State Of Maharashtra Etc. Etc vs Sukhdeo Singh And Anr. Etc. Etc on 15 July, 1992

Equivalent citations: 1992 AIR 2100, 1992 SCR (3) 480, AIR 1992 SUPREME COURT 2100, 1992 (3) SCC 700, 1992 AIR SCW 2486, (1992) 3 SCR 480 (SC), 1992 CRILR(SC MAH GUJ) 678, (1992) 4 JT 73 (SC), 1992 (3) SCR 480, 1992 SCC(CRI) 705, (1993) SC CR R 1, (1993) 2 MAHLR 523, (1992) 2 ORISSA LR 209, (1992) 5 OCR 493, (1992) 3 SCJ 330, (1992) 2 CURCRIR 195, (1993) 1 CHANDCRIC 57, (1992) 2 ALLCRILR 727, (1992) 3 CRIMES 5, (1993) 1 BOM CR 233

Author: A.M. Ahmadi

Bench: A.M. Ahmadi, K. Ramaswamy

PETITIONER:
STATE OF MAHARASHTRA ETC. ETC.

Vs.

RESPONDENT:
SUKHDEO SINGH AND ANR. ETC. ETC.

DATE OF JUDGMENT15/07/1992

BENCH:
AHMADI, A.M. (J)
BENCH:
AHMADI, A.M. (J)
RAMASWAMY, K.

CITATION:
1992 AIR 2100 1992 SCR (3) 480
1992 SCC (3) 700 JT 1992 (4) 73
1992 SCALE (2)9

ACT:
Penal Code, 1860-Sections 302, 307 and 34-Prosecution for murder of General Vaidya-Trial under TADA-Conviction and death sentence by Designated Court-Validity of.
Penal Code, 1860-Sections 120B, 302, 307, 465, 468, 471 and 212 and Sections 3 and 4 of the Terrorist and Disruptive Activities Act, 1985 and Section 10 of the Passport Act-Charges under against the accused-Conviction and death sentence of accused 1 and 5 u/ss. 302, 307, 34, IPC and acquittal of other accused by Designated Court-Appreciation

of evidence by Supreme Court-Findings of Designated Court approved.

Evidence Act, 1872-Section 9-Test Identification parade-After long lapse of time, first time in Court-Evidential value of.

Evidence Act, 1872-Sections 3, 73-Appreciation of evidence-Evidence regarding identity of author of document-Expert opinion-Reliability of-Comparing documents by Court-Effect of-Identification of accused-Evidential value of.

Code of Criminal Procedure, 1973-Section 311-Statements recorded under-Evidential value of-Plea of guilt tantamount to admission of all facts constituting offence-Court's duty.

Terrorist and Disruptive Activities Act, 1985-Sections 3(2)(i) or (ii) and 3(3) read with sections 120B, 465, 468,471, 419, 302, 307, 34, IPC-Charged under-Procedure to be adopted.

Code of Criminal Procedure, 1973-Section 235(2)-Conviction and death sentence pronounced on same day-Legality of.

HEADNOTE:

The Prosecution case was that on the orders of the then Prime Minister, the then Chief of the Armed Forces, General Vaidya, was assigned the task of flushing out militants who had taken refuge in the

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Golden Temple. Some militants were killed and a part of the Golden Temple was damaged in the Blue Star Operation.

The militants vowed to avenge the deaths of their colleagues and to punish those who were responsible for the descreation of the Golden Temple. The then Prime Minister was assassinated on 31.10.1984.

General Vaidya after his retirement on 31.1.1986 decided to settle down with his wife in Pune. As their Bungalow was under construction, they shared the bungalow occupied by another Major General in Pune.

On 26.5.1986, when General Vaidya and his wife shifted to their new bungalow, they were provided only the service's of only one armed Head Constable for security duty.

On 10.8.1986, at about 10 a.m., General Vaidya with his wife went for shopping accompanied with the securityman. General Vaidya was driving the Car with his wife sitting in the front seat to his left and the securityman sitting in the near seat just behind her. After shopping, at about 11.30 a.m., while they were returning to their residence via Rajendrasinghji Road, General Vaidya, slowed down to negotiate a turn to the right at the square in front of his residence, at the intersection of Rajendrasinghji and Abhimanyu Roads. At that point of time, a red Ind-suzuki motor cycle came parallel to the car on the side of General Vaidya and the person occupying the pillion seat of the

motor cycle fired three shots from close range at the head of the deceased. Before his wife and securityman could realise what had happened, General Vaidya slumped on his wife's shoulder. The motor cyclists drove away and could not be located. As General Vaidya lost control over the car, it surged towards a cyclist. The cycle came under the car, and the car stopped at a short distance in front of a compound wall. The cyclist escaped by jumping off the cycle. The injured General Vaidya was carried to the Command Hospital in a passing by green matador van, which was fetched by the securityman. In the Hospital General Vaidya was delcared dead.

The securityman immediately informed the L.I.B. Office about the incident and at the place of the incident the securityman's format complaint was recorded by a Police Inspector, and the investigation was commenced. A Panchnama of the scene of occurrence was drawn up by the Inspector in the presence of witnesses and the empty cartridges and other
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articles were recovered therefrom.

On 7.9.1986, two persons riding a red Ind-Suzuki motor cycle collied with a truck. They were thrown off the motor cycle and sustained injuries. A bag containing arms and ammunition was also thrown off. They hurriedly collected the spilled articles. when the people, who had collected there went to assist them, they behaved in an abrasive manner and one of them, who was identified as accused No.1 raising his revolver threatened to shoot, which raised the crowd's suspicion and the matter was reported to Police Inspector of Pimpri Police Station. Police swung into action and caused the arrest of the accused Nos.1 and 2. They were charge-sheeted under section 307, IPC for that incident. (Later they were convicted and sentenced for that offence.) While they were being taken in a jeep to the Pimpri Police Station, the accused raised slogans of "Khalistan Zindabad" and proudly proclaimed that they were the assailants of the deceased General Vaidya.

In the course of investigation it came to light that apart from accused Nos. 1 and 2, other terrorists namely accused Nos. 3 to 5 and the absconding accused Nos. 6 to 9 were involved in the conspiracy allegedly hatched for assassinating the deceased General immediately after his retirement and on depletion of the security cover.

On 14.8.1987, the accused Nos. 1 and 2 others were charge sheeted under sections 120B, 302, 307, 465, 468, 471 and 212, IPC, and sections 3 and 4 of the Terrorist and Disruptive Activities Act, 1985 and section 10 of the Passport Act.

The Presiding Judge of the Designated Court held that the prosecution failed to prove beyond reasonable doubt that the accused before him and the absconding accused had entered into a criminal conspiracy to commit the murder of General Vaidya; that accused No. 5 was driving the motor

cycle with accused No.1 on the pillion seat; that accused No.1 fired the shots from close range killing General Vaidya and injuring his wife who was seated next to him; that the crime in question was committed in furtaerance of the common intention of accused No.1 and accused No. 5 to cause the murder of General Vaidya.

The Judge of the Designated Court convicted accused No.1 under sections 302 and 307, IPC for the murder of General Vaidya and for

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attempting to take the life of his wife. Accused No. 5 was convicted under section 302 and section 307 read with section 34, IPC. Accused Nos. 1 and 5 were sentenced to death subject to confirmation of sentence by this Court. They were also sentenced to rigorous imprisonment for 10 years for the offence under section 307. The substantive sentence were ordered to run concurrently. Accused 1 and 5 were acquitted of all other charges levelled against them. Accused Nos. 2,3 and 4 were acquitted of all the charges levelled against them.

Accused 1 and 5 did not file any appeal against their convictions by the Designated Court.

In the Death Reference No.1 of 1989 and in the Criminal Appeal No. 17 of 1990, the State questioned before this Court the correctness of the grounds on which the trial Court acquitted the accused Nos. 2 to 4 of all the charges levelled against them and the acquittal of accused 1 and 5 of the other charges levelled against them besides sections 302, 307/34, IPC.

The State also submitted that the statement of the accused recorded under section 313 of the Code of Criminal Procedure, 1973 was sufficient to prove their involvement in the commission of the crime and such statement also corroborated the prosecution case.

The accused contended that if there was no evidence or circumstance appearing in the prosecution evidence implicating the accused with the commission of the crime with which they were charged, there was nothing for the accused to explain and their examination under section 313 of the Code was wholly unnecessary and improper and should be totally discarded and their admissions, if any, wholly ignored; that since the conviction and sentence were pronounced on the same day, the capital sentence awarded to the accused should not be confirmed.

Dismissing the Criminal Appeal and disposing of the Death Reference, this Court, while confirming the conviction order and sentence passed by the Designated Court.

HELD : 1.01 No weight can be attached to such identification more so when no satisfactory explanation is forthcoming for the investigation officer's failure to promptly hold a test identification parade. [501E]

1.02. The direct evidence, if at all, regarding the identity of the persons

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who moved about in different assumed names is either wholly wanting or is of such a weak nature that it would be hazardous to place reliance thereon without proper corroboration. The direct evidence regarding identity of the culprits comprises of (i) identification for the first time after a lapse of considerable time in Court or (ii) identification at a test identification parade. In the case of total strangers, it is not safe to place implicit reliance on the evidence of witnesses who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in Court. In the present case it was all the more difficult as indisputably the accused persons had since changed their appearances. [506C-E]

1.03 Test identification parade, if held promptly and after taking the necessary precautions to ensure its credibility, would lend the required assurance which the court ordinarily seeks to act on it. In the absence of such 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 and that too of persons who had changed their appearance. [506F]

Kanan & Ors. v. State of Kerala, [1979] 3 SCC 319, relied on.

1.04. Before a Court can act on the opinion evidence of a handwriting expert two things must be proved beyond any manner of doubt, namely, (i) the genuineness of the specimen/admitted handwriting of the concerned accused and (ii) the handwriting expert is a competent, reliable and dependable witness whose evidence inspires confidence. [508B]

1.05 Evidence regarding the identity of the author of any document can be tendered (i) by examining the person who is conversant and familiar with the handwriting of such person or (ii) through the testimony of an expert who is qualified and competent to make a comparison of the disputed writing and the admitted writing on a scientific basis and (iii) by the court comparing the disputed document with the admitted one. [509F]

1.06 Since the science of identification of handwriting by comparison is not an infallible one, prudence demands that before acting on such opinion the Court should be fully satisfied about the authorship of the admitted writings which is made the sole basis for comparison and the Court should also be fully satisfied about the competence and credibility of the handwriting expert. It is indeed true that by nature and habit, over

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a period of time, each individual develops certain traits which give a distinct character to his writings making it possible to identify the author but it must at the same time

be realised that since handwriting experts are generally engaged by one of the contesting parties they, consciously or unconsciously, tend to lean in favour of an opinion which is helpful to the party engaging him. [509H-510A]

1.07 When one comes across cases of conflicting opinions given by two handwriting experts engaged by opposite parties. It is necessary to exercise extra care and caution in evaluating their opinion before accepting the same. So courts have as a rule of prudence refused to place implicit faith on the opinion evidence of a handwriting expert. Normally courts have considered it dangerous to base a conviction solely on the testimony of a handwriting expert because such evidence is not regarded as conclusive. Since such opinion evidence cannot take the place of substantive evidence, courts have, as a rule of prudence, looked for corroboration before acting on such evidence. True it is, there is no rule of law that the evidence of a handwriting expert cannot be acted upon unless substantially corroborated but courts have been slow in placing implicit reliance on such opinion evidence, without more, because of the imperfect nature of the science of identification of handwriting and its accepted fallibility. There is no absolute rule of law or even or prudence which has ripened into a rule of law that in no case can the court base its findings solely on the opinion of a handwriting expert but the imperfect and frail nature of the science of identification of the author by comparison of his admitted handwriting with the disputed ones has placed a heavy responsibility on the courts to exercise extra care and caution before acting on such opinion. Before a court can place reliance on the opinion of an expert, it must be shown that he has not betrayed any bias and the reasons on which he has based his opinion are convincing and satisfactory. It is for this reason that the courts are wary to act, solely on the evidence of a handwriting expert; that, however, does not mean that even if there exist numerous striking peculiarities and mannerisms which stand out to identify the writer the court will not act on the expert's evidence. In the End it all depends on the character of the evidence of the expert and the facts and circumstances of each case. [510B-G]

1.08 A handwriting expert is a competent witness whose opinion evidence is recognised as relevant under the provisions of the Evidence Act

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and has not been equated to the class of evidence of an accomplice. It would, therefore, not be fair to approach the opinion evidence with suspicion but the correct approach would be to weigh the reasons on which it is based. The quality of his opinion would depend on the soundness of the reasons on which it is founded. But the court cannot afford to overlook the fact that the Science of identification of handwriting is an imperfect and frail one as compared to the

science of identification of finger-prints; courts have, therefore, been wary in placing implicit reliance on such opinion evidence and have looked for corroboration but that is not to say that it is a rule of prudence of general application regardless of the circumstances of the case and the quality of expert evidence. No hard and fast rule can be laid down in this behalf but the Court has to decide in each case on its own merits what weight it should attach to the opinion of the expert. [513A-C]

Ram Narain v. State of U.P., [1973] 2 SCC 86; Bhagwan Kaur v. Maharaj Krishan Sharma, [1973] 4 SCC 46 and Murari Lal v. State of M.P., [1980] 1 SCC 704, referred to.

1.09 Although section 73 specifically empowers the court to compare the disputed writings with the specimen/admitted writings shown to be genuine, prudence demands that the Court should be extremely slow in venturing an opinion on the basis of mere comparison, more so, when the quality of evidence in respect of specimen/admitted writings is not of high standard. [514F]

1.10 It is not advisable to venture a conclusion based on such comparison having regard to the state of evidence on record in regard to the specimen/admitted writings of the accused Nos. 1 and 2. [514G]

1.11 Except for a couple of minor contradictions there is nothing brought out in his cross-examination to doubt PW 16's (Security man) testimony regarding identification of accused No.1 as the person who fired the shots at General Vaidya. The presence of this witness at the time of occurrence cannot and indeed was not doubted. So also it cannot be denied that he had an opportunity to identify the assailant. There is no serious infirmity in his evidence which would cast a doubt as regards his identification of accused No.1 [517C]

1.12 PW 14, the cyclist, did not notice an autorickshaw but in court's

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view that cannot cast any doubt on the credibility of PW 16. His attention was rivetted at the car and the motor cycle after he heard the shots and there was no need for him to notice the autorickshaw. [518H]

2.01 Section 313 of the code is a statutory provision and embodies the fundamental principle of fairness based on the maxim audi alteram partem. It is trite law that the attention of the accused must be specifically invited to inculpatory pieces of evidence or circumstances laid on record with a view to giving him an opportunity to offer an explanation if he chooses to do so. The section imposes a heavy duty on the court to take great care to ensure that the incriminating circumstances are put to the accused and his response solicited. The words `shall question him' clearly bring out the mandatory character of the clause and cast an imperative duty on the court and confer a corresponding right on the accused to an opportunity to

offer his explanation for such incriminating material appearing against him. [526H-527B]

2.02 The stage of examination of the accused under clause (b) of sub-section (1) of section 313 reaches only after the witnesses for the prosecution have been examined and before the accused is called on to enter upon his defence. At the stage of closure of the prosecution evidence and before recording of statement under section 313, the judge is not expected to evaluate the evidence for the purpose of deciding whether or not he should question the accused. After the section 313 stage is over he has to hear the oral submissions of counsel on the evidence adduced before pronouncing on the evidence. The trial judge is not expected before he examines the accused under section 313 of the Code, to sift the evidence and pronounce on whether or not he would accept the evidence regarding any incriminating material to determine whether or not to examine the accused on that material. To do so would be to pre-judge the evidence without hearing the prosecution under section 314 of the Code. [527C-E]

2.03 It is only where the court finds that no incriminating materials has surfaced that the accused may not be examined under section 313 of the Code. If there is material against the accused he must be examined. [527F]

2.04 In the instant case it is not correct to say that no incriminating material has surfaced against the accused, particularly accused No. 5, and hence the trial judge was not justified in examining the accused under section 313 of the Code. [527G]

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2.05 Since no oath is administered to the accused, the statements made by the accused will not be evidence Stricto sensu. That is why sub-section (3) says that the accused shall not render himself liable to punishment if he gives false answers. [527H]

2.06 The answers given by the accused in response to his examination under section 313 can be taken into consideration in such inquiry or trial. This much is clear on a plain reading of the above sub-section. Therefore, though not strictly evidence, sub-section (4) permits that it may be taken into consideration in the said inquiry or trial. [528C]

State of Maharashtra v. R.S. Chowdhari, [1967] 3 SCR 708; Hate Singh v. State of Madhya Bharat, 1955 Crl. L.J. 1933 and Narain Singh v. State of Punjab, [1963] 3 SCR 678, relied on.

Jit Bahadur Chetri v. State of Arunachal Pradesh, 1977 Crl. L.J. 1833 and Asokan v. State of Kerala, 1982 Crl. L.J. 173, distinguished.

2.07 The plea of guilt tantamounts to an admission of all the facts constituting the offence. It is, therefore, essential that before accepting and acting on the plea the Judge must feel satisfied that the accused admits fact i.e.

ingredients constituting the offence. The plea of the accused must, therefore, be clear, unambiguous and unqualified and the Court must be satisfied that he has understood the nature of the allegations made against him and admits them. The Court must act with caution and circumspection before accepting and acting on the plea of guilt. Once these requirements are satisfied the law permits the Judge trying the case to record a conviction based on the plea of guilt. If, however, the accused does not plead guilty or the learned Judge does not act on his plea he must fix a date for the examination of the witnesses, i.e. the trial of the case. There is nothing in this Chapter which prevents the accused from pleading guilty at any subsequent stage of the trial. But before the trial Judge accepts and acts on that plea he must administer the same caution unto himself. This plea of guilt may also be put forward by the accused in his statement recorded under section 313 of the Code. [530B-D]

2.08 In the instant case, besides giving written confessional statements, both accused No. 1 and accused No. 5 admitted to have been involved in the commission of murder of General Vaidya. It is pointed out that both the accused have unmistakably, unequivocally and without any

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reservation whatsoever admitted the fact that they were responsible for the murder of General Vaidya.[530E]

2.09 Accused No. 1 did not name accused No. 5 as the driver of the motor cycle, perhaps he desired to keep him out, but accused No. 5 has himself admitted that he was driving the motor cycle with accused No.1 on the pillion seat and to facilitate the crime he had brought the motor cycle in line with the Maruti car so that accused No.1 may have an opportunity of firing at his victim from close quarters. There is, therefore, no doubt whatsoever that both accused No.1 and accused No. 5 were acting in concert, they had a common intention to kill General Vaidya and in furtherance of that intention accused No.1 fired the fatal shots.[530F-G]

2.09 The trial Judge was justified in holding that accused No.1 was guilty under section 302 and accused No.5 was guilty under section 302/34, IPC.[530H]

3.01 In the instant case, the accused were tried under the section 3(2)(i) or (ii) and 3(3) provisions of TADA Act and the Rules made thereunder along with the offences under sections 120B, 465, 468, 471, 419, 302 and 307, IPC. They were also charged for the commission of the aforesaid offences with the aid of section 34, IPC. Under section 13(4) the procedure which the Designated Court must follow is the procedure prescribed in the Code for the trial before a Court of Session. [531H-532C]

3.02 The Trial Judge took the view that since the murder of General Vaidya was also on account of his involvement in the Blue Star Operation his case stood more

or less on the same footing and hence fell within `the rarest of a rare' category. This line of reasoning adopted by the Trial Judge is unassailable. The accused persons had no remorse or repentence, in fact they felt proud of having killed General Vaidya in execution of their plan.

[532H-533B]

Kehar Singh & Ors. v. State (Delhi Administration), [1988] 3 SCC 609, relied on.

4.01 The choice of sentence had to be made after giving the accused an effective and real opportunity to place his antecedents, social and economic background, mitigating and extenuating circumstances, etc. before the Court, for otherwise the court's decision may be vulnerable. [533D]

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Allaudin Mian v. State of Bihar, [1989] 3 SCC 5; Milkiat Singh v. State of Punjab, JT (1991) 2 SC 190 (Paragraph 18); Jumman Khan v. State of U.P., [1990] Suppl. 3 SCR 398 and Kehar Singh & Ors., v. State, [1988] 3 SCC 609, referred to.

4.02. Having regard to the well planned manner in which they executed their resolve to kill General Vaidya they were aware that there was every likelihood of the Court imposing the extreme penalty and they would have, if they so desired, placed material in their written statements or would have requested the Court for time when their statements under section 313 of the Code were recorded, if they desired to pray for a lesser sentence. Their resolve not to do so is reflected in the fact that they have not chosen to file and appeal against their convictions by the Designated Court. In the present case the requirements of section 235(2) of the Code have been satisfied in letter an spirit and no prejudice is shown to have occurred to the accused. [535C]

4.03 The conviction of accused No.1 under section 302 and 307, IPC and accused No. 5 under sections 302 and 307, IPC, both read with section 34, IPC and the sentence of death awarded to both of them is confirmed.

[535E]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Death Reference Case No. 1 of 1989.

WITH Criminal Appeal No. 17 of 1990.

From the Judgment and Order dated 21.10.89 of the Pune Designated Court in Terrorist Sessions Case No. 2 of 1987.

Altaf Ahmed, Additional Solicitor General, V.V.Vaze, S.B. Takawane, S.M.Jadhav, A.S.Bhasme and Ms. A.Subhashini for the Complainant/Appellant.

R.S.Sodhi, Harshad Nimbalka, P.G. Sawarkar and I.S. Goel for the Accused/Respondent.

The Judgment of the Court was delivered by AHMADI, J. General A.S.Vaidya, the then chief of the Armed Forces was, on the orders of the then Prime Minister Smt. Indira Gandhi, assigned the difficult and delicate task of flushing out militants who had taken refuge in the Golden Temple at Amritsar. during this operation, known as the Blue Star Operation, some militants were killed and a part of the Golden Temple known as Harminder Saheb was damaged. Both the then Prime Minister Smt. Indira Gandhi and General Vaidya had, therefore, incurred the wrath of the Punjab militants for what they called the desecration of the Golden Temple. They, therefore, vowed to avenge the deaths of their colleagues and punish all those who were responsible for the damage to the Golden Temple. After the assassination of Smt. Gandhi on 31st October, 1984, it is the prosecution case, they waited for General Vaidya to retire on 31st January, 1986 so that the security cover which would then stand reduced may not be difficult to penetrate. After his retirement General Vaidya decided to settled down in Pune in the State of Maharashtra.

After his retirement on 31st January, 1986, General Vaidya and his wife Bhanumati left Delhi for Pune. As their bungalow at Pune was still under construction, they shared bungalow No.20 at Queens Garden, Pune, occupied by Major General Y.K. Yadav. General Vaidya owned a Maruti Car bearing Registration No. DIB 1437 which reached Pune on the next day i.e. 1st February, 1986. Between 4th and 16th February, 1986 General Vaidya and his wife went to Goa for a brief holiday. They returned to Pune on 16th February, 1986. They continued to reside in the bungalow occupied by Major General Y.K. Yadav. General Vaidya was required to be hospitalised from 24th March to 7th April, 1986 as he was suspected to be suffering from jaundice. During his stay in bungalow No. 20, Queens Garden, two Police Sub-Inspectors were available on security duty, one for himself and another for Major General Yadav but after his discharge from the hospital and on their shifting to their bungalow at 47/3, Koregaon Park with effect from 26th May, 1986 only one armed Head Constable, Ram Chandra Kshirsagar, was on security duty with him. Although the name plate of General Vaidya was displayed on one of the two posts of the entrance gate to bungalow No. 20 at Queens Garden, no such name plate was displayed at bungalow No. 47/3, Koregaon Park.

On the morning of 10th August, 1986, General Vaidya and his wife left their bungalow with the securityman Ramchandra Kshirsagar for shopping in their Maruti Car No. DIB 1437 at about 10.00 a.m. The car was being driven by General Vaidya with his wife sitting in the front seat to his left and the securityman sitting in the rear seat just behind her. After the shopping spree was completed at about 11.30 a.m. and while they were returning to their residence via Rajendrasinghji Road, the car had to take a turn to the right at the square in front of 18 Queens Garden at the intersection of Rajendrasinghji and Abhimanyu roads. To negotiate this turn General Vaidya who was driving the vehicle slowed down. At that point of time a red Ind-Suzuki motor cycle came paralled to the car on the side of General Vaidya and the person occupying the pillion seat of the motor cycle fired three shots from close range at the head of General Vaidya. Before his wife and securityman could realise what had happened, General Vaidya slumped on the shoulder of his wife Bhanumati. The motor cyclists drove away and could not be located. An auto-rickshaw passed by. As General Vaidya lost control over the vehicle the car surged towards a cyclist Digamber Gaikwad. The latter, in order to save himself, jumped off the cycle. The cycle came under the Maruti Car and as a result the car

stopped at a short distance in front of a compound wall. Immediately thereafter the securityman stepped out of the vehicle and went in search of some bigger vehicle to carry General Vaidya to the hospital. A Green Matador Van which was passing by was fetched by the securityman in which the injured General Vaidya was carried to the Command Hospital where he was declared dead.

The securityman immediately informed the L.I.B. Office about the incident which information was received by Police Inspector Garad. On receipt of the information the Commissioner of Police and his Deputy arrived at the hospital and questioned the securityman who narrated the incident to them. Thereupon the securityman was asked to go to the Control Room. On reaching the Control Room he received a message from Inspector Mohite requiring him to return to the place of the incident where his formal complaint was recorded by Inspector Mohite. A Panchnama of the scene of occurrence was drawn up by Inspector Mohite in the presence of witnesses and the empty cartridges and other articles were recovered therefrom.

As stated earlier, the assailants of General Vaidya had made good their escape from the scene of occurrence after the incident. On 7th September, 1986, two persons riding a red Ind-Suzuki motor cycle collided with a truck. They were thrown off the motor cycle and sustained injuries. A bag containing arms and ammunition was also thrown off but they hurriedly collected the spilled articles. When members of the public who had collected there immediately after the accident went to assist them they behaved in an abrasive manner and one of them, later identified as accused No. 1 Sukhdev Sing @ Sukha, raised his revolver and threatened to shoot, which raised the suspicion of the crown prompting one Narayan Bajarang Pawar to report the matter to Inspector A.I. Pathan of Pimpri Police Station. Inspector Pathan swung it to action and along with the informant and his staff members, including Sub-Inspector Nimbalkar, went in search of the two motor cyclists. Inspector Pathan went to the pimpri Railway Police Station and asked P.S.I. M.K.Kadam of that Police Station to immediately go to the place of the accident and guard the same until further orders. Inspector Pathan, on return, noticed two persons passing by Vishal Talkies and as one of them was limping his suspicion was aroused whereupon he drove his vehicle near them and pounced on one of them, later identified as accused No.2 Nirmal Singh @ Nima. Accused No. 1 Sukha tried to run away but P.S.I. Nimbalkar gave a chase and caught hold of him and brought him to Inspector Pathan. Before he was overpowered, it is the prosecution case, that accused No.1 Sukha unsuccessfully tried to fire a shot at P.S.I. Nimbalkar to make good his escape. It may here be mentioned that both accused No.1 and accused No.2 were charge-sheeted under section 307, IPC, for that incident and were ultimately convicted and sentenced.

After both accused No.1 and accused No.2 were apprehended by Inspector Pathan and P.S.I. Nimbalkar they were searched and weapons like pistol and revolver along with live cartridges were recovered from them. They were also carrying certain papers concerning the red Ind-Suzuki motor cycle and they too were attached. As a seizable crowd had gathered on the road Inspector Pathan thought it wise to cause the seizure memorandum to be recorded at the Pimpri Police Station. The prosecution case is that while the two persons were being taken in a jeep to the Pimpri Police Station they raised slogans of "Khalistan Zindabad" and proudly proclaimed that they were the assailants of General Vaidya. After reaching the Police Station all the articles which were found in the possession of these two persons were attached under a seizure memorandum. Inspector Pathan suspected that

the pistol which was found from them may have been the weapon used for killing General Vaidya and hence he sent the weapons as well as the cartridges attached from the scene of occurrence to the Ballistic Expert who reported that the cartridges found from the place where General Vaidya was shot were fired from the pistol which was recovered from the possession of these two persons after their arrest on 7th September, 1986. In the course of investigation it came to light that besides accused Nos.1 and 2 certain other persons described as terrorists, namely, accused No.3 Yadvinder Singh, accused No.4 Avtar Singh, accused No.5 Harjinder Singh and absconding accused Sukhminder Singh @ Sukhi, Daljit Singh @ Bittoo @ Sanjeev Gupta, Jasvinder Kaur, and Baljinder Singh @ Raju were involved in the conspiracy allegedly hatched for assasinating General Vaidya immediately after his retirement and on depletion of the security cover. Accused Nos.1 and 2 and others named hereinabove were charge sheeted on 14th August, 1987 under sections 120B, 302, 307, 465, 468, 471 and 212, IPC sections 3 and 4 of Terrorist and Disruptive Activities Act, 1985, hereinafter called `TADA', and section 10 of the Passport Act.

In regard to the charge of conspiracy, forgery, etc. the prosecution case is that absconding accused Sukhi hired a flat sometime in October-November 1985 at 7, Antop Hill, Bombay. Thereafter he came to Pune and stayed in Dreamland Hotel in the assumed name of Rakesh Sharma. On January 26, 1986 he shifted to and registered himself as Ravindra Sharma in Hotel Gulmohar on the pretext that he was visiting the city for business purposes. He was accompanied by another person. They gave a false address that they were residents of 307, Om Apartments, Bombay. While in Pune an advertisement appeared in the local daily Maharashtra Herald offering a flat No. G-21, Salunke Vihar, Pune on hire. This flat was in the possession of Major A.K.Madan and he was desirous of letting it out to repay the instalments of the loan taken for meeting the construction cost of the said flat. He had entrusted this work of finding a suitable tenant to one V.R.Hallur and had given a Power of Attorney to him for that purpose. The said V.R.Hallur approached the Estate Agents Bhavar Sanghavi and disclosed that he was desirous of letting out the flat on a rent ranging between Rs. 1200 and Rs. 1500 with a deposit ranging between Rs. 12,000 and Rs. 15,000. The Estate Agents published an advertisement in the local newspaper Maharashtra Herald, in consequence whereof one person identifying himself as Ravindra Sharma approached the Estate Agent and finalised the deal by paying Rs. 15,000 in cash as deposit and agreeing to pay rent at the rate of Rs. 1500 per month and went on to pay advance rent for three months i.e. Rs. 4500 to the said V.R. Hallur. The deal was closed on 30th January, 1986. It is the prosecution case that this flat was fired as the conspirators needed an operational based in Pune to facilitate the killing of General Vaidya.

The prosecution case further is that on 3rd May, 1986 the 7, Antop Hill flat at Bombay was raided and besides arms and ammunition an English novel Tripple was found on the cover page whereof someone had scribbled the number of General Vaidya's maruti Car. Clothes of different sizes were also found indicating the presence of more than one person. On 8th May, 1986 an Ind-Suzuki motor cycle bearing No. MFK 7548 was purchased in the name of Sanjiv Gupta from its owner Suresh Shah through R.V. Antapurkar, a salesman. Accused No.1 is reported to have lived in Hotel Ashirvad, Pune on 9th June, 1986. Accused No.1 lived in Hotel Amir in Room No. 517 on 11th June, 1986, in Hotel Jawahar in Room No. 206 on the next day and in Hotel Mayur in Room No. 702 on 13th June, 1986. On the same day he is shown to have stayed in Hotel Commando, Bandra, Bombay in Room in 402. The Union Bank robbery took place on that day. The motor cycle was sent for servicing on Ist

July, 1986. Sukhi left for U.S.A. on a forged passport on 14th July, 1986 and was arrested there. According to the prosecution they lived in different hotels in different assumed names for drawing up a plan to kill General Vaidya.

Now we enter the crucial stage. According to the Prosecution, in pursuance of the conspiracy hatched to kill General Vaidya, Accused Nos.1, 2 and 5 left Ambala cantonment for Doorg on 3rd August, 1986 by 138 UP Chhatisgadh Express. The form for reservation of sleeper berths dated 29th July, 1986, Exh. 700, is alleged to have been filled by Accused No.1, of course in an assumed name. They reached Doorg on 5th August, 1986 and left for Bombay on the next day by Gitanjali Express. From Bombay the prosecution alleges that they went to Pune. Prosecution has also tendered evidence to show that on 9th August, 1986, accused Nos.1 and 5 made inquiries concerning the whereabouts of a retired military officer in the neighbourhood of General Vaidya. After accomplishing the task accused No.1 returned to Bombay by 7.30 p.m. and stayed in Hotel Neelkanth, Khar, in the assumed name of Pradeep Kumar. On 6th September, 1986, accused Nos.1 and 2 are stated to have stayed in Hotel Dalmond, Bandra, Bombay, in the assumed names of Ravi Gupta and Sandeep Kumar before their arrest at Pune on 7th September, 1986 by Inspector Pathan. This, in brief, are the broad outlines of the alleged conspiracy perpetrated by the accused persons and the absconding accused to kill General Vaidya. To prove these circumstances a large number of documents and ocular testimony of several witnesses came to be tendered by the prosecution before the Designated Court.

The investigation revealed that on the date of the incident the motor cycle was driven by accused No.5 Harjinder singh @ Jinda with accused No.1 Sukhdev Singh @ Sukha in the pillion seat. The shots were fired by accused No.1 from the pillion seat at close range after accused No.5 had brought the motor cycle in line with the front window of the driver's seat of the Maruti Car. The window pane was lowered and General Vaidya was at the steering wheel with his right elbow resting on the window and the hand holding the top of the car. As stated earlier, three shots were fired in quick succession and before Bhanumati and the securityman could realise what had happened the motor cyclists made good their escape. Had it not been for the accident which took place on 7th September, 1986 in which the said motor cycle was involved the police would have been groping in the dark to nab the perpetrators of the crime. Accused Nos.2, 3 and 4 were put up for trial as co- conspirators. The other co-conspirators could not be placed for trial as they could not be traced since they were absconding. All the five accused denied the charge and claimed to be tried. However, after the charge was framed accused No.1 Sukhvinder Singh @ Sukha expressed his desire on 19th September, 1988 to make a statement before the Court admitting to have killed General Vaidya. He made the statement in open Court and the learned Presiding Judge of the the Designated Court, Pune gave him eight days'time to reflect and make a detailed written statement thereafter, if he so desired. On 26th September, 1988 when the accused were once again arraigned before the Designated Court accused No.1 submitted a written statement, Exh. 60-A, admitting to have fired four bullets at General Vaidya and to have killed him. He also stated in that statement that he had accidentally injured Bhanumati Vaidya although he did not intend to do so. According to him since she was sitting close to General Vaidya one of the bullets strayed and caused injury to her. So far as accused No.5 Harjinder Singh @ Jinda is concerned, he, in his statement recorded under section 313 of the Criminal Procedure Code, 1973, admitted that he was the person driving the black (not red)

Indu-Suzuki motor cycle with accused No.1 in the pillion seat. It was he who brought his motor cycle with accused No.1 in the pillion seat. It was he who brought his motor cycle in line with the Maruti Car driven by General Vaidya to facilitate accused No.1 Sukha to shoot the General. It was only thereafter that accused No.1 fired the bullets which caused the death of General Vaidya.

The learned Presiding Judge of the Designated Court, Pune, framed the points for determination and came to the conclusion that the prosecution had failed to prove beyond reasonable doubt that the accused before him and the absconding accused had entered into a criminal conspiracy to commit the murder of General Vaidya. He, however, came to the conclusion that accused No.5 was driving the motor cycle with accused No.1 on the pillion seat and it was the latter who fired the shots from close range killing General Vaidya and injuring his wife who was seated next to him. He came to the conclusion that the crime in question was committed in furtherance of the common intention of accused No.1 and accused No.5 to cause the murder of General Vaidya. He also came to the conclusion that the said two accused persons were guilty of attempt to commit the murder of Bhanumati in furtherance of their common intention. After a detailed and elaborate judgment running into over 300 typed pages, the learned judge of the Designated Court, Pune, convicted accused No.1 under sections 302 and 307, IPC for the murder of General Vaidya and for attempting to take the life of his wife Bhanumati. He convicted accused No.5 under section 302 and section 307, both read with section 34, IPC. He sentenced both accused No.1 and accused No.5 to death subject to confirmation of sentence by this Court. For the offence under section 307 he sentenced both accused No.1 and accused No. 5 to rigorous imprisonment for 10 years. Both the substantive sentences were ordered to run concurrently. He acquitted both accused No.1 and accused No.5 of all the other charges levelled against them. So far as accused Nos.2, 3 and 4 are concerned he acquitted them of all the charges levelled against them and directed that they be set at liberty at once.

The facts of which we have given a brief resume make it crystal clear that broadly speaking the prosecution case has two elements, the first relating to the charge of criminal conspiracy and the various criminal acts done in furtherance thereof and the second relating to the actual murder of General Vaidya. The prosecution has also invoked sections 3 and 4 of TADA.

Now according to the prosecution as soon as it became known to the militant that General Vaidya planned to settle down at Pune after his retirement from Army service, wheels began to move to kill him as soon as the security cover available to him was reduced. The prosecution tendered evidence, both oral and documentary, to show that the conspiracy was hatched between 23rd January 1986 and 3rd May, 1986. The first step taken in this direction was to hire a flat in Block No. G-21, Salunke Vihar, Pune, to create an operational base to work out and implement the alleged criminal conspiracy. This flat was hired by one Ravindra Sharma whom the prosecution identifies as absconding accused Sukhi. Now according to the prosecution after acquiring this base, Sukhi left the country on 14th July, 1986 and did not participate further in the execution of the alleged conspiracy. Accused No.2 Nirmal Singh became privy to the conspiracy later on. To prove this part of the prosecution case evidence has been tendered to show that two persons Raj Kumar Sharma and Rakesh Sharma came and stayed in Hotel Dreamland, Pune, from 23rd to 26th January, 1986 and contacted various estate agents on telephone, including PW 20 B.D. Sanghvi, partner of M/s. Estate Corporation, Pune, with a view to hiring a flat in Pune. The absconding accused Sukhi, it is

contended, had stayed in that hotel under assumed name of Rakesh Sharma. PW 3 Rajender Tulsi Pillai has been examined to show that thereafter the said accused Sukhi and his companion shifted to Hotel Gulmohar on the 26th at about 2.20 p.m. and stayed there till 10.00 a.m. of the 29th. Therefore, according to the prosecution Rakesh Sharma and Ravinder Sharma were one and the same person and the evidence of the handwriting expert PW 120 M.K. Kanbar establishes that the said person was none other than the absconding accused Sukhi. The entries identified as Q.3 and Q.4 from the register of Dreamland Hotel and Q.5 and Q.6 from the register of Gulmohar Hotel are, in the opinion of PW 120, to be of Sukhi. It is indeed true that while discussing this part of the prosecution evidence the learned trial judge has committed certain factual errors and has wrongly read the evidence as if PW 120 had opined that the said entries were made by accused No.1 Sukha. That is probably on account of similarity of names; he seems to have substituted Sukha for Sukhi. We have, however corrected this error while appreciating the prosecution evidence. But is must be remembered that because Sukhi had fled from the Country he could not be produced for identification by the hotel staff. No one has, therefore, identified him as Rakesh Sharma or Ravinder Sharma. The question of identity, therefore, rests solely on the evidence of the handwriting expert PW 120.

Then we come to the evidence of PW 20 B.D.Sanghvi and PW 22 G.H.Bhagchandani who figured in the transaction concerning the letting out of the G-21, Salunke Vihar flat at Pune, to one Ravinder Sharma. According to the prosecution this Ravinder Sharma had met PW 20 and it was PW 22 who had shown the flat to him. Both these witnesses had, therefore, an occasion to see Ravinder Sharma from close quarters. It was in their presence that the said Ravinder Sharma had signed the agreement to lease on 27th January, 1986. PW 104 V.R.Hallur, the Power of Attorney of Major Madan and PW 105 R.J.Kulkarni who has contacted PW 20 were also concerned with the said deal. The evidence of PW 65 D.B.Bhagve reveals that one Ravinder Sharma had purchased a bank draft of Rs. 15,000 from the Bank of Baroda, Pune, on 25th January, 1986 in the name of Neelam Madan. The lease documents are at Exh. 598 and 599. From the evidence of the aforestated witnesses it is established that a person who gave his name as Ravinder Sharma had contacted them for hiring the flat and the deal with finalised, payments were made and documents executed between the 24th and 27th January, 1986 at Pune. The question is who was this Ravinder Sharma? Once again there is no direct evidence regarding his identity but the prosecution places reliance on the opinion evidence of the handwriting expert PW 120 who has deposed that all these documents are in the handwriting of the absconding accused Sukhi.

From the above evidence what the prosecution can at best be said to have established is that the person who signed the register of Dreamland Hotel as Rakesh Sharma and the register of Gulmohar Hotel as Ravinder Sharma and the person who signed the lease documents pertaining to G-21, Salunke Vihar flat as Ravinder Sharma was one and the same person because according to the evidence of PW 120 the handwritings tally but the identity of that person has got to be established by comparing the said handwriting with the undisputed handwriting of the suspect. The prosecution seeks to attribute the authorship of the aforesaid documents to the absconding accused Sukhi but since the specimen or admitted handwriting of Sukhi could not be secured, as he had fled from this country to U.S.A. even before the conspiracy came to light, the mere opinion evidence of PW 120, even if accepted as its face value, is not sufficient to establish the identity of the author if those

documents. We will have to see if this missing link is supplied by other evidence on record. We may also hasten to add that at this stage we are not examining what value can he attached to the evidence of PW 120. The find of the original bill of Hotel Gulmohar, Exh. 92A, from the G-21, Salunke Vihar flat after the arrest of accused Nos.1 and 2 does not improve the matter for that by itself cannot prove that the absconding accused Sukhi was the author of the documents relied on. none of these witnesses, not even PW 62 Kantilal Shah, has identified him even from his photograph. So also the fact that the said person, whoever he was, had given a false and bogus Bombay address of 307, Om Apartments, Borivali or that the handwriting of some person who had stayed in yet another assumed name in different hotels of Pune, Ahmedabad and Bhavnagar is of no help to establish the identity. Even though the entries Exh. 416 and 417 have been relied upon the two telephone operators of Dreamland Hotel were not examined. That being so the prosecution evidence falls for short for establishing its case that all these entries were made by the absconding accused Sukhi.

Then we come to the evidence in regard to the activities at the Antop Hill flat, Bombay, belonging to PW 49 Sadanand Gangnaik. According to him he had let the flat to Makhni Bai but since she has not been examined the further link is not established. As pointed out earlier, according to the prosecution, that flat too was hired by the absconding accused Sukhi sometime in October-November 1985 and the same was raided on 3rd May, 1986. Evidence was tendered by the prosecution with the avowed purpose of showing that a group of terrorists were in occupation of the said flat and when the same was raided certain incriminating evidence was found and attached therefrom. One such important piece is stated to be a novel in english entitled Tripple on the cover page whereof someone had scribbled in pencil the number of General Vaidyas' Car DIB-1437. On the basis of the documents referred to in the preceding paragraph, the handwriting expert PW 120 says that the scribe of this number is the very person who happens to be the author of the aforesaid documents. But this piece of evidence suffers from the very same handicap from which the other evidence suffers in regard to the identity of the author of this document also. Besides, PW 48 H.S. Bhullar has contradicted himself on the authorship of the writing on the cover page of the novel Tripple. In his examination- in-chief he said it was in the handwriting of Sukha but on this point he was cross-examined by the prosecution to extract a statement that it was written by Sukhi. The idea was to establish contact between Sukhi and Sukha so that the former can be connected with the crime with the aid of section 120B, I.P.C. From the fact that clothes of different sizes were recovered from the said flat it was argued that several persons were in occupation of the flat. The find of three live and one empty cartridges was a circumstance projected by counsel to support his say that the flat was used for illegal purposes.

From the above facts it is not possible to infer that Sukhi and Sukha were in occupation of the flat. This gap is sought to be filled through PW 48 H.S. Bhullar who claims to be a friend of the inmates of the flat. This witness deposes to have taken three prostitutes to the flat to satisfy the sexual urges of Sukhi, Sukha and another who were living therein. Now this witness is said to have identified Sukha in Court. Exh. 318 dated 8th December, 1988 is an application given by accused No. 5 Jinda alleging that when he and Sukha were being taken to Court they were shown to the prosecution witnesses. Before we examine this allegation it is necessary to bear in mind that PW 48 was apprehended by the police on 10th May, 1986 and was booked as a co-accused but was later released and used as a witness. Great care must be exercised before acting on such a belated identification in

Court by a witness who cannot be said to be an independent and unbaised person. Corroboration is sought to be provided through the maid servant PW 49 Lalita who was working in the flat. She too had identified the accused in Court only. She was candid enough to accept the fact that the accused Sukha and Jinda were shown to her and PW 48 when they were being taken to Court. This admission nullifies the identification of the two accused by these two witnesses in Court. No weight can be attached to such identification more so when no satisfactory explanation is forthcoming for the investigation officer's failure to hold a test identification parade. So also PW 50 Hira Sinha, one of the prostitutes, also identifies him in Court but she too was not called to any test identification parade to identify the inmates of the flat. She too admits that Sukha was shown to her when he was in the lock-up. The other prostitute Jaya who is said to have had sex with Sukha was not called to the witness stand though she attended Court. When PW 50 could not identify the person with who she had sex what reliance can be placed on her identification of Sukha in Court after a lapse of almost two years? Besides, it is an admitted fact that there was considerable change in the appearance of the accused, earlier they were clean shaven and later they were attired like sikhs making identification all the more difficult. No neighbour, not even the laundryman, was examined to establish their identity. In this state of the evidence if the learned trial judge was reluctant to act on such weak evidence, no exception can be taken in regard to his approach.

Reliance has been placed on the evidence of PW 46 Jagdish Bhave, a policeman, who deposes that he had gone to the flat at 10.00 a.m. to make inquiries, was pulled in and locked up in the lavatory on 3rd May, 1986. He identifies accused No.1 Sukha as the person who had pointed a foreign make revolver at his neck. He also claims to have identified him at the test identification parade as well as in Court. In regard to the identification at the test identification parade, there is some discrepancy as he seems to have initially identified a wrong person. He had also seen him in the lock-up before the identification parade. Lastly, he claims he had managed to secure help by breaking the glasspanes of the rear ventilator of the lavatory. Now PW 49 Lalita deposes that she was in the flat till 11,00 a.m. If this witness was locked up and he had raised an alarm, PW 49 lalita would certainly have learnt about the same but she is totally silent about the same. If the glasspanes were broken a note thereof would have been taken in the panchnama. Atleast PW 158 PSI George would have spoken about the same. Besides the story given by PW 46 cannot be said to be a natural and credible one. The prosecution tried to contend that PW 49 Lalita being an illiterate woman was making a mistake on the time factor. We have no reason to so believe. Even if there is any doubt the benefit thereof would go to the defence. PW 155 M.V.Mulley who arranged the test identification parade for PW 46 supports him. But the prosecution does not explain why Inspector Ratan Singh and Sub-Inspector Govind Singh and the laundry man were not examined. Sub-Inspector Govind Singh would have explained why he could not identify accused No.1 at the test identification parade if he had been called to the witness stand. To us it seems PW 46 was put up to supply the lacuna regarding the involvement and identification of accused No.1 in particular. The learned trial judge was right in pointing out that several independent witnesses had not been examined and the prosecution staked its claim on an artificial and unnatural story found unacceptable put forth in the testimony of PW 49 Lalita. Even the identification of accused No.1 Sukha by PW 46 Jagdish does not carry conviction and is of no avail to the prosecution.

From the flat during the raid three live and one empty cartridges were found. One live cartridge was of .32" bore while the other two live cartridges were of .38" bore. The empty cartridge was of .38" bore. These were forwarded along with the revolver which was found from accused No.2 on 7th September, 1986 at Pune, to PW 125 M.D.Asgekar, the ballistic expert. This witness has deposed that the empty cartridge was fired from the revolver found from accused No.2, which weapon, it was said, was used in the Union Bank robbery. It is further his say that the live pistol cartridge .32" bore was similar to the one used in General Vaidya's assassination. True it is, the learned trial judge has overlooked this evidence. We will consider the impact of this evidence at a later stage.

A Brylcream bottle, Article 83, was found in the flat. PW 150 Vijay Tote lifted the fingerprint on that bottle which was later compared by PW 122 A.R. Angre, Fingerprint- expert, with the fingerprint of accused No. 1 Exh. 607 and was found to tally. PW 107 S.V.Shevde, Director of Fingerprint Bureau proves this fact.

The next circumstance relied upon concerns the purchase of a red Ind-Suzuki motor cycle MFK 7548 on 8th May, 1986 through PW 18 Anantpurkar from PW 23 Suresh Shah, the allottee. This motor cycle was later serviced on 1st July, 1986 by PW 39 Pimpalnekar. The motor cycle was purchased in the name of Sanjeev Gupta, a name allegedly assumed by absconding accused Daljit Singh alias Bittu. The evidence of PW 12 Trimbak Yeravedkar shows that it was registered in the R.T.O. in the name of S.B.Shah and was then transferred in the name of Sanjeev Gupta. PW 76, a CBI officer had attached the free service coupon Exh.187 and the requisition slip Exh. 259. Neither bears any signature of the police officer or panch witness in token of being attached. The papers concerning a motor cycle bearing the name of Sanjeev Gupta are stated to have been recovered of 7th September, 1986 from Sukha and Nimma after their arrest following an accident. Since, according to the prosecution, the said motor cycle was used for murdering General Vaidya and was later recovered from the accident site on 7th September, 1986, it was argued that there was conspiracy preceding the said murder. The owner's manual, Article 10, was found from G-21, Salunke Vihar, Pune, but that does not bear any name of even the registration number of the vehicle. The find of such a document, assuming it was really there and was not planted as submitted by the defence counsel, cannot advance the prosecution case. Another link which the prosecution tried to establish was that this motor cycle was seen parked in the garage allotted to the occupant of G-21, Salunke Vihar flat. This fact is proved through PW 24 Vidyadhar Sabnis. PW 25 Lt. Col. Basanti Lal, occupant of G-23 flat, however, states that since the garage allotted to him was being used for preparing his furniture in the month of May 1986, he was using the garage allotted to G-19 or G-21 flat holders for parking his car. All that his evidence shows that in the month of May 1986 one person had come inquiring about the occupants of G-21 flat and as the flat was locked he had left a message which this witness says he had slipped through the gap in the door of that flat. This is neither here nor there. Then he states that he had seen a red Ind-Suzuki motor cycle parked near the garage of G-21 flat on the 9th or 10th of August, 1986. PW 26 Prakash Sabale, a neighbour residing in Anand Apartments, was called to depose that sometime in June 1986 he had seen a red Ind-Suzuki parked in the garage of G-21 flat. The evidence of this witness conflicts with that of PW 25 who has stated in no uncertain terms that he was parking his car in the said garage. Was there any particular reason for these witnesses to take note of the red coloured Ind-Suzuki motor cycle? No reason has been assigned by the witnesses or the investigating officer. Such red Ind-Suzuki

motor cycles were not an uncommon sight in the city of Pune, atleast none says so. The evidence tendered by the prosecution in this behalf betrays a laboured attempt to connect the inmates of G-21 flat with the purchase of a red Ind-Suzuki motor cycle since it was subsequently involved in an accident on 7th September, 1986 and accused Sukha and Nimma were found using the same. No attempt was made to establish the identity of Sanjeev Gupta even through photographs.

PW 27 Hanuman Kunjir, a newspaper vendor, was examined to prove that he supplied the Indian Express newspaper to the occupants of G-21 flat. He discontinued supplying the newspaper when he found that the earlier issues which he had left in the door-gap had not been collected by anyone and there was no gap through which he could push-in the newspaper. Once he had found the door open and recovered his dues under receipt Exh. 218.No attempt has been made to establish the identity of the person who asked him to supply the newspaper or the person who paid the amount of Rs.40 for which he gave the receipt Exh. 218. Hence his evidence is of no use to the prosecution.

The prosecution alleges that Sukhi left India on 14th July, 1986. The absconding accused Bittu and accused No.1 Sukha had also secured false passports in fake name.Sukha is said to have taken out a passport in the name of Charan Singh. No expert opinion was tendered though the handwriting expert was examined to show that the application for passport was tendered by Sukha in the assumed name of Charan Singh. The learned trial judge also points out that the photograph seems to have been tempered with and ex-facie raises a grave suspicion regarding the circumstances in which and the point of time when it came to be affixed. PW 55 S.S.Kehlon has signed the index card of Charan Singh's application. PW 54 Raj Rani Malhotra deposes that nothing adverse was reported by the CID officers in respect of Charan Singh. The passport was, therefore, issued to Charan Singh. From the above evidence it is difficult to ascertain who tampered with the photograph. Even PW 70 Rajkumar Mittal who dealt with the index card did not find anything suspicious at that time. PW 77 Kulbhusan Sikka had delivered the passport to Shashi Bhushan who was authorised by Charan Singh to receive the same. From the above evidence and particularly lack of expert evidence it is difficult to conclude that accused No.1 Sukha had committed forgery to secure a passport to leave India. The prosecution has tried to show that Sukhi obtained a passport in the name of Sunil Kumar, Bittu obtained a passport in the name of Harjit Sidhu and Sukha tried to obtain a passport in the name of Charan Singh. It is true that Sukhi left India on 14th July 1986, may be on a forged passport. So also we may assume that Bittu obtained a false passport and so did Sukha. This by itself will not establish a firm link between the three as co-conspirators. As stated earlier none in the passport office suspected anything shady in regard to Charan Singh's application for grant of passport. It seems that only after the passport was issued some tampering was attempted. The manner in which the photograph is pinned raises suspicion. Who did it is the question? There is no evidence in this behalf. There is nothing on record, except suspicion, that accused No.1 was privy to it. In the absence of reliable evidence it is unwise to act on mere suspicion. We. therefore, cannot find fault with the approach of the learned trial judge so far as this part of the prosecution case in concerned.

One further fact on which the prosecution places reliance in support of its' case of criminal conspiracy is that accused Nos. 1, 2 and 5 travelled by Chhatisgarh Express from Ambala to Doorg between 3rd August, 1986 and 5th August, 1986 and from Doorg to Bombay by Gitanjali Express in

assumed names. Apart from the oral evidence of PWs 126 to 135 and 151, the prosecution has placed strong reliance on the reservation forms Exh. 700 and 701 purporting to be in the handwriting of accused No.1 Sukha. There is no direct evidence as admittedly they had travelled in assumed names and none has identified them. Thus the only evidence is the opinion evidence of the handwriting expert PW 120 to the effect that the reservation forms are in the handwriting of accused No.1 Sukha. While in Bombay, the accused No. 1 is stated to have given his clothes to Lily White Dry-

cleaners on 7th August, 1986 and received them from PW 89 Deepak Nanawani on the next day. PW 30 Arjun Punjabi has proved the two tags of the said laundry found from G-21, Salunke Vihar flat when the same was searched. But the said evidence cannot be of much use unless the identity of the person who delivered and received back the clothes is established. Here also the prosecution relies on the evidence of the hand-writing expert to show that accused No.1 had written his name (assumed name) on the bill prepared at the time the clothes were delivered for dry- cleaning.

From the facts discussed above it becomes clear that the direct evidence, if at all, regarding the identity of the persons who moved about in different assumed names is either wholly wanting or is of such a weak nature that it would be hazardous to place reliance thereon without proper corroboration. As pointed out earlier the direct evidence regarding identity of the culprits comprises of (i) identification for the first time after a lapse of considerable time in Court or (ii) identification at a test identification parade. In the case of total strangers, it is not safe to place implicit reliance on the evidence of witnesses who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in Court. In the present case it was all the more difficult as indisputably the accused persons had since changed their appearance. Test identification parade, if held promptly and after taking the necessary precautions to ensure its creditability, would lend the required assurance which the court ordinarily seeks to act on it. In the absence of such 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 and that too of persons who had changed their appearance. We, therefore, think that the learned trial judge was perfectly justified in looking for corroboration. In Kanan & Ors. v. State of Kerala, [1979] SCC 621 this Court speaking through Murtaza Fazal Ali, J. observed:

> "It is well settled that where a witness identifies an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has been a previous T.I. parade to test his powers of observations. The idea of holding T.I. parade under Section 9 of the Evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no T.I. parade is held then it will be wholly unsafe to rely on his testimony regarding the identification of an accused for the first time in Court."

We are in respectful agreement with the aforequoted observations.

The prosecution also led evidence to show that the accused persons were put up for test identification by the witnesses who claim to have seen them at different places before the actual incident of murder took place. we have adverted to the prosecution evidence in this behalf earlier

and have pointed out how weak and thoroughly unreliable the said evidence is. It has been shown that some of the witnesses who claim to have identified the accused, one or more, have conceded that they had an occasion to see the accused in the Borivali lock-up earlier in point of time. This admission on the part of the witnesses has rendered the evidence in this behalf of little or no value and such evidence was rightly brushed aside by the trial Court. We too, having critically examined the evidence in this behalf, find it difficult to accept the same. Therefore, the direct evidence regarding the identity of the accused is of no help to the prosecution.

The prosecution has then relied on the evidence of the handwriting expert PW 120 to establish the involvement of the accused, including the absconding accused, in the commission of the crime in question. In the case of the absconding accused Sukhi, PW 120 examined a host of documents marked Q.1 to Q.34, Q.55 and Q.62 to Q.91 and compared them with the two documents A53 and A54 marked as admitted writings of Sukhi. The expert opined that Q.1 to Q.12, Q.14 to Q.23, Q.55, Q.62 to Q.66, Q.68 to Q.70, Q.72 to Q.77, Q.79 to Q.85, Q.87 and Q.89 were in the handwriting of the author of the documents marked A53 and A54. In the case of accused No.1 Sukha, PW 120 examined the questioned documents marked Q.40 to Q.54, Q.60, Q.61, Q.94 and Q.95 and compared them with his specimen writings marked S1 to S49, S52 to S59, S62 to S64 and the admitted writings A1 to A53 and A62 to A73 and came to the conclusion that the writings Q.40, Q.54, Q.60, Q61., Q.94 and Q.95 tallied with the specimen and admitted writings of accused No.1. So far Q.55 is concerned an express negative opinion was obtained that it was not in the hand of accused No. 1. Similary in regard to the accused Daljit Singh @ Bittu, questioned documents marked Q.35 to Q.39 were compared with the admitted writings marked A55 to A59 and the expert opined that Q.35 to Q.39 showed similarities with A55 to A59. The handwriting of accused No.5 Jinda could not be obtained and, therefore, the question of comparing his specimen writings with the questioned writings did not arise.

Before a Court can act on the opinion evidence of a handwriting expert two things must be proved beyond any manner of doubt, namely, (i) the genuineness of the specimen/admitted handwriting of the concerned accused and

(ii) the handwriting expert is a competent, reliable and dependable witness whose evidence inspires confidence. In the present case since the absconding accused are not before us we are mainly concerned with the expert's opinion implicating accused No.1 Sukha. The specimen writings of this accused have been proved through the evidence of PW 5 Shaikh Zahir and PW 68 Anand Pawar. The evidence shows that PW 168 S.Prasad, a police officer, had called the witness to a room where accused No.2 Nirmal Singh was present and he was required to write down what the said police officer dictated to him. The specimen writings of Nirmal Singh have been proved through the evidence of the said PW 5 and PW 41 Ramkripal Trivedi. Thereafter they went to another room where accused No. 1 was present. At the instance of PW 160 M.P. Singh he was asked to sign as many as fifteen papers. The learned trial judge has not doubted this part of the prosecution case and we may proceed on that basis. To prove the natural handwriting of accused No.1, the prosecution examined PW 84 S.K.Prachendia, a lecturer of Gyan Jyoti P.G. College. This witness claims that accused No.1 was his student and he had submitted an application in the prescribed from for admission to be P.G. Course as a private candidate. In support, reliance is placed on the photograph

Art.31 showing the witness in company of accused No.1. Two other registers (Arts. 39 & 40) have been relied upon to prove that certain replies are in the hand of accused No.1. But unfortunately for the prosecution the witness could not even identify accused No.1. in the dock nor did he state that the form and the entries in the registers were made by accused No.1 in his presence. In his cross-examination the witness admitted that he would not be able to identify the handwriting of other students who studied under him. More so in the case of accused No.1 who was only a private student. In the circumstances we agree with the learned trial judge that the evidence on record in regard to the natural handwriting of accused No.1 is not satisfactory and does not inspire confidence. If we rule out this part of the material used by the handwriting expert for comparison we are merely left with the specimen writings/signatures of accused No.1 taken while in custody. Here also the evidence of PW 120 itself shows that the handwriting of the railway reservation from Exh. 700 does not tally with the specimen writings/signatures of accused No. 1. It only highlights the fact that it would be dangerous to identify the person who travelled on the strength of the reservation form Exh. 700 by comparing the writing thereon with the specimen writings of accused No.1. The evidence of PW 30 Arjun Punjabi and PW 89 Deepak Nanwani and the find of laundry tag No. 8833 of Lily White Dry-cleaners from G-21, Salunke Vihar flat on 7th September, 1986 was used to establish the fact that accused No.1 was one of the inmates of the said flat and was in Pune a couple of days before the murder of General Vaidya. This connection is sought to be established on the strength of the opinion evidence of PW 120 that the handwriting and signature on the laundry bill Exh. 547 tallied with the specimen writings/signatures of accused No.1. But the laundry tags do not bear the name of the laundry or the year of issue. It was, however, urged that the evidence of PW 89 clearly proved that the number on the tags tallied with the number on the Bill and the opinion evidence of PW 120 clearly established the fact that since the writing and signature on the bill tallied with the specimen writing/ signature of accused No.1, it was reasonable to infer that accused No.1 resided in the G-21, Salunke Vihar flat. But what is indeed surprising is that PW 89 was neither called to the test identification parade nor asked to identify the person who had delivered the clothes for drycleaning from amongst the accused seated in the dock. The question then is whether implicit reliance can be placed on the opinion evidence of the handwriting expert PW 120.

It is well settled that evidence regarding the identity of the author of any document can be tendered (i) by examining the person who is conversant and familiar with the handwriting of such person or (ii) through the testimony of an expert who is qualified and competent to make a comparison of the disputed writing and the admitted writing on a scientific basis and (iii) by the court comparing the disputed document with the admitted one. In the present case the prosecution has resorted to the second mode by relying on the opinion evidence of the handwriting expert PW

120. But since the science of identification of handwriting by comparison is not an infallible one, prudence demands that before acting on such opinion the Court should be fully satisfied about the authorship of the admitted writings which is made the sole basis for comparison and the Court should also be fully satisfied about the competence and credibility of the handwriting expert. It is indeed true that by nature and habit, over a period of time, each individual develops certain traits which give a distinct character to his writings making it possible to identify the author but it must at the same time be realised that since handwriting experts are generally engaged by one of the contesting parties they, consciously or unconsciously, tend to lean in favour of an opinion which is

helpful to the party engaging him. That is why we come across cases of conflicting opinions given by two handwriting experts engaged by opposite parties. It is, therefore, necessary to exercise extra care and caution in evaluating their opinion before accepting the same. So courts have as a rule of prudence refused to place implicit faith on the opinion evidence of a handwriting expert. Normally courts have considered it dangerous to base a conviction solely on the testimony of a handwriting expert because such evidence is not regarded as conclusive. Since such opinion evidence cannot take the place of substantive evidence, courts have, as a rule of prudence, looked for corroboration before acting on such evidence. True it is, there is no rule of law that the evidence of a handwriting expert cannot be acted upon unless substantially corroborated but courts have been slow in placing implicit reliance on such opinion evidence, without more, because of the imperfect nature of the science of identification of handwriting and its accepted fallibility. There is no absolute rule of law or even of prudence which has ripened into a rule of law that in no case can the court base its findings solely on the opinion of a handwriting expert but the imperfect and frail nature of the science of identification of the author by comparison of his admitted handwriting with the disputed ones has placed a heavy responsibility on the courts to exercise extra care and caution before acting on such opinion. Before a court can place reliance on the opinion of an expert, it must be shown that he has not betrayed any bias and the reasons on which he has based his opinion are convincing and satisfactory. It is for this reason that the courts are wary to act solely on the evidence of a handwriting expert; that, however, does not mean that even if there exist numerous striking peculiarities and mannerisms which stand out to identify the writer, the court will not act on the expert's evidence. In the end it all depends on the character of the evidence of the expert and the facts and circumstances of each case.

In Ram Narain v. State of U.P., [1973] 2 SCC 86 this Court was called upon to consider whether a conviction based on uncorroborated testimony of the handwriting expert could be sustained. This Court held:

> "It is no doubt true that the opinion of handwriting expert given in evidence is no less fallible than any other expert opinion adduced in evidence with the result that such evidence has to be received with great caution. But this opinion evidence, which is relevant, may be worthy of acceptance if there is internal or external evidence relating to the document in question supporting the view expressed by the expert."

A similar view was expressed in the case of Bhagwan Kaur v. Maharaj Krishan Sharma, [1973] 4 SCC 46 in the following words:

> "The evidence of a handwriting expert, unlike that of a fingerprint expert, is generally of a frail character and its fallibilities have been quite often noticed. The courts should, therefore, by wary to give too much weight to the evidence of a handwriting expert."

In Murari Lal v. State of M.P., [1980] 1 SCC 704 this Court was once again called upon to examine whether the opinion evidence of a handwriting expert needs to be substantially corroborated before it can be acted upon to base a conviction. Dealing with this oft repeated submission this Court pointed out:

> "Expert testimony is made relevant by Section 45 of the Evidence Act and where the Court has to form an opinion upon a point as to identity of handwriting, the opinion of a person `specially skilled' `in questions as to identity of handwriting' is expressly made a relevant fact. There is nothing in the Evidence Act, as for example like illustration (b) to Section 114 which entitles the Court to presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars, which justifies the court in assuming that a handwriting expert's opinion in unworthy of credit unless corroborated. The Evidence Act itself (Section 3) tells us that `a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists'. It is necessary to occasionally remind ourselves of this interpretation clause in the Evidence Act lest we set an artificial standard of proof not warranted by the provisions of the Act. Further, under Section 114 of the Evidence Act, the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to facts of the particular case. It is also to be noticed that Section 46 of the Evidence Act makes facts, not otherwise relevant, relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant. So, corroboration may not invariably be insisted upon before acting on the opinion of an handwriting expert and there need be no initial suspicion. But, on the facts of a particular case, a court may require corroboration of a varying degree. There can be no hard and fast rule, but nothing will justify the rejection of the opinion of an expert supported by unchallenged reasons on the sole ground that it is not corroborated. The approach of a court while dealing with the opinion of a handwriting expert should be to proceed cautiously, probe the reasons for the opinion, consider all other relevant evidence and decide finally to accept or reject it."

After examining the case law this Court proceed to add:

> "We are firmly of the opinion that there is no rule of law, nor any rule of prudence which has crystallised into a rule of law, that opinion- evidence of a handwriting expert must never be acted upon, unless substantially corroborated. But, having due regard to the imperfect nature of the science of identification of handwriting, the approach, as we indicated earlier, should be one of caution. Reasons for the opinion must be carefully probed and examined. All other relevant evidence must be considered. In appropriate cases, corroboration may be sought. In cases where the reasons for the opinion are convincing and there is no reliable evidence throwing a doubt, the uncorroborated testimony of an handwriting expert may be accepted. There cannot be any inflexible rule on a matter which, in the ultimate analysis, is no more than a question of testimonial weight."

What emerges from the case law referred to above is that handwriting expert is a competent witness whose opinion evidence is recognised as relevant under the provisions of the Evidence Act and has

not been equated to the class of evidence of an accomplice. It would, therefore, not be fair to approach the opinion evidence with suspicion but the correct approach would be to weigh the reasons on which it is based. The quality of his opinion would depend on the soundness of the reasons on which it is founded. But the court cannot afford to overlook the fact that the science of identification of handwriting is an imperfect and frail one as compared to the science of identification of finger- prints; courts have, therefore, been wary in placing implicit reliance on such opinion evidence and have looked for corroboration but that is not to say that it is a rule of prudence of general application regardless of the circumstances of the case and the quality of expert evidence. No hard and fast rule can be laid down in this behalf but the Court has to decide in each case of its own merits what weight it should attach to the opinion of the expert.

The trial court examined the evidence of the handwriting expert PW 120 in great detail and came to the conclusion that it was hazardous to rely on his evidence as he had betrayed bias against the accused and in favour of the prosecution as `he also belongs to the Police Department` (see paragraph 159 of the judgement. As regards the specimen writings/signatures of accused No.1 the trial court observes in paragraph 157 as under:

> "These answers in cross-examination of this witness do show that the specimen writings of Sukhdev Singh alias Sukh (accused No.1) and the questioned writings are not written by Sukhdev Singh (accused No.1) at all."

As regards accused No.2 Nimma, the learned trial judge points out that the specimen signature `N.Singh` does not correspond with the questioned documents. The learned trial judge, therefore, did not consider it wise to place reliance on the opinion of PW 120 particularly because he did not consider his opinion to be independent but found that he had betrayed a tilt in favour of the investigating machinery. Since the trial court did not consider the opinion of PW 120 to be dependable he did not deem it necessary to look for corroboration. For the same reason he did not consider it necessary to scrutinise the evidence of the expert in regard to the two absconding accused Sukhi and Bittu. No such opinion evidence is relied upon in respect of the other accused. We may at once state that the quality of evidence in regard to proof of identity of Sukhi and Bittu through their so-called handwriting is weaker than that of accused No.1. We have carefully examined the opinion evidence of PW 120 and we agree with the learned trial judge that the quality of his evidence is not so high as to commend acceptance without corroboration. Having given our anxious consideration to the expert's evidence, through which we were taken by the learned counsel for the prosecution, we do not think that the view taken by the learned trial judge is legally unsustainable or perverse. Even otherwise having regard to the facts and circumstances of the case and the nature of evidence tendered and the quality of evidence of PW 120 the prosecution has not succeeded in establishing beyond reasonable doubt the so-called conspiracy.

It was then submitted, relying on section 73 of the Evidence Act, that we should compare the disputed material with the specimen/admitted material on record and reach our own conclusion. There is no doubt that the said provision empowers the court to see for itself whether on a comparison of the two sets of writing/signature, it can safely be concluded with the assistance of the expert opinion that the disputed writings are in the handwriting of the accused as alleged. For this

purpose we were shown the enlarged copies of the two sets of writings but we are afraid we did not consider it advisable to venture a conclusion based on such comparison having regard to the state of evidence on record in regard to the specimen/admitted writings of the accused Nos.1 and 2. Although the section specifically empowers the court to compare the disputed writings with the specimen/admitted writings shown to be genuine, prudence demands that the Court should be extremely slow in venturing an opinion on the basis of mere comparison, more so, when the quality of evidence in respect of specimen/admitted writings is not of high standard. We have already pointed out the state of evidence as regards the specimen/admitted writings earlier and we think it would be dangerous to stake any opinion on the basis of mere comparison. We have, therefore, refrained from basing our conclusion by comparing the disputed writings with the specimen/admitted writings.

From the above discussion of the evidence it is clear that the prosecution's effort to provide the missing links in the chain by seeking to establish the identity of the participants to the alleged conspiracy through the handwriting expert PW 120 has miserably failed. We, therefore, agree with the conclusion of the learned trial judge in this behalf.

That brings us to the incident of murder of General Vaidya on the morning of 10th August, 1986 at about 11.30 a.m. We have set out the facts in regard to the said incident in some detail in the earlier part of this judgment and will recapitulate only those facts which are necessary to be noticed for the purpose of appreciating the evidence leading to the murder. The fact that General Vaidya died a homicidal death is established beyond and manner of doubt by the evidence of PW 157 Dr. L.K.Bade who had undertaken the post-mortem examination and had opined that death was due to shock suffered following gun shot injuries. Counsel for the defence had also admitted this fact as is evidenced by Exh. 155. As this fact was not challenged before the trial court, as indeed it could not be, nor was it contested before us, we need not detain ourselves on the same and would proceed to examine the evidence with a view to fixing the responsibility for the said crime.

On the morning of the day of the incident General Vaidya and his wife PW 106 Bhanumati had gone out for shopping in the Maruti Car DIB 1437 at about 10.00 a.m. with their securityman PW 16 Ramchandra Kshrisagar in the rear seat. When they were returning at about 11.30 a.m. with General Vaidya in the driver's seat, his wife by his side in the front and the securityman behind her, the incident in question occurred. The car had slowed down at the intersection of Rajendrasinghji and Abhimanyu roads since it had to negotiate a sharp right turn to go to the residence of General Vaidya. Taking advantage of this fact a Ind- Suzuki motor cycle came parallel to the car on the side of the driver i.e. General Vaidya and the pillion rider took out a pistol or gun and fired and three shots in quick succession at the deceased. Immediately thereafter the motor cyclists sped away and the victim slumped on the shoulder of his wife who too was injured. Unfortunately the reflexes of the securityman were not fast enough and hence the culprits could make good their escape without a shot having been fired at them by the securityman. The car drifted towards the cyclists PW 14 Digambar Gaikwad who, sensing trouble, jumped off leaving the cycle which came under the front wheel of the car. Therefore, we have the testimony of three persons who can be described as witnesses to the main incident, namely, PW 16 the securityman, PW 106, the wife of the deceased and PW 14, the cyclist. In addition to the evidence of the aforesaid three witnesses, the prosecution

has also placed reliance on the evidence of PW 111 G.B.Naik, PW 114 Vijay Anant Kulkarni and PW 115 B.V.Deokar, on the plea that these witnesses had also seen the incident and the culprits from the rickshaw in which they were passing at that time of the incident. The trial court has placed reliance on the first set of the witnesses and has rejected the evidence tendered through the second set of witnesses as it did not accept the fact that the autorickshaw in question had actually passed by. We will discuss the prosecution evidence regarding the commission of the crime in two parts.

The evidence of the securityman PW 16 Ramchandra Kshirsagar is that when the car was proceeding towards the intersection from where it had to turn right to go to the bungalow of General Vaidya, he saw an autorickshaw coming from the opposite side and signalled it by stretching out his hand to keep to the extreme left. Then he saw a cyclist also coming from the opposite side and signalled him also. Just then the car which had slowed down considerably began to negotiate a turn when a red Ind-Suzuki motor cycle drove along the car on the side of General Vaidya who was at the steering wheel. The pillion rider fired three shots from his weapon at the head of General Vaidya and then sped away. This witness wants us to believe that as he was busy signalling the rickshaw driver he had not seen the motor cycle approaching the car before the first shot was fired. As soon as the car came to a halt, he jumped out of the car with his service revolver but as PW 106 Bhanumati Vaidya was shouting for a conveyance he went about searching for one and found a matador van in which the injured General Vaidya was rushed to the hospital. It was after reaching the hospital that he contacted the L.I.B. Inspector Garad to whom he narrated the incident and reiterated the same to the Commissioner of Police. His detailed complaint Exh. 179 was then recorded by PW 119 Inspector Mohite in which he described the colour of the motor cycle as black and not red. Since he was sitting behind PW 106 Bhanumati, he could have seen the assailant when his attention was drawn in that direction on hearing the first shot fired from close range. It is difficult to believe that he had no opportunity to see the motor cyclists. It must be remembered that four shots were fired, albeit in quick succession, but there was a slight pause after the first shot. It is difficult to agree with the suggestion that he had no opportunity to see the assailant and his companion. In fact he states that he saw them from a distance of three or four feet only. As pointed out earlier accused Nos.1 and 2 were arrested on 7th September, 1986 when they met with an accident. Thereafter on 22nd September, 1986 this witness was called at about 12 noon to the Yervada Jail. Soon thereafter a person who identified himself as a magistrate came and gave them certain instructions regarding the identification parade about to be held. He was then called to a room in which 10 to 12 persons had lined up and he was asked if the person who had fired at General Vaidya was amongst them. He identified one person from the queue as the assailant. He identified accused No.1 as that person in Court also. The Panchnama drawn up in regard to the test identification parade is at Exh. 349 duly proved by PW 51 B.S. Karkande, Special Judicial Magistrate. Except for a couple of minor contradictions there is nothing brought out in his cross-examination to doubt his testimony regarding identification of accused No.1 as the person who fired the shots at General Vaidya. The presence of this witness at the time of occurrence cannot and indeed was not doubted. So also it cannot be denied that he had an opportunity to identify the assailant. We, therefore, do not see any serious infirmity in his evidence which would cast a doubt as regards his identification of accused No. 1.

The next important witness is PW 106 Bhanumati Vaidya. She had accompanied her husband and was sitting next to him in the front seat of the car when the incident took place. She states that when the car took a turn at the intersection she heard three sounds like the misfire of a motor cycle but soon thereafter her husband's left hand slipped from the steering and his neck slumped on her shoulder. She states that the car drifted towards a cyclist who jumped off leaving the cycle which was run over by the front wheels of the motor car. She saw the motor cycle with two riders speed away and could only see the back of the pillion rider. She too had received bullet injuries on her right shoulder and was admitted in the intensive care unit of the hospital. She was operated upon for removal of the bullets from her body. Next day a magistrate had visited the hospital and had recorded her statement. She has deposed that the pillion rider whom she had seen from behind had been noticed by her two days earlier on 8th August, 1986 at about 9.00 or 9.30 a.m. with a red motor cycle opposite Gadge Maharaj School at the corner of bungalow No. 45. Two persons were standing there one of whom was the pillion rider whom she saw from behind after the shoot out. She, however, expressed her inability to indentify him from amongst the accused persons in Court. Under cross-examination she stated that she could not say if it was a motor cycle or a moped. Thus her evidence proves the incident beyond any manner of doubt but her evidence is of little use on the question of identity of the assailant and his companion.

PW 14 Digamber Shridhar Gaikward, the cyclist, deposes that at the time of incident he was proceeding on his cylce towards the railwaystation when he heard three sounds and looked towards the Maruti car. He saw a red motor cycle by the side of the driver of the car. It sped away with two persons riding it. The pillion rider who had a bag was seen putting something therein. Since the driver of the car was wounded on his head, he lost control of the vehicle and the same came towards him whereupon he jumped off and the cycle was under the wheels of the car. In cross-examination he stated that he had not seen any other vehicle on the road, thereby ruling out the presence of any autorickshaw in regard to which PW 16 has spoken. His evidence is also not useful from the point of identity of the assailant.

The evidence of three more witnesses PW 60 Jaysingh Mahadeo Hole, PW 61 Nazir Husain Ansari and PW 103 Ashok Jadhav may be noticed at this stage. PW 61 and PW 103 have deposed that on the day previous to the incident two persons had approached them and had inquired about the residence of a recently retired army General. These two persons identified accused No.1 as the person who had approached them with his companion waiting near the motor cycle. PW 60 is the chowkidar who had seen two persons sitting on their red motor cycle in the compound of Gadge Maharaj School and had driven them out. He also identified accused No. 1 along with PWs 16, 61 and 103 at the test identification parade held on 22nd Sepember, 1986. It is pertinent to note that PWs 61 and 103 had identified accused No.5 through his photographs Articles 23 and 75. They identified him in Court but accused No.5 stated in answer to question No. 135 that they did so at the behest of the police.

We now come to the next group of witnesses, the driver and the two passengers of the autorickshaw which the securityman PW 16 claims was seen coming from the opposite direction. PW 16 says that just as the car was turning towards the right, he saw an autorickshaw coming from the opposite direction and signalled it to move to the extreme left. True it is that PW 14, the cyclist, did not notice

it but in our view that cannot cast any doubt on the credibility of PW 16. There was no need for the cyclist to take note of the autorickshaw. His attention was rivetted at the car and the motor cycle after he heard the shots and there was no need for him to notice the autorickshaw. Counsel for the accused submitted that the story regarding the presence of an autorickshaw was invented by the securityman PW 16 to save his skin as he had been guilty of a serious lapse in having failed to save General Vaidya and apprehend his assailants. We may examine the evidence of the rickshaw driver PW 115 Baban Vithobha Deokar and the two passengers PW 111 G.B.Naik and PW 114 Vijay Anant Kulkarni. PW 111 had two daughters Anuradha and Anupama. Anuradha is the wife of PW 114 whereas Anupama was wedded to Arunkumar Tomar. Anupama had come to her father's house from Secunderabad on 4th August, 1986 as her relations with her husband were strained. On the next day her husband who was an Education Instructor in the Military had also come to Pune. While at the house of PW 111 there was a quarrel between the couple; hot words were followed by physical assault. In the course of this quarrel she was kicked in the abdomen and being pregnant complications developed within a couple of days necessitating her removal to the clinic of PW 1 Dr. Sudhir Kumar on 7th August, 1986. Her husband had left earlier but PW 114 who had come to Pune had assisted his father-in-law in the treatment of Anupama who was operated upon on the morning of 10th August, 1986, vide Exh. 82. The son of PW 111 was also a doctor in military service and in consultation with him and PW 114, PW 111 had decided to lodge a complaint against Arunkumar Tomar with the higher military authorities. After the complaint was drafted it was decided to have it typed on a stamp paper so that sufficient copies could be taken out for being despatched to various authorities. The stamp paper was purchased from PW 36 Mrs. Gokhle The draft was got typed at N.B.Xerox company situate at Camp, Pune, as is evident from PW 37 Hidayat Ali. This part of the prosecution case is supported by Exh. 249, an entry from the stamp-vendor's register, evidencing the purchase of the stamp paper Exh. 249A proved through the stamp-vendor PW 36. The original complaint Exh. 249A typed on the stamp paper was forwarded to the General Officer Commanding whereas ten copies thereof taken out on an electronic typewriter were sent to different authorities under the signature of Anupama. This is also proved through the deposition of PW 37 Hidayat Ali.

On 10th August, 1986, PW 111 and PW 114 picked up an autorickshaw outside Agakhan Palace at about 11.00 a.m. to go to Stree Clinic of Dr. Sudhir Kumar. He was instructed to drive through camp area. They passed through Bund Gardens, took the overbridge and passed via the Circuit House to Abhimanyu Road. PW 111 was sitting on the right side and his son-in-law PW 114 was to his left. A white Maruti car was noticed and then he saw a red coloured Ind-Suzuki motor cycle being driven parallel to the car on the driver's seat side. They then saw the pillion rider pump in three bullets in the head of the driver of the car. This witness deposes that the assailants were 20 or 25 years of age. When the motor cycle passed by the rickshaw, the witness had an opportunity to identify the motor cyclists. They were clean shaven then but were in turban and beard in Court. Then these two witnesses got down from the rickshaw and helped others lift the body of General Vaidya to the matador van which carried him and his wife to the hospital. They then went to PW 37 Hidayat Ali, picked up the typed material and went to Stree Clinic where they discharged the rickshaw. They had narrated the incident to PW 37. PW 111 also claims to have made a note about the incident in his dairy Exh. 622. It is true that the statements of these two witnesses were recorded late i.e.on 24th October, 1986 presumably because their names had not surfaced earlier. The witness was shown several photographs and he could recognise one of them as the driver of the motor cycle. This

photograph is marked Art. 148. Later both PW 111 and PW 114 had identified accused No.1 at the test identification parade held on 29th October, 1986. Both the witnesses also identified accused Nos.1 and 5 in Court. Albeit PW 111 took some time to identify accused No.1 in Court but that may be on account of the change in his appearance. It is said that the evidence of PW 111 and PW 114 stands corroborated by the evidence of PW 36 and PW 37 and the documentary evidence Exh. 249, 249A and Exh. 82 The rickshaw driver PW 115 has deposed that on 10th August, 1986 at about 11.00 a.m. while he was waiting in front of Agakhan Palace he was engaged by PW 111 and PW 114 who instructed him that they desired to go to the camp area and from there to the Deccan area. When his vehicle approached the Circuit House intersection and emerged on the Abhimanyu road he saw a white Maruti car and one Ind-Suzuki motor cycle taking a turn to the right of the intersection. The motor cyclists drove on the side of the driver's seat and the pillion rider fired three shots at the driver of the car. Immediately thereafter the motor cyclists sped away. He then speaks about the manner in which the cyclist jumped off and the car came to a halt after running over the cycle. He also states that thereafter the two passengers got down from his rickshaw and went near the car. He also parked his rickshaw at the corner of the intersection and joined the other two passengers. He found that the car driver was injured on the head and was bleeding profusely. A matador van arrived and the injured was lifted and placed in the van and carried to the hospital. He and the two passengers then returned to the rickshaw and proceeded towards Deccan side and from there to the Stree Clinic. Sometime after the incident i.e. on 8th November, 1986, the C.B.I. officers showed him seven or eight photographs and asked him if he could recognise the photographs of the motor cyclists. He recognised the photograph of the driver of the motor cycle is but he did not notice any photograph of the pillion rider. The photograph of the driver of the motor cycle is included at Art. 150 and his signature was obtained on the reverse of it. This photograph is stated to be of accused No.5 whom the witness later identified in Court also. No test identification parade could be held as accused No.5 Jinda could not be arrested till 30th August, 1987. The evidence of this witness also lends corroboration to the evidence of PWs 111 and 114.

There is also the evidence of PW 28 Noor Mohamad, also a rickshaw driver in whose rickshaw PW 111 and PW 114 had gone to the Jan Kalyan Blood Bank to register their name in case blood may be required at the time of Anupama's operation. He has also stated that the two passengers were talking about having witnessed a shoot out earlier in the day as is ordinarily seen in movies.

The learned trial judge discarded this part of the prosecution case for diverse reasons, some of them being (i) the story of the securityman PW 16 in regard to the location of the autorickshaw is in sharp conflict with his version in the FIR; (ii) the presence of PW 111 and PW 114 at the place of the incident is highly doubtful for the reason that there was no cause for them to take the longer route, more particularly when Anupama was admitted to the clinic of PW 1 and was to be operated on that very day; (iii) the conduct of both the witnesses in maintaining sphnix-like silence for more than two and a half months when the incident had shaken the nation was highly unnatural, more so because admittedly PW 111 had met inspector Mohite only a few days after the incident., may be in some other connection; (iv) the entry in the diary of PW 111 regarding this incident was ex-facie a laboured attempt made with a view to creating corroborative documentary evidence to support his false version; and (v) the identification of the motor cycle driver through a photograph purport-

ing to be of accused No. 5 Jinda is also an attempt to connect the said accused with the crime in question. The learned Additional Solicitor General made a valiant attempt to question the correctness of the grounds on which the learned trial judge brushed aside this part of the prosecution case. But for the view we are inclined to take we would have given our anxious consideration to the submissions of the learned counsel. The purpose of leading this evidence was essentially to identify the driver of the motor cycle through these witnesses. They did so by picking up one photograph from seven or eight shown to them. Whose photograph is this? Accused No. 5 disowns it. No test identification parade was held since accused No. 5 Jinda was apprehended at Delhi a year or so later on 30th August, 1987 and was taken to Pune in January 1988. Although the prosecution did not deem it wise to hold a test identification parade because of the passage of time, the witnesses examined later did not hesitate to point a finger at accused No.5 Jinda during the trial. Therefore, according to the prosecution the photograph was that of accused No. 5 Jinda who was very much in Court. The learned trial judge, therefore, had the benefit of comparing the photograph with accused No. 5 whose photograph it purported to be. In the connection the learned trial judge has this to say in paragraph 342 of his judgment :

> "Firstly, in my opinion, this photograph does not appear to be that of Harjinder singh alias Jinda (accd. 5) at all."

*** *** *** *** "...how can I hold that this is the photograph of Jinda (accd. S), when obviously to the naked eyes, it does not look similar to the face of Jinda (accd. 5) Proceeding further, in paragraph 343, the learned judge add:

> "……..whereas in the instant case before me, the photograph does not appear to be of Jinda (accd.
>
> 5)"

It will thus be seen that the learned judge on a comparison of the photograph with the features of accused No. 5 who was very much before him categorically held that the photograph pointed out by the witnesses was not of accused No. 5. We cannot ignore the photograph from consideration for non-production of the negative (not traced) because that is merely an additional plank on which the trial court has ruled out this part of the prosecution case. For the above reasons the trial court refused to place reliance on the prosecution's attempt to establish the identity of accused No.5 as the driver of the motor cycle through photographs.

But the learned Additional Solicitor General submitted that it is not possible to believe that the photographs relied on were not the photographs of accused No.5. He submitted that accused No.5 was apprehended in Delhi on 30th August, 1987 and as his legs were fractured he was immediately admitted to a hospital and was taken to Pune in January 1988. In the meantime his photographs had appeared in various newspapers, magazines and also on television and, therefore, it is not possible to believe that the investigating officer would be so naive as to show and produce some one else's photographs. He submitted that perhaps because the appearance of accused No.5 and undergone a change in the meantime even the learned judge had difficulty in identifying him as the

person in the photographs. He submitted that this was followed by the witnesses identifying him in Court. There is considerable force in this line of reasoning but at the same time we cannot over look the opinion of the learned judge who had the opportunity to compare the photographs with the features of accused No. 5 who was very much before him. Had the evidence rested there we would have found it difficult to ignore it but we find that accused No.5 has in his statement recorded under section 313 of the Code admitted the fact that it was he who was driving the motor cycle with accused No.1 on the pillion seat when General Vaidya was shot down. He has also admitted this fact in his written statement Exh.922 submitted to court through the Jailor and followed it up by admitting the same in answer to Question No. 249 of his statement under section 313 of the Code. He has further stated that accused No. 1 and he killed General Vaidya as he had attacked and destroyed the Akal Takht in the Golden Temple at Amritsar. He then adds that the Sikhs are fighting for a separate State of Khalistan and will continue to fight till the goal is achieved. Lastly, he says "we sikhs are not afraid of death". It was, therefore, submitted by the learned Additional Solicitor General that this statement is sufficient to prove his involvement in the commission of the crime and in any event it lends corroboration to the prosecution evidence in this behalf. Accused No.1 has also made a statement on similar lines admitting his involvement in the crime and the fact that he had fired the fatal shots at General Vaidya from the pillion seat of the motor cycle. So far as accused No.1 is concerned there is evidence tendered by the prosecution of witnesses who identified him at the test identification parade, in court, through photographs and by the eye-witness the securityman PW 16 and his statement lends corroboration thereto. The question then is can a conviction be based on such an admission of guilt made in the written statements followed by the oral statement under section 313 of the Code?

The charge was framed on 2nd September, 1988. Both accused Nos.1 and 5 along with others pleaded not guilty to the charges levelled against them and claimed to be tried. After recording the plea, the proceedings were adjourned to 19th September, 1988 on which date accused No.1 orally informed the learned trial judge that he had killed General Vaidya and he did not desire to contest the case. The accused No. 1 has later explained in his statement under section 313 of the Code that according to him killing General Vaidya was not a crime and that is why he had not pleaded guilty. Be that as it may, the learned trial judge gave accused No.1 time upto 26th September, 1988 to reflect. On that date accused No.1 presented a written statement Exh. 60A wherein he admitted to have fired four shots at General Vaidya and killed him. He further stated that he had learnt that he had injured his wife also but that was wholly unintentional. Even later when his statement was recorded under section 313 of the Code, he owned the statement Exh. 60A and did not try to wriggle out of it. He departs from the prosecution case, in that, he says he was riding a black (not red) motor cycle and that accused No.5 was not the driver but one Mathura Singh was driving the motor cycle. That betrays an attempt on his part to keep out accused No.

5. Even after this statement was filed the learned trial judge did not convict him straightaway but proceeded to complete the prosecution evidence before recording his statement under section 313 of the Code. He followed this up by yet another statement Exh. 919 admitting his guilt.

Accused No. 5 Jinda pleaded not guilty to the charge. He did not make any such statement till the conclusion of the evidence when he sent Exh. 922 through jail. However, at the conclusion of the

prosecution evidence when accused No. 5 was examined under section 313 of the Code, he admitted that he was the driver of the motor cycle and accused No.1 was his pillion rider. He also admitted that accused No.1 had fired the fatal shots at General Vaidya while sitting on the pillion seat. In answer to the usual last question accused No. 5 said that on the date of the incident he was driving a black motor cycle with accused No.1 on the pillion seat and it was the latter who fired at and killed General Vaidya. This being an admission of guilt, the question is whether the Court can act upon it. He has supported this by his written statement Exh. 922. It will thus be seen that both the accused Nos.1 and 5 made written as well as oral admissions regarding their involvement in the commission of the crime.

It is manifest from the written statements of both accused Nos. 1 and 5 and from their oral statements recorded under section 313 of the Code that they firmly believed that since General Vaidya was responsible for conducting operation Blue Star which had damaged a sacred religious place like the Akal Takht of the Golden Temple at Amritsar and had also hurt the religious feelings and sentiments of the sikh community, he was guilty of a serious crime, the punishment for which could only be death, and, therefore, they had merely executed him and in doing so had not committed any crime whatsoever. As stated earlier it is on this notion that the accused continued to plead not guilty while at the same time admitting the fact of having killed General Vaidya. It may be mentioned that when the eye- witness account was put to him, accused No.1 admitted that he was the pillion rider who had fired four shots at General Vaidya. His answers to the various circumstances pointed out to him in his statement under section 313 of the Code reveal that he unhesitatingly admitted the entire eye- witness account and also owned responsibility for the crime. Even in his written statement Exh. 60A he admitted "Maine Vaidya Sabko Mara Hain" meaning "I have killed Vaidya Saheb". So far as accused No. 5 is concerned he too admitted the correctness of the eye-witness account of the incident leading to the ultimate death of General Vaidya. When he was asked if he had anything else to say, he referred to his statement Exh. 922 and admitted that it was in his own handwriting, its contents were correct and he had signed it. He also admitted that he was driving the motor cycle when his pillion rider fired at General Vaidya and injured him. It is in this background that we must examine the impact of their admissions in their statements under section 313 of the Code.

Section 313 of the Code is intended to afford a person accused of a crime an opportunity to explain the circumstances appearing in evidence against him. Sub- section (1) of the section is in two parts : the first part empowers the court to put such questions to the accused as it considers necessary at any stage of the inquiry or trial whereas the second part imposes a duty and makes it imperative on the court to question him generally on the prosecution having completed the examination of its witnesses and before the accused is called on to enter upon his defence. Counsel for accused No.5 submitted that since no circumstance had surfaced in evidence tendered by the prosecution against the said accused, there was nothing for him to explain and hence the learned trial judge committed a grave error in examining the said accused under section 313 of the Code. He submitted that since the examination has to be made under the said provision after the prosecution has examined all its witnesses and rested, it is obligatory on the learned judge to decide which circumstance he considers established to seek the explanation of the accused. He submitted that the obligation to question the accused is a serious matter and not a mere idle formality to be gone through by the trial court

without applying its mind as to the evidence and circumstances necessitating an explanation by the accused. Therefore, counsel submitted, if there is no evidence or circumstance appearing in the prosecution evidence implicating the accused with the commission of the crime with which he is charged, there is nothing for the accused to explain and hence his examination under section 313 of the Code would be wholly unnecessary and improper. In such a situation the accused cannot be questioned and his answers cannot be used to supply the gaps left by witnesses in their evidence. In such a situation counsel for accused No.5 Jinda strongly submitted that his examination under section 313 should be totally discarded and his admissions, if any, wholly ignored for otherwise it may appear as if he was trapped by the court. According to him the rules of fairness demand that such examination should be left out of consideration and the admissions made in the course of such examination cannot form the basis of conviction. Counsel for the accused No.1 also contended that the evidence adduced by the prosecution against the accused was so thin and weak that even if it was taken as proved the court would not have been in a position to convict him and, therefore, it was unnecessary to examine him under section 313 of the Code. Strong reliance was placed on Jit Bahadur Chetri v. State of Arunachal Pradesh, 1977 Crl.L.J.1833 and Asokan v. State of Kerala, 1982 Crl.L.J.173. We do not see any merit in these submissions Section 313 of the Code is a statutory provision and embodies the fundamental principle of fairness based on the maxim audi alteram partem. It is trite law that the attention of the accused must be specifically invited to inculpatory pieces of evidence or circumstances laid on record with a view to giving him an opportunity to offer an explanation if he chooses to do so. The section imposes a heavy duty on the court to take great care to ensure that the incriminating circumstances are put to the accused and his response solicited. The words `shall question him' clearly bring out the mandatory character of the clause and cast an imperative duty on the court and confer a corresponding right on the accused to an opportunity to offer his explanation for such incriminating material appearing against him. It is, therefore, true that the purpose of the examination of the accused under section 313 is to give the accused an opportunity to explain the incriminating material which has surfaced on record. The state of examination of the accused under clause (b) of sub-section (1) of section 313 reaches only after the witnesses for the prosecution have been examined and before the accused is called on to enter upon his defence. At the stage of closure of the prosecution evidence and before recording of statement under section 313, the learned judge is not expected to evaluate the evidence for the purpose of deciding whether or not he should question the accused. After the section 313 stage is over he has to hear the oral submissions of counsel on the evidence adduced before pronouncing on the evidence. The learned trial judge is not expected before the examines the accused under section 313 of the code, to sift the evidence and pronounce on whether or not he would accept the evidence regarding any incriminating material to determine whether or not to examine the accused on that material. To do so would be to pre-judge the evidence without hearing the prosecution under section 314 of the Code. Therefore, no matter how weak or scanty the prosecution evidence is in regard to a certain incriminating material, it is the duty of the court to examine the accused and seek his explanation thereon. It is only after that stage is over that the oral arguments have to be heard before the judgment is rendered. It is only where the court finds that no incriminating material has surfaced that the accused may not be examined under section 313 of the Code. If there is material against the accused he must be examined. In the instant case it is not correct to say that no incriminating material had surfaced against the accused, particularly accused No. 5, and hence the learned trial judge was not justified in examining the accused under section 313 of the Code.

That brings us to the question whether such a statement recorded under section 313 of the Code can constitute the sole basis for conviction. Since no oath is administered to the accused, the statements made by the accused will not be evidence stricto sensu. That is why sub-section (3) says that the accused shall not render himself liable to punishment if he givens false answers. Then comes sub-section (4) which reads :

> "(4). The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed."

Thus the answers given by the accused in response to his examination under section 313 can be taken into consideration in such inquiry or trial. This much is clear on a plain reading of the above sub-section. Therefore, though not strictly evidence, sub-section (4) permits that it may be taken into consideration in the said inquiry or trial. See State of Maharasthra v. R.B. Chowdhari, [1967] 3 SCR 708. This court in the case of Hate Singh v. State of Madhya Bharat, 1953 Crl.L.J.1933 held that an answer given by an accused under section 313 examination can be used for proving his guilt as much as the evidence given by a prosecution witness. In Narain Singh v. State of Punjab. [1963] 3 SCR 678 this Court held that if the accused confesses to the commission of the offence with which he is charged the Court may, relying upon that confession, proceed to convict him. To state the exact language in which the three-Judge Bench answered the question it would be advantageous to reproduce the relevant observations at pages 684-685 :

> "Under section 342 of the Code of Criminal Procedure by the first sub-section, insofar as it is material, the Court may at any stage of the enquiry or trial and after the witnesses for the prosecution have been examined and before the accused is called upon for his defence shall put questions to the accused person for the purpose of enabling him to explain any circumstance appearing in the evidence against him. Examination under section 342 is primarily to be directed to those mattes on which evidence has been led for the prosecution to ascertain from the accused his version or explanation - if any, of the incident which forms the subject-matter of the charge and his defence. By sub-section (3), the answers given by the accused may "be taken into consideration" at the enquiry of the trial. If the accused person in his examination under section 342 con-
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> fesses to the commission of the offence charges against him the court may, relying upon that confession, proceed to convict him, but if he does not confess and in explaining circumstance appearing in the evidence against him sets up his own version and seeks to explain his conduct pleading that he has committed no offence, the statement of the accused can only be taken into consideration in its entirety."

(Emphasis supplied) Sub-section (1) of section 313 corresponds to sub- section (1) of section 342 of the old Code except that it now stands bifurcated in two parts with the proviso added thereto clarifying that in summons cases where the presence of the accused is dispensed with his examination under clause (b) may also be dispensed with. Sub-section (2) of section 313 reproduces

the old sub-section (4) and the present sub-section (3) corresponds to the old sub-section (2) except for the change necessitated on account of the abolition of the jury system. The present sub-section (4) with which we are concerned is a verbatim reproduction of the old sub-section (3). Therefore, the aforestated observations apply with equal force.

Even on first principle we see no reason why the Court could not act on the admission or confession made by the accused in the course of the trial or in his statement recorded under section 313 of the Code. Under section 12(4) of the TADA Act a Designated Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before a Court of Session, albeit subject to the other provisions of the Act. The procedure for the trial of Session cases is outlined in Chapter XVIII of the Code. According to the procedure provided in that Chapter after the case is opened as required by section 226, if, upon consideration of the record of the case and the documents submitted therewith, the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused for reasons to be recorded. If, however, the Judge does not see reason to discharge the accused he is required to frame in writing a charge against the accused as required by section 228 of the Code. Where the Judge frames the charge, the charge so framed has to be read over and explained to the accused and the accused is required to be asked whether he pleads guilty of the offence charged or claims to be tried. Section 229 next provides that if the accused pleads guilty, the Judge shall record the plea and may, in his discretion, convict him thereon. The plain language of this provision shows that if the accused pleads guilty the Judge has to record the plea and thereafter decide whether or not to convict the accused. The plea of guilt tantamounts to an admission of all the facts constituting the offence. It is, therefore, essential that before accepting and acting on the plea the Judge must feel satisfied that the accused admits facts or ingredients constituting the offence. The plea of the accused must, therefore, be clean, unambiguous and unqualified and the Court must be satisfied that he has understood the nature of the allegations made against him and admits them. The Court must act with caution and circumspection before accepting and acting on the plea of guilt. Once these requirements are satisfied the law permits the Judge trying the case to record a conviction based on the plea of guilt. If, however, the accused does not plead guilty or the learned Judge does not act on his plea he must fix a date for the examination of the witnesses i.e. the trial of the case. There is nothing in this Chapter which prevents the accused from pleading guilty at any subsequent stage of the trial. But before the trial Judge accepts and acts on that plea he must administer the same caution unto himself. This plea of guilt may also be put forward by the accused in his statement recorded under section 313 of the Code. In the present case, besides giving written confessional statements both accused No.1 and accused NO.5 admitted to have been involved in the commission of murder of General Vaidya. We have already pointed out earlier that both the accused have unmistakably, unequivocally and without any reservation whatsoever admitted the fact that they were responsible for the murder of General Vaidya. It is indeed true that accused No. 5 as the driver of the motor cycle, perhaps he desired to keep him out, but accused No. 5 has himself admitted that he was driving the motor cycle with accused No.1 on the pillion seat and to facilitate the crime he had brought the motor cycle in line with the Maruti car so that accused No.1 may have an opportunity of firing at his victim from close quarters. There is, therefore, no doubt whatsoever that both accused No.1 and accused No. 5 were acting inconcert, they had a common intention to kill

General Vaidya and in furtherance of that intention accused No. 1 fired the fatal shots. We are, therefore, satisfied that the learned trial Judge was justified in holding that accused No. 1 was guilty under section 302 and accused No. 5 was guilty under section 302/34, IPC.

As pointed out earlier, learned counsel for accused Nos. 1 and 5 contended that although a statement recorded under section 313 of the Code can be taken into consideration in an inquiry or trial since it is not `evidence' Stricto sensu and not being under oath, it has little probative value. Reliance was placed on R.B.Chowdhari's case in support of this proposition. The two decisions of the High Courts to which our attention was drawn do not in fact militate against the view which we are inclined to take in regard to the admission of guilt made by the two accused in their statements recorded under section 313 of the Code. In the case of Jit Bahadur Chetri only one witness was examined and immediately thereafter the statement of the accused was recorded under section 313 of the Code. The deposition of the sole witness did not reveal that he had seen the accused causing the injury in question. The question that was framed was not consistent with this evidence and hence the High Court found that the trial court had acted illegally. It was held that such an answer cannot be construed as pleading guilty within the meaning of the provisions of the Code and hence the learned Magistrate had contrary to law in convicting and sentencing the accused on the basis of that plea. It will thus be seen that the Court came to the conclusion that the accused could not be stated to have pleaded guilty and hence the conviction was set aside. In the other case of Asokan the High Court of Kerala pointed out that in a criminal case the burden of establishing the guilt beyond reasonable doubt lies on the prosecution and that burden is neither taken away, nor discharged, nor shifted merely because the accused sets up a plea of private defence. It was pointed out that if the prosecution has not placed any incriminating evidence such an admission made by the accused will be of no avail unless the admission constitutes an admission of guilt of any offence. In that case also the admission made by the accused read as a whole did not constitute an admission of guilt of the offence charged. On the contrary it was in the nature of a plea of private defence. In such circumstances, the High Court came to the conclusion that in the absence of a unequivocal, unmistakable and unqualified plea of guilt, the Court could not have convicted the accused on the statement made by him under section 313 of the Code. This decision also does not, therefore, help the defence.

The accused were inter alia charged under sections 3(2)(i) or (ii) and 3(3) of TADA Act read with sub-rule (4) of rule 23 of the rules framed thereunder. Section 3 provides the punishment for terrorist acts. Section 10 lays down that when trying any offence a Designated Court may also try any other offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with such other offence. It is obvious that where an accused is put up for trial for the commission of any offence under the Act or the Rules made thereunder he can also be tried by the same Designated Court for the other offences with which he may, under the Code, be charged at the same trial provided the offence is connected with such other offence. In the instant case, the accused were tried under the aforesaid provisions of TADA Act and the Rules made thereunder along with the offences under sections 120B, 645, 468, 471, 419, 302 and 307, IPC. They were also charged for the commission of the aforesaid offences with the aid of section 34, IPC. As pointed out earlier under section 12(4) the procedure which the Designated Court must follow is the procedure prescribed in the Code for the trial before a Court of Session. Accordingly, the two accused persons

were tried by the Designated Court since they were charged for the commission of offences under the TADA Act. The Designated Court, however, came to the conclusion that the charge framed under section 3 of the TADA Act read with the relevant rules had not been established and, therefore, acquitted the accused persons on that count. It is not necessary for us to examine the correctness of this finding as we also come to the conclusion that capital punishment is warranted. It also acquitted all the accused persons of the other charges framed under the Penal Code save and except accused Nos. 1 and 5, as stated earlier. The accused were also convicted under section 307 and 307/34 respectively for the injury caused to PW 106 Bhanumati Vaidya. Thus the conviction of accused sno.1 and 5 is outside the provisions of TADA Act and, therefore, it was open to the Designated Court to award such sentence as was provided bythe Penal Code. Section 17(3) of the TADA Act makes sections 366 to 371 and section 392 of the Code applicable in relation to a case involving an offence triable by a Designated Court. The Designated Court having come to the conclusion that this was a case falling within the description of `the rarest of a rare' awarded the extreme penalty of death to both accused Nos. 1 and 5 for the murder of General Vaidya. In doing so, the Trial Court placed strong reliance on the decision of this Court in Kehar Singh & Ors. v. State (Delhi Administration), [1988] 3 SCC 609. The learned Trial Judge took the view that since the murder of General Vaidya was also on account of his involvement in the Blue Star Operation his case stood more or less on the same footing and hence fell within `the rarest of a rare' category. We think that this line of reasoning adopted by the learned Trial Judge is unassailable. We may also point out that the accused persons had no remorse or repentance, in fact they felt proud of having killed General Vaidya in execution of their plan and hence we find no extenuating circumstance to make a departure from the ratio of Kehar Singh's case.

Lastly, placing reliance on the decision of this Court in Allaudin Mian v. State of Bihar, [1989] 3 SCC 5 the learned defence counsel submitted that in the present case also since the conviction and sentence were pronounced on the same day, the capital sentence awarded to the accused should not be confirmed. In the decision relied on, to which one of us (Ahmadi, J.) was a party and who spoke for the Court, it was emphasised that section 235(2) of the Code being mandatory in character, the accused must be given an adequate opportunity of placing material bearing on the question of sentence before the Court. It was pointed out that the choice of sentence had to be made after giving the accused an effective and real opportunity to place his antecedents, social and economic background, mitigating and extenuating circumstances etc., before the Court for otherwise the Court's decision may be vulnerable. It was then said in paragraph 10 at page 21 :

> "We think as a general rule the trial courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender." .lm The above decision was rendered on 13th April, 1989 whereas the present decision was pronounced on 21st October. 1989. Yet contended learned counsel for the accused the Court did not appreciate the spirit of section 235(2) of the Code. The ratio of Allauddin Mian's case was affirmed in Milkiat Singh v. State of Punjab, JT (1991) 2 SC 190 (paragraph 18).

> On the other hand the learned Additional Solicitor General invited our attention to a subsequent decision of this Court in Jumman Khan v. State of U.P., [1990] Suppl. 3 SCR 398. That decision turned on the facts of that case. In that case the Court refused to entertain the plea on the ground that it was not raised in the courts below and was sought to be raised for the first time in the apex court. That decision, therefore, does not assist the prosecution. Reliance was then placed on the third proviso to section 309 of the Code which reads as under :
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> "Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him."

This proviso must be read in the context of the general policy of expeditious inquiry and trial manifested by the main part of the section. That section emphasises that an inquiry or trail once it has begun should proceed from day to day till the evidence of all the witnesses in attendance has been recorded so that they may not be unnecessarily vexed. The underlying object is to discourage frequent adjournments. But that does not mean that the proviso precludes the Court from adjourning the matter even where the interest of justice so demands. The proviso may not entitle an accused to an adjournment but it does not prohibit or preclude the Court from granting one in such serious cases of life and death to satisfy the requirement of justice as enshrined in section 235(2) of the Code. Expeditious disposal of a criminal case is indeed the requirement of Article 21 of the Constitution; so also a fair opportunity to place all relevant material before the court is equally the requirement of the said article. Therefore, if the Court feels that the interest of justice demands that the matter should be adjourned to enable both sides to place the relevant material touching on the question of sentence before the Court, the above extracted proviso cannot preclude the court from doing so.

But in the instant case we find that both the accused decided to plead guilty. Accused No.1 had done so at the earlier stage of the trial when he filed the statement Exh. 60A. Accused no. 5 had also made up his mind when he filed the statement Exh. 922 even before his examination under section 313 of the Code. Accused No. 1 had reiterated his determination when he filed the statement Exh. 919. Thus both the accused had mentally decided to own their involvement in the murder of General Vaidya before their statements were recorded under section 313 of the Code. Not only that their attitude reveals that they had resolved to kill him as they considered him an enemy of the sikh community since he had desecrated the Akal Takht. They also told the trial court that they were proud of their act and were not afraid of death and were prepared to sacrifice their lives for the article of their faith, namely, the realisation of their dream of a separate State of Khalistan. It is thus apparent that before they made their statements admitting their involvement they had mentally prepared themselves for the extreme penalty and, therefore, if they desired to place any material for a lesser sentence they had ample opportunity to do so. But after the decision of this Court in Kehar Singh's case and having regard to the well planned manner in which they executed their resolve to kill General Vaidya, they were aware that there was every likelihood of the Court imposing the extreme penalty and they would have, if they so desired, placed material in their written statements or would have requested the Court for time when their statements under section 313 of the Code

were recorded, if they desired to pray for a lesser sentence. Their resolve not to do so is reflected in the fact that they have not chosen to file any appeal against their convictions by the Designated Court. We are, therefore, of the view that in the present case the requirements of section 235(2) of the Code have been satisfied in letter and spirit and no prejudice is shown to have occurred to the accused. We, therefore, reject this contention of the learned counsel for the accused.

For the above reasons, we are of the opinion that the decision of the learned Trial Judge is based on sound reasons and is unassailable. We, therefore, confirm the conviction of accused No.1 under section 302 and 307, IPC and accused No.5 under section 302 and 307, IPC, both read with section 34, IPC and the sentence of death awarded to both of them. We see no merit in the State's appeal against the acquittal of the other accused persons of all the changes levelled against them and accused Nos. 1 and 5 on the other counts with which they were charged and accordingly dismiss the stage's Criminal Appeal No. 17 of 1990. The Death Reference No. 1of 1989 will stand disposed of as stated above.

Before we part we must express our deep sense of gratitude for the excellent assistance rendered to us by the learned Additional Solicitor General, the learned counsel for the State of Maharashtra and the learned Advocates appointed as amicus curiae to represent the accused persons. But for their excellent marshalling and analysis of the evidence which runs into several volumes we may have found it difficult to compress the same and reach correct conclusions. A word of special praise is due to the learned advocates Shri H.V.Nimbalkar and Shri I.S.Goyal both of whom,sacrificed their practice at Pune and attended to this case from time to time devoting their valuable professional hours at considerable personal inconvenience. Their devotion and dedication is also evident from the fact that apart from making twenty trips to Delhi they spent a seizable amount of Rs. 29,000 from their own pockets as against which they have received a sum of Rs. 5,000 only on 29th October, 1991. At one point of time they had also difficulty in procuring accommodation in Maharashtra Sadan till we passed orders in that behalf. such devotion and dedication enhances the image and prestige of the legal profession. Apart from the time actually spent on the aforesaid twenty occasions in this Court one has to merely imagine the number of hours they must have devoted for preparing the defence. We direct the State of Maharashtra to pay the outstanding amount of Rs. 24,000 which they have spent for travel and lodging and boarding expenses and we also direct that they together be paid a further sum of Rs. 25,000 by way of professional fees for rendering service as amicus curiae. The said amount will be paid to them within one month from today.

V.P.R. Death Reference disposed of/Appeal dismissed.