panchanama (Exh.67) (admitted by the defence) indicates that he suffered injuries with sharp weapons. Dr. Sachin (PW 6) conducted autopsy on the mortal remains of Rafiq. He noticed following external injuries on the person of the deceased :-

“1. Superficial incised wound of size 2 cm x 1 cm x subcutaneous tissue deep horizontally placed over right submandibular region, 4 cm below and right lateral to chin, reddish.

2. Superficial incised wound of size 2.8 cm x 0.1 cm x subcutaneous tissue deep horizontally oblique placed over right side of chest with tail medially and downwards, 6.5 cm below right nipple, reddish.

3. Stab wound of size 3.1 cm x 1.5 cm x muscle deep (3.5 cm on approximation) obliquely placed with medial angle acute and lateral blunt, lower margin abraded, upper margin clean cut and beveled downwards, with a notch of 0.2 cm present 1 cm from acute angle, present over right lumbar region of abdomen, mid axillary line 17 cm above and lateral to umbilicus, reddish. The wound was directed downwards and posteriorly piercing through skin, subcutaneous tissue and muscle.

4. Stab wound of size 2.8 cm x 0.8 cm x peritoneal cavity deep (on approximation 2.9 cm in length) with lateral angle acute and medial blunt, present over right iliac region of abdomen, situated 7 cm below injury number 3), 1 cm below iliac crest and 4 cm behind anterior superior iliac crest, reddish. The wound was directed upwards and medially, piercing through skin, subcutaneous tissue and muscles passing above iliac crest piercing through peritoneum and cutting lateral wall of ascending colon upto muscular layer.

5. Stab wound of size 2.8 cm x 1.5 cm x muscles deep (on approximation 3 cm in length), present over lateral part of axilla, 1 cm

anterior to mid axillary line, 1 cm lateral to axillary fold with blood oozing out through the wound. reddish.

On dissection: the tract of the wound is directed upwards and laterally from skin-subcutaneous tissue to muscles cutting brachial vessels. Left arm muscles and fasciae surrounding the stab wound shows haematoma, reddish.

6. infected wound of size 0.5 cm x 0.5 cm present over posterior aspect of right shoulder, reddish yellow.

Therapeutic pinpoint puncture wound of i.v. line present over right hand dorsum, reddish.”

Upon internal examination, he found corresponding injuries as well. The postmortem examination report (Exh.71) states in no uncertain terms that Rafiq died of, “hemorrhagic shock due to stab injuries”.

13. The appellant and the respondents did not dispute Rafiq met with homicidal death. The question is whether they are the authors of his homicidal death. We, therefore, turn to the other evidence on record.

14. The F.I.R. (Exh.23) was lodged by Munnabi (PW 1). Her evidence disclosed that her residence is in Lane No.25, Baijipura, Aurangabad. By 08:00 p.m. on 04th June, 2016, Rafiq had been to her residence. He told her that he was proceeding to buy the milk bag and also for prayer (namaj). Rafiq left her house in a while. Within minutes thereof, she heard commotion emanating from the masjid side. She, therefore, went towards the masjid. She saw blood on the road. Some persons told her the appellant and the respondents to have knifed Rafiq and he was carried to MGM Hospital. Hasina (PW 2) met her around. Both of them, therefore,

went to the MGM Hospital in an auto-rickshaw. Rafiq was being treated in ICU. The medical officer there, however was unsuccessful to save his life. Rafiq was declared dead. Munnabi, therefore, approached Jinsi Police Station and lodged the F.I.R. (Exh.23) against the appellant and respondents – Ejaj and Ismail.

15. Based on her F.I.R., a crime, vide C.R. No. 3 of 2016 was registered. Involvement of respondent - Shoeb was also made out during investigation besides involvement of one juvenile.

16. The evidence of Munnabi (PW 1) is only relevant to the extent of setting the criminal law in motion by filing the F.I.R. (Exh.23). Admittedly, she did not witness the incident. Soon before the incident, the deceased had been to her residence. Her evidence disclose that she met Hasina (PW 2) at the crime scene and both of them went to MGM hospital in an auto-rickshaw. During her cross-examination, she has admitted that Hasina did not have interaction with her on way to the hospital. She was confronted with her supplementary statement and even the F.I.R. as well that Hasina became unconscious on having seen Rafiq dead and she regained consciousness after two days.

17. Hasina (PW 2) is the widow of deceased – Rafiq. She testified that on 04th June, 2016 by 07:00 p.m. she left the home alongwith her husband for purchase of grocery and milk. She was to return with grocery,

however her husband was to proceed to masjid for prayer (namaj). On the way, her husband went to the house of Munnabi. She remained outside. He returned within five minutes. Both of them thereafter went to buy milk. Rafiq went to a milk dairy. She remained present at the road side. There was a *naan* shop. When her husband (deceased) returned from dairy, she saw Irshad, Shoeb and Imran (juvenile) were standing in front of the *naan* shop. They were eating *naan*. Her husband happened to dash Irshad inadvertently. As a result, *naan* in his hand fell on the ground. Irshad got annoyed thereby. He abused her husband and questioned him as to whether he did not know who he was. Hasina further testified that Rafiq tendered apology and told Irshad that the dash was not intentional. Irshad still did not listen. The trio, Irshad, Shoeb and Imran started beating up Rafiq. They took him in lane no.16 near Johra Masjid. Respondents – Ejaj and Ismail, brothers of Irshad, joined them. Hasina claimed to have intervened to rescue her husband. The appellant, however pushed her away. Respondent – Shoeb held hands while appellant – Irshad and respondent - Imran stabbed Rafiq. Both, Ismail and Ejaj were threatening the people around by brandishing knife so as to prevent them to intervene to rescue Rafiq.

18. Hasina further testified that she went to lane no.25 asking for help. Nobody came forward to help her out. She, therefore, returned to the back side of Johra Masjid. On the way she met with Munnabi (PW 1). They learnt Rafiq to have been shifted to hospital. Both of them, therefore, went to MGM

hospital. Having seen the condition of her husband, she felt giddiness and fell down. Relations brought her back to her residence. Munna Bee (PW 1) stayed behind. After sometime she came to her (Hasina) residence and told Rafiq to have passed away. On hearing the same, her health worsen. She went on to state that after two days she alongwith Munnabi (PW 1) went to Jinsi Police Station. She narrated the incident. The police officer there recorded the same.

19. Hasina (PW 2) was subjected to a searching cross-examination. It has been brought on record that there were many lanes at Baijipura. There were sub-lanes as well. It was a populated area. Johra Masjid was located in lane no.16. To reach there, one has to cross two lanes. The masjid was in the lane besides the lane wherein her residence was. Further questions put to her during cross-examination indicate that topography of the crime scene has been brought on record.

20. She further testified to have good relations with Munnabi (PW 1). According to her, Munnabi was her relative from her husband's side. She could not state when she lastly visited the house of Munnabi. She even did not state as to why she had not joined her husband to the house of Munnabi, while both of them were on the way to buy grocery and milk.

21. They would usually purchase grocery from, "R.K. Grocery Shop". She did not see her husband being taken away to the hospital. She claimed

ignorance that Rafiq was taken to the hospital in a tractor. She learnt that Rafiq was being treated in MGM Hospital. Thereafter both, Munnabi and herself went to MGM Hospital in an auto-rickshaw. She did not see police chowki on the premises of MGM Hospital. Her cousins, Haroon and Usman were present at the hospital. The doctors there asked the relatives to stay behind and she was asked to go home. Therefore, she was taken back to her home in one auto-rickshaw. She testified that it was only on 06th June she narrated the names of the assailants to the police for the first time. Relations had gathered at her residence. Discussion took place over the incident. Munnabi (PW 1) had to go to her residence after half an hour after her return to the house from hospital. She (Hasina) had not been admitted to the hospital. She told Munnabi (PW 1) names of the assailants. She, however did not relate her cousins the names of the assailants. She did not have a cell phone with her while the incident took place. She wanted to see Rafiq in the hospital. The doctors, however did not permit her. She had to return home without seeing Rafiq. According to her, she did not feel giddiness and fell down after having the seen Rafiq. She admitted to have stated accordingly in her statement to the police. Rest of the questions put to her were in the nature of denial of her testimony in examination-in-chief.

22. Sanjay Maske (PW 3) is a panch witness to the disclosure statement made by respondent – Shoeb. It is in his evidence that Shoeb disclosed that he would take out the clothes on his person at the relevant time from Baijupura. A panchnama to that effect was drawn, which is at

Exhibit 60. Shoeb then took the police and panchas in lane no.13 at Baijipura. He took them to one house. He took out the clothes from one almira. Police seized the same under pachanama (Exh.61).

He was not substantially cross-examined. He did not state who was the owner of the house to which he had taken them.

23. Sanjay Gawande (PW 4) and Bhagvan (PW 5) were the police officials, who carried the seized articles to R.F.S.L. Aurangabad. Office copies of the forwarding letters find place at Exhibit 63 and 66 respectively.

24. Lalman (PW 7) was a witness to the panchanama of the seizure of clothes of Irshad (Exh.76). He did not stand by prosecution. When he was subjected to a cross-examination by learned A.P.P., he gave positive answers that pursuant to the statement made by Irshad a knife was seized from his house. He referred to the disclosure statement made by Irshad. It is at Exhibit 77, while panchanama relating to seizure of knife is at Exhibit 78. Again, during cross-examination undertaken on behalf of the appellant he stated that all the articles were shown to him at the police station and his signatures were obtained on the documents at the police station itself.

25. Majid (PW 8) too did not stand by prosecution.

26. Shaikh Javed (PW 9) testified that he was serving as Moazam with Johra masjid. At 08:45 p.m. on 04th June, 2016 he offered namaj. After five minutes he heard some commotion. He saw crowd was gathered and

one person was lying injured. Some persons from the crowd took the injured somewhere else (hospital). After a while, police came there. It was 01:45 a.m. He was asked to open the masjid. He opened it. The police prepared the panchanama there and recorded his statement.

This witness was not cross-examined by the defence.

27. Hanumant (PW 10) was the Police Inspector attached to the Control Room. Initially he was entrusted with the investigation of the crime. He prepared the spot panchanama (Exh.90). He seized blood stained shirt from the crime scene under panchanama (Exh.91). He then went to Ghati Hospital and prepared inquest (Exh.67). He recorded supplementary statement of both, Munnabi (PW 1) and Hasina (PW 2). Further investigation was carried out by Police Officer Bahure (PW 14).

During his cross-examination he testified that he visited the house of the deceased and recorded statement of his widow. Then he came to know that she was the eye witness of the incident. He learnt that her cousins viz. Haroon and Usman were present at the MGM Hospital. He, however did not make any enquiry with them.

28. Bahure (PW 14) testified that he recorded the disclosure statement (Exh.60) made by respondent – Shoeb, pursuant to which he seized a knife under panchanama Exhibit 61. He sent some muddemal articles to R.F.S.L., Aurangabad. He then handed over the investigation to Wasurkar, Police Inspector (PW 16).

29. Amitesh Kumar (PW 12) was working as Joint Commissioner of Mumbai. It was he, who accorded approval (Exh.115) for invoking offences under the MCOC Act. He referred to a proposal (Exh.116) in that regard received from Wasurkar, P.I. (PW 16).

30. Dnyanoba (PW 11) was the Assistant Commissioner of Police. He was assigned with the investigation of the crime. Since provisions of MCOC Act were invoked, he succeeded Wasurkar. Irshad made him a statement. He, therefore, informed the same to the Commissioner of Police ('CP') about it. The CP, therefore, directed Pardeshi, Dy.CP (PW 13) to record Irshad's confessional statement. He, therefore, produced Irshad before Pardeshi for recording his confessional statement.

Confessional Statement :-

31. Pardeshi (PW 13) was the officer in the rank of Superintendent of Police. He testified that CP directed him to record confessional statement, if any, to be given by Irshad. He referred to the letter in that regard (Exh.119). He testified that one Mundhe, ACP produced Irshad before him on 22nd July, 2016. The appellant was produced through Paralikar, PSI. On his production before him, he asked Paralikar to leave his chamber. He obliged. The appellant was not handcuffed. He took all the precautions that whatever talk was to be made in his chamber could not be overheard from outside. His stenographer, Mr. Avhale was with him. He testified to have found the accused to have been comfortable with a particular language. Then he

introduced himself and informed to have no connection with the investigation of the crime. On enquiry with the appellant, he told him to have desire to confess to the crime. He then enquired with him as to whether he was tortured or promised anything to make the confession. The appellant replied in negative. He then questioned him as to whether he was going to make the confession voluntarily. He replied in positive. Pardeshi went on to state to have informed the appellant that he was not bound to make a confessional statement. He even informed him that if he made the same, it will be used against him and co-accused as well. The appellant told him to have understood the same. The reading of examination-in-chief of Pardeshi (PW 13) indicates that he made compliance of the mandatory provisions of Section 18 of MCOC Act and Rule 3 of MCOC Rules, 1999. We, therefore, do not propose to reproduce further evidence in extenso.

32. His testimony further suggests that he gave Irshad twenty-four hours time for reflection. He was given in the custody of Mr. Bankar, ASI with a direction to keep him in the lockup of CIDCO Police Station. The police officers were instructed that no policemen connected with the investigation or anyone else shall be allowed to meet the appellant during his stay in the lock-up at CIDCO Police Station. He asked Mr. Bankar, ASI to produce Irshad before him on 24th July by 12:30 p.m. Whatever interaction took place between Pardeshi (PW 13) and Irshad on 22nd July was typed written. It was stated to be Part I of the confessional statement. It is at Exhibit 121.

33. Evidence of Pardeshi (PW 13) further indicates that on 24th July Mr. Bankar, ASI produced Irshad before him by 12:30 p.m. Close reading of his evidence would indicate that he did the same exercise which he had done before recording Part I of the confessional statement. In short, he made interaction with Irshad to find that he wanted to make the confessional statement voluntarily. He was neither influenced nor tortured or promised to make such a statement. After having assured of the same, he recorded Irshad's confessional statement. Part II of the confessional statement is at Exhibit 122. The same bears signatures of Irshad and that of Pardeshi (PW 13). We have perused the same to find Pardeshi to have had taken all the precautions which were required to be taken before recording the confessional statement.

34. It is true that Irshad was directed to be produced on 23rd July, but was produced before Pardeshi (PW 13) on 24th July. No questions in that regard were put to any of the prosecution witnesses including Pardeshi (PW 13), who recorded the confessional statement. As such, the prosecution lost opportunity to explain why the appellant was not produced on 23rd July itself. In our view, the same would indicate that the appellant got twenty-four hours more time for reflection whether to make a confessional statement.

35. The confessional statement made by Irshad reads thus :-

"मी शेख इश्दी शेख इब्राहिम वय-२४ वर्षे रा. बाबर कॉलनी, आय.पी. मेस समोर औरंगाबाद समक्ष पोलीस उप आयुक्त (परिमंडळ-१) यांनी विचारल्या वरून जबाब देतो की, मी वरील ठिकाणी माझी आई फरीदा, मोठा भाऊ शेख इस्माईल, शेख फारुख, शेख एजाज व लहान

भाऊ शेख उमर असे आईचे नावावर असलेल्या घरात एकत्र राहतो. मी पेन्टरचे काम करून त्यामधून आलेले पैसे खान्यापिण्यासाठी खर्च करीत होतो. माझा मोठा भाऊ शेख इस्माईल हा जुन्या चारचाकी गाड्यांचा खरेदी विक्रीचा व्यवसाय करतो. शेख फारुख व शेख एजाज हे सर्विस सेंटरवर काम करतात. शेख उमर हा अपंग असल्याने घरीच असतो. माझे शिक्षण ५ वी पर्यंत फातेमा स्कुल येथे झालेले आहे.

दि.०४/०६/२०१६ रोजी संध्याकाळी आठ वाजेचे दरम्यान मी व माझे मित्र नामे १. शेख शोएब शेख रियाज २. मोहम्म इम्रान मोहर द लतीफ असे आम्ही इम्रान याच्या पांढऱ्या रंगाच्या अॅक्टीवा गाडीवर ट्रिपलसीट बसून गल्ली नं. १६ बायजीपुरा समोरील रोडवर भटयार खान्याचे टपरीजवळ गेलो. तेथे मी सिगारेट पिऊन भटयार खाना येथे नान रोटी व जेवणाचे सामान घेतले. ते सामान घेऊन आम्ही तिघे जात असतांना मला एका इसमाचा जोराचा धक्का लागला. त्यावर मी त्यास "अंधा है क्या? देखके नहीं चल सकता क्या?" असे म्हणाल्याने त्याने मला मादरचोद म्हणुन शिवीगाळ करून हाताचापटाने मारहाण करून माझे सोबत भांडण केले. तेव्हा मोहम्मद इम्रान यास पण त्या इसमाने शिवीगाळ करून मारहाण करून बाजुला लोटले. त्यावेळी मोहम्मद इम्रान मोहम्मद लतीफ याने त्याचे जवळील चाकुने त्या इसमाच्या बगलमध्ये वार केला. मी माझ्या जवळील चाकुने त्याच्या पोटात दोन चार केले. तेव्हा शेख शोएब शेख रियाज याने त्या इसमास लाथाबुक्क्याने मारहाण केली. त्यानंतर तो इसम जखमी आवस्थेत गल्ली नं.१६ मध्ये पळून जोहरा मस्जिदमध्ये गेला. आम्ही तिघांनी त्याचा पाठलाग केला परंतु मस्जिदमध्ये बरेच लोक असल्याने आम्ही तिघे जण अॅक्टीवा गाडीवर ट्रिपल शिट बसून पळून गेलो. आम्ही ज्याला जखमी केले होते तो बायजीपुरा येथील राहणारा असुन त्याचे नाव शेख रफिक शेख खाजा असे असल्याचे व तो मयत झाल्याचे मला दुसऱ्या दिवशी कळाले. मी गुन्ह्यात वापरलेला चाकु व गुन्हा करतांना घातलेले कपडे माझ्या घरात लपवुन ठेवलेले होते. मला गुन्ह्यात अटक झाल्यानंतर मी गुन्ह्यात वापरलेला चाकु व कपडे दि.०९/०६/२०१६ रोजी माझ्या घरातुन पोलीसांना काढून दिलेले आहेत."

36. A separate certificate, as is required in terms of Section 18 (3) of the MCOC Act, has been with the confessional statement. The certificate is under the signature of Pardeshi (PW 13).

37. True, as per the statutory mandate, the appellant was produced before learned Chief Judicial Magistrate on 25th July, 2016, i.e. on the following day of recording of his confessional statement. The statement made by the appellant before the CJM reads thus :-

"मी पोलीसांसमोर कोणताही जबाब दिला नाही. मला मराठी भाषा येत नाही. पोलीसांनी माझी फक्त जबाबावर सही घेतली. ती सही घेण्याकरिता पोलीसांनी मला माझे दोन्ही भाऊ,

त्यांच्यावर असलेल्या गुन्ह्यातून सुटून जातील असे अमिष दिले. म्हणून मी पोलीसांनी सांगितले म्हणून त्यावर सही केली. पोलीसांनी माझा अंगठादेखील घेतला मात्र पोलीसांनी बयाण म्हणून काय लिहून घेतले हे मला वाचून दाखविले नाही.”

38. Then order passed by CJM on 25th July, 2016 reads thus :-

“Accused Shaikh Irshad s/o Shaikh Ibrahim is produced before me by A.S.I., Sanjay Bankar, Jinsi Police Station, Aurangabad. The accused does not make complaint regarding torture. The accused states that the present statement is forcibly taken by police. The statement is not read over to him. He does not know that what is written in this statement and only his signature obtained by police. So statement of the accused has got separately recorded accordingly, which is signed by the accused and it is attached herewith.”

39. Learned counsel for the appellant would submit that the appellant had made clear that he did not understand Marathi. He took education in Urdu medium school. Our attention was adverted to the arrest form of the appellant to indicate that he was conversant with Hindi. The same, however does not disclose that he was conversant with Hindi only. Whatever was stated by the appellant on his production before the CJM has been recorded in Marathi. Necessarily in the language in which it was stated. It is presumed that official act has been performed in regular course of business. To top it, the questions put to the appellant during his examination under Section 313 of Code of Criminal Procedure were in Marathi. He answered all those questions in Marathi only. It, therefore, cannot be said that the appellant did not know Marathi. Admittedly, he was brought up in Maharashtra. Then learned counsel took us through the confessional statement to submit that the same is in chaste Marathi. Had the appellant really made the confessional statement, it would have been in broken

Marathi. It has already been stated that Pardeshi (PW 13) has testified on oath that whatever was disclosed and stated by the appellants was reduced into writing (typing) by his stenographer as it is.

40. True, no sooner the appellant was produced before the CJM, he retracted from his confessional statement. It appears that CJM was only expected to verify whether the appellant was tortured or he has any complaint to make against the police officials regarding compelling him to make a statement. Admittedly, the appellant did not make any complaint against any police officer. Learned CJM made a mistake that he opened the sealed cover containing the appellant's confessional statement and read it over to him. Then appellant stated to have not made the same. According to him, his signatures were simply obtained. He was promised that his two brothers would not be prosecuted if he makes such a statement.

Appreciation :-

41. The criminal law was set in motion by Munnabi (PW 1), who was not an eye witness to the incident. Her evidence was, therefore, of little consequence to further the prosecution case. The only material evidence is that of Hasina (PW 2), widow of the deceased. She claimed to have been in the company of the deceased while the incident took place. Her evidence indicates that she alongwith Munnabi (PW 1) went to MGM Hospital in an auto-rickshaw. Her evidence indicates that she was aware of the names of the assailants. On the way to the hospital she did not share anything to

Munnabi about the incident. Munnabi (PW 1) lodged the F.I.R. (Exh.23) naming the assailants. Her case was that she learnt the names of the assailants from the onlookers. When Hasina (PW 2) reached the hospital, her two cousins were there. She did not share them the incident too. In one breath she stated that she felt giddiness and fell down on having seen the deceased in injured state in the hospital. In the second breath, she testified that she had no occasion to see her husband in the hospital, since he was in ICU. She admitted to have not felt giddiness or fell down. She being the widow of the deceased and her husband to have passed away, her relations and the doctors naturally advised others to ensure that she be sent home. She, therefore, went to her home. The prosecution had come with a case that she was not keeping well for two days. The evidence is, however contrary. She admitted to have never been admitted to the hospital. There is even nothing to indicate that she was required to be extended medical treatment. It is true that one can understand the plight of a woman, whose husband was murdered. The funeral took place on the following day. Thereafter one day passed by. She testified that on 06th June she accompanied Munnabi (PW 1) to the police station to narrate the eye witness account. The police accordingly recorded the same. Whereas, Hanumant (PW 10) testified that on 06th June he went to the house of the deceased and recorded the statement of Hasina (PW 2) and then only he realised that she was an eye witness to the incident. Being the widow of the deceased, claiming to have witnessed the incident, did not report the incident to the police immediately when there was police outpost on the premises of MGM

Hospital itself and even for next two days, lead us to conclude that her evidence does not inspire confidence. She might not have been in the company of her husband while the incident took place. Her two elder cousins were on the Hospital premises. She even did not narrate them the names of the assailants. Nor did she relate the names of the assailants to the informant, while both of them were together for long. As such, in our view, the prosecution may be said to have not proved the appellant and the respondents to have committed the offence. There is, however another aspect of the matter i.e. confessional statement of Irshad admissible in evidence in view of Section 18 of the MCOC Act. Before advertent thereto, a glance at certain provisions of MCOC Act is a must, which read thus :-

“(I) The statement of object and reasons of MCOCA indicates that, it was found expedient to make special provisions for prevention and control of and for coping of criminal activities by organised crime syndicate or gang and for matter connected therewith.

Organised crime has, for quite some years, now come up as a very serious threat to our society. It knows no national boundaries and is fueled by illegal wealth generated by contract killings, extortion, smuggling in contrabands, illegal trade in narcotics, kidnappings for ransom, collection of protection money and money laundering etc. The illegal wealth and black money generated by the organised crime is very huge and has serious adverse effect on our economy. It is seen that the organised criminal syndicates make a common cause with terrorist gangs and foster narco terrorism which extend beyond the national boundaries. There is reason to believe that organised criminal gangs are operating in the State and thus, there is immediate need to curb their activities.

It is also noticed that the organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

The existing legal frame work i.e. the penal and procedural laws and the adjudicatory system are found to be rather inadequate to curb or control the menace of organised crime. Government has, therefore, decided to enact a special law with stringent and deterrent provisions including in certain circumstances power to intercept wire, electronic or oral communication to control the menace of the organised crime.

(II) Section 3 of the MCOCA prescribes for punishment for organised crime and other offences. Section 3 reads thus :

3.(1) Whoever commits an offence of organised crime shall,— (i) if such offence has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees one lac;

(2) Whoever conspires or attempts to commit or advocates, abets or knowingly facilitates the commission of an organised crime or any act preparatory to organised crime, shall be punishable with imprisonment for a term which shall be not less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(3)

(4) Any person who is a member of an organised crime syndicate shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(III) For being an organised crime within the meaning of Section 2(c) of the MCOCA, it has to be proved that it was a continuing unlawful activity of an organised crime syndicate. For an activity to be continuing unlawful activity,

(a) the activity must be prohibited by law;

(b) it must be a cognizable offence punishable with imprisonment of three years or more;

(c) it must be undertaken singly or jointly;

(d) it must be undertaken as a member of an organised crime syndicate or on behalf of such syndicate;

(e) in respect of which more than one charge-sheet have been filed before a Competent Court and the Court has taken cognizance thereof.

(IV) For prosecution for the offence of abetment of organised crime, it is not necessary that more than one charge sheet to have been filed before the competent Court within the preceding period of ten years

and that Court has taken cognizance of such offence. Abetment of an organised crime and the organised crime are two different and distinct offences. However, for an offence of being a member of an organised crime syndicate, in our view, the requirement of filing of more than one charge sheets as is required within the term of continuing unlawful activity, within the meaning of Section 2(1) (d), would be a condition precedent.”

42. As per the case of prosecution itself the incident took place as a result of inadvertent collusion of the deceased with the appellant. A quarrel, therefore, ensued between the two and the rest followed. Moreover, the Investigating Officer has admitted that the appellant and the respondents have never committed a crime jointly and no charge-sheet has been filed against them or any of them in a Court of competent jurisdiction for a particular kind of offence in terms of definition of a continuing unlawful activity. By no stretch of imagination it could be said that the offence in question was an organised crime, punishable under Section 3 of the MCOC Act.

43. Section 11 of the MCOC Act reads thus :

*“11. Power to transfer cases to regular Courts :
Where, after taking cognizance of an offence, a Special Court is of the opinion that the offence is not triable by it, it shall, notwithstanding that it has no jurisdiction to try such offence, transfer the case for trial of such offence to any Court having jurisdiction under the Code and the Court to which the case is transferred may proceed with the trial of the offence as if it had taken cognizance of the offence.”*

44. In the case in hand, none of the accused before the Trial Court resorted to Section 11 of the MCOCA. The Charge (Exh.9) was framed. The

appellant faced the charge for offences under Sections 3(1)(ii), 3(2) and 3(4) of the MCOC Act. This provision (Section 11) has some relevance in this case and, therefore, mention thereof has been made.

45. The relevancy is as regards admissibility of confessional statements. In this case, appellant made confessional statement. Before adverting to evidence in that regard, it would be apposite to reproduce relevant provisions and rules thereunder in that regard. Section 18 of the MCOCA reads :

“18. Certain confessions made to police officer to be taken into consideration :-

(1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872, but subject to the provisions of this Section, a confession made by a person before a police officer not below the rank of the Superintendent of Police and recorded by such Police Officer either in writing or on any mechanical devices like cassettes, tapes or sound tracks from which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator :

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

(2) The confession shall be recorded in a free atmosphere in the same language in which the person is examined and as narrated by him.

(3) The police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he is satisfied that it is being made voluntarily. The concerned police officer shall, after recording such voluntary confession, certify in writing below the confession about his personal satisfaction of the voluntary character of such confession, putting the date and time of the same.

(4) Every confession recorded under sub-section (1) shall be sent forthwith to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate having jurisdiction over the area in which such confession has been recorded and such Magistrate shall forward the recorded confession so received to the Special Court which may take cognizance of the offence.

(5) The person from whom a confession has been recorded under sub-section (1) shall also be produced before the Chief Metropolitan Magistrate or the Chief Judicial Magistrate to whom the confession is required to be sent under sub-section (4) along with the original statement of confession, written or recorded on mechanical device without unreasonable delay.

(6) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate shall scrupulously record the statement, if any, made by the accused so produced and get his signature and in case of any complaint of torture, the person shall be directed to be produced for medical examination before a Medical Officer not lower in rank than of an Assistant Civil Surgeon.”

46. Rule 3 of the MCOC Rules, 1999 reads :-

“3. Procedure for recording of confession under Section 18 of the Act.

(1) The Police Officer recording a confession under Section 18 of the Act shall record it as provided in sub-rules (2) to (7) of this rule.

(2) When the person whose confession is to be recorded is produced before such Police Officer, no Police Officer who has taken part in the investigation of the offence in connection with which the confession is being recorded, shall be allowed to remain present at the time of recording of the confession.

(3) The Police Officer recording the confession shall explain to the person making the confession that he is not bound to make such confession and that if he does so, such confession may be used as evidence against him.

(4) After having been so explained and warned, if such person adheres to his intention and insists on making a confession, the concerned Police Officer, who is to record the confession shall give, not less than 24 hours time to the person making the confession for reconsideration of his decision to make confession.

(5) After elapsing of the time given under sub-rule (4), when such person is again brought before such Police Officer, he shall once again ascertain from the person intending to make the confession whether he is still willing to make a confession. Upon such person reiterating his desire to make a confession, the concerned Police Officer shall record in writing the confession of such person in the same language and as narrated by the confessor.

(6) The confession recorded under sub-rule (5) shall, if it is in writing, be signed by the person who has made such confession and by Police Officer, who has recorded the said confession. Such Police Officer shall, under his own hand, also make a memorandum at the end of the confession to the following effect :--

“I have explained to (name of the confessor) that he is not bound to make a confession and that, if he does so, any confession that he makes, may be used as evidence against him and I am satisfied that this confession has been made voluntarily. It has been made before me and in my hearing and has been recorded by me in the language in which it is made and as narrated by, the confessor. I have read it over to the confessor and he has admitted it to be verbatim and correct, and containing also full and true account of the confession/ statement made by him.”

(7) Where the confession has been recorded on any mechanical device, the memorandum referred to in sub-rule (6) above, in so far as it is applicable, shall be incorporated in the form of a declaration made by the Police Officer recording the confession, by recording such declaration on the mechanical device at the end of the confession to the effect that the confession recorded on the mechanical device has been correctly recorded in his presence and hearing and that the recorded statement/ confession has been played back to the confessor and after hearing it, it has been admitted by him to be full, correct and without any technical faults in recording.

(8) The Police Officer recording the confession shall, after forwarding the certified copy of the confession made or retraction, if any, thereof, to the Chief Magistrate or the Chief Judicial Magistrate as provided in sub-section (4) of Section 18 of the Act and after ascertaining that the Chief Magistrate or the Chief Judicial Magistrate has, as provided in sub-section (6) of the said Section 18, forwarded the confession to the Special Court for taking cognizance of the offence, supply a copy of the confession recorded by him to the Investigating Officer, who is

conducting investigation into the offence in connection with which, or relating to which, such confession has been made, for the purpose of investigation.”

47. Section 15 of the TADA reads thus :

“15. Certain confessions made to police officers to be taken into consideration : -

(1) Notwithstanding anything contained in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this Section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or soundtracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under this Act or rules made thereunder:

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

48. Section 18 of the MCOC Act is para materia with Section 15 of the TADA. In case of ***State through Superintendent of Police, CBI/SIT Vs. Nalini & ors. (1999) 5 SCC 253***, it has been held :-

“B. Terrorist and Disruptive Activities (Prevention) Act, 1987 – Ss. 15 & 21 – Evidentiary value of confession recorded by Police Officer under S.15 against its maker and against a co-accused, abettor or conspirator – Effect of non obstante clause in S.15(1)– S. 30 of Evidence Act whether excluded thereby – Effect of addition of words “or co-accused, abettor or conspirator” in sub-section (1) of S.15 and deletion of cls. (c) and (d) of S.21 by Amending Act 43 of 1993 – Words ‘substantive evidence’ – Meaning of – Words “shall presume” in S.21(1) – Connotation of – Held, (per majority, Thomas, J. contra) confession of an accused is admissible as a substantive evidence against himself as well as against a co-accused, abettor or conspirator – But as a matter of prudence Court should require some corroboration of confession when used against a co-accused– Decision in Kalpnath Rai v. State overruled – Words and phrases – Evidence Act, 1872, S.30 – Confession under S.15 TADA Act.”

In paragraph No.81 of the judgment in case of Nalini (supra), it has been observed:-

“81. Section 15 of TADA enables the confessional statement of an accused made to a police officer specified therein to become admissible “in the trial of such a person”. It means, if there was a trial of any offence under TADA together with any other offence under any other law, the admissibility of the confessional statement would continue to hold good even if the accused is acquitted under TADA offences.”

49. Moreover, in case of **Mohd. Farooq Abdul Gafur and Ors. Vs. State of Maharashtra, (2010) 14 SCC 641**, it has been held :-

“C. Maharashtra Control of Organised Crime Act, 1999 (30 of 1999) – Ss. 18 & 29 and R.3(6), MCOC Rules, 1999 – Confession of co-accused – Conviction of A-1 on basis of confession of A-5 and A-6 – Permissibility – Held, confessional statement of co-accused can form basis of conviction under MCOCA–Maharashtra Control of Organised Crime Rules, 1999– R. 3(6) – Criminal Trial – Confession – Confession under special statutes.

D. Maharashtra Control of Organised Crime Act, 1999 (30 of 1999) – Ss. 18 & 29 and R.3(6), MCOC Rules, 1999 – Confession of accused and co-accused- Conviction on sole basis of – Sustainability – Held, Conviction can be based solely on basis of confessional statement of accused and also the co-accused – Further held, evidence of co-accused is admissible as a piece of substantive evidence and in view of non obstante clause in S. 18 of MCOCA, Cr.P.C. would not apply – Maharashtra Control of Organised Crime Rules, 1999 – R. 3(6).”

50. It is reiterated that, the confessional statement recorded by competent officer under the Special Statute is held to be a substantive piece of evidence against the maker thereof and even a co-accused charged and tried along with the maker. Confessional statement can be acted upon if it is found to be made voluntarily and is true. In case of **Bharat Vs. State of U.P. (1971) 3 SCC 950**, it has been observed :

“7. . . . Confessions can be acted upon if the court is satisfied that they are voluntary and that they are true. The voluntary nature of the confession depends upon whether there was any threat, inducement or promise and its truth is judged in the context of the entire prosecution case. The confession must fit into the proved facts and not run counter to them. When the voluntary character of the confession and its truth are accepted it is safe to rely on it. Indeed a confession, if it is voluntary and true and not made under any inducement or threat or promise, is the most patent piece of evidence against the maker. Retracted confession, however, stands on a slightly different footing. As the Privy Council once stated, in India it is the rule to find a confession and to find it retracted later. A court may take into account the retracted confession, but it must look for the reasons for the making of the confession as well as for its retraction, and must weigh the two to determine whether the retraction affects the voluntary nature of the confession or not. If the court is satisfied that it was retracted because of an afterthought or advice, the retraction may not weigh with the court if the general facts proved in the case and the tenor of the confession as made and the circumstances of its making and withdrawal warrant its use. All the same, the courts do not act upon the retracted confession without finding assurance from some other sources as to the guilt of the accused. Therefore, it can be stated that a true confession made voluntarily may be acted upon with slight evidence to corroborate it, but a retracted confession requires the general assurance that the retraction was an afterthought and that the earlier statement was true.”

51. In case of **State of T.N. Vs. Kutty Alias Laxmi @ Narsimhan, (2001) 6 SCC 550** it has been observed :-

“13. It is not the law that once a confession is retracted the Court should presume that the confession is tainted. As a matter of practical knowledge, we can say that a non-retracted confession is a rarity in criminal cases. To retract from a confession is the right of the confessor and all the accused against whom confessions were produced by the prosecution have invariably adopted that right. It would be injudicious to jettison a judicial confession on the mere premise that its maker has retracted from it. The Court has a duty to evaluate the evidence concerning the confession by looking at all aspects. The twin test of a confession is to ascertain whether it was voluntary and true. Once those tests are found to be positive the next endeavor is to see whether there

is any other reason which stands in the way of acting on it. Even for that, retraction of the confession is not a ground to throw the confession overboard.”

52. Learned A.P.P. has relied on the judgment of the Apex Court in case of Shankar alias Gauri Shankar (supra) and particularly paragraph no.32 thereof which reads thus :-

“32. At this stage we may usefully refer to the principles governing the evidentiary value of retracted confession. The confession is a form of admission consisting of direct acknowledgment of guilt in a criminal charge. It must be in express words by the accused in a criminal case of the truth of the guilt fact charged or some essential part of it and a statement that contains a self-exculpatory matter can not amount to a confession. The confession should be a voluntary one, that means not caused by inducement, threat or promise. Whether a confession is Voluntary or not is essentially a question of fact. The judicial confessions are those which are made before a magistrate or in Court in due course of legal proceedings and when such a confession is retracted, the courts have held that apart from the statement being voluntary it should be true and should receive sufficient corroboration in material particulars by independent evidence. The rule of prudence namely requiring corroboration does not mean that each and every circumstances mentioned in the confession with regard to the participation of the accused in the crime must be separately and independently corroborated. It is sufficient if there is general corroboration of the important incidents, just like in the case of an approver's evidence and it is not necessary that the corroborate evidence itself should be sufficient for conviction. It may not be necessary to refer to remaining aspects governing the use of retracted confession for the purposes of this case. Suffice it to say that it is also laid down that it is not illegal to base a conviction on an uncorroborated confession of an accused person but as a rule of prudence which has sanctified itself to the rule of law, the Courts do look for corroboration before acting upon and accepting the retracted confession and what amount of corroboration would be necessary in a case would be a question of fact to be determined in the light of the circumstances of the case. (See Balbir Singh v. State of Punjab, AIR 1957 SC 216 , Swaran Singh Rattan Singh v. State of Punjab, AIR 1957 SC 637, Ediga

Anamma v. State of Andhra Pradesh, AIR 1974 SC 799 and State of Uttar Pradesh v. Boota Singh and Ors., AIR 1978 SC 1770).

53. Then she relied on another judgment in case of Dayal Maroti Lakhote and Anr. (supra) so as to make out a case of the appellant and the respondents to have committed the offence in furtherance of common intention, and therefore, liable for punishable for the same offence with same punishment.

54. The judgment relied on by learned A.P.P. in case of Gaurishankar (supra) was in relation to a judicial confession, which always made to a Magistrate or the Court during trial.

55. We have already referred to the above Apex Court judgment wherein it has been observed that a confessional statement recorded under a special statute is a substantive piece of evidence against the maker thereof and the co-accused as well, who is prosecuted alongwith the maker thereof. The judgment in case of Gaurishankar (supra) would, therefore, be of not much assistance for the prosecution.

56. Learned counsel for the appellant has relied on the judgment of this Court in case of ***Prasad Jagannath Shetty Vs. State of Maharashtra, Criminal Appeal No. 871 of 2018***. He adverted our attention to paragraph nos. 81, 85 and 87 thereof. He would further submit that admissibility of the confessional statement and its reliability are two different aspects. There can be no dispute over the same. Needless to mention, a criminal case has to be

decided on the facts and circumstances in that case. A reference to the authority to pronouncement may be a good guide, but may not be a precedent in a criminal case. Keeping all these in mind, we are appreciating the evidence in the case.

57. The confessional statement made by the appellant has already been referred to hereinabove. We have already discarded the eye witness account. The same suggests that the brothers of the appellant – Irshad were in no way involved in the crime in question. They have, therefore, been rightly acquitted of all the offences they were charged with.

58. Close reading of the confessional statement would indicate that the incident occurred in a spur of moment. The appellant and the respondents on one hand and the deceased on the other were not knowing each other. After having purchased a milk bag the deceased inadvertently dashed the appellant. The appellant thereupon questioned him, “Are you blind?” (अंधा है क्या?). To this the deceased reacted and abused the appellant over his mother, “मादरचोद”. He even started beating up the appellant. At the same time the deceased abused and assaulted Imran. Thereupon only, both, the appellant and Imran (juvenile in conflict with law) fished out the knives. Imran assaulted just below the armpit of the deceased with two knife blows. The appellant assaulted the deceased with one knife blow. Respondent – Shoeb assaulted the deceased with fist and kick blows. The deceased (then injured) entered the Johra masjid.

59. Evidence of Javed (PW 9) (priest) referred to hereinabove reinforces or corroborate the confessional statement. He was not cross-examined. Meaning thereby his evidence remained unchallenged. As per the confessional statement, the injured entered Johra masjid. On the given day little past 01:00 a.m. police made him to open the masjid and panchanama (Exh.90) was drawn. Blood stains were found there. This corroborates the confessional statement. Moreover, the fact that the incident took place while the appellant had purchased *naan roti* and other eatables. There is only small variance. Since according to the eye witness, a *naan roti* fell down from the hands of the appellant and that was the cause of the incident. It is reported that Hasina (PW 2) was not an eye witness. The fact, however remains that the incident took place when the appellant had purchased a *naan roti* and other eatables, then the deceased happened to dash him reinforces the confessional statement. As already observed above, retraction of the confessional statement is not unusual. Non retraction is an exception.

60. Since we found the confessional statement of the appellant to have been voluntarily made and it being a substantive piece of evidence against its maker and the co-accused (respondents) as well, we propose to act upon it. We have also found some corroboration to the confessional statement in the evidence of Javed (PW 9) and the factum of the incident taking place no sooner the appellant purchased the *naan roti* and other eatables.

61. Now the question is whether the conviction for the offence punishable under Section 302 of the I.P.C. is sustainable in the facts and circumstances of the case. Learned A.P.P. would submit that it was a brutal murder. She, however lost sight of the fact that Section 300 of the I.P.C. has certain exceptions. Admittedly, both, the deceased on one hand and the appellant and the respondents on the other were not known to each other. There was no prior enmity between them. The confessional statement indicates that although the appellant had questioned the deceased whether he was blind, the deceased took it to his heart. The deceased got annoyed. He abused the appellant over his mother, “मादरचोद” and even assaulted the appellant and the co-accused, juvenile in conflict with law. Although both, the appellant and the juvenile in conflict with law assaulted the deceased with knives and the same being the cause of his death, it lead us to infer that they had intended to do away with the deceased. The injuries caused were sufficient in ordinary course of nature to cause death. Section 300 of the I.P.C. would, therefore, rightly been invoked. In our view, the case of prosecution would fall under exceptions 1 and 4 or one of them at least. For better appreciation we reproduce both the exceptions below :-

“Exception 1 :- When culpable homicide is not murder. - Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

Exception 4 :- Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.”

62. The facts indicate that there was no pre-meditation. It was a sudden fight in the heat of passion and upon sudden quarrel. Even the deceased provoked the appellant and others by abusing and assaulting them first. In our view, therefore, the case would fall under Section 304 Part I of the I.P.C., which reads thus :-

“When it is proved that the accused had the intention to cause such bodily injury as is likely to cause death, the offence committed is punishable under section 304, Part I, I.P.C. When he had the grave and sudden provocation to cause death of the deceased, the offence committed is punishable under section 304, Part I, I.P.C.”

63. We have not referred to other evidence on record such as recovery of knife as per the disclosure statement made by respondent - Shoeb. The C.A. report thereof records no blood stains found thereon and as such it can not be said that said knife was used in the crime and the same, therefore, being relevant under Section 27 of the Evidence Act.

64. Section 304 of the I.P.C. gives the Court discretion as regards quantum of punishment to be imposed. Considering the nature of offence and role played by the respective assailants, we propose to deal with them in terms of following order :-

ORDER

- (I) Both the appeals are partly allowed.
- (II) In Criminal Appeal No. 68 of 2019, impugned judgment and order of conviction dated 29th December, 2018 passed by Special Judge, Aurangabad in Special Case

(MCOC Act), No. 3 of 2016 thereby convicting appellant - Shaikh Irshad Shaikh Ibrahim for the offence punishable under Section 302 of the Indian Penal Code is hereby set aside.

- (III) Appellant - Shaikh Irshad Shaikh Ibrahim stands convicted for the offence punishable under Section 304 Part I of the Indian Penal Code, and therefore, sentenced to suffer rigorous imprisonment for nine (9) years and to pay fine of Rs.15,000/- (Rupees Fifteen Thousand), in default, to suffer rigorous imprisonment for one year.
- (IV) Criminal Appeal, No. 906 of 2024 stands dismissed against Respondent Nos. 1 to 3 i.e. Shaikh Irshad Shaikh Ibrahim, Shaikh Ejaj shaikh Ibrahim and Shaikh Ismail Shaikh Ibrahim.
- (V) Criminal Appeal, No. 906 of 2024 is allowed against Respondent No.4 - Shaikh Shoeb Shaikh Riyaz, holding him guilty of the offence punishable under Section 323 of the Indian Penal Code, considering his role in the crime in question that he assaulted the deceased with fists and kicks, and therefore, sentenced to suffer imprisonment for the period which he has already undergone (10 months and 4 days) and to pay fine of Rs.1,000/- (Rupees One Thousand), in default to suffer rigorous imprisonment for two months.
- (VI) Fine amounts be paid to the widow of the deceased, if recovered.
- (VII) Criminal Application No. 281 of 2019 stands disposed of accordingly.

- (VIII) Fees of Mr. A.R. Shaikh, learned counsel appointed to represent Respondent No.2 in Criminal Appeal, No. 68 of 2019, is quantified to Rs.8,000/- (Rupees Eight Thousand) to be paid by Legal Services Sub-Committee, High Court, Aurangabad.

SSD

(NEERAJ P. DHOTE, J.)**(R.G. AVACHAT, J.)**