

State Vs. Sunil Batra Alias Bobby

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Court : Delhi

Decided On : Feb-23-1978

Reported in : ILR1978Delhi536

Judge : S. Rangarajan and; R.N. Aggarwal, JJ.

Acts : [Indian Penal code, 1860](#) - Sections 120B; [Evidence Act, 1872](#) - Sections 27

Appeal No. : Murder Reference No. 1 of 1977

Appellant : State

Respondent : Sunil Batra Alias Bobby

Advocate for Pet/Ap. : B.L. Kalia,; R.S. Sareen and; S.P. Minocha, Advs

Judgement :

S. Rangarajan, J.

(1) This judgment in Murder Reference No. 1 of 1977 will dispose of not only Cr. Appeals No. 43/77 and 44/77 (filed by Sunil Batra), 68/77 and 123/77 (filed by Vipin Kumar Jaggi and Ravinder Nath Kapur, respectively), 186/77 and 187/77 (filed by Shahwar Mohd. Khan), but also Cr. Appeal No. 164 of 1977, referred by the State seeking to enhance the sentence on the other three appellants except Sunil Batra (who will hereafter be referred to as Sunil). For purposes of convenience Vipin Kumar Jaggi will hereafter be referred to as V. Jaggi, the name

which appears frequently:CD/78-2in evidence; Ravinder Nath Kapoor will hereafter be referred to as Ravi and Shahwar Khan as Shahwar only.

(2) Sunil has been convicted under Sections 120-B, 302, 396 as well as under S. 395 read with Ss. 397 and 398 1. P. C. for having caused the death of both Bansi Ram and Ram Niwas, the gun man and the driver, respectively, of the green coloured van of the Union Bank of India, Chandni Chowk (bearing No. DHB 768, Ex. P. '15) and awarded the extreme penalty subject to the confirmation of this Court, under Sections 302 1. P. C. and 396 1. P. C. the lesser sentence, of imprisonment for life, has been awarded under the other sections. The other appellants V. Jaggi, Ravi and Shahwar have been convicted under the aforesaid sections except that the conviction under S. 302 1. P. C. is only constructive, i.e., read with S. 34 1. P. C. for having caused the death of both Bansi Ram and Ram Niwas (gunman and the driver, respectively, of the van of the United Bank of India, Chandni Chowk). Each of them has been awarded imprisonment for life on all the said counts. The sentences of imprisonment, in case of all the four appellants, have been ordered to run concurrently. Sunil and Shahwar were convicted and sentenced under the Arms Act also.

(3) The learned counsel for the appellants, Mr. Ram Jethmalani and Mr. R. K. Garg in particular, urged that the identification of persons not previously known to the witnesses was the weakest type of evidence. Mr. Ram Jethmalani drew our attention to certain observations made by Glanville Williams in the course of his Hamlyn Lectures on The Proof of Guilt (3rd Ed., pages 106-124). Glanville Williams refers to various writers on the subject including some well-known trials. In the case of Adolf Beck he was wrongly picked out at identification parades by no fewer than 12 women who had been defrauded by him and to some of whom he also made love. Without being detained by the possibilities of such error which Glanville Williams points out or even by the recommendations made by the Royal Commission on Police Powers in 1929 for improving the procedure for identification of the alleged culprits by concerned witnesses, we may refer to the observations of Beg. J. (as he then was) in Yashwant & Ors. v. State of Maharashtra (Criminal Appeals No. 175 of 1969 and No. 90 of 1970, decided on 20-4-1972 (1972) 930 U J 923, para 20) : 'It is well known that evidence as to identification, particularly

of previously unknown persons, is a deceptive kind of evidence which has led to miscarriage of justice sometimes'. There is need for caution in acting upon such evidence (vide *Ramazan & Ors. v. Emperor A. I. R.* 1929 Sind 149).

(4) Mr. Ram Jethmalani also referred us to some decisions of Baydekar, J. (Cr. Appeal 1492 of 1951 decided on 19-2-1952; *State v. Mohan Singh* Cr. Appeal No. 1071 decided on 5-12-1951; *Rex v. Pratap Singh Naurasing & Ors.* Cr. Appeal No. 361 of 1948 decided on 24-8-1948) to stress the weak nature of such evidence. Mr. Jethmalani also brought to our notice the Doctoral thesis of Patrick M. Wall on 'Eye Witness Identification in Criminal Cases', published by Charles C. Thomas (Springfield), Illinois, U.S.A., 2nd printing (1971) where the experience in this respect of several countries e.g. United States, Canada, Australia, England etc. has been collected : reference has also been made by Wall to a number of leading authorities on Evidence like Wigmore and McCormick. Wall explains the two types of identification, described in American parlance as a 'show up' '(when one person alone or his photo is shown to the concerned witness(es) or line-up [where a number of persons are lined up along with the suspect or a number of photographs shown to enable the concerned witnesses) to identify the culprit(s)]. The Royal Commission of 1929 had recommended two line-ups', one with the suspect and another without the suspect; but this was not found to be feasible to adopt in practice despite the greater measure of safety it would afford. The English practice has gone so far (contrary to ours) as to permit a police officer to give evidence pertaining to identification of a suspect by a witness, despite his denying before the Court that he identified the suspect (*Cross on Evidence*, 4th Edn., p. 51)

(5) Mr. R. K. Garg, learned counsel for Shahwar, relied upon certain observations of Hewart, C.J. in *R. vs. Dwyer* (1925) 2 K.B. 799. In that case two photographs had been produced before the jury who inspected it; this conveyed the suggestion that the prisoner, whose photographs were shown, had a prior criminal record. This did cause prejudice to the prisoner; the conviction was therefore quashed. In an earlier decision (see *R v. Malany*. 1924 Cr. App. 2 it appears to have been held that a judge need not caution a jury on the danger of identification of a culprit or his photograph being shown to the witness prior to his examination in court; there was a going back on this in *Dwyer* when Hewart, C.J. observed : 'afterwards the

witness who has so acted in relation to a photograph is not a useful witness for the purpose of identification, or at any rate the evidence of that witness for the purpose of identification is to be taken subject to this, that he has previously seen a photograph'. This would mean that the trial judge should exclude that evidence or at least caution the jury. As Glanville Williams points out (at p. 123) in *R v. Hinds* (1932) 2 K. B. 644 the court rejected the view taken in *Dwyer* and in effect returned to *Melany*. Avory, J. while charging the jury had observed in *Hinds* : '.....there is no objection to the police who are seeking for information as to the person or persons who may have committed a crime showing to persons who are able to identify the criminal a photograph or series of photographs to see if they can pick out any of them which resembles the person whom they think they would be able to identify. What is objectionable is, if a witness has identified an accused person, for the police to try and corroborate the evidence of that witness by showing him or her a photograph of the actual person whom they have already identified, but there is no suggestion in this case that anything of that kind has been done. There is no ground for suggesting that the police have in any way infringed any rule of conduct in the showing of photographs to the witnesses who have been called in this case'. Approving the direction of the trial judge to the jury in *Hinds*, Humphrey, J. observed, on page 647 : 'It is not essential to the summing up that the judge should state that the evidence of the witnesses who have identified the defendant at an identification parade may possibly be of less weight by reason of their having previously picked out his photograph from amongst those of other persons'. Vis-a-vis showing photographs after arrest Avory, J. however, conceded (at page 464) that the matter would require consideration; in this respect reference was made to *Rex v. Haslam* (1925) 19 Cr. App. 59, where the court expressed the view that it is undesirable that the photograph of a person already under arrest should be shown to witnesses just before an identifying parade for the purpose of seeing whether they pick out that person as the person whom they suspect.

(6) The House of Lords (vide *Arthur v. Attorney General for Northern Ireland* 1971 55 Cr. App. 161) considered it undesirable to lay down as a rule of law that a warning in some specific form or partly defined terms must be given. The following portions from the speech of Lord Morris of Borth-y-Gest are enlightening:

'IT is not contended that it should be laid down that evidence of visual identification must be corroborated. What is urged is that there should be a requirement that a jury should be told to bear in mind that there had been a number of instances in the past where witnesses whose honesty was undisputed and whose opportunities for observation had been adequate had made positive identifications which had subsequently been shown to be wrong and that juries should be warned to be specially cautious before accepting identification evidence, though they would be at liberty to act upon it if after careful examination of it in the light of all the other evidence they felt satisfied beyond reasonable doubts as to its correctness'.

'IT is the aim of all to strive to reduce to a minimum the risks of the conviction, of one who is in fact innocent. A judge will have this aim constantly in mind during his conduct of a trial and in his direction to the jury. It is manifest that in cases where the vital issue is whether the identification of the accused person is certain and reliable the judge must direct the jury with great care. However careful is his general directions as to the onus of proof, the judge will feel it necessary to deal specifically with all the matters relating to identification.

WHERE a conviction will involve the acceptance of the challenged evidence of one or more witnesses in regard to identification, a summing-up would be deficient, if it did not give suitable guidance in regard to identification. The circumstances of individual cases will, however, greatly differ. Thus there may be cases in which a witness can say that at a certain place and time he saw and clearly recognised the accused person. If the accused person was someone who was well known to him or at least was well known to him by sight and if the conditions at the relevant time were such that there was nothing to impede or to prevent recognition or to make recognition difficult, then a jury would mainly have to consider whether the witness was both truthful and dependable'.

(7) In *Arthurs*, the House of Lords was concerned with a case where the identifying witnesses knew the accused previously. In *Robert William Long* 1973 (57) Cr. AR 871 the Court of Appeal followed *Arthurs* in a case where the accused was unknown previously to the three witnesses who identified him. The summing up in that case was held by Lawton, J., who spoke for the Court of Appeal, to be

'adequate, clear and fair'. The appeal was dismissed despite the complaint to appellant's counsel that the summing up did not give the jury guidance upon the problem of identification. That was also a case of robbery of cash in a van belonging to a cooperative society; the occurrence was in the evening, at 4.30 P.M.; the robbers, who seized the cash and driven away the van were masked; they had clubbed the driver of the van and also shot at the windscreen of a lorry, whose driver had tried to stop them. The points bearing on the identification by the witnesses in that case were pointed out in the summing up. Yet, it was contended that no general warning of the dangers of such identification evidence had been given to the jury, who had also not been alerted on the need for caution. Leave to appeal to the House of Lords was also declined, in spite of certifying the question of law as being of general importance: the question of the need to give a general warning to the jury.

(8) Mr. R. K. arg invited our attention to the contrary view taken by the High Court of Australia in *Davies and Cody vs. The King* 1946 57 C L R 170. That was a case where the accused alone had been exhibited to the witnesses. Such a case a clear warning of the dangers which existed should be given to the jury; absence of such warning would vitiate the conviction. The Supreme Court of Victoria, from whose decision the appeal arose, had not regarded the prisoner being shown to the witness simply as a suspect, as exposing the accused to too much danger as to warrant the setting aside of a conviction; the trial Judge was not required to include a general warning, of the kind discussed earlier, in the summing up. Among other things, reliance was placed by the High Court of Australia on the practice of the English Court that such witness(es) are likely to assent to the view that the man shown corresponds to his recollection. It was further pointed out by the Australian High Court that a witness is called upon to say whether any one, out of a number of persons shown to him, was the man concerned, his entire mental attitude will be different and that the witness's 'recollection should not be overlaid or in any way affected by suggestions that a particular person in custody is either the person previously seen by the witness or is the person suspected or charged, with the crime. Moreover, inspection of a photograph of the person in custody before viewing him naturally tends to impress on the mind the characteristics shown in the photograph, so that the witness, however honest he may be, tends to identify

the person in custody with the person shown in the photograph rather than with) the person whom he himself saw previously'. The High Court of Australia wished that the view accepted in England should apply to Victoria also.

(9) We have already referred to the decisions of the House of Lords and of the Court of Appeal, rendered in England, subsequent to Davis and Cody. The above Australian case was also somewhat complicated by the fact that a witness for the prosecution had afterwards declared that his evidence against the prisoner was false.

(10) Some of the earlier Australian cases (noticed below) were also studied by us along with Mr. Garg, who argued this legal question at great length.

(11) In *Rex v. Bagley* 1926 (3) DLR 717 a number of English decisions have been discussed and it was pointed out that the witness should not be shown a single photograph of the culprit in order that he may be assisted, but there was no objection to a bundle of photographs being shown without any suggestion.

(12) *Rex v. Dean* 1942 (1) DLR 702 contains some discussion of the legal position; it is, however, seen that a new trial was ordered in that case because the prosecution had shown to the jury a photo of the culprit implying thereby that he had a previous record.

(13) *Rex v. Smierciak* 1947 (2) DLR 156 was a case where a single photograph of a suspect was shown; he was later arrested and charged. The conviction was quashed. On this point it will be useful to revert to *The King v. Alfred George Hinds* 1932 (2) LR K. B 644 (Avory, J. tried the case; Eumphyreys, J. spoke for the Court of Appeal) where it was pointed out that it was not essential to the sufficiency of the summing up that the judge should state that the evidence of witnesses who have identified the defendant at an identification parade may be possibly of less weight by reason of their having previously picked out his photograph from amongst those of other person; this was so despite *Dwyer* (already discussed) and *Rex v. Halsam* 1925 19 Cr. App. 59 where it was pointed out that it was 'undesirable that photographs of a person already under arrest should be shown to the witnesses just before attending an identification parade' etc. In *Hinds*, the

factual position was that photographs were shown to the witnesses with the object of ascertaining whether they could pick out a person who was not yet in custody so that he may be arrested; this might be regarded as an 'irregularity'. *Rex v. Smierciak* referred to Dwyer but not to Hinds.

(14) The decision in *R. v. Turnbull and others* 1976 (3) All E.R.549 was brought to the notice of counsel for both sides by us, practically after both sides had addressed full arguments on the law bearing on proof of identity. Counsel appearing for the appellants, especially Mr. Jethmalani and Mr. Garg, invited us to adopt the same view as Lord Widgery, C.J. had in that case. The discussion was indeed specially valuable owing to the observations concerning what is poor identification and what is not. Even in the case of poor identification on which it is not safe to act upon by itself it can be acted upon safely when there is supporting evidence. A delicate balance has been struck reconciling the public interest in social defense and the need to avoid the danger of innocent men being convicted. The decision related, inter alia, to identification of one of the culprits from a moving car in a well-lit street; the same was found sufficient and reliable when there was supporting evidence. In such a situation there could be no warrant for withdrawing the case from the jury. Mr. R. K. Garg, in particular, insisted throughout his submissions, that we must rule out altogether the identity evidence in this case : he said that the identity evidence is weak or poor (as a fact), in terms of what the High Court of Australia had held. The High Court of Australia which followed the English law and practice in this respect, adopted it for Victoria, where the practice in this respect was different.

(15) Some of the excesses, caused by the former approaches based on consideration of pure safety from the point of view of the accused and without any regard to the requirements of social defense, were sought to be avoided by the House of Lords. A charge to the jury was quashed previously, for mere failure to give a 'general direction' about the lurking dangers quite after inhibiting the jury altogether from returning a verdict of 'not guilty' for that reason, the House of Lords attempted to set this right by not insisting on such a general direction; a charge specifically dealing with the strength and weakness of identity evidence was held sufficient. Lord Widgery, C.J. for his part, gave a number of hypothetical

illustrations to drive home the point that identity evidence, likely to be considered insufficient without supporting evidence, would be safe to act upon when there is such supporting evidence-which would, as he pointed out, include 'odd coincidences'. One of them was the case of a culprit being seen only for a fleeting moment, getting into a house shortly after the crime, which house was shown, at a distance, to be that of his father. This 'odd coincidence' permitted a safe conviction, where without it there would be no safety. We only wish to add that such supporting evidence would indeed cover a wide spectrum.

(16) In this light we wish to refer to a few major parameters of this case the evidence of five bank employees, whose presence at the time of occurrence could not be doubted. The rather wild suggestions by Mr. arg during his submissions to us as to their being participants or even being seriously suspected of complicity, were not even remotely supported by any suggestion to this effect. His theory that there was at least yet another person involved in the occurrence, whose involvement has been suppressed, seems far less tenable. His further contention, that by reason of the 'exposure', as he called it, at the Dev Nagar Police post on 25/12/1973 ; the identity evidence should be rejected out of hand, completely overlooks so many factors bearing on the falsity of the defense that they were exposed to witnesses both at Bhopal and at Delhi, their unjustified refusal to take part in the identification parade arranged soon after the occurrence (to take place on 18/12/1973, almost within a week of their being apprehended), the precautions taken by the police and facilities given to the culprits to safeguard themselves against being identified by anyone before the identity parade, etc.

(17) The suggestions made on behalf of the defense, concerning witnesses being given an opportunity of identifying them both) at Bhopal and at Delhi are even mutually destructive of each other. The case of being photographed on the terrace of the Canara Bank, Bhopal is utterly falsified by the fact that the terrace could not even be approached by them and was not 'in the tenancy of the bank. The positive evidence of the concerned Magistrates is that they advised the culprits when they were produced to keep their faces muffled; yet there was no complaint to them that either their faces were not kept muffled or that any witness was allowed to see them, etc. To these aspects we will be reverting later in greater detail; some

reference to them has become necessary even in this context to briefly indicate the untenability of the argument of Mr. Garg, in particular, that because of the exposure on 25/12/1973, even if not earlier, the value of the identity evidence has become useless. His reliance on decision of the Australian High Court dealing with witnesses being allowed to see any culprit or even his photo being shown prior to identification parade or in court normally, does not seem to avail him, in the context of the willful (wrong) refusal by the appellants in the present case to take part in the identity parade (which was obviously done under advice) and the reason for the said 'exposure' on 25/12/1973. Mr. Ram Jethmalani's argument that the avertment of V. Jaggi that he was identified earlier and about his declining to participate in the parade having to be rated higher than even that of the rest of the appellants overlooks the fact that even V. Jaggi had his lawyer with him when he did so. The culprits and their advisers obviously knew that if they did not take part in the identity parade it would, in fact, take a very long time for the trial to commence and the identification by the eye witnesses, for the first time in court and after such a long interval of time, would become very weak for that reason itself. We form the view in this case, agreeing with the learned trial Judge, that the police were justified in what they did on 25/12/1973. We further hold that this occasion was not abused by them in any manner, despite the 'exposure' the concerned witnesses did not identify any more than those of whom they had given such identifying particulars as they could.

(18) The subsequent discussion, in the varying contexts and in details, will establish the bona fides of the step taken by the police in this regard, the need for it, and the non-abuse of the said opportunity. We are unable to agree with the contention of Mr. Garg that the bona fides of the police is irrelevant and the entire identity evidence should be totally disregarded. The above course became necessary for at least two very good reasons, both of them have been mentioned by the learned trial Judge:-(1) The investigation could not have been fairly completed without it, (2) It was necessary to clear up whether there were four or five culprits in the case. On the latter aspect the contention of Mr. Jethmalani, that the Police Officers could have easily made sure, on the statement which the eye-witnesses had before them already, that the culprits were stated to be 5 in number, overlooks the fact that this exercise might be regarded as easy (on the

reading of those statements now) by hindsight; it was not so easy by foresight at least one could not make sure of this until all of them had been apprehended and assembled at the Dev Nagar Police Post for the eye-witnesses, who had been examined by the police earlier, could make sure that five, not four, had participated in the crime. To this aspect also we shall revert later when we discuss it in the light of the message flashed by the police.

(19) Our attention has not been invited to any Indian decision which discusses the exact point argued by Mr. Garg. In some of the decisions brought to our notice on this aspect there are only some general observations to be found, they are not objected to by Mr. Kalra. Among those cited, it may be sufficient to notice the following : The Delhi Administration v. Balakrishnan, etc. : 1972 CriLJ 1. Pa-le-kar, J., who spoke for the Court, drew the inference that the accused had been brought to the house of the witness, two and a half months after the incident and before the test identification parade was held because the police were unable to explain why the accused had been so taken. Dua, J. has made some useful observations, but only of a general nature, in Rameshwar Singh v. State of Jammu and Kashmir : 1972 CriLJ 15 and Hasib v. The State of Bihar : 1972 CriLJ 233. Chandarchud, J. made the following observation concerning refusal to take part in an identification parade in the following manner in Mulkh Raj Sikka v. Delhi Administration : 1974 CriLJ 1171:

THE appellant resumed his duty on the morning of June 8 when he was put under arrest by Inspector Avtar Singh. The attache-case which he was carrying contained issues of the Statesman dated 1/06/1970 and of Sunday Standard and Pratap dated 31/05/1970. These newspapers contained reports of the murder of Satish Chander. It is clear that the appellant was aware all along that his youngest brother who was living with him was murdered in his own house. And yet the appellant neither made inquiries about the circumstances leading to the tragedy nor did he indeed go to his house to find out for himself as to what was the real truth. In this back-ground the appellant's refusal to participate in the identification parade or to give specimens of his foot-prints is not difficult to gauge

(20) Rajamannar J. put the matter thus in *In re Sangiah* 1948 A.I.R.Mad 113 following the earlier decision in *Public Prosecutor v.Sankarapandia Naidu* 1932 (32) MWN 427:

IDENTIFICATIONparades are held not for the purpose of givingdefense advocates material to work on, but in order tosatisfy investigating officers of the bona fides of the prosecution witnesses.

(21) Desai, J., who seems to have written a long treatise, as it wereon identification of those previously unknown to witnesses, in *SatyaNarain v. The State* : AIR1953 All385 , seems to have gqpethe length of making a purely arithmetical reckoning to the effectthat if one witness alone identified it was not safe; if they were twothe risk was probably reduced; if they were three it became a certainty.With respect it seems to us that this does not admit of any such purelyquantitative test by the number of witnesses alone and regardless oftheir quality.

(22) Without multiplying more decisions on this question we may nowrefer to what another scholar of great reknown, Wigmore (as distinguished from Glanville William), has to say on this question,Wigmore had criticised any rule that cornoboration 'was necessary in respect of identification in the following terms:

Acapable judiciary, and an effective jury system (both depending upon a conscientious citizenship and a sound condition of politics), are in the end the only real safeguardsof an innocent man' (Vol. 7, S. 2044, page 286).

(23) In *Arthurs*, the House of Lords had, in the passage quoted above,said almost the same thing. It is worth repeating:

IT is not contended that it should be laid down that evidenceof visual identification must be corroborated' 57 Cr.App 161.

(24) After setting out the above observations of Wigmore, Wall agreesthat there is 'much truth' in the above statement. He adds, however,that 'a capable judiciary, when it recognises so serious a problemas that of identification, may deem it wise to require corroborationof that type of identification evidence which experience has

shown to be the most dangerously unreliable'.

(25) The long excursion into this interesting legal area, of utmost importance in criminal trials, serves to remind us of the dangers involved and yet, at the same time, of the danger of adopting any rigid and preconceived approach. The value to be placed upon the evidence of witnesses who identify persons previously unknown to them would depend on so many factors, which can not be exhaustively enumerated: what is considered sufficient and safe in one case may not be so in another even if it is nearly of the same kind. The following observations in *Arthur's* may well serve as a sample:

'THE jury were told that, even if Constable Spiers was satisfied in his own mind that he had identified the accused, he might have made a mistake. So there were very many matters to be considered. Was the light sufficient to enable the constable to identify the accused as a person who threw petrol bombs? If the only light was the light that came from the fire in the building or from the fire from the wicks of the petrol bombs, was that sufficient to enable the constable to identify the accused, even allowing for the accepted fact that the constable knew the accused well? Was the direction of the flames such as to make it possible for the constable, at the point where he said he was, to identify the accused? Could the constable see properly through the barricade? Did he make a real and true identification?

HAD the accused in fact left the barricade before the constable went to it? To these various questions the jury were invited to give their consideration'.

(26) The contention, therefore, that regardless of the quality of the witnesses who so identify, the safety regarding which may be assured by the kind of opportunity they had to identify the culprits, the light available and the duration of time they had etc, and the bona fides of the police in seeking assurance by asking the concerned witnesses to identify them before the trial after they had refused to participate in an identification, the whole of such evidence (merely on account of the risk inherent in an exercise of that kind) should be discarded seems to have not much to commend it. 'That would mean that regardless of the context such cases are fore-doomed to failure a result which more recent cases, in particular, wish to avoid. The progression of the law relating to this aspect does serve to highlight the

safety, in respect of such identification lying with Judge (fortunately in India this is not complicated by a jury trial) ; as Hall put it his 'capability'. Juris-prudence, which is after all a higher form of prudence, may require that, at least in difficult contexts it may be wiser to look for corroboration.

(27) In the case on hand, we have to remember that on 25/12/1973 the concerned witnesses had an opportunity of seeing the appellants and Public Witness 1 at the Dev Nagar police post but for this reason alone the entire evidence does not have to be rejected out of hand. Here was no hole and corner affair; this was done openly. Copies of the statements of the concerned witness under Section 161 Criminal Procedure Code. (1973), disclosing such identification, had been supplied to the accused. We have been impressed by the evidence of P.Ws. 2 to 6; it is not as if despite the opportunity they had on 25/12/1973 all of them had identified all concerned, the details pertaining to such identification have already been noticed.

(28) In the net analysis it appeared that some of the learned counsel for the appellants. Mr. R. K. Garg, in particular, endeavored to rely upon certain statements under S. 161 Criminal Procedure Code., almost as substantive evidence in the case, without confronting the witnesses about them this is especially so in case of eye witnesses (P.W.2 to 7). So far as Sunil is concerned, he has been identified by all the Bank employees (P.Ws 2 to 6) but not Public Witness 7. Public Witness 2, in addition to P.Ws 3 to 7 was able to identify Shahwar, who was occupying the driver's seat in the bank van ; at the time of occurrence Shahwar was having drooping moustaches like Chinese, long side whiskers and long head hair ; he was also putting on coloured glasses as he appears in the photo (Ex. P.W.I/P) ; at the trial, however, he was nursing a beard, which he did not have at the time of the occurrence. P. W. 2 was also able to identify Sunil and described him as having long head hair, long side whiskers and moustaches of full (not short) size as they appear in the two photographs (Exs. Public Witness I/Q and Public Witness I/QI). During the cross-examination on behalf of Sunil Public Witness 2 added that the person who had the revolver (Sunil) was about 25 or 30 years by appearance ; he was only questioned about his omission to tell the police about his having long side whiskers. He also admitted that in respect of Shahwar and Sunil he had described them as being strongly built

; though Shahwar was appreciably stouter it was by no means a wrong description of Sunil. Whether Public Witness 2 had referred to Sunil having moustaches at all and even if he did not what impact it has on his identification of Sunil has been already discussed ;it was explained even if there was any infirmity in Public Witness 2's identification of Sunil the same did not affect the identification of Sunil by those who did .There was no cross-examination of Public Witness 2 by Shahwar concerning omission by him, to state any of the facts, or contradiction saying anything differently.

(29) The above analysis pertaining to the identification of the appellants shows that everyone of them identified only to the extent he could; this is what makes their evidence appear so natural. No one speaks about all the culprits or of all the physical features. It does not appear, therefore, that there is anything to lessen the quality of the identification ; there is mutual corroboration among them. It seems to us that the above is especially valuable the naturalness of identification. The opportunity that each one of them had to identify them whenever they did, was indeed sufficient; P.Ws 2 to 4 among them were able to see whom they did for a longer duration-5 to 6 minutes the time Public Witness 7 had to identify those whom he did and the distance from which he identified were both sufficient. Regarding the participation by each one of them, as spoken to by Public Witness 1, there is ample corroboration to be had from the evidence of P.Ws 2 to 7. There is, therefore, hardly any substance in the criticism of Mr. Garg that then-identification was poor 'to start with and became hundred percent good after the exposure of the culprits to them at Dev Nagar Police post on 25/12/1973. As the above discussion shows it was not 'poor' to start with; it did not become 'hundred percent good' after 25/12/1973, because none of the witnesses identified all the appellants. The above criticism also ignores the extent to which the said evidence corroborates P.W. 1 and the ample corroboration, aliunde. there is.

REFUSAL to participate in the identification parade fixed for 18/12/1973.

(30) The refusal to take part in the identification parade, arranged for 18/12/1973, much before they saw them at Dev Nagar Police Post may now be considered in some detail.

(31) It is worth-recalling, in the first place, that the suggestion made concerning the above said witnesses being shown to them at Bhopal, their having been taken to Bhopal and brought back by air along with the appellants to Delhi, are destructive of the suggestions that V. Jaggi was shown to them at about the same time at Delhi soon after his arrest on the 12th. The suggestions made on behalf of the other appellants being identified at Bhopal are also of the same kind.

(32) Secondly, sufficient precautions had been taken, as already noticed, to prevent the appellants and Public Witness 1 being observed by the witnesses in this case; these precautions have been spoken to by a large number of witnesses, namely, P.Ws 110, 115, 136, 140 and 142. P.Ws 82, III, 136, 140 spoke about Ravi's face which was muffled even at the Kilol Cafeteria along with the rest, continuing to be muffled even when he was taken to his house by the police. P.Ws. 34, 61 and 81 had spoken to Public Witness I's face being muffled when he took the police party to P.Ws 34 and 67 and point it out leading to the seizure of the revolver (Ex. P. 9). The fact of Shahwar's face having been muffled was stated by P.Ws 98 and 115. Sunil was taken to the Jhoomri Talaya police station at about 6.10 a.m. on the morning of 12/12/1973, and was kept there till 11.15 a.m. from where he was taken to the house of Sri Krishan Dawar from whom a sum of Rs. 50,000 was recovered from inside a brief case (Ex. P. 7), and later to the Canara Bank, Bhopal. During the former occasion P.Ws. 37 to 39 and 80 had seen Sunil with the muffled face; P.Ws 40 and 42, who are both independent witnesses, had spoken to Sunil's face also having been muffled when he was at the Canara bank to point out Sunil's locker, from which Rs. 65,000 were recovered.

(33) The A.D.M., Bhopal (P.W. 94), who had allowed an interview to Shahwar's lawyer, also spoke about the faces of Public Witness I, Sunil, Shahwar and Ravi being muffled; there was no complaint to Public Witness 94 of the appellants' faces being unmuffled. The persons (P.Ws 88, 136 and 142) who were in the aircraft in which the above four culprits (other than V. Jaggi) were brought to Delhi had also seen the faces of all the four of them being muffled.

(34) P.W. 1 and Sunil had admitted in their written representations that they were muffled; the latter had particularly mentioned about muffling of faces till they

landed at Delhi. None of them had complained to- the Chief Metropolitan Magistrate Mr. V. B. Andley (P.W. 102) about unmuffling at any time despite Public Witness 102 also (like Public Witness 94) instructing them to keep their faces muffled till the identification parade was held. P. W. 142 had also spoken about this fact. The Jailor Central Jail, Tihar, (P.W. 87) has also spoken about the appellants (except V. Jaggi) who were brought from Bhopal having their faces muffled when they were received in the jail, after being produced by P.W. 142 and remanded to judicial custody. The version of V. Jaggi that his face was unmuffled before he was taken to Mr. R. L. Gupta has already been rejected.

(35) All the above facts had been spoken to by Public Witness 1 himself. He stated that their faces were kept muffled throughout; they had not gone to Budha Jayanti Park but were taken from the airport to P.W. 102 and from there to the Central Jail, Tihar.

(36) Refusal by the appellants to participate in the identification parade to be held on 18/12/1973 was unjustified. The following observations of Chandrachud, J, speaking for the Supreme Court in *Mulkh Raj v. Delhi Administration* : 1974 CriLJ1171 seem appropriate in this context:

It is clear that the appellant was aware all along that his youngest brother who was living with him was murdered in his own house. And yet the appellant neither made inquiries about the circumstances leading to the tragedy nor did he indeed go to his house to find out for himself as to what was the real truth. In this back-ground the appellant's refusal to participate in the identification parade or to give specimens of his foot-print.

(37) We are reserving for later discussion the evidence of Public Witness 1. But it may be worth noting even in this context that we are not at all impressed by the argument that Public Witness 1 has been tutored to give these details suit the prosecution case. We are in complete agreement with the learned trial Judge that Public Witness 1 would not have been in a position to give the detailed version he has given unless he had himself been a party to the conspiracy and execution as explained by him at such length. We ourselves perceived the difficulty of even setting out the mass of facts, even after the hearing was over. The decided

cases, listed before us (of which it is sufficient to cite only *Muthuswami versus State of Madras* A.I.R. 1974 S.C.4 dealing with confessional statements by accused are not quite useful while evaluating an approver's statement. When the accused makes a long statement, where he can indulge in his own flight of fancy, he cannot be tested by cross-examination ; but the approver, whose statement, if it has to be useful, to conform to the structure of the prosecution case and be corroborated in material particulars, is often subject to the closest and minute cross examination; it is also made an oath.

(38) We only wish to add, to what the learned trial Judge has said, that the fact of Public Witness I's statement having been recorded continuously for long hours (as requested by him owing to the situation in which he seems to have been) is not a factor which militates against the reality or genuineness of his statement ; it probably augments the weight to be attached to it. To these aspects, and more, we shall (as we have said) revert later.

(39) We shall now turn to a few major aspects of the case. Ravi Along with Sunil and Shahwar were dropped earlier at Thompson Road; they were to begin operating as soon as the bank van was stopped by the Ambassador car slowing down ahead of it; Sunil and Shahwar alone, among them, had gone into action; Ravi had done nothing then, even though, according to plan Ravi had to snatch the guard's gun Public Witness 1 and V. Jaggi were in the Ambassador car when the bank van was stopped. Public Witness 2 could, in the very nature of things, not only look at the two main actors, Shahwar and Sunil, but also easily remember them. Public Witness 2 had also not failed to notice another vehicle stopping ahead of the van for he had referred to this in Ex. Public Witness 2/C, but he also added that he could not observe the other two persons sitting inside it. But later, at the place where the boxes were lifted) he saw was a 'white Ambassador' car. Persons speaking about what they see during the course of a quick-moving and shocking event are rarely in a position to mention by themselves all the details soon afterwards ; they are able to recall them only gradually as and when they come back to normal. Soon after the van slowed down (by reason of the car ahead stopping) an explosion was heard and the van also stopped. It is not surprising that even the driver had missed the significance of the white Ambassador car being

ahead of the van; cangoing ahead of the van in such a busy locality as Thompson Roadare not likely to be particularly noticed in the absence of anything special to attract attention. All that the driver could say in the circumstances was his stopping the van and coming out as soon as the sound inside the van was heard. This would be the natural instinct of any driver. When he looked back he found blood coming out the mouth of gun man. He found a person standing close by. This was obviously Shahwar. The driver said that he had caught hold of that person though some others say that the other person had caught hold of the driver; it may well have been both, as noticed already. It was at that point of time that the driver was shot at. He could only identify the person who shot and the other person whom he caught hold of being mone-an expression meaning non-Sikh. Having been seriously bound-ed the driver was not in a position to make a detailed statement; his condition was then critical according to Dr. P. N. Gupta (P.W. 86).

(40) The comment of Mr. Garg that reading the dying declaration of the driver (Ex. Public Witness 86/B) together the ruqa (Ex. Public Witness 2/C) given by Public Witness 2 it is destructive of the prosecution case against Shahwar has nothing to commend it; this was only an attempt to blow up, out of all proportion, the brief statement which alone the driver was able to make prior to his death and the inability of Public Witness 2 to mention the name of any other than Sunil and Shahwar. We should have thought that, if anything, the name being given in respect of Shahwar (in addition to Sunil) would perhaps make the prosecution case against Shahwar only stronger; even later in court Public Witness 2 did not identify any other. Mr. Garg, appearing for Shahwar, stressed with all his might the fact of the driver not having stated details P.Ws. 5 and 6 had referred to a fair complexioned and tall person (Shahwar) catching hold of driver's hand and to the attempt made at snatching-the obvious reference here is to snatching the key of the van. As already explained by us, we are unable to see any absurdity or even contradiction. P.Ws. 5 and 6 must have taken sometime at least to reach the right (driver's) side of the van after getting down from the left and before the driver, as he had stated in Ex. Public Witness 86/B, caught hold of Shahwar after getting down from the van, probably under the impression that Shahwar had something to do with the explosion that was heard impelling him to stop the van. It is true that the driver could not, at that stage, have the faintest idea of the significance of the

Ambassador car stopping ahead ; before he could see the car moving later and stopping at the entrance to the lane he had been shot. Public Witness 2 could only see, as he claims, the driver falling down on Thompson road; Public Witness 2 was sitting in the van on the left side, facing that (right) side of Thompson road. In other words, Public Witness 2, while giving Ex. Public Witness 2/C, could only say that he suddenly heard the sound of explosion (dhamaka) and the gunman was seen injured on the face from where blood was oozing; the driver opened the door of the van and got down; an armed man (Sunil) opened the rear door of the van and aimed the firearm against them and threatened them; later the other man (Shahwar) came to the steering of the jeep and drove the van to the secluded spot in Barren road. It is not as if Public Witness 2 did not have sufficient opportunity to see Shahwar, whom he had no difficulty in identifying-the strength, in a sense, of Public Witness 2's evidence is that he identified only Sunil and Shahwar. He had both plenty of time and opportunity to see Shahwar who drove the van from Thompson road to the secluded spot-the duration being about 5 to 6 minutes. There was no partition between the driver's (front seat) and where P.Ws. 2 to 4 and the gunman were sitting ; Public Witness 2 could, from where he was sitting, clearly see Shahwar driving the van without any difficulty and from such a short distance-the photograph Ex. Public Witness 24/E4 in particular, shows the interior of the van in such a manner as to bring this out clearly. P.W. 2 could also see Sunil clearly because he was the one who opened the rear door of the van, after the gunman was shot and the van stopped; he was also aiming the firearm at P.Ws. 2 to 4, who were then inside the van, after getting Sunil into the van from the rear and threatening them not to shout or to look till they reached the secluded spot when the van stopped at the secluded spot ; it was Sunil who pointing the revolver at them asked P.Ws. 2 and 3 to transfer the boxes to the Ambassador car. The opportunity that Public Witness 2 thus had to identify both Sunil and Shahwar was thus sufficient; he was a responsible officer of the Union Bank of India; the quality of his identification of both of them. was indeed very high. It seems to us that regarding both Shahwar and Sunil (despite the question whether P.W. 2 had referred to Sunil's moustache or not) is really high, of such an order that a conviction of both of them merely on the basis of his evidence would be quite safe; it is amply supported, in any case, by the evidence of Public Witness 1 (as indeed

Public Witness 1's evidence concerning their participation is supported by Public Witness 2's evidence) and so many other circumstances which seems needless to set out here.

WHETHER there were four or five culprits?

(41) The debate whether there were four or five culprits--apart from Mr. Garg's effort to queer the pitch by introducing the theories of there having been more, at least one more, if not two, along with P.Ws. 2 to 6 in the van at the time of occurrence and one or more among P.Ws. 2 to 6 being privy to it (without any the least suggestion in this respect or warrant)--was possible until five of them, the appellants and Public Witness 1, were asked to be identified by P.Ws. 2 to 7 at the Dev Nagar Police post on 25/12/1973. Mr. Jethmalani, however, made the point that it was possible for the concerned police officials to have fixed the number as five even by reading the statements of the witnesses recorded under section 161, Criminal Procedure Code. After having given the contention of Mr. Jethmalani our most careful attention it seems to us that Mr. Jethmalani assumes a kind of insight on their part which may be easily possible by hindsight but not by foresight. The concerned eye-witnesses, who had been examined soon after the occurrence by the police, themselves expressly stated that they came to know the fact of there being five culprits (not four merely) only when they saw all of them at the said outpost on 25/12/1973. It is important to note that the fact of such identification by P.Ws. 2 to 7 was not elicited during their chief examination; the details concerning the same were elicited only during the cross-examination. The fact of such identification was not, however, kept back by the prosecution because copies of the statements of the concerned witnesses regarding such identification had been supplied to the accused under section 173 Criminal Procedure Code. It was in this manner and for the said reason that the details regarding such identification were elicited from the concerned witnesses during cross-examination. It was only natural that no one could make sure (even if there was at least some suspicion concerning five, not merely four, culprits being involved. It was plainly admitted by the concerned police officials that even when they were at Bhopal between December 5 and 10, 1973, they did not know about the involvement of a transport carrier of Delhi (V. Jaggi) in this case; it is also worth recalling that the search warrants

were obtained at Delhi on the 10th only in respect of the appellants other than V. Jaggi, and Public Witness 1. There were, as already noticed to some extent, a few inherent difficulties in the case. Ravi had played practically no noticeable part in the occurrence at Thompson Road; Public Witness 1 had removed his turban and put on a handkerchief on his head, (In these modern days especially when a large number of young men grow beard and also have long head hair) merely because a person had beard (as Public Witness 7 said Public Witness 1 had) one could not make sure that the person was a Sikh. The vernacular expression 'Mone', generally denote a non-Sikh-a clean shaven person as distinct from a Sikh-perhaps also added in its own way to the other difficulties in this respect. One might in this-what we described earlier as a musical chair, situation try to take advantage by making it appear that he was, among five culprits, the fifth man : It is small wonder that the wireless messages flashed soon afterwards (repeatedly) were based on the ruqa given by Public Witness 2 from which the presence of four, not five, could alone be spelled out. Even before us it was suggested on behalf of Ravi that his participation in the occurrence had not been made out. Mr. Garg contended that despite the recovery of nearly four lakhs (assuming it to be true) it might still be a case of his brother (Sharad Kapur, who is said to have brought it along with Shahwar from Delhi to Bhopal by train) having kept the said amount there but it is in evidence that Ravi was also there when Sharad brought the money to 30 Civil Lines besides Ravi having disclosed to the police that he had kept it in the office table drawer and not only without any explanation but also choosing to deny the recovery altogether.

It is seen from the judgment of the learned trial Judge (para 647) that it was the contention of V. Jaggi's counsel that V. Jaggi's name was later on added to make the number of culprits five. Before us it was contended by Mr. Garg that Shahwar's participation in the crime had not been made out and that this could not be said to be established against Shahwar merely from the use of the jeep since he may at best be entitled to joint use of it along with the rest of the members of his family, including his brother Waqar Muhammad. So far as Ravi is concerned it was the evidence of Public Witness 4 which helped fix his presence; P.W 4 identified Ravi as the person who got into the bank van at the secluded spot-probably to check whether anything else than the two cash boxes which were being transferred from

the van to the car was inside the van-through the rear door and got out of the front driver's door by stepping, as he crossed over, on the front seat leaving a blood foot-or-foot-wear print on the front seat. All these had to be pieced up only later to solve this puzzle of four or five-this was so easy of solution when all the five had not only been assembled at Dev Nagar Police post on 25/12/1973, but also identified by P.Ws. 2 to 7 to the extent and in the manner they did. The solution had not been rendered easier even by the evidence of Public Witness 7, who did not identify Sunil. The difficulty which was thus experienced in this regard does, in a sense, provide some support for the view that there had been no exchange of information among the concerned witnesses (or that they had compared notes among themselves) when they were initially examined by the police ; if this had happened then the difficulty might have been solved to some extent but in no sense these could have a final or certain resolution until 25/12/1973.

(42) In the above light an effort will now be made to analyze the evidence pertaining to wireless messages sent by the police.

(43) Inspector Tek Chand Chopra (P.W. 142) was cross-examined at length about the wireless messages that were sent by the police subsequent to the occurrence, referring only to four but not five culprits. Mr. B. L. Kaira drew our attention to Ex. D.W. 21) A, a message dated 29/09/1973, disclosing that one of the assailants had a beard and long hair, with a handkerchief on his head ; this was to emphasise the fact that this message contained a reference to Public Witness I, even this was not enough to suggest either that the culprits were five in number. The Evening News dated 28/09/1973. (Ex. P.W. 1/2) did contain a report that one of the culprits was a Sikh, but it has not been explained on what material this publication was made; the concerned reporter could have made such an inference himself or even got it from any passersby unknown even to the police. These aspects not being clarified one can only speculate about it. P.W. 1 may have seen the press report on this particular before he met Public Witness 33 that very night. probably prompting him to ask Public Witness 33 on the morning of 29th whether the newspaper he was having with him contained any mention of a Sikh being involved; this again can be nothing more than speculation; even without adverting to any of these, being specially vulnerable to easier identification, being the

only Sikh among the culprits, it is easy to account for his nervousness which prompted him to ask Public Witness 33 whether the newspaper contained any such report. Such reactions and impulses are of the moment. Reference is made here to some of these only to indicate how the evidence of Public Witness 33 (also of Public Witness 1) to the above effect cannot be considered to be so improbable as contended for the appellants. It is admitted by Public Witness 5, for instance, that he only made sure that one of the culprits being a Sikh only on 25/12/1973, at Dev Nagar Police Post. This indeed was so; despite Public Witness 7's reference to beard and long hair he could himself make sure of it only on 25/12/1973. All these, however, hardly bear on the point, whether the culprits were 4 or 5. The earliest wireless messages normally follow what is contained in the F.I.R. which it turns was based on the ruqa given by Public Witness 2, who saw only two culprits occupying the front seat of the Ambassador car in addition to two others whom he identified as Sunil and Shahwar. Only when Public Witness 1 came out of the car to scare away P.W. 7 that Public Witness 3 (who was following Public Witness 2) got an opportunity to see Public Witness 1; When Ravi was entering the Bank van through the rear door, he was seen by Public Witness 4 (who was sitting inside the van in the rear); Public Witness 7, who was standing in the Ahlyabai Road, to the left of the Bank van, saw Ravi standing with a gun. Neither Public Witness 2 nor P.W. 3, who were engaged in transferring the boxes, saw Ravi. The van and the car were parked within a distance of about 4 feet from each other; the dicky of the car had been lifted; the rear door of the van was open-at an angle of 90. P. W. 7 did not see Sunil. as it has been explained already. There was no difficulty, however, in P.W. 7 seeing Shahwar the tallest of the lot; he could identify all except Sunil. whom he did not see. Sunil also was at the police station then, but Public Witness 7 did not identify him. This also supports our view that he is a witness of truth who did not wish to identify any one he did not see. When Public Witness 2 gave the ruqa he had not discussed it with any other: notes had not been compared by them, among themselves or with P.Ws. 5 and 6.

(44) The wireless messages which are flashed by the police and repeated intermittently in such situations are usually on the basis of the F.I.R.. without incorporating the additional material that becomes available from time to time during the progress of the investigation. Public Witness 142 made the

specific statement, during cross-examination, that prior to 10/12/1973 they did not know the number of culprits to be five; only when they got some concrete information there was a breakthrough, resulting in the arrest of the appellants (Except V. Jaggi) and Public Witness 1 at Bhopal on December 11/12, 1973 and of V. Jaggi at Delhi soon thereafter (on 12th). We have necessarily to go into the credibility or otherwise of the testimony of the eye witnesses as well as Public Witness 1 and consider to what extent their evidence is corroborated in material particular which need not be impaired in any way by the earliest wireless messages referring to 4 culprits, none of them being a Sikh. What is being explained here is that there was no improbability in the investigating agency entertaining the impression, to start with, that four culprits were involved; no significance can be attached to the offence of robbery (not dacoity involving more than 4) being mentioned in the earlier police proceedings, no significance can, therefore, be attached to the statement in Ex. Public Witness 142DA (printed as item No. 846, Vol. V-A, p. 292 containing supplement No. 2 to D. P. B. No. 215 dated 28-9-1973) describing 'robbery cum murder' having taken place at Thompson Road. This was obviously on the basis of Ex. Public Witness 2(C which merely referred to two persons in the Ambassador car and the descriptive particulars (Hulia) were of Shahwar and Sunil alone. Ex. Public Witness 2/C contains the following statement : 'The description of the assailants is still not known. They were non-Sikhs'. The message requested that 'a sharp look-out may be maintained and if any clue leading to the tracing of the case is found immediate information be passed on to the Superintendent of Police Crime and Railways Delhi by the quickest possible means'. The reference made by the driver to 'Mone' only shows that they did not have long hair. The driver did not have any opportunity to even look at P.W.1 who was sitting in the front seat of the car ahead of the van because he did not realise the importance of the car at all. The case of Public Witness 1 having been one of the persons concerned in this incident could not be thus falsified. The credibility of Public Witness 1, and it so to what extent his evidence could be acted upon, has to be considered on other grounds. In the light of the above discussion of the evidence of P.Ws. 2 to 7, leaving for later discussion that of Public Witness 1, it will be useful to turn our attention to a few major aspects of the case.

(45) The first major aspect pertains to the question whether Ex. P. 9 was the revolver used in this case. i.e., whether the two crime bullets (Exs. P. 359 and P. 429, respectively) which pierced through the, .gunman and the driver respectively fired from Ex. P. 9?

(46) It seems to us that the revolver (Ex. P. 9, 455 Webley Scott, belonging to Rameshwar Public Witness 34), has been made out to have been the fire-arm from which the two bullets (Exs. P. 359 and P. 429) were fired. Doubts were sought to be thrown on the evidence of the Assistant Director, Ballistics, Dr. G. R. Pershad (P.W. 109) who gave, as his final opinion that the two crime bullets were fired from Ex. P. 9 but no other fire-arm. When Public Witness 109 gave his earlier opinion Ex. P. 9 had not been sent to him. Doubts were sought to be thrown on the final opinion of Public Witness 109 that the two crime bullets were fired from Ex. P. 9 in two ways :- Firstly it was pointed out that according to P.W. 1 he had borrowed Ex. P. 9 from Public Witness 67, the son of Public Witness 34, with the holster Ex. P. 10; Public Witness 67 said that Public Witness 1 had borrowed the revolver without the holster. But Public Witness 1's evidence on this point is supported by the seizure memo (Ex. Public Witness 34/B) which specifically records Ex. P. 9 having been inside Ex. P. 10 and that of Public Witness 34 that Ex. P. 10 (the holster) in his. Public Witness 1 had kept the holster wrapped in paper with the revolver inside it under his thighs when he was dining. It does not at all seem likely that the revolver would have been loaned without the holster, if there was one. As the subsequent statement of Public Witness 1 would show that he was in Delhi, not at Bhopal, on 30/09/1973, the date which 1st & 2nd teatve applicatiOn (Ex. P.W. 110 bears, yet we find Public Witness 67 making a few statements from which an inference was sought to be drawn that during the dates mentioned by Public Witness 67, Public Witness 1 was in Bhopal on that day. More detailed reference will be made to this aspect later while discussing the evidence of Public Witness 1 ; it has become necessary to refer to it even here in order to indicate how P.W. 67's evidence in this respect has to be appreciated. Secondly doubts were also thrown on the testimony of Public Witness 109 about the possibility of the two crime bullets having been fired from the same revolver, namely. Ex. P. 9.

(47) So far as the first point is concerned, it seems to us, on a total appreciation of the relevant aspects, that the omission to refer to leather case on the part of Public Witness 67 might well be due to forgetfulness or it may even be for some other reasons upon which it is only possible to speculate. The trial Judge thought that Public Witness 1 took Ex. P. 9 without Ex. P. 10. The question whether Public Witness 1 borrowed Ex. P. 9 along with Ex. P. 10 and returned it along with Ex. P. 10 has a bearing on the appreciation of the testimony of Public Witness 1; that there is mention of Ex. P. 10 having been seized along with Ex. P. 9 and Public Witness 67 claimed Ex. P. 10 as his own does lend support to Public Witness 1's version though the version given by Public Witness 67, in this aspect, is different. Public Witness 34 swears that Ex. P. 10 belonged to him. It does not admit of any doubt whatever that at the time of the seizure Ex. P. 9 was inside Ex. P. 10; this has been recorded in the memo Ex. P. dated 12/12/1973. It is not likely that Ex. P. 9 was taken without Ex. P. 10. Dhananjay Singh, (P.W. 81), an advocate practicing at Bhopal has attested Ex. Public Witness 34/B; he swore that the revolver was in a cover when Public Witness 67 brought it along with 23 cartridges. Public Witness 81 lived only about a kilometer away from Public Witness 34; he was a respectable witness of the locality. No significance can be attached to Public Witness 1's omission to tell the police about the holster when it is mentioned specifically in the seizure memo Ex. P. 34/B. The learned trial Judge did not rightly attach any significance to the slight error in copying the number of the revolver which had been described as .455. The identity of the revolver as the fire-arm used in this case unmistakably fixed by the clinching scientific evidence (of Public Witness 109) regarding the two crime bullets having been fired from Ex. P. 9. This was specifically stated in P.W. 109's report dated 18/12/1974 (Ex. Public Witness 109-K paras 4-5 of 'Result', Vol. 5-A, page 150), though in his earlier report dated 11/11/1973 (Ex. Public Witness 109/F Vol. 5-A pp. 142-145, @ page 143 of para 2 of Result). Public Witness 109 had merely said that the two crime bullets appeared to have been fired from .455 revolver (from the same weapon) having seven lands with right hand twist of rifling, though 'a definite opinion could not be given for want of adequate data'; it is worth repeating that Ex. P. 9 had not been made available to Public Witness 109 then.

(48) We may now summarise the evidence of the Ballistic Expert(P.W. 109) concerning E. P. 9 in greater detail. He found Ex. P. 9 to be in working order; on visual examination, its two consecutive chambers were found fouled with, burnt products of powder-though the barrel was clean; Chemical examination of this fuel in the two chambers revealed that it was of black powder. Obviously the two chambers had not been cleaned after the two shots were fired; only the barrel appears to have been cleaned.

(49) The question put to Public Witness 109, to the effect that he did not prepare photographs of other test bullets because they were totally dissimilar to the two crime bullets was rightly denied by Public Witness 109; it does not reveal sufficient insight into how striation match is done. Besides being a first class M.Sc. in Mathematics Public Witness 109 obtained a Ph.D. in Ballistics; he had been working in the Central Forensic Science Laboratory, New Delhi for six years previously. During that period he had examined a number of cases of fire-arms and had been giving expert evidence in the Courts at Rajasthan and Delhi. He denied the suggestion put to him that Ballistic Science was not sufficiently developed as to enable identification of fired bullets from a particular fire-arm. His view is supported by the treatises on the subject, to which there is no need to refer except that of Dr. B. R. Shafl-rna, who is himself an expert and had studied them.

(50) In Forensic Science in Criminal Investigation and Trials by Dr. B.R. Sharma (2nd Ed. 1977) the undermentioned observations occur:

'THE identification of fired ammunition is always carried out by comparison with test exhibits. Ordinarily, two test cartridges are fired. But in the case of some fire-arms even one cartridge may be sufficient. In certain high grade fire-arms the marks are not clearly imprinted, when even a dozen cartridges may have to be fired. The number of test cartridges is not material. The limiting factor is only the clarity of the marks. If clear marks are obtained on the first cartridge, it is not necessary to fire a second cartridge. Formerly it was suggested that a number of cartridges should be fired and the test exhibits be studied in series to establish the thumb print of the fire-arm. It is no longer necessary because individuality of each firearm is established',

Regarding how the comparison is done Dr. Sharma says as follows, on page 279:

'THE comparison microscope and other comparison devices are useful and convenient but they are not indispensable. All comparisons can be made by an ordinary microscope and a photomicrographic camera. A camera with bellows extension and close-up attachment can replace photomicrographic camera; if necessary.'

DR. Sharma also points out (at page 278) that 'comparison work is best carried out with a comparison microscope. The instrument is in fact a combination of two microscopes, where the images formed by the two objectives are brought in focus in the same eye-piece through prisms'. This is the same arrangement as for photography; the comparative study made visually is also recorded photographically for presentation in a court. Public Witness 109 compared carefully the rifling mark on the bullets of 8 test cartridges (C.7, C.9 to C.13, C.16 and C-17) with the rifling marks appearing on the two crime bullets (B.C. 1 and B.C. 2; Ex. P. 359 and P. 429). All the close characteristics, that is, number of land marks and directions of twist on these bullets were found totally. He selected three test bullets (C.7, C.16 and C.17) having the best marks for 'thorough' comparison with the two crime bullets. The repetitively appearing characteristic marks in the land and groove marks; of the three test bullets (C. 7, C. 16 and C. 17) were found totally with those in the two crime bullets.

(51) It is worthwhile to set out what Public Witness 109 had stated in the further report (Ex. Public Witness 109/K) dated 18th February 1974:

'4. Out of the 23 cartridges of parcel 'B' of memo dated 19-12-1973, nine .455 Kynech cartridges (marked C/7 to C/15) contained black powder.

THE bullets of these nine cartridges (C/7 to C/15) have some peculiar characteristics which tally with these on the two bullets (marked BC/1 and BC/2) mentioned in my report of even number dated 8-11-73. This indicates that the two bullets (BC/1 and BC/2) could come from two cartridges similar to the nine cartridges (C/7 to C/15) of parcel 'B'.

5. The two bullets (marked BC/1 and BC/2) contained in parcel No. 1) of memo dated 29-9-1973 and parcel No. 14 of memo dated 30-10-1976 respectively have

been fired from the revolver (W/I) in question.'

He himself explained during the course of his evidence (page 931 Vol. II-A) that out of the total of 23 cartridges which had been sent to him by the police in a parcel which had been marked 'B' 9 of them (marked C.1, C.7, C.9 to C.13, C.16 and C.17) were tested by him from the revolver (Ex. P.9). One of them (C.1) misfired probably because it was old; the rest (8) fired normally. Two bullets of all the 8 cartridges were recovered in tact in the bullet recovery box for comparison of markings on them. The firing on all the 8 cartridges, which were cartridges of the same type as of the two crime bullets, were conducted from various ranges and their effect on the target was also observed in order to compare the range of the blackening and tattooing with those of tests conducted by him earlier with .455 service revolver using Indian ammunition. He selected 3 test bullets (C.7, C.16 and C.17) as having the best marks on them for a thorough comparison with the two crime bullets B.C. 1 and B.C. 2. The repetitively appearing characteristic marks in the land and groove marks of the three test bullets were found to tally with similar marks appearing on the two crime bullets. He compared and matched the two crime bullets with the test bullets with the help of a comparison microscope in all possible positions. This enabled him to come to the firm conclusion that the two crime bullets were fired from the same revolver from which the test bullets had been fired; the revolver from which all of them were fired is Ex. P.9; the two crime bullets even like the test bullets-which he himself fired from Ex. P. 9, could not have been fired from any other similar weapon. He took four photomicrographs of the two crime bullets, B.C.2 and one test bullet (C.7) in different positions of the test. The four photographs are Exs. Public Witness 109/J.1 and P.W.109/J.4; the negatives are Exs. Public Witness 109/J.5 to Public Witness 109/J.8. The test firing with Ex. P.9 also gave results regarding range of blackening and tattooing which approximated with the results given by him in the report which was given earlier (items 4 and 5 of Ex. Public Witness 109/F).

(52) The bullets in question, both the crime bullets as well as the test bullets, were machine made; the three knurled cannelure with their particular design were present on all the 9 bullets which were test fired. There was no doubt a possibility, which Public Witness 109 would not rule out, that the same type of cannelure

design was found on other cartridges of .455 made by other manufacturers also, but Public Witness 109 thought that the design in this case was peculiar; he could not find them on cartridges of about half a dozen other makes examined by him in the laboratory. He did not consider it necessary to photograph bullets of other makes.

(53) Despite the crime bullets being mutilated identification marks enabling comparison being made were still to be found. There could be about half a dozen major points of similarities in two bullets fired from the same revolver; there could also be dissimilarities but they would be only in respect of fine striations which come in the land and groove marks due to rifling of the barrel. There were such dissimilarities in the case of the crime bullets in this case, but they had not been mentioned by him in the notes because such dissimilarities would be found in all the bullets fired from a particular fire-arm. He had found half a dozen fundamental similarities. The conditions such as were caused in this case-such as blackening on skin and tattooing on the clothes-could, however, be present in the case of firing by yet another service revolver. But no two barrels can cause the same striations since the fine microscopic striations inside the land groove-marks on the bullets, caused by random microscopic irregularities in the bore of the weapon, were always different between any two fire-arms. When questioned about the following differences in the photographs taken by him in this case Public Witness 109 answered as follows:

It is not there in the photograph of C.7. It is true that in photograph Ex.P.W.109/J.4, there is to be seen a white patch and, thereafter a crevasse and, therefore, a white patch in respect of BC/2, while there is no such patch or crevasse in the case of C.7. Again said-white patch is there to some extent but not the crevice. There appears a long line obliquely in respect of C.7 in photograph Ex. Public Witness 109/J.4, while there is no such line in respect of BC/2 in the same photograph. In photograph Ex. Public Witness 109/J-4, a number of dents are to be observed in the photographs of BC/2 and C.7 but these are not identical. In photograph Ex. Public Witness 109/J-3, there are to be seen where patches in respect of BC/2 and C/7 but they are not identical. In BC/2 there appears a line below the white patch but similar lines is (sic) not to be seen in

the photograph of bullet C.7. The dark parallel lines in the lower portion of the bullet BC/2 in the same Exhibit, the lower lines is broken by a small curve though its extension line in the test bullet C.7 is not so broken. In Ex. Public Witness 109/J-2 there is a large dent on the bottom of BC/I, there is no lodge throughout the bullet on the left side, while (sic) streak in the dark horizontal line in the centre of the bullet, there are two curves cutting each other. Identical marks are not present in the test bullet C.7. There is a black furrow vertically to be seen in C.7. This is not to be seen in BC/I of the same exhibit. There is a dent to be seen in C-7 which is not to be seen in BC/I same exhibit. There are some black marks to be seen in C-7 which are not there in BC/I in the same exhibit. The identical striations on BC/I and C/7 in Ex. Public Witness 109/J-2 do not run in the same length in the photograph. The photographs are dissimilar in respect of the broad dissimilarities though the striations on -which the identity is based are in identical positions as illustrated in the photograph"

(54) The opinion of Public Witness 109 that the crime bullets were fired from Ex. P.9 and not from any other fire-arm thus remaining unshaken; it is amply supported by the observations to be found in Dr. Sharma's book. It seems needless to refer to other treaties on the subject since Dr. Sharma has explained the position clearly after study of some leading text-books on the subjects. Dr. Sharma is himself an expert in this field. Our own visual comparisons made with the the help of the photographic striations match done by Public Witness 109 for presentation in Court agree with the final opinion of Public Witness 109. The most important feature of this case, therefore, is that the two crime bullets have been established to have been fired from Ex. P. 9 at the gunman and the driver of the Bank van and that Ex. P. 9 had been recovered from P. W. 34 as a result of being pointed out by P. W. I; the information concerning the same was obtained by the police from Shahwar to start with (vide Ex. Public Witness 82/H). We find it more convenient to discuss the legal aspects pertaining to all the statements made under section 27 of the Evidence Act in one place; we shall do so later.

(55) In this context, it is convenient to deal with the evidence concerning the injuries noticed on both the deceased persons in the light of the testimony of Public Witness 109. Whereas Dr. Suman Sain (not examined) had found charring of

edges of the wound, which she described as an entry wound on the left side, 1 cm diameter and the wound of exit on the right 2 cm long, Dr. A. K. Ghosh (P.W. 143), who conducted the autopsy, had stated that at the site of this wound there was no tattooing and no blackening. But, Dr. Suman Sain did not find any charring at the wound of exit at the back. Dr. A. K. Ghosh had also agreed that there was no tattooing or blackening at the site of this wound. Whereas Dr. Suman Sain had no difficulty in recognising the wound in the upper neck behind the mandible on the left side as having charred edges Dr. Suman Sain had prepared the outpatient ticket (Ex. Public Witness 2/F) pertaining to the gunman in the ordinary course of business and falls squarely within 32(2) of the Evidence Act. *Dua, C.J.* (as he then was) held in *Om Prakash vs. State* : 5(1969)DLT144 that reliance on report of a doctor, proved by the Head doctor of a hospital, could not be faulted.

(56) Dr. Ghosh said the wound on the left side had an irregular everted margins, as distinguished from the smooth, inverted clean cut margins of the wound on the right lower jaw. Broadly speaking, while according to Dr. Suman's report (Ex. Public Witness 2/F), the wound on the left side was the wound of entry and the wound on the right side was the exit wound (this corresponds to the situation of the gunman sitting on the right rear seat of the van, his left neck facing the rear entrance with a grill), it seems to be just the reverse on the basis of Dr. A. K. Ghosh's evidence. A difficulty which has been caused, in addition to P.W. 143 not noticing the charring of edges on the left side, is that he described the left side injury as having 'everted' edges and the right side injury having 'inverted' clean cut margins. Dr. Ghosh had, however, described the direction of the injury being obliquely downward towards the left; at the same breath he stated that the injury on the right side had smooth inverted clean cut margins and the injury on the left having irregular inverted margins. According to Public Witness 109 the wound of entry would have clean cut margins if the bullet hits the body directly without hitting anything intervening. What is important in this connection is Public Witness 109 had noticed blackening outside the grill; he was of the opinion that the fire-arm was fired while it was outside the grill. This should have been the case. If the bullet hit the grill before it hit the body of the gunman it would not be possible to expect clean cut margins on the left side of the neck; Dr. Ghosh had himself found only irregular margins on the left side. Even generally speaking the mere fact of edges being everted or inverted

would not be determinative. It seems a pity that Dr. Ghosh stuck to his view despite the above feature being brought to his notice. This is not the first time we find difficulty in dealing with Dr. Ghosh's medico-legal testimony; we had occasion to deal with a somewhat similar difficulty caused by Dr. Ghosh's evidence, which we discussed at great length in *Tirlochan Singh v. Chander Badan Singh & Another* (Cr. Appeal No. 323 of 1974 decided on 5-3-1976). We are, therefore, led to seriously suspect Dr. Ghosh's understanding of a situation similar to the one in the present case. We have here the advantage of Dr. Suman Sain having noticed the injury on the left being not only charred but having everted edges. It is a pity that Dr. Suman Sain could not be examined by reason of her being in England at the time of the trial but the Casualty Card (Ex. Public Witness 2/F) containing the above-said details in her handwriting has been proved by Public Witness 2. What is still more significant is that at the time Dr. Suman Sain saw Banshi Ram (gunman) she had noticed bleeding from the 'exit' wound despite Banshi Ram having been declared dead. This bleeding was noticed shortly after death. Dr. Ghosh having conducted the autopsy much later, he did not probably have the benefit of this observation.

(57) Mr. Rajinder Singh, who argued the case for Sunil Batra with considerable ability, did not claim that this would make any other difference in the appreciation of the evidence of eye witnesses in this case; he only urged that it might have a bearing on the question of sentence. We shall revert to this aspect finally.

(58) What seems crucial for the present discussion is the distance from which the gunman was shot at. Public Witness 109 stated, on the basis of his experience during the test firing from Ex. P.9, that he could find blackening marks up to 6 and a faint blackening up to 9, appreciable tattooing up to 26* and feeble tattooing up to 36'. K charring was noticed by Dr. Suman Sain on the wound on the left side of the gunman's neck the shot could have been fired within a distance of 6. The clothes of the gunman had also been sent to the Forensic Laboratory, but since his clothes did not come into contact with the bullet P. W. 109, could not find any bullet hole or gun powder deposits on his clothes—a feature which was present in the case of the clothes of the driver (Ram Niwas) on the basis of which Public Witness 109 could say that the shot must have been fired from within two to three feet

distance. The iron grill on the back of the Bank Van and on the two glass window panes (with fissure fractures) could have been caused by firing by a .455 revolver from a distance of approximately 3' and the same hitting the glass after piercing through the neck. The shot appeared to have been fired at an angle of 40 degrees approximately, causing cracking of the window glass pane.

(59) The distance from which the gunman was shot can be conclusively determined by the charring on the grill; the total distance between the end of the revolver and the left neck of the gunman should have been less than 12'. No distortion of such understanding (as above) is thus even possible by reason of the manner in which Dr. Ghosh unfortunately chose to describe the injuries noticed by him in the post mortem report pertaining to the gunman and also during the course of his examination.

(60) This also seems to be a convenient occasion to refer to the evidence of P-W-109 pertaining to the pistol (Ex. P-8) being in working order or not. In his statement (Ex. Public Witness 82/K) Shahwar had disclosed that he had kept concealed the pistol in the steel almirah of his house; he had taken the police party led by Public Witness 142 to his house and took out Ex. P. 8, which was seized under Ex. Public Witness 98/B on the night of 12-12-1973 itself.

(61) Girdhar (P.W. 82) whose evidence was discussed earlier and found acceptable had attested Ex. Public Witness 82/K but not Ex. -P.W. 98/B; he had not attested Ex. P.W. 98/B because after Ex. Public Witness 82/K was recorded, he was present when Public Witness 142 interrogated Sunil and came to know about Rs. 50,000.00 being with Sri Kishan Dawar (P.W. 82 attested that statement. Ex. Public Witness 82/L, also); thereafter he went along 'fqftt Phool Chand Jain, Sunil, Shabwar and Public Witness 142 to Shabjahanbad Police Station and from there Public Witness 142 took Shahwar to his house; only Phool Chand Jain, not Public Witness 82 went along with them to Shahwar's house. It may be noticed, in this context, that from the Kitoi Park Cafeteria the appellant (except V. Jaggi) and Public Witness 1 were taken to Gandhinagar police station and kept in four separate rooms. As the disclosures were being made by each, of them the others were informed about it. It was Public Witness 140 who informed

Shahwar about the recovery of the huge amount from Ravi; it was then that Shahwar disclosed (P. W. 82/H) about the revolver and some bullets being returned to Public Witness 67. There is nothing surprising in Shahwar also thinking that the game was up and he took the police party to his house and produced the key from underneath the bed of his cot, opened the steel almirah and produced the pistol. Owing to this taking place in the middle of night no other public witness than Phool Chand Jain was there; Public Witness 82 did not go there because he felt tired. In Ex. 82/H Shahwar is stated to be a resident of Bare Mahal ; the relevant seizure memo (Ex. Public Witness 82/C) of the same date mentions Shahwar as a resident of Nawab Manzil. Nothing really seems to turn upon the so-called discrepancy between Bare Mahal and Nawab Manzil, though much fuss seems to have been made about this during the trial ; the former is the area and the latter is the house.

(62) Even the suggestion made to Public Witness 82 contained an implicit assumption. as the learned trial Judge pointed out (para 413), that Shahwar made disclosures statements but allegedly due to torture ; however, Shahwar later on stated to the trial Court under Section 313 Criminal Procedure Code ,1973 that the disclosure statements were manipulated as signatures were obtained from him on blank papers. While according to Public Witness I, P. 8 was not in working order because the trigger, when pulled, would get jammed, Public Witness 109 found that the standard obstruction in the barrel of the pistol was found broken ; this was probably to condition the pistol for firing the bullets. Public Witness 109 did not have any gas cartridge of 8 mm to test-fire from the said pistol ; he, therefore, test fired a .32 cartridge with bullet through the pistol to examine its firing condition. The pistol fired normally but the bullet got lodged near the obstruction because of its slightly bigger size; during this process, of testing it, the pistol got damaged. The firing pin, as it was seen during the trial, was cocked by drawing the slide and released by drawing the trigger. P.W. 109 had referred to these features in his report (Ex. Public Witness -109/M) ; he considered it to be a fire-arm as defined in the Arms Act (54 of 1959). For this reason, however, it cannot be said that Public Witness I's evidence is contrary to that of Public Witness 109. By reason of the standard obstruction in the barrel of the pistol having been broken the persons concerned (specially those not used to fire-arms) may have

genuinely thought that it was not in proper working order. Probably under such an (even erroneous) impression none of them evidently bothered further about it. The substance of the matter was that it was considered necessary to have yet another pistol ; it may be recalled that Sunil had suggested the need for two revolvers or pistols to scare away people. Their intention, at least initially, was not to use any such fire-arm in order to hurt or kill any one ; they were needed more for the purpose of scaring away people. There being no difficulty about the revolver, OD/78-4 in the context of a person having a loaded revolver from which one could fire, it was sufficient for some one to merely hold the pistol in hand to serve as an effective threat; even a toy pistol might have served the purpose in such context. Ultimately the pistol was not used at all; it was probably inside Shahwar's pocket. When the driver was shot at and the key of the van snatched from him. This was a deviation from their original plan. Mr. Kalra rightly conceded that we are not much concerned with the pistol because no one has said that it was actually used during the occurrence ; he also rightly conceded that the conviction of Shahwar under the Arms Act was not justified because there could be no trial at Delhi in respect of an unlicensed pistol (Ex.P. 8) having been seized from Shahwar at Bhopal; Public Witness 35 was not able to identify Ex. P. 8 as one of the two fire-arms used for target practice; Public Witness 1 alone, among the witnesses examined in this case, spoke of Ex- P. 8 having been with the culprits at Delhi, but since a conviction under the Arms Act is for a separate offence, Public Witness 1's evidence in this respect is not corroborated.

(63) Indeed there were other deviations too, Vike Ravi not snatching the gun from the gunman and Sunil himself having to shoot not only the gunman but the driver also. These deviations from the original plan do not destroy, or even detract from, the truth of the plan as finally made. It might well be that they overlooked a few things despite their detailed planning; they had been changing some of the details of the plan on more than one question-as for instance, the driver having to be immobilised by a person other than the one who shot at the gunman; The. original plan) it might be recalled, was that Ravi was to snatch the gun from the gunman. This was in all likelihood to prevent others sitting in the van from using it- But Ravi failed to do so. Despite his need to be near the gunman, when Ravi had failed to snatch the gun, Sunil had himself to fire at the driver also in an effort to snatch the

key from him when Shahwar was tackling him. After shooting at the driver Sunil was able to come back at the rear of the van and get into it with one foot on the rear step. But none of those deviations from the original plan will help us discard the entire version concerning the occurrence, as Mr. Garg wanted us to do. We cannot overlook the fact that the appellants seem to have been really no better than amateurs; the quality of their planning, or even any gap between their plan and execution, will have no appreciable impact on the massive evidence against them showing their association with each other and participation in this crime.

(64) An asbestos sheet, not exhibited, according to the evidence of P.W.J and Public Witness 35 was used for target practice in the house under construction of V. Jaggi at Greater Kailash. According to P. W.1 when Sunil and Shahwar were practicing with the revolver (Ex. P.9), firing one or two bullets in the air, V. Jaggi's friend Anil Kumar Pun (P.W. 35) came to the terrace. W. 35 had met V. Jaggi earlier at Connaught Place and had been told about his house being constructed at Greater Kailash. After Public Witness 35 was introduced to Ravi, Shahwar and Public Witness I, were present, Sunil and Shahwar fired at the top corners of the asbestos sheet, measuring 3" x 1', placed outside the wall of the terrace of V. Jaggi's house. According to Public Witness ' 35, who had been treated as hostile by the prosecution, the revolver was not fired during the period of 10 minutes or less that he stayed at the terrace; he had only seen them opening the weapon. The need to cross-examine him was felt by the Special Public Prosecutor primarily on account of his saying that he assumed that there was target practice; this was obviously with a view to help the accused. He was confronted with his prior statement under Section 161 Criminal Procedure Code. (Ex. P-W. 35/C) where he had stated that they were 'doing target practice' with the revolver at an asbestos sheet when he reached there; he then agreed that he had stated so (this would be substantive evidence). The asbestos sheet was recovered as a consequence of being pointed out by V. Jaggi on 23/12/1973, by Inspector Shamsher Singh (P.W. 140). Ex. Public Witness 35/A is the pointing out memo prepared by Public Witness 140. It is very important to note that it was V. Jaggi who had taken Public Witness 140 to Public Witness 35 on the same day.

(65) In his report (Ex. P.W 109/K) Public Witness 109 could not find any definite evidence of firing by .455 revolver on the asbestos sheet.

(66) Though Public Witness 35 deliberately sought to introduce some doubts on his earlier version to the police and even his own sworn statement, initially, before the trial court when he said that he presumed that there was target practice, he was even trying to go back on what he had told the court himself. He had categorically stated that he saw Sunil and V. Jaggi, whom he knew ; he was introduced to Shahwar, Ravi and P.W. 1 ; he referred to Sunil and Shahwar having fire-arms (revolver). These are the substantive statements that he had made before the court which, if true, can be acted upon. This is not a case where there is any need to act upon any of his prior statement to the police as substantive evidence (this is not possible). Some of his prior statements to the police as well as those under Section 16 Criminal Procedure Code. are referred to for appreciating this evidence; the latter could be used, as a prior statement under Section 157 of the Evidence Act, for corroboration. His bias in favor of his friends, Sunil and V. Jaggi, which is only natural, is clear from the kind of answers he gave in cross-examination ; we have therefore, only to appreciate the evidence of Public Witness 1 and Public Witness 35. I shall discuss the evidence of P. W. 1 last. So far as P. W. 35 is concerned it has to be borne in mind that he was a friend of V. Jaggi and it is not at all likely, therefore, that the prosecution would have attempted to introduce falsely a friend of the accused to figure as a witness. His being a witness to the target practice would not have been known to the police but for V. Jaggi taking P.W. 140 to Public Witness 35 on the 23rd ; P.W. 1 was in judicial custody after he was brought to Delhi from Bhopal and when examined by the police on 21st had stated about P.W. 33, not Public Witness 35. This by itself shows that Public Witness 1 was not making a clean breast of everything, even from the time he was arrested- this is only to be expected from any person who is arrested till he is offered pardon.

(67) It has been now settled by the Supreme Court in *Sat Pal v. Delhi Administration* A.I.R. 1976 SC 296 that the evidence of a hostile witness is not to be necessarily discarded but may be acted upon if, on a consideration of all relevant matters, his evidence could still be acted upon. The evidence of a witness should not be discarded merely because he is cross-examined by the party that

called him. In paragraph 51 (p. 308) Sarkaria, J. explained that this was 'for the Judge of fact' to consider; treating the testimony 'as washed off the record altogether' merely because he is cross-examined is not correct. 'If the Judge finds', Sarkaria, J. observed, 'that in the process the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness as a whole, with due caution and care, accept it, in the light of other evidence on record, that part of his testimony which he finds to be creditworthy and act upon it. If, however, the witness stood squarely and totally discredited, his evidence had to be discarded in toto as a matter of prudence'. The law having been declared in such clear terms it is not necessary to consider the other cases of the Supreme Court rendered prior to the said decision. It is sufficient to refer to a later decision rendered by Goswami, J., speaking for the Court, in *Bhagwan Singh, v. State of Haryana* : 1976 CriLJ 203 which merely reaffirmed what was held in *Sat Pal*; he pointed out that there was no legal bar to such testimony being considered if corroborated by other reliable evidence. On this point the most important fact to recall is that Public Witness 1 checked in at 6.10 P.M. at Jeevan Lodge on the same day (September 27, 1973). This sets at rest the doubt, if any, which Public Witness 35 sought to create—whether it had become dark by then, including the absurd suggestion to him, which he accepted, that the sun set at 5 P.M. in September. There is a statement made under S. 27 of the Evidence Act by V. Jaggi on 15/09/1973 relating to the stay of Ravi, Shahwar, and Public Witness 1 in the hotels specified by V. Jaggi in that statement (Ex. Public Witness 127/A) in assumed names. The admissibility of these statements will be discussed subsequently. It will be sufficient to note in this context that this is by itself a very strong piece of corroboration of the evidence of Public Witness 35; Ravi, Shahwar, and Public Witness 1 all of them belonging to Bhopal, were in Delhi then, as stated by Public Witness 35.

(68) The testimony of this witness was vehemently criticised by Mr. Jethmalani on some other grounds as well. He pointed out, relying upon the decision of the Supreme Court in *Shivaji Sahabrao Bobadev. State of Maharashtra* : 1973 CriLJ 1783, that when there is only one witness speaking about a matter of some importance corroboration should be insisted upon as a rule of prudence unless it happens to be 'sterling testimony of a competent honest

man.'The simplest answer to this contention, as a fact, is that there is suchcorroboration in this case.

(69) A further criticise was that he was a silent witness ; in other words,in. spile of his having seen them having a target practice a day prior tothe present occurrence, which attracted lot of notice in the press, he didnot inform any one else or even the police about it. Even this contentionis easily answered, on the facts, because there is nothing to show thathe could have suspected the appellants and Public Witness 1 as persons who wereinvolved' in the said occurrence. He had only seen them having shootingpractice which went on despite his presense there; he even felt badbecause he was not even offered a cigarette. The continuance of theshooting practice even after he reached there was such as would notinduce suspicion; it might have, on the other hand, made Public Witness 35suspicious if it was stopped as soon as he came there. Public Witness 35 was noteven asked any question concerning why he did not report this matterto any one else or to the police. More over, it would not be propelto expect a friend of V. Jaggi to expose him and his companions evenin the event of his having had any suspicion, no basis having been laidfor thinking that Public Witness 35 had entertained any suspicion. The contentionof Mr. Jethmalani that Public Witness 35, equally Public Witness 33, were in the positionof accessories after-the'fact, has nothing to commend it. An accompliceis one who is participis cmninis; the only two permissibleextensions are when a person receives stolen property with knowledge.that it is stolen or has been shown to have participated earlier in asimilar criminal act from which an inference of guilt is possible (videR. K. Dalmia v. The Delhi Admn., : [1963]1SCR253 -following 1954 A. C. 378. These decisions cited by Mr. Jethmalani do notseem to help him. On the other hand, there is judicial dicta available insupport of the view that merely because a person does not disclose hisknowledge of commission of a crime he does not become an accessoryafter the fact. A decision exactly in point is State of Bihar y. SrilalMejriwal : AIR1960 Pat459 ; it followed Ismail V. Emperor AIR 1947 Ubores 220, which, m turn, follower Mahadeo v. The King AIR1936 P.C. 242. We were not quite aide .to follow Mr- Jethmalani whenhe said that the above decisions do not touch what is implicit in theconcept of an accessory-after the fact; he probably meant that thewitness had done something which in its very nature partook of

some criminal element ; we fail to see how, on their showing, Public Witness 33 or Public Witness 35 can be said to have done anything in the nature of what may be described as a criminal act-to characterize them as participis criminis.

(70) P.W. 35 had himself stated that he did not subsequently see the five persons, whom he saw in the terrace that evening before he was examined under S. 161 Cr-P. C. It was V. Jaggi himself who had brought the police to P-W- 35/12/1973. He was staying only 400 yards away from the house under construction ; earlier when V. Jaggi had met Public Witness 35 at Connaught Place he had told him about this building a house in Greater Kailash. There was therefore, nothing unnatural in his having called on V. Jaggi when he and his companions were on the terrace of his house under construction. Public Witness 35 did say that it was V. Jaggi's house under construction; there has been no cross-examination on the aspect. It is, therefore, not possible to urge that it was not the house of V. Jaggi as he tried to make it appear for the first time when he was questioned (Q. 85) under S. 313 Criminal Procedure Code .It was also brought to our notice that P. W. 35 had stated to Public Witness 140 on 23/12/1973 that he had gone to the house of V. Jaggi at Greater Kailash 'probably 2 days before the bank van robbery case'; but this was only a rough statement made from memory concerning an incident which happened 3 months prior to his examination by The police.

(71) We have carefully considered the evidence of Public Witness 35 as a whole and also listened carefully to the criticisms made of his evidence by the learned counsel for the appellants. Public Witness 35 had an obvious bias for V. Jaggi ; this was only natural since he was a friend : Public Witness 35, therefore, had no compunction in obliging the defense by answering in the affirmative questions put to him in leading form ; some of the important questions and answers have been carefully recorded by the learned trial judge as questions and answers. It is apparent that the defense counsel were anxious to put to him some questions tending to throw some doubt on Public Witness 35's identity; Public Witness 35 seems to have fully accommodated the defense in this respect.

(72) The more important feature of Public Witness 35's evidence is that even the statements which he had made in court do not by themselves throw any doubt on the truth of his evidence. He did meet the appellants and Public Witness 1 that evening. It was not suggested to P.W. 35 that he did not go there that evening. On the other hand, the following question and answer would themselves seem to be surest that he had seen a Sikh gentleman on the terrace:

QUESTION: The Sikh which you saw on the terrace was one with flowing beard, dark complexion and height about five feet and aged 17/18 years- Is it so? Answer : Yes, something like that.

(Vol. II, p. 505)

P.W.1 had, in point of fact, no flowing beard; he was said to be of dark complexion while he was fair ; his height was said to be 5 feet while it was about 6 feet. But it was later elicited from him in cross-examination by Mr. Kalra that Public Witness 1 was shown to him in the court room and that Public Witness 1 was taller than himself-he was 5' 11" (pages 532-33). Having agreed with the suggestion that Public Witness 1 was aged about 17/18 years, when questioned further about this by Mr. Kalra, Public Witness 35 said that he could not say whether Public Witness 1 was older than himself (28 or 29 years). Public Witness 35 had mentioned his own age as 26 years when he gave his evidence. His age was elicited in cross-examination to be as 17/18 years while he was about 28 years. These suggestions were calculatedly put to Public Witness 35 in order to get the needed affirmative answers from him. The strategy adopted is so obvious revealing the extent to which Public Witness 35 was anxious to help the defense-even by going to ridiculous lengths.

(73) Mr. Kalra rightly contends that he is entitled to take advantage of the suggestion which was to the effect that a Sikh gentleman was there and that according to Public Witness 35 he was none other than Public Witness 1 ; P.W. 35 had identified Public Witness 1 at Dev Nagar Police Post on 25/12/1973, a fact brought out during cross-examination of Public Witness 1. Even before the trial court Public Witness 35 had identified Public Witness 1 as one of the persons whom he met that evening. Public Witness 35 had gone further to admit, in cross-

examination by the accused, that the photographs of all the accused were shown to him ; though he denied the suggestion put to him by Mr. Kaira that he had said so to accommodate the accused, he had also stated in the trial court (vide pages 505, 535 and 586 of Vol. II) that he gave the descriptions of those persons to the police before he identified them at Dev Nagar Police Post on 25/12/1973.

(74) He described both the weapons which they had as 'revolvers' though they were, even according to him, of different sizes. It is just possible that a layman may mistake a pistol for a revolver but the fact of the matter is that he did not identify Ex. P. 8.

(75) On balance, it does not appear probable that the police would have invented a case of a target practice, some of the appellants taking part therein, and Public Witness 1 having been present merely for the purpose of giving an occasion for Public Witness 1 to speak about it also also get corroboration for what Public Witness 1 had said by falsely introducing, as a witness, one who was a friend of at least two of them-Sunil and V. Jaggi. The criticism of his evidence on the ground that he was a chance witness cannot be viewed in isolation since there was nothing unusual in a person known to V. Jaggi just dropping in to find out what was happening in the house of a friend which was under construction when he saw a car-not necessarily V. Jaggi's car-standing outside. According to Public Witness 1 they had gone there in the Ambassador car; Public Witness 35 obliged by saying in cross-examination that it was V. Jaggi's car; but he had not stated when questioned under section 164 Criminal Procedure Code that it was V. Jaggi's car (Vol. II p. 504). A reading of Public Witness 35's evidence before the court conveys the impression that at all material points he was crying to make his evidence accord as much as possible in favor of the appellants. He mentioned the time of his going there as 6.30 or 7 P.M.; it was the month of September and it would not have been quite dark even if it were so. It was suggested to him by the Special Public Prosecutor that he had been to the house even at 6 P.M. because the sun sets at 6.30 P.M. in the month of September ; this suggestion was based upon Public Witness 35's statement to the police about his having gone there at 6 P.M. (Ex. P-W. 35/C). Obviously the time mentioned was only approximate. The time of arrival by Public Witness 1 at Jiwan Lodge (the evidence concerning which will be

discussed later) was 6.10 P.M. If this entry is genuine, it shows that the target practice should have been over by about 5.30 or 5.45 at the latest. There could have been no target practice after sun set. It was admitted by Public Witness 35, in answer to a question on behalf of V. Jaggi in leading form, that it could be that the sun set in those days even at 5 P.M.! V. Jaggi was his friend from schooldays. Hooda and Brar were the common friends of Public Witness 35 and V. Jaggi; they were in the same class in the same school; yet he made it appear that V. Jaggi was not on good terms with Hooda and Brar to get over, as we shall see later, Public Witness 1's statement about their having been seen with V. Jaggi. Public Witness 35's statement was recorded under section 164 Criminal Procedure Code. on 26-12-1973. He had gone even so far as to agree with a specific suggestion put to him that his statement under section 164 Criminal Procedure Code. was recorded in order to prevent him from resiling from it. He also went so far as to say that he could not say whether the revolvers were genuine ones. He had also spoken of rival groups being headed by V. Jaggi and Hooda and Brar respectively at school. The trial court had considered some of the above admissions made by Public Witness 35 during the course of cross-examination with a view to demolishing the prosecution case while granting permission to the Special Public Prosecutor to cross-examine Public Witness 35. The Special Public Prosecutor before concluding his cross-examination put to him a series of suggestions (vide P. 535, Vol. II) tending to show that such statements were made by Public Witness 35 only to accommodate the appellants. The said suggestions are plausible. It is, therefore, only a question of appreciating the totality of his entire evidence; his leanings obviously were with the appellants. We are thus thrown back on the question which we posed earlier for ourselves: why did the police introduce the evidence of Public Witness 35 at all in the case despite his being a friend of the appellants, one who was affluent, a graduate and a 'Sherwoodian' like his friends Sunil and Ravi? This seems to permit only one answer, namely, that Public Witness 35 had initially stated to the police what he had seen the appellants and Public Witness 1 there. He did not have second thoughts when he was examined under Section 164 of the Code of Criminal Procedure, which examination was considered necessary because he was a friend of V. Jaggi; when he was examined in court he had sought to push his evidence and stretch it to as favorable

a length as possible on the side of the appellants consistent with his earlier statements, especially the one under S. 164 Criminal Procedure Code. We could see this from those portions of his evidence recorded in the form of questions and answers; such answers as he was expected to give in favor of the accused were practically put into his mouth in leading form. It is worth reporting that if the police wished to create false evidence on a matter like this it is hardly likely that they would have relied upon a friend of V. Jaggi for his purpose.

STATEMENTS under Section 27, Evidence Act. Recoveries falling under Section 8, Evidence Act.

(76) The statements under Section 27 of the Evidence Act are admissible in evidence only in so far as the information furnished by the accused leads distinctly to the recovery of anything deposed to, as cause and effect, regarding the same being a confession or not. Recoveries made as a result of the accused pointing them out would be admissible as conduct of the concerned accused under section 8 of the Evidence Act even when they are not preceded by any information given by the accused. Before discussing the individual statements of the appellants alleged to have been made under section 27 of the Evidence Act it seems helpful to deduce a few legal principles from decided cases, to the extent to which they may be of relevance to this case.

It would be convenient to refer first to *Pulukuri Kottaya v. Emperor* A.I.R. 1947 P.C. 67. The accused in that case had stated not only that he would produce a knife concealed in the roof of his house but that he had stabbed the deceased with that knife. The latter statement 'with which I stabbed A' was clearly inadmissible not because it amounted to a confession but because it did not relate to the discovery of the knife in the house of the informant. Any statement pertaining to the past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. It is fallacious to treat the 'fact discovered' as equivalent to the object produced. The fact discovered only embraces the place from which the object is produced and the knowledge of the accused as to this; the information given, must relate distinctly to this fact. The condition necessary to bring S. 27 into operation is that the discovery of a fact must be deposed to;

thereupon so much of the information as relates distinctly to the fact thereby discovered maybe proved ; this is on account of some guarantee being afforded thereby that the information was true and could be safely allowed to be given in evidence. The extent of the information admissible however, must depend on the exact nature of the fact discovered to which such information is required to relate. Sir John Beaumont, who spoke for the Judicial Committee of the Privy Council, referred to Ss. 25 to 27 of the Evidence Act and emphasized S. 27 providing an exception to the prohibition imposed by the preceding section against receiving in evidence about facts deposed to by an accused to a police officer; this exception alone enables certain statements made by a person in police custody to be proved. The ban, it was pointed out, was presumably inspired by the fear of the legislature that a person under police influence might be induced to depose by undue pressure. The information supplied by the accused persons in custody in that case, that he would produce a knife concealed in the roof of his house, did not lead to the discovery of a knife since, as Sir John Beaumont explained, 'knives were discovered many years ago'. The statement leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge; if the knife is proved to have been used in the commission of the offence the fact discovered is very relevant. The decision of the Full Bench of the Madras High Court in *Athappa Goundan v. Emperor* A.I.R. 1937 Mad 618 was held to be wrong; on the other hand, the view taken by the High Court of Lahore in *Sukhan v. Emperor* A.I.R. 1929 Lah 344 was approved. In the Madras case the Court had admitted a confession on account of the offer in the last sentence, as recorded (readily separable from the Best) to produce two bottles, a rope and the cloth galg which, according to the confession, had been used in, or be connected with, the commission of murder; the objects were in fact produced. The High Court was impressed by the fact that the objects produced were not themselves of an incriminating nature. Sir John Beaumont did not approve of this reasoning and observed :

'THE difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification for reading into S. 27 something which is not there, and admitting in evidence a confession barred by S. 26. Except in cases in which the possession, or concealment, of an object

constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of the prosecution case. It is only one link in the chain allowed by law.'

(77) The Lahore view was that only that portion of information which is the immediate and proximate cause of discovery of fact can be proved. The statement attributed to the accused in that case was: 'I had removed the karas. I had pushed the boy into a well and pledged the karas with Alla Din'. Shadi Lal, C.J. who spoke for the majority, held that portion of the statement where he had admitted pushing the boy into the well to be inadmissible; it related to a separate matter which had no connection with possession of ornaments by Alla Din, which was the only fact discovered. The pledging of the ornaments by the prisoner with Alla Din from whom they were recovered was, however, admissible; it was in consequence of this statement that the discovery was made.

(78) The above said decision of the Judicial Committee has been specifically followed by the Supreme Court in a number of cases.

(79) In *Prabhoo v. State of Uttar Pradesh* : [1963] 2 SCR 881, S. K. Das (as he then was). speaking for the Court observed as follows: '...the courts below were wrong in admitting in evidence the alleged statement of the appellant that the axe had been used to commit murder or the statement that the blood stained shirt and dhoti were his From the mere production of the blood stained articles by the appellant one cannot come to the conclusion that the appellant committed the murder. Even if somebody else had committed the murder and the blood stained articles had been kept in the house, the appellant might produce the blood stained articles when interrogated by the Sub-Inspector of Police. It cannot be said that the fact of production is consistent only with the guilt of the appellant and inconsistent with his innocence.'

(80) In other words, the equivocal fact of production consistent with both the guilt and innocence of the appellant could not complete the chain of circumstantial evidence against him, an aspect which is explained at some length in *State of U.P. v. Deoman Upadhyaya* A.I.R. 1960 S.C. 125, where the court in fact accepted

as sufficient evidence the production of the blood stained weapon. It was explained in *Prabhu* that the circumstantial chain in *Deoman Upadhyaya* did not depend merely on the production of the said weapon (a *gandasa*) but on other circumstances as well.

(81) The true principle of law, as explained by the Supreme Court in *Deoman Upadhyaya*, is that in a case of circumstantial evidence, consisting of several links, pointing to the accused as the principal assailant or culprit his mere silence or false Explanation concerning one of important links in the chain of circumstantial evidence connecting it with the occurrence would help complete that chain against him (on this point, also vide *Deonandan Misra' vs. State of Bihar*, : 1955 CriLJ1647). This presumption has been invoked against the accused in various contexts. For instance, in *Wasim Khan v. State of U.P.* : 1956 CriLJ790 it was explained how when murder and robbery are simultaneously committed, the fact of the accused having been found to be in possession of the property of the deceased may itself raise the presumption that he is the murderer, if such possession is recent and unaccounted and there is corroborative evidence in support of the presumption.

(82) In dealing with an equivocal statement, leading to production of any object, which may be consistent, as already stated, with both with the guilt and innocence of the accused, other corroborative circumstances would be required. But the discussion herein is confined to the extent to which statements made by the accused under S. 27 of the Evidence Act are receivable in evidence.

(83) If the police officer does not want to prove the information or any part thereof, as explained in *Ramkrishan Mithanlal Sharma v. State of Bombay* : 1955 CriLJ196 , section 27 would not come into operation. In other words, only if the police officer wants to prove the information or a part thereof, the court would have to consider whether it relates distinctly to the fact thereby discovered and allow the proof thereof only if that condition was satisfied. As it was further explained in the said decision, the said information, sought to be proved by The police officer, would not be admissible when it amounts to a confession, unless there is the guarantee of the truth of it by reason of the discovery of some object, distinctly in consequence of that information ; when such object is discovered so much of the

information would be admissible, regardless of the same amounting to a confession.

(84) In *Jaffer Husain Dastagir v. The State of Maharashtra* : 1970 CriLJ1659 Mitter, J. speaking for the Court, explained how, in that case, the police already knew that the third accused had the stolen articles with him. There was, therefore, no 'discovery' of any fact connecting the accused with the receipt of the articles which were stolen, within the meaning of S. 27 of the Evidence Act. Reference was made to an earlier decision of the Supreme Court in *K. Chinnaswamy Reddy v. State of Andhra- Pradesh* : [1963]3SCR412 where the Supreme Court had differed from the Sessions Judge who had held that part of the statement of the accused which related to his having hidden ornaments to be inadmissible. The Supreme Court had observed that those words, namely, where he had hidden the ornaments, had nothing to do with the past history of the crime and were distinctly related to the actual discovery which took place by virtue of that statement.

(85) The above is what Mitter, J. also explained in *Jaffer Husain* in the following manner :

'In order that the section may apply the prosecution must establish that the information given by the appellant led to the discovery of some fact deposed to by him. It is evident that the discovery must be of some fact which the police had not previously learnt from other source and that the knowledge of the fact was first derived from information given by accused. If the police had no information before of the complicity of accused No. 3 with the crime and had no idea as to whether the diamonds would be found with him and the appellant had made a statement to the police that he knew where the diamonds were and would lead them to the person who had them, it can be said that the discovery of the diamonds which the third accused was a fact deposed to by the appellant and admissible in evidence under S- 27. However, if it be shown that the police already knew that accused No. 3 had got the diamonds but did not know where the said accused was to be found, it cannot be said that the information given by the appellant that accused No. 3 had the diamonds and could be pointed out in a large crowd at the waiting hall led

to the discovery of fact proving his complicity with any crime within the meaning of S. 27. The fact deposed to by him would at best lead to the discovery of the whereabouts of accused No. 3'

'If an accused charged with theft of articles or receiving stolen articles, within the meaning of S. 411 Indian Penal Code, states to the police, 'I will show you the articles at the place where I have kept them' and the articles are actually found there, there can be no doubt that the information given by him led to the discovery of a fact, i.e., keeping of the articles by the accused at the place mentioned. The discovery of the fact deposed to in such a case is not discovery of the articles but the discovery of the fact that the articles were kept by the accused at a particular place. In principle there is no difference between the above statement and that made by the appellant in this case which in effect is that 'I will show you the person to whom I have given the diamonds exceeding 200 in number'. The only difference between the two statements is that a 'named person' is substituted for 'the place' where the article is kept. In neither case are the articles or the diamonds the fact discovered.'

(86) Another useful decision of the Supreme Court is *Balbir Singh v. State of Punjab* : 1957 CriLJ 481. In that case the accused made a statement to the police to the effect that he had buried gold ear-rings near a pipal tree and the ear-rings were recovered from the place pointed out by him. The learned Sessions Judge in that case had drawn a distinction between possession and knowledge and held that the appellant merely knew where the ear-rings had been concealed and that he did not possess them. The High Court pointed out (a view which was affirmed by the Supreme Court) that the distinction was not justified on the evidence on record and that the statement that the appellant had buried the gold rings was admissible under S. 27 of the Evidence Act.

(87) The caution administered by the Supreme Court, which has to be exercised always, is to resist any attempt by the investigating officer to circumvent, by manipulation or ingenuity, the protection afforded by Ss 25 and 26 of the Evidence Act ; the Court has to be assured that the information furnished and the fact discovered are credible.

(88) In this context it will be useful to refer to yet another decision of the Supreme Court in *Mohmed Inayatnilah v. State of Maharashtra* : 1976 CriLJ481 where the accused had made a statement to the following effect: 'I will tell the place of deposit of the three Chemical drums which I took out from Haji Bunder on 1st August'. It was pointed out by Sarkaria, J., speaking for the court, that the statement had to be split up into its components and the admissible had to be separated from the inadmissible portions. Only those components or portions which were the immediate cause of the discovery would be legal evidence and not the rest which must be excised and rejected. The first part of the statement that he would tell the place of deposit of those drums was the immediate and direct cause of the fact discovered; this portion was admissible but the rest constituted only the past history of the drums or their theft by the accused ; not being two distinct and proximate cause of the discovery it had to be rilled out of evidence altogether. The above said admissible portion gives rise to two hypothesis, both of which were equally possible: (1) it was the accused, who had himself deposited the stolen drums in the musafir khana, or (2) that he only knew that the drums were lying at that place. The second hypothesis being wholly compatible with innocence he would be entitled to the benefit of doubt. But the following observations of Sarkaria, J. brings out the crucial aspect of that case which would distinguish it from any of the statements to be considered in the present case:

It will be seen that he never said that it was he who had deposited the drums at the place from which they were produced. It seems the latter part of the statement, which was an outright confession of the theft, was not completely ruled out of evidence and something of it was imported into and superimposed on the first part of the statement so as to fix the responsibility for deposit and possession of the stolen drums there, on the accused.

(89) It was noticed that what is to be discovered is a material fact; the admissible portion of the information which has caused the discovery must be such as to connect the information and the fact of discovery with each other as cause and effect. This principle was explained in *Himachal Pradesh Administration v. Om Prakash* : 1972 CriLJ606. In this decision it was pointed out that a witness cannot be said to be discovered in consequence of the information given by the accused if

nothing is to be found or recovered from him as a consequence of the said information, in other words, the statement would not fall within S. 27 if the information merely discloses the identity of the person but, the fact of the accused pointing out the said witness would be admissible under S. 8 of the Evidence Act. This will be at par with the accused pointing out (even where it is not preceded by any information given by him) a place from which a recovery of any article, shown to be incriminatory is found or recovered. Recoveries made in the said way, independent of such searches being conducted, would also not attract S. 103 of the Criminal Procedure Code. ; such recoveries could be proved even by the solitary evidence of an investigating officer if his evidence could otherwise be believed. Any such discovery would, however, become inadmissible if the police party knew where they were hidden .

(90) In the light of the above principles an effort will now be made to analyze and discuss the disclosure statements alleged to have been made by the respective appellants in this case.

(91) The two disclosure statements made by him on 12/12/1973 to Public Witness 142 are Exs. Public Witness 82/J and Public Witness 82/L; on the same date he made yet another disclosure statement (Ex. Public Witness 42/A) to Public Witness 142 are Exs. Public Witness 82/J and Public Witness 82/L; on the same date he had taken on rent a locker bearing No. 44 in Canara Bank, Bhopal on 20-11-1973 and had placed therein the currency notes of Rs. 65,000 each currency note being of the denomination of Rs. 10, pertaining to the Union Bank of India, Chandni Chowk, Delhi. He had also stated that he had deposited Rs. 3,000 pertaining to the same bank in his deposit account No. 3518 opened on 2/11/1973 in three installments ; he had referred to another sum of Rs. 10,000 in the shape of currency notes of Rs. 10 each deposited in the same locker for which a Draft No. 7376 dated 11-12-1973 was prepared in the name of M/s. Nishan Spring (P) Ltd., Jabalpur. He could point out and secure the same and thereafter produced it. The fact of his having taken a locker on rent on 20/11/1973 was intimately connected with his having placed the notes in the said locker.

(92) EX. Public Witness 82/J contains statements pertaining to the said Ambassador car having been used at the time of the occurrence and the stains of blood on the car which were later washed in the garage. Statements to the above effect except the car being in the garage would clearly be inadmissible. It also pertains to his having kept a sum of Rs. 20,000 to Rs. 25,000 in his house after exchanging them; this would not be admissible, since it is only a record of a past transaction.

EX. Public Witness 82/L refers to Sunil having kept a sum of Rs. 50,000 in the form of hundred rupee and 10 rupee notes in a brief case lying in the office of his uncle Sri Kishan Dawar; Rs. 40,000, out of the same, were in the shape of 10 rupee currency notes and the balance in the shape of 100 rupee notes, which he had not converted into 10 rupee currency notes pertaining to the Union Bank. It also refers to his having got issued a Draft for Rs. 10,000 after depositing the amount in the shape of currency notes pertaining to the Union Bank—a draft which was issued in favor of M/s. Nishan Spring (P) Ltd., Jabalpur, the receipt of which had also been taken into possession by Public Witness 142 from Sunil. He had also referred to his opening an account in his name in the Canara Bank, Hamidia Road, Bhopal by depositing the amount pertaining to the Union Bank. So far as the amount left with Sri Kishan Dawar is concerned even in his statement under S. 313 Criminal Procedure Code. he had admitted (in answer to Q. No. 219) that he had told the police about keeping a brief case containing Rs. 50,000 at the office of his uncle. He had also then stated (in answer to Question 235) that Rs. 65,000 were taken out of his locker without his pointing out and, that the seals of the Union Bank were not there'; he only represented that he was not carrying the key of the locker. Sunil had also admitted (in answer to Q. 228) that certain recoveries were made from No. 27 Sundar Nagar, which is in occupation of his mother, Rs. 35,757 in the form of currency notes besides silver coins, silver plates and ornaments. These were no doubt seized under Ex. P. W. 53/A but the recovered money and articles were claimed to belong to the members of his family.

(93) For the sake of completeness alone it may be noticed in this context that in pursuance of an order passed by the A.D.M., Bhopal on 20/12/1973 (Ex. Public Witness 62/B) Harbans Lal Ahuja (P.W. 62), the Agent of the State Bank of India,

Bhopal had surrendered to The police a packet of 100 rupee notes (Exs. P. 1. to 4/1-100) plus 10 rupee notes bearing the seal of the Sorting Cell of the Union Bank of India, Karol Bagh, New Delhi ; these were seized under Exs. P. W. 62/A. Sunil admitted (in answer to Q. 230) that Public Witness 62 had produced the currency notes but claimed that they had been planted by The police. Sunil also had admitted (in answer to Q. 233) that he had produced a draft against cash on 11/12/1973 which he got cancelled on 12/12/1973. The cancellation and payment of the amount to the police was done by Sunil at the instance of The police

(94) A few more recoveries made on the pointing out of Sunil will be referred to presently. The evidence pertaining to some of the recoveries has already been discussed. To the extent to which Sunil himself took out and pointed out the place from where recoveries were made that would be evidence of conduct falling within the scope of S. 8 of the Evidence Act. Sunil is said to have made another disclosure statement on 12/12/1973 to Public Witness 142 (as per Ex. P. W. 96/A). It was in this statement that reference was made to his keeping with his uncle Sri Kishan Dawar yet another sum of Rs. 20,000. The same not being recovered this is not admissible. He had also referred then to his purchasing surgical white gloves from Bliss and Cotton, Connaught Place. Since the place was mentioned it was possible to recover a cash memo (Ex. P. 12/B) of that company relating to the purchase of the fine pairs of white surgical hand rubber gloves but the person who had purchased had not been noted. Ex. P. W. 96/A also contains a statement that some days prior to 28/09/1973 jeep bearing No. Mpb 9828 was serviced from ESSO service station near Ashoka Hotel. Car bearing No. Dhb 9254 (white Ambassador said to be involved in this case) was also got services from the same service station. He had also purchased ammunition for .455 revolver at Delhi from the New Commercial Refrigeration, Ram Nagar, Delhi. The jeep No. Mpb 9828 was got repaired at Lajpat Nagar; blood stains on cash boxes were washed in the bath room on the first floor of 27 Sunder Nagar (evidence pertaining to these will be discussed later).

(95) The disclosure statement (as per Ex. Public Witness 82/H) is alleged to have been made by Shahwar to Public Witness 14 2/12/1973 to the effect that Public Witness 1 had produced a revolver .455 bore and one bullet from his friend (P. W.

67). The evidence pertaining to the recovery of the same, not in the presence of Shahwar but in the presence of Public Witness I, has already been discussed.

(96) On the same day Shahwar is said to have made yet another disclosure statement (as per Ex. Public Witness 82/K) the admissible portion of which is that he had kept concealed the pistol 8 mm in a large sized steel almirah under the bedding of his cot and that he could get the same recovered after taking the key from there and after unlocking the said almirah- He had also referred to jeep No. MPB 9828 parked in his porch. The evidence of Public Witness 82 has already been discussed at length ; he had referred to Public Witness 142 interrogating Shahwar and recording his statement (as per Exs Public Witness 82/H and Public Witness 82/K) after recording Ex. Public Witness 82/H, Public Witness 142 recovered the revolver from P.W. 67. Having regard to the fact that it was past midnight when Shahwar was interrogated and the discovery statements were recorded it was not evidently possible to get the attestation of any nearby witnesses. Shahwar's father was also an influential person in that locality. It has already been indicated how Public Witness 82 and Phool Chand Jain (not examined), who were independent witnesses of the locality, had attested the disclosure statement, recoveries etc. made on December 11/12, 1973.

(97) The pistol (Ex. P. 8) was recovered under a memo (Ex. Public Witness 9S/ which was prepared by Public Witness 115 ; the same had been attested by only the brother of Shahwar in addition to Phool Chand Jain and a Constable. Public Witness 115 also gave evidence (so recorded in the memo as well) that Shahwar, out of his own accord, took out the key from under the bedding of his cot in the residential room of his house Nawab Manzil and after opening the steel almirah produced the said pistol. A vain effort was made to show that there was some discrepancy in the description of the place, whether it was Nawab Manzil. The learned trial Judge has discussed this portion at length and was not impressed by any of the criticisms leveled on this portion of the case ; we agree with him. Both the key and the pistol were recovered. The packet was sealed with the monogram KDS. The said seal was taken from Phool Chand Jain and handed over to Constable Kidar Pande after use. When the police party led by Public Witness 115 was coming out after recovering Ex. P. 8 Shahwar pointed out the jeep MPB

9828 parked under the projection which was seized under a memo (Ex.P-W. 98/C) which also was attested by the same set of witnesses.P.W. 115 did not make any entry at police station Shahijanabad in regard to Shahwar. Shahwar was handed over to Public Witness 115 outside the police station and from there they were led by Shahwar to his house at Nawab Manzil. The house of Shahwar has been described in the memo (Ex. Public Witness 98/B) as being Nawab Manzil. It is no doubt true that Public Witness 142 had obtained a search warrant from a Magistrate in Delhi, as noticed already, even on 10/12/1973 (as per Ex.P.W. 99/L-3) wherein there was a mention of the recovery of fire-arms to be collected. Without getting the key of the steel almirah which was kept concealed underneath the bedding of Shahwar's cot the almirah could not have been opened and the pistol (Ex. P. 8) also could not have been recovered. The search warrant was not utilised for the reasons noticed already - there was no certain indication as to where the concerned articles, mainly the currency notes, were ; any premature search could have rendered the attempt abortive. Shahwar himself had signed the disclosure statement (Ex. Public Witness 82/K) which he admitted ; he only claimed that the same had been obtained by the police on a blank paper by force (in answer to Q. 217). There does not seem to be any doubt that Shahwar had made the disclosure as above leading to the discovery of the pistol (Ex. P. 8). But for Shahwar's statement about Public Witness 1 having got the revolver from Public Witness 67 and having returned it there would not have been any recovery of the revolver (Ex. P. 9). P.W. I, after having been pointed out by Shahwar, led the police party (after Shahwar had made the statement) to the house of Public Witness 34/67. Regarding the criticism that the police had prior information about the pistol as well as about Nawab Manzil and, therefore, the disclosure statement was not admissible there seems to be no force in it because, as already pointed out, the fact of having got an earlier warrant to search the house of Shahwar could not mean that the police knew about the pistol (Ex. P. 8) having been kept concealed in the steel almirah and the key of the almirah having been concealed in Shahwar's bedding under his cot. The fact, however, remains that it has not been shown how Shahwar secured the pistol (Ex. P. 8). It was an un-licensed one. The recovery of the pistol from Shahwar would afford corroboration in respect of Public Witness I's testimony concerning the plan according to which another pistol was thought to be

necessary which Shahwar had procured. The concession of Mr. Kalra that Shahwar's conviction under the Arms Act can not be sustained has already been noticed.

(98) It is worth recalling that according to the original plan Shahwar was to shoot at the gunman with the revolver but he developed cold feet even prior to the occurrence when they were in the Rambles Restaurant in Delhi; this led to Sunil offering to shoot the gunman himself with the revolver.

(99) On 11/12/1973 Public Witness 140 interrogated Ravi in the presence of P.Ws. 82 and Iii and Phool Chand Jain when he made a statement (as per Ex. P. W. 82/D-1) that he had kept concealed currency notes of the Union Bank of India, Delhi in the sum of about Rs. 4 lakhs in the lower right side drawer of the office table in the outer room of his residential house No. 30 Civil Lines which he could take out after pointing out. The relevant details concerning this have been noticed already at considerable length. The details pertaining to the recovery of these notes have also been discussed fully. The above said disclosure has been fully proved and no part of the disclosure statement as recorded (Ex. P. W. 82/D-1) can be said to be either false or inadmissible. The observations of Sarkaria, J. in *Mohmed Inayatullah*, extracted above, would be directly applicable to this case. The disclosure statement related to the discovery of the fact, as deposed to by Ravi; it was of a relevant fact; the information given by him related distinctly to the fact thereby discovered. As Sarkaria, J. has observed in that decision the word 'distinctly' means directly, indubitably, strictly and unmistakably. Ravi, according to that statement, had kept concealed (and, therefore, had possession of) the currency notes concerned in the lower right side of the office table lying in the outer room of his residential building; it was not a case of his having only mere knowledge about it. The part of the statement which was confession, of his having kept the money there and having concealed it, would be admissible in terms of S. 27 of the Evidence Act.

(100) The alleged disclosure statement, said to have been made by V. Jaggi (as per Ex. Public Witness 127/A) on December 15, 1973 was recorded by P. W. 142 and attested by Walaiti Ram (P. W. 60) whose evidence has already been

discussed at great length. The learned trial Judge passed a separate order (Item 125, page 619 Vol. II of the printed record), regarding what portions of this statement are admissible after hearing arguments on both sides. After discussing the decision of Pudukuri Kottaya etc. he held as follows : The fact of discovery, in pursuance of the above statement, concerned the entries made in fictitious names (Ashok Bhargava, Dixit and Shah) by the accused persons or some of them in the hotels from where registers with entries were seized and the knowledge of V. Jaggi in regard to these; was the first point for consideration; he held further, that the above fact thus discovered, would be a relevant fact in a case of conspiracy under S. 120-B 1. P. C. The disclosure made by V. Jaggi led to the discovery of the entries being fictitiously made in the hotel registers and hence would fall within the scope of S. 27 of the Evidence Act

(101) For a clearer understanding of this aspect the following portions of Ex. P. W. 127/A, held by the trial court to be admissible, may be separately set out:

ON 22/09/1973 Shahwar Khan, Harjit and Ravi Kapur stayed at Hotel Bright and got recorded fictitious names which were probably Ashok Bhargava, Dixit and Shah..... One or two days prior to the occurrence Sunil Batra purchased gloves from Connaught Circus.. . On 28/09/1973 Shahwar Mohd. Khan and Ravi Kapur left Prabhat Hotel. They stayed there under assumed names and got recorded their names as Ashok Bhargava and Shah.

(102) It is contended on behalf of V. Jaggi that the fact of three of the above-said appellants having stayed at the hotels concerned was known even previous to 15/12/1973, and after V. Jaggi's arrest (on 14/12/1973). Yet, it is argued, no effort was made by the police to go to the hotels concerned to find out from those registers. The answer to this by Shri Kaira is that even if the police had gone to the hotels they would not have been able to find out anything from concerned hotel registers since they would not have showed the fact of any of the appellants having stayed there-this would become known only if the assumed or fictitious names in which they stayed were also known and this fact became known to P. W. 142 only when he recorded Ex. P. W. 127/A on 15/12/1973. It seems to us that the said statement would, therefore, come under S. 27 of the Evidence Act.

(103) Mr. Jethmalani addressed, what seemed to us, a laboured argument, that the discovery of hotel registers will not fall under S. 27 of the Evidence Act. Shortly stated, his argument was that only the discovery of physical objects as distinctly related to the facts deposited would come within its scope; since the hotel registers were the physical objects in this case they could not be discovered; they are maintained by every boarding house as required by law; there could be no discovery of them in the same way as 'Knives could not be discovered', knives having been discovered a long, long time ago. In other words, concealment of physical objects being a necessary precondition of admissibility under section 27 there was no such concealment in this case-the registers were open to inspection by any one and the police, in this case, could have done so when even on 14/12/1973, V. Jaggi had stated, on interrogation by the police, about the stay of the appellants (except himself) in some hotels at Delhi. But it was only on 15th he had mentioned the details specifically as per Ex. P. W. 127/A, setting out the assumed names under which each one of them stayed in the hotels. Bright and Prabhat and Jeevan Lodge. On 17th, V. Jaggi took the police to the respective hotels and the registers, containing those entries, were seized. We are not even like the trial court, impressed by the argument of the registers themselves not having been sealed, because, as rightly pointed out by the learned trial Judge, the concerned entries in each of them had been encircled and initialled and the contents were incorporated fully in the seizure memos. Nonealing may have an impact only on the possibility of their being shown to the concerned witnesses, including P. W. 1; in fact, it was necessary to show them to the concerned witnesses (P. W. 1 was shown those registers by the police) for fully and effectively questioning them; it may also be necessary to interrogate the accused about them, before concluding the investigation. Mr. Jethmalani's argument, somewhat attractive at first blush, seems to overlook the fact that without knowing the assumed names under which they stayed in the hotels it may not have been possible to connect these entries with any of the accused; it would have been futile for the police to proceed to these hotels immediately after they interrogated V. Jaggi on 14/12/1973 for they could have been none the wiser for it-unless they conducted an extensive and roaming investigation concerning every one who stayed in each of those hotels for the entire period checking and crosschecking every entry and

concerning persons who were coming there possibly from long distances; such efforts were not likely to be very successful. If V. Jaggi had even on that day himself taken the police to the hotels and pointed out the rooms of the respective hotels and pointed out where the concerned appellants and P. W. 1 stayed it might have been different; V. Jaggi did so only on the 17th. There is, therefore, no substance in the contention that when V. Jaggi stated to the police about the assumed names on the 15th they already knew about this on the 14th or that they could have come to know of this if they had perused (and seized) the concerned registers. Nor is there any force in the contention that even on the 17th V. Jaggi is not stated to have pointed out the entries in the registers ; he had not only mentioned on the 15th assumed names under which each of them stayed in which hotel but he had also pointed out the rooms where they stayed in the concerned hotels-after which it was so easy to pick out the concerned entries.

(104) The above contentions, of a subsidiary nature, having been thus met, it only remains to discuss the meaning of 'concealment' which is something that invariably precedes 'discovery'. When one talks of discovery it is invariably in the sense of the thing discovered being previously hidden from view. The cloak, which hides the physical object discovered from view, may be due to physical or other reasons; it would certainly take in a case like the present where the assumed names may not have been known, even after making a reasonable effort to know them, but for the information given to the police. No difficulty can be perceived in this case on the ground of the fact deposed to not distinctly relating to the object thereby discovered, for the discovery of the concerned entries in the concerned hotels did distinctly relate to the fact deposed. The object discovered was not so much the register and the concerned entry therein ; the fact of the existence of these entries in the concerned registers would not have been 'discovered' except for the specific information supplied giving the details (facts deposed by V. Jaggi) concerning their existence. This situation seems covered by S. 27; there seems no warrant for the kind of interpretation put upon it by Mr. Jethmalani.

(105) Regarding the fact of V. Jaggi making the statement as per Ex.P- W. 127/A Mr. Jethmalani pointed out that V. Jaggi was not likely to have made such a statement having regard to what happened when he was produced before the

Magistrate on 13-12-1973-his having resisted the identification parade being held in respect of him and in view of Mr. Kaira himself not disputing the trial judge having excluded from consideration V. Jaggi's statement leading to the recovery of the key of the Bank van. On the latter point Mr. Kaira's submission was based on the said statement not having been signed by V. Jaggi in the face of Ex. Public Witness 127/A being signed by him; this does not mean that the said statement was a fabrication. It was indeed fair of Mr. Kaira, as he has been throughout the hearing before us, to have stated that for the above reason he was not in a position to rely upon the statement leading to the recovery of the key of the Bank van. As a matter of probability, however, it seems possible to view the statement of V. Jaggi about the key of the Bank van (being with him) with favor; the key must have been with one of the culprits and it was not even suggested that it was with any one else or that there was any duplicate key. We have already referred to P. W. 35 having been interrogated as a witness in this case when V. Jaggi, under handcuffs, took Public Witness 140 to Public Witness 35 on December 23rd. P. W. 35, though he became hostile, did not deny that V. Jaggi took P. W. 140 to him. On this basis it is seen that V. Jaggi was also giving information leading to the progress of the investigation by the police despite his resisting it when advised by his father or other adviser. Ex. P. W. 127/A could not therefore, be rejected merely on the above ground urged by Mr. Jethmalani.

(106) Yet another criticism advanced by Mr. Ram Jethmalani was that if V. Jaggi had refused to participate in identification parade on 13th he is not likely to have made any discovery statement on the 15th. It does not appear that for this reason alone Ex. P. W. 127/A may be doubted; despite his father and lawyer having intervened on 13th itself V. Jaggi might have felt that when the other appellants and P. W. 1 had been arrested and recoveries made from them the game was up. Ambivalence, in any case, on his part cannot be ruled out.

(107) It is still further stated that on 22/12/1973, V. Jaggi made a disclosure statement (as per Ex. P. W. 481A) to P. W. 140 stating that he had kept the key of the Bank van in the drawer of his office table. Public Witness 48 who has attested this disclosure statement has been examined. Ex. Public Witness 48/B is the seizure memo which is also attested by P. W. 48. But that reason shall be noticed

later no reliance need be placed on the recovery of key.

(108) While considering the evidence of P. W.I we shall revert to Jaggi again.

(109) Evidence of handwriting experts and others concerning certain documents relied upon by both the prosecution and the defense in support of their respective cases.

(110) Section 47 of the Evidence Act provides that when the court has to form an opinion as to the person by whom any document is written or signed, the opinion of any person acquainted with the handwriting of that person is relevant ; direct evidence by a witness signing/writing a document stands on an even higher footing. Section 45 of the Evidence Act enables the court to form an opinion upon a point of handwriting after taking into consideration the opinion of an expert. The court may also, under S. 73 of the Evidence Act, compare the writings or signatures with proved ones ; the court may direct any person present in court to write, and then compare the words or figures so written with those alleged to have been written by the same person. The present Section 73 corresponds to S. 48 of the repealed English Act 2 of 1955 with some modifications; prior to 1854 the English law did not allow the witness, even a jury (except in special circumstances) to compare two writings in order to find out whether they were by the same person. The present position in England (vide Halsbury's Laws of England, Fourth Edition, Vc-l. 17, Para 89, page 66) is, as it is in India also, that it is for the court to determine whether a particular piece of writing is to be assigned to a particular person: documents may be submitted to the court for comparisons to be made.

(111) P. B. Mukharji, J. (as he then was) observed in *Bissesar Poddar v. Nabadwip Chandra Poddar & Anr.* : AIR 1961 Cal 300 that 'judicial blindness' has not been imposed in this respect; the court is not 'prevented by law to use its own eyes either in addition to handwriting expert's evidence on the point or even in the absence of such evidence on the point'. When the work of such comparison is described as a 'hazardous and inconclusive' exercise, to be used with 'great care and caution', it is not to be understood as the exercise having been 'forbidden'. Mukharji, J., is only protesting against the requirement of caution being converted into a rule of law, imposing judicial blindness, as it were. The weight to be attached

will depend on the skill of the expert, (Halsbury's Laws of England, 4th Edn. Vol. 17 paras 89,91).

(112) The Judicial Committee was strongly impressed by such comparisons] in *Mahindra Chandra Lala v. Mahaluxmi Bank Limited* ; it stressed the danger of such comparisons in *Kessarbai v. Jethabhai Jivan* A.I.R. 1928 P C 27. Hidayatullah, J. (as he then was) compared the writings for the court to reach a conclusion of guilt.

(113) Mr. Garg, learned counsel for Shahwar, placed reliance on the observations of Bhagwati, J. in *Magan Bihari Lal v. The State of Punjab* : 1977 CriLJ711. They only emphasise the need for caution in the matter of acting on opinion evidence given by a handwriting expert ; substantial corroboration has been insisted upon ; it can rarely, if ever, take the place of substantive evidence.

(114) The proper approach to the appreciation of expert testimony was indicated by Raghubar Dayal, J. in *State of Gujarat v. Vinaya Chandra Chhota Lal Pathi* A.I.R. 1967 S.C. 778 as follows:

'It has also been held that the sole evidence of a handwriting expert is not normally, sufficient for recording a definite finding about the writing being of a certain person or not. It follows that it is not essential that the handwriting expert must be examined in a case to prove or disprove the disputed writing.

Evidence of this kind may be worthy of acceptance if there is internal or external evidence relating to the document in question supporting the view of the expert. The evidence of an approver on any particular may derive support from the testimony of a handwriting expert-as in this case-when P. W. 1 says that he saw some one, among the appellants, write something, the handwriting expert says, with words to support it, that the said writing is in the handwriting of the person to whom the writing is attributed by the approver and the court on comparison of the said writing with the sample or proved writing confirms it; in other words this would be substantial corroboration concerning the persons whom the approver implicates. This is a guarantee which the court will look for, for there is likelihood of the approver implicating even an innocent person adopting the broad framework of

the prosecution case; the kind of corroboration concerning the persons whom he implecates will, however, depend Upon the facts and circumstances of each case; an aspect which we will discuss later. It is not, as if, as contended by Mr. Garg, the evidence could be useless in this respect because we have also the evidence of P. W. 1's version of the concerned appellants occupying the rooms in three Hotels; Bright, Prabhat and Jeevan Lodge, Public Witness 1 himself swore that he saw Ravi making certain entries in Hotel Bright and had himself spoken to the effect that he had made the entry in Hotel Prabhat register. Regarding such facts the evidence of the expert where it supports his evidence could be taken into consideration and may, indeed, be invaluable. The evidence of the expert adduced by the defense where they contradicted Public Witness 1's statement that he did not sign Ex. D. W. 34/A, which is a deed executed at Bombay on 28/09/1973, (the date of the present occurrence) would be of the weakest description when, as the later discussion would show, the evidence of the Magistrate and the Lawyer from Bombay is seen to be unacceptable. The evidence of P. W. 97 who gave cogent reasons in support of his view that the admitted and proved signatures of P. W. 1 did not tally with those founded in Ex. D. W. 34/A would, in fact, support P. W. 1's denial that he did not sign Ex. D. W. 34/A either in the presence of the lawyer or of the Magistrate.

(115) It is well known that when specimen writings/hand-writings are obtained there is likelihood of simulation or alteration. But even when specimens are taken, there is care 'usually exercised to give random dictation of the letters, figures in question and they are repeated several times. The care to be taken in getting volunteered specimen writing has been explained in Chapter Xv of 'Questioned Documents Problems' by Albert S. Osborn and Albert D. Osborn (Second Edition). The specimen writings taken in this case seem to have been taken with such care.

(116) Usually regard is paid to the presence of personal characteristics, mannerisms, peculiarities in spelling, formation of loops in some letters, fixed pen habits, embellishments etc. and other characteristics which enter into the handwriting as personality and leave their unconscious impress on a person's handwriting. But nature and habit, individuals contract a system of forming letters which, give a character to their writing as distinct as that of the human face.

Scientific advances in this sphere have proved an invaluable help; we are on the threshold of even making clinching computer-comparisons-not yet in our country. It has been said that although a person's handwriting varies as to its precise detail, yet there are fundamental characteristics, despite 52 letters of the English alphabet (large and small) permitting almost infinite possibilities of the positions in which they may be placed. That is why in spite of a clever forger trying to give forged signatures as much resemblance as possible to a genuine signature (the model (s) available to him) the personal characteristics of the writings or signatures are often an unfailing guide ; it is often difficult work for a forger or a stranger to produce faithfully all such characteristics in the writings (Bissessar)- This aspect of the matter has been neatly and compendiously summed up in 'SUSPECT DOCUMENTS-their scientific examination' by Wilson R. Harrison, Sweet & Maxwell Limited, Second Impression with Supplement 1966:. . it may fairly be assumed that a developed handwriting, being the product of a long period of modification and adaptation to the needs and abilities of the writer, will be peculiar to the individual ; in view of its complexity, the probability of any two persons having handwritings which are so similar that the presence of one or more consistent dissimilarities cannot be demonstrated, is extremely small.

(117) Although this is so, it does not follow that the comparison of various specimens of handwriting to determine whether or not they have been written by the same person is necessarily simple and straightforward, even when there is no possibility of disguise having been introduced. The comparison of handwritings can never be accomplished mechanically as though pieces of a jigsaw puzzle were being compared with the spaces which remain to be filled. Human beings never function with the regularity and precision of machines,' which is why natural variation will be a characteristic of every specimen of handwriting which is the subject of examination and comparison. The influence on handwriting of this natural variation has already been considered in some detail, but it must be repeated that because of it, one is unlikely to encounter passages of handwriting or even individual words which are perfect replicas, even when they have been written under similar conditions by a practiced penman.

(118) It follows from this that because two specimens of handwriting, even when written by the same person, can never be replicas, a measure of judgment is called for on the part of the examiner when he has to decide whether:

(1) the differences in the writings being compared can be regarded as being due to variation, or if they are indicative of different authorship;

(2) in the absence of any consistent differences which cannot reasonably be attributed to natural variation, the sum total of resemblances in letter design and in details of structure uncovered by the examination can be explained only on the grounds that the writings are of common authorship, and that the possibility of the resemblances occurring by chance can be discounted'.

(119) 'THE rule is simple- whatever features two specimens of handwriting may have in common, they cannot be considered to be of common authorship if they display but a single consistent dissimilarity in any feature which is fundamental to the structure of the handwriting, and whose presence is not capable of reasonable explanation.

(120) This rule must not be applied blindly. For example, the dissimilarity must be present in some feature which is known to the examiner to be fundamental to the structure of the handwriting. The presence of initial strokes to some of the letters of one specimen of handwriting and their absence in the other is not fatal to an expression of opinion that they are of common authorship, for the experienced examiner is aware that many writers vary their habits with respect to the initial strokes to certain letters. On occasion, a handwriting will be liberally garnished with such strokes, whilst in a specimen written by the same person under different circumstances, initial strokes may be sought for in vain.

(121) Again, the dissimilarity must be truly consistent ; the presence of a few accidents should never be interpreted as denoting the existence of a consistent dissimilarity not capable of reasonable explanation. The dissimilarity must clearly be shown to be a natural feature of the writing.

(122) The consistent dissimilarity need not be such an obvious feature of the handwriting that its presence obtrudes itself on the eye. Too obvious a feature of a handwriting is invariably regarded with some suspicion by the careful document examiner, because there is always the possibility that it has been deliberately introduced to confuse the issue. The type of dissimilarity which is regarded as most significant is that which has to be sought for in the structure of the handwriting and whose presence may well be overlooked by those inexperienced in the critical examination of handwriting. There is little chance of such inconspicuous dissimilarities having been deliberately introduced as disguise'.

(123) 'WHEN two passages of handwriting are to be compared, a certain amount of preliminary work has to be undertaken before any detailed comparison of their characteristics is embarked upon. The writings should be read, re-read and studied until the examiner is so familiar with its appearance that he is able to interpret any word at a glance. Great care should be exercised in the interpretation of doubtful letter formations, and the possibility of there being examples of misspelling or of the inclusion of unfamiliar proper names should be borne in mind, otherwise the examiner may be confused by some of the letter designs.'

(124) There are more suspicious circumstances. Both D. W. 33 and D. W. 34 were summoned for 13th July. But summons had been effected on D. W. 33 alone on 9th July. He did not turn up, but made an endorsement on the back of the summons requesting that he be examined on commission since he had taken over as a Judge, Cooperative Court, after retirement. Service of summons had been effected on D. W. 34 on 10th July. Without turning up he requested that he be examined on July 16 on the ground that he was held up on account of urgent court work. D. W. 33 was telegraphically informed that his request could not be granted and that he must appear on 16th July and, failing with, on 19th July; D. W. 34 was informed that he could appear on 16th July as requested by him. Neither of them appeared on 16th July. While information from D. W. 33 was awaited D. W. 34 was telegraphically informed to appear on 19th July on pain of coercive steps being taken. Two telegrams were received by the trial court on 17th July, one from each of them, at 4.35 P. M. stating that they would be attending on 23rd July. This coincidence regarding the date on which they had agreed to appear, their

telegrams reaching the court at the same time after they had been telegraphically informed by the trial court as above, could not all be purely coincidental. Both the telegrams received by the trial court from D. W. 33 and D. W. 34 were express telegrams dispatched with Nos. Ad 137 Bombay 17.26 and No. 138 Bombay 17.27 with receipt numbers Ln 101 Ad 137 and LN102 Ad 138. Both the telegrams were addressed to 'HON VOHRASAHIB.' The learned trial Judge referred to the observations of the Supreme Court in *Vidhya Singh v. State of Madhya Pradesh* : 1971 CriLJ1296 that the courts had to rely more on human probabilities than on assertions of witnesses while assessing the probative value to be attached to their evidence.

(125) It is in the above background that one has to evaluate the evidence of the Handwriting Expert S. K. Gupta, Assistant Director (Documents), C.F.S.L., who was examined as a court witness, to see whether the signatures appearing on Ex. D. W. 34/A could have been of the same person (P. W. 1) who had submitted his specimen writings to court. After a thorough Stereo-zoom microscopic examination C. W. 1 had submitted his report (Ex. C. W. 1/J). The following points emerge from his report and the evidence he (C. W. 1) gave before the trial court:

1. Examination through Stereo-zoom microscope revealed inherent signs of imitation such as drawn and hesitating line quality, unusual pen-lifts and careful joining of lines at unusual places, irregular pen-pressures and careful retouchings. There was lack of carelessness, freedom and natural variations.

- 2.(a) Examples of careful joinings of strokes and unusual penlifts in signature marked (G) are observed in start of letter 'H' in the connecting strokes between 'H' and 'a' in the body curve of letter 'S' and in the final staff of word 'Singh'. The initial stroke of letter 'H' shows opposite direction of movement from the point of careful joining.

- 2.(b) Careful retouching is observed in the short bar appearing at the end of questioned signature marked 'G' in the upward finishing stroke in the word 'Singh', in the body of small 'a' and at the foot of letter 'j' in the signature.

2.(c) Hesitating line quality and irregular pen-pressure are observed in the base of first staff of 'H' in the second vertical staff of letter 'H' in the connecting stroke between 'H' and 'a' in combination 'arj', in the connecting stroke between letters 't', and 'S' and in the starting stroke and body of letter 'S' in signature marked 'G'. Entire signature marked 'G' shows drawn hesitating and inert line quality.

3.(a) Careful joining of stroke and unusual pen-lifts are observed in the questioned signature marked C at the start of letter 'H' in the body of letter 'S' and in the curve stroke after letter 'S'. The starting stroke of 'H' shows opposite direction of movement from the point of careful joining.

3.(b) Careful retouching is observed in the body of 'a' at the top of 's' at the top of 't' and at the start of the hooked stroke of 'H' as well as at the top of final vertical stroke of word 'Singh'. Lower connecting stroke of letter 'H' also shows careful joining of strokes.

3.(c) Hesitating line quality and irregular pen-pressure are present almost in the entire signature marked C but more prominently seen in the lower loop of 'H' in the second vertical staff of 'H' and in the stroke between 'f' and 'S'.

4. Although there is similarity in letter forms when compared with admitted signatures too much attention is given to unimportant details and there is a slow, hesitating and unnatural appearance.

5. As between C and G small differences have been created but it has been done deliberately as pretence for natural variation.

6.(a) In admitted signatures letter 'i' is written isolated with downward start but in the questioned signatures it is written very slowly with a light pressure and written in the opposite direction.

6.(b) Connecting stroke between the two vertical staffs in letter 'H' shows divergence in their execution being compared with admitted signatures.

6.(c) Formation of an elongated lower loop at the base of the first staff of letter 'H' is a very rare habit and observed in out one of 96 signatures but it appeared in

almost identical manner in both the questioned signatures.

7. Admitted signatures show fluent line quality with delicate and controlled pen-pressure tapering start in the beginning and finish at the end of the stroke in dictating that the hand was in motion before the pen touched the paper and also after it had left while there was absence of such start or finish in questioned writings'.

(126) Of the scholarship and experience of C. W. 1 there can hardly be any doubt. He was trained in the office of Examiner of Questioned Documents at Simla in Home Office Forensic Laboratory, Government of U.K. and in the Interpol Headquarters at Paris. Though technically he is under the administrative control of the C.B.I. the real control vested with the Director who was a scientist. There is absolutely no reason to doubt his impartiality. He had carried on his investigation with the help of scientific aids. More than all his view is fully supported by the probabilities and human conduct such as referred to above.

(127) On this point D.W. 41 was examined on behalf of Ravi ; he only endorsed most of the observations in regard to fraudulent retouching, poor line quality, hesitation in execution of strokes etc. explained by C.W. 1.

(128) SUNIL'S counsel made a request for cross-examining D. W. 41 which was also allowed; but, as observed by the learned trial Judge, nothing could be brought out regarding the points where C.W. 1 and D.W.41 were in agreement. But not content with cross-examining D.W.41 Sunil also examined -a. private handwriting expert R. R. Mahant (D. W. 40). He made a report (Ex. D.W. 40/B). After examining the originals for about 45 minutes and the photographs for a day or two he claimed that the disputed signatures were free from fraudulent retouching, hesitation and futile pen stops and pen lifts at unusual places. On the other hand, he claimed that the movement was of the wrist; the line quality is perfect and speed rapid and personal characteristics like alignment, slant, pen pressure and shading were similar in the questioned and sample signatures. But he was perforce obliged to admit various details during his cross-examination which were put to him on the basis of the observations made by C.W. 1. He had to agree with some of them.

(129) As opposed to the status of C.W. I, D.W. 41 does not even contribute any article to any journal. He knew when he has called to give evidence that the Government Examiner of Questioned Documents had expressed the view that it was a case of false simulation. D.W. 41 completed the report on 15th and appeared in court on 16th for giving evidence. He claimed that he was not contacted by any of the parties before coming to the witness box. He was not even paid by the party for his opinion or preparation of photographs, it being merely agreed that the expenses would be paid. The learned trial Judge was rightly of the view that these circumstances divest the witness of impartial character and undermine the value of his evidence considerably. The learned trial Judge himself compared the disputed specimen of signatures CD/78-6 of P. W. I. We have also done so. We have no difficulty at all in upholding that Ex. D. W. 34/A did not contain the signature of P. W. 1 and that the same had been fraudulently manipulated in order to buttress the defense that P. W. 1 was away at Bombay at about the time of the occurrence at Delhi.

(130) On the view taken by the learned trial Judge himself, and the view we also take of the evidence of D.Ws. 33 and 34 and Ex. D. W. 34/A, we feel that it was expedient in the public interest to have ordered prosecutions against both of them. It is so shocking that members of this noble profession, one of them a Presidency Magistrate to boot, should have been guilty of such ignoble conduct. Our view is that Ex. D. W. 34/A was subsequently conducted for the purpose of providing a false alibi. But for the labour involved all round-even on our part-it would have been not only difficult to expose Ex. D. W. 34/A as a forgery the true character of D. Ws. 33 and 34 but avoid the damaging impact of the same on this case. If, as we pointed out earlier, P. W. 1 was at Bombay on September 27/28, 1973, he could not have been present at Delhi on 28/09/1973 during t

'340.(1) When, upon an application made to it in this behalf or otherwise, any Court is of the opinion that it is expedient in the interests of justice that an injury should be made into any offence referred to in clause (b) of sub-section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such

preliminary inquiry, if any, as it thinks necessary, -

(A) record a finding to that effect;

MAKE a complaint thereof in writing;

SEND it to a Magistrate of the class having jurisdiction ;

TAKE sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary to do, send the accused in custody to such Magistrate; and bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a Court by sub-section (1) in respect of an offence may, in any case, where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub-section (4) of section 195.

An appeal could have been filed, however, under section 341 of the same Code, we could then have given effect to our true intention in this matter. But we are handicapped because of no such appeal having been filed; we regret that no appeal has been filed.

(131) In the circumstances we have only to content ourselves with expressing our strongest condemnation, which we do, of the conduct of D.Ws 33 and 34.

(132) (6) The suggestion made on behalf of V. Jaggi was that P. W. 1 was a blackmailer who threatened to implicate V. Jaggi if he (P. W. 1) was not paid Rs. 50,000.00 as demanded. This demand is said to have been conveyed by Public Witness 1 to V. Jaggi inside Tihar Jail in circumstances which are unbelievable. Mahendra Kumar (D.W. 29) got Ex.D.W.23/A typed as requested by Public Witness 1; D.W. 29 also gave his pen to Public Witness 1 for signing it after he got it typed the same evening when Public Witness 1 asked him to hand it over to V. Jaggi; D. W. 29 declined. He is able to fix the time of the above as 26/03/1974 because it was the day of his sister's marriage, which he could not attend. D. W.

29 was a life convict undergoing imprisonment in Tihar Jail. D. W. 29 informed V. Jaggi about this only in the first week of June 1976.

(133) Virendra Kumar Bajaj (D. W. 23) a student of M.A. (Previous) claimed to know P. W. 1 for about five or six years. He proved P. W. 1's signature in certain documents including in Ex. V. J. I (also marked as Ex. D.W. 23/A).

(134) The so-called experts produced by the defense in this case only serve to highlight the dis-service that such experts do not only to themselves but also to the cause of forensic science itself. The fact that some experts are willing to forswear themselves cannot, however, be a reason for not paying the weight that is due to the testimony of those who are found to be sufficiently knowledgeable in this field and reliable. The ultimate responsibility in this respect, however, lies with the court, which will not hesitate to discard testimony of no value and pay regard to that which it considers is sufficiently weighty and acceptable—a weighty opinion, in this sense, is the one which is scientific, backed by expertise and given with the aid of tools which modern science and technology have made available. In all these cases, which we have examined with minute care and labour, we have no doubt that the opinions pertaining to them given by P. W. 97 and C. W. 1 are entitled to great weight, while those of D.Ws. 36, 37, 38 & 41 (P R. Maham getting two D. W. numbers 38 and 40, and 37 being examined once over again as D. W. 39) have only to be discarded. The expert witnesses examined for the defense, have without any exception, tried to confuse and confound by making much of even these features which can be reasonably attributed to 'natural variations' (in the case of Exts. Public Witness 97/B and Public Witness I/M) and not paying regard to 'dissimilarities' which are consistent with and are 'fundamental to the structure' of the signatures (in the case of Ex's D.Ws. 34/A, 23/A, 38 G and G/I to 3. and Ex.' Public Witness 2/S.M. (a) while C.W. 1 and Public Witness 97 have paid adequate attention to all relevant aspects. The evidence of experts who do not 'read and re-read' the concerned writings and 'study' it until the examiners became 'familiar' with their appearance 'as to become able to interpret any word at a glance' is practically worthless; none of the experts examined for the defense even claims to have taken such efforts : on the contrary, their evidence leaves one with the impression that they had not done so. The defense evidence in this

respect does not even seem to advert to the feature of 'inconspicuous dissimilarities' being 'deliberately introduced as disguise'-a feature which is only conspicuous in the sample writing written after dictation in Court. The quality of the evidence of P. W. 97 and C. W. is doubtless high, they are supported by the substantive evidence in the case and other attendant circumstances; in sheer contrast to the defense in this respect. Evidence of P.W .1'.

(135) (1) It was contended that the tender of pardon in this case is invalid because there was no need for taking Public Witness 1 as an approver in the view that there were six eye witnesses and that even the existence of those eye-witnesses had not been brought to the pointed notice of Shri K. B. Andley, Magistrate, who passed the order tendering the pardon conditionally to P. W. 1 by his order dated March 22/03/1974 (vide page 104, Vol. V-A of the record). There is hardly any substance in this contention because Shri Andley has specifically stated in his order that the case of criminal conspiracy prima facie rests on the substantial evidence of P. W. 1 and he therefore considered it necessary, in the interest of justice, to make P. W. 1 an approver in the case, in the absence of sufficient direct evidence of conspiracy. For this reason alone the argument for the appellants has to be repelled.

(136) The order is also one which is thus supported by reasons as required by S. 337-IA.

(137) Yet another contention bearing on the offer of conditional pardon, which was urged on behalf of the appellants was that before tendering pardon a full statement of P. W. 1 should have been recorded. We do not think there is any force in this contention either. On this point our attention has been drawn by Mr. Kaira to the decision of A. A. Dave, J. in *Gagu v. State of Gujarat* : (1974) GLR 584. It is to the effect that the prosecution cannot be compelled to get the statement recorded under S. 164, Criminal Procedure Code before the approver is actually examined by the Magistrate as provided under S. 337(2) Criminal Procedure Code. (paragraph 8, page 673). We respectfully agree with this view.

(138) With the above principle in mind the observations of Murtaza Fazal Ali, J. in *Maghar Singh v. State of Punjab* : AIR 1975 SC 1320 may be read in order to

make this position clearer:

IT is true that Baldev Singh did not say that he took any active part in the assault on the deceased, but his statement clearly shows that he was a privy to an abettor in the commission of the offence. The Magistrate who granted the pardon to the approver was fully satisfied that the approver was going to make a full and complete disclosure which has undoubtedly, did. In these circumstances, we do not think that the provisions of S. 337 of the Code of Criminal Procedure have been violated in any way.

(139) The above observation clearly shows that the offer of conditional pardon can be made even before recording a statement of that person.

(2) Administration of oath to a person to whom pardon has been tendered when examining him under section 164, Cr.P. C. 1898

(140) Mr. Ram Jethmalani, counsel for V. Jaggi, has put forward an interesting argument: no oath can be administered to an approver to whom pardon has been tendered when his statement is recorded under section 164, Criminal Procedure Code. He went so far as to say that to no person, whether he is an ordinary witness or a person to whom pardon has been tendered, could oath be administered.

(141) For the above proposition he relied upon the following provisions of the Oaths Act of 1873 and the still later Act of 1969. Sections 4 and 5 of the former Act read as follows:

'4. Authority to administer oaths and affirmations.

The following Courts and persons are authorized to administer, by themselves or by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law:

(A) all Courts and persons having by law or consent of parties authority to receive evidence ;

Provided-

5.Oaths or affirmations to be made by witnesses;

(A)all witnesses, that is to say, all persons who may lawfully be examined, to give, or be required to give,evidence by or before any Court or person having bylaw or consent, of parties authority, to examine suchpersons or to receive evidence; etc.

Provided-

(142) Nothing herein contained shall render it lawful to administer, IN a criminal proceeding, an oath or affirmation to the accused person,unless he is examined as a witness for the defense or necessary toadminister to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those dtities.

(143) Corresponding sections in the later Act of 1969 are sections 3and 4 and they read as follows:

'3.Power to a,dminister oaths.-(1) The following Courisand persons shall have power to administer, by themselves or, subject to the provisions of sub-section (2) ofsection 6, by an officer empowered by them in this behalf, oaths and affirmations in discharge of the dutiesimposed or in exercise of the powers conferred uponthem by law, namely:

(A)all Courts and persons having by law or consent ofparties authority to receive evidence;

(2)without prejudice to the powers conferred by subsection (1) or by or under any other law for thetime being in force, any Court. Judge, Magistrate orperson may administer oaths and affirmations for thepurpose of affidavits, if empowered in this behalf-

(A)by the High Court, in respect of affidavits for thepurpose of judicial proceedings;
or

by the State Government in respect of other affidavits.

4.Oaths or affirmations to be made by witnesses, interpreters and jurors:

(1) Oaths or affirmations shall be made by the following persons, namely:-

(A) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence.

Provided-(2) Nothing in this section shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, unless he is examined as a witness for the defense, or necessary to administer to the official interpreter of any court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.'

(144) Section 164(5) of the Criminal Procedure Code, 1973, as amended, reads as follows:

SEC. 164(5). Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(145) In the Criminal Procedure Code, 1893, as it stood before the amendment of 1973, the relevant provision was section 164(2); it read as follows:

SECTION 164(2) such statements shall be recorded in such of the manners, hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in section 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.

(146) The Forty first Report of the Law Commission, which preceded the introduction of section 164(5) of the Criminal Procedure Code of 1973, had stated as follows:

The earlier Report (37th) considered the question whether the statements recorded under section 164 should be on oath recommended that they should be. The

actual practice, 'we understand it varies; but it would certainly be proper if such statements are always made on oath, and this should be provided in the section itself' as it has been done by the new sub-section (5).]

(147) The new Criminal Procedure Code came into force on 1/04/1974; "this case was taken cognisance of only afterwards ; the New Code applied to the trial of this case. But the statement of P. W. under section 164 was recorded before that date. In terms of section 484(2)(a) of the New Code if, immediately before the date on which this Code comes into force, there is any investigation pending, then the same shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the Code of Criminal Procedure, 1898, as in force immediately before such commencement (old Code) as if this Code had not come into force.

(148) We have only to consider section 164(2) of the old Code and the decisions, bearing on this question under the old Code.

(149) The question whether an accused person could be converted into a witness with a pardon being lawfully granted to him under section 347 of the then Code of Criminal Procedure (Act X of 1872) came up for decision before the Bombay High Court in *Reg v. Hanmanta* 1876 I.L.R. (1) 610; but that decision does not specifically bear on the question of administering the oath to a person, to whom pardon was tendered and accepted. In *Queen Empress v. Alagu Kone* 1893 (16) I.L.R. Mad 421, a Division Bench of that Court held that a Magistrate acting under section 164 Criminal Procedure Code had power to administer an oath while holding an inquiry under section 159 Criminal Procedure Code. and recording statement under section 164, Criminal Procedure Code. Reference was made to the Oaths Act, 1873; the following observations were made:

'THE term 'Court' includes all Magistrates (section 3 of the Indian Evidence Act).

THE direction in section 164 that the statement shall be recorded in one of the manners prescribed for recording evidence is merely a direction as to procedure. The statement itself was one which the law (section 164. Criminal Procedure Code), permitted to be made before the Court by a witness, and is therefore

evidence within the definition of section 3 of the Indian Evidence Act the person making it was witness within the meaning of section 5 of the Oaths Act, and therefore one to whom an oath or affirmation might be administered.'

(150) ' Yet another Division Bench of the Madras High Court, following Alagu Kone, came to the conclusion in Suppa Tevan & Ors. v. Emperor I.L.R. 1906 (29) Mad 89 that a Magistrate taking statements under section 164 of the Code of Criminal Procedure acted in discharge of duties imposed on him by law and is empowered to administer an oath under sections 4 and 5 of the Oaths Act. The question arose as to whether such, a person could be prosecuted for making a false statement on oath. The earlier decision in Alagu Kone was merely followed without any discussion.

(151) The view that the Magistrate recording statements under section 164, Criminal Procedure Code is a Court did not find the approval of the Judicial Committee of the Privy Council, which pointed out that a Magistrate acting under section 164 is not a Court.

(152) One of the two questions referred to a Full Bench of the Nagpur High Court in Rambharose Narbadaprasad Kachhi v. Emperor, specifically raised is;

(1) Once an approver has been tendered a pardon under S. 337(1), Criminal Procedure Code, and he has accepted the tender, can his statement be legally recorded under S. 164 on affirmation, or can it only be recorded as a confession under S. 164 read with S. 364

(153) As the opinion of the Full Bench itself shows there seems to have been no disagreement between two Judges who differed, resulting in the reference to the Full Bench, on the point herein discussed; one of them (Bose, J.) had observed as follows:

It may be that an approver can be examined under S. 164 after pardon. It may even be desirable at times that he should be so examined. And if he is so examined he must, I think, be examined on oath.

(154) The Full Bench opinion shows that the question on which there was difference of opinion had arisen between the two Judges, (Bose and Digby, JJ) as follows:

'WHETHER such a statement can be given under section 339

(2) Criminal Procedure Code. against the approver in the subsequent trial of the approver for the original offence?'

THAT is not the question which has to be discussed now. Mr Ram Jethmalani only contended that no oath could be lawfully administered to a person accused of an offence, to whom a pardon was tendered and accepted; he went even further to say that to no witness examined under S. 164 could oath be administered; the reason put forward by him in support of this contention is that the statement of an ordinary witness under section 164, Criminal Procedure Code. could not be read as an evidence at the trial; in other words, such a statement is not substantive evidence at the trial. No decision has been brought to our notice to show that even ordinary witnesses cannot be examined under section 164, Criminal Procedure Code. prior to the commencement of the trial.

(155) The present case deals with the tender of pardon, which was accepted, to Public Witness 1; the statement, recorded under section 164, Cr.P. C. of the old Criminal Procedure Code. the question, so far as this case is concerned would have to be determined not only on a construction of Section 164(2) generally but on the law as it seems to have been applied to this particular area, belonging to the former Punjab. It seems sufficient, on this point, to refer to *Emperor v. Hussaina* AIR 1933 Lah 868 where Abdul Rashid, J. held that there is no legal bar to the examination of an approver who had accepted tender of pardon for being examined under section 164 Criminal Procedure Code. like any other witness. The previous authorities of the same Court were followed; the view of Rangoon High Court in was not followed.

(156) On a matter of procedure, specially after there has been an amendment of the relevant statutory provision, either clarifying or even stating the law for the future (assuming it is so) it would not be desirable or proper to take any view

contrary to the practice in the concerned area, Delhi having been formerly a part of Punjab, the practice as laid down by the Lahore High Court governed and it would not be proper to differ from it. We are also, even independently, in respectful agreement with the view taken by the High Court of Lahore and Nagpur on this point.

(157) In any case, it is by no means clear to us how the administration of an oath to the approver who has accepted the pardon tendered to him can even lead to any prejudice so far as the appellants are concerned. The administration of an oath would only operate as a constraint against speaking falsely; this is something which should normally ensure to the benefit of other appellants rather than be construed as something which can work out to their prejudice.

(158) (3) Mr. Jethmalani has raised yet another interesting question of law. According to him a Magistrate tendering conditional pardon to an accused person passes a judicial order, he should, therefore, pass such an order only after hearing the persons (the other accused) who are likely to be affected by such an order. In order to appreciate this contention it is necessary to read sub-section (1) and 1-A of S. 337 of the Code of Criminal Procedure, 1898:

'337. Tender of pardon to accomplice-(1) in the case of any offence triable exclusively by the High Court or Court of Sessions, or any offence punishable with imprisonment (which may extend to seven years) or any offence under any of the following sections of the Indian Penal Code, namely, sections 161, 165, 165-A, 216-A, 369, 401, 435 and 477-A, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or any Magistrate of the first class may, at any stage of the investigation or inquiry into, or the trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making at full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof:

PROVIDED that, where the offence is under inquiry or trial no Magistrate of the first class other than the District Magistrate shall exercise the power hereby conferred,

unless he is the Magistrate making the inquiry or holding the trial, and, where the offence is under investigation, no such Magistrate shall exercise the said power unless he is a Magistrate having jurisdiction in a place where the offence might be inquired into or tried and the sanction of the District Magistrate has been obtained to the exercise thereof.

(I-A) Every Magistrate who tenders a pardon under subsection (1) shall record his reasons for so doing, and shall, on application made by the accused, furnish him with a copy of such record;

PROVIDED that the accused shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost.'

(159) On a plain reading of S. 337(1) the stage at which a conditional pardon can be tendered has been indicated: 'at any stage of the investigation or inquiry into or trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence.....'. Having thus indicated the stage from and up to which conditional pardon can be tendered the proviso imposes the limitation that the power of tendering such pardon cannot be exercised by any 1st Class Magistrate; other than the District Magistrate, unless he is a Magistrate making the inquiry or holding the trial there is the rider added that when the offence is under investigation no such Magistrate shall exercise the said power unless he is a Magistrate having jurisdiction in a place where the offence might be enquired into or tried and the sanction of the District Magistrate has been obtained to the exercise thereof. The above sub-section (1) and the proviso make a distinction between two stages of the case, namely, the stage of investigation and the later inquiry into or trial of the offence. In the present case we are concerned with the tender of pardon at the stage of investigation, that is, before the stage of inquiry or trial. This distinction has to be prominently borne in mind while noticing some of the cases cited to us at the bar. The following observations of B- P. Jha, J. in *P. R. Sarkar v. State of Bihar* seem to bear precisely on this question. 'If the order granting pardon is passed during investigation, the accused shall not be heard because till that time no police report (chargesheet under section 173 of the Code) is preferred against the

accused persons'. In a petition under S. 561-A of the old Criminal Procedure Code, to quash the commitment the validity of the order of a Magistrate tendering pardon without recording reasons was held to be illegal. After giving a direction for the tendering of pardon, if necessary, in accordance with law the learned Judge made certain observations to indicate that the District Magistrate while granting pardon would 'bear the accused persons also because it is a judicial proceeding.'

(160) The existence of a judicial proceeding, when an offer of pardon is made, seems to make a difference—a vital difference—in the matter of whether any person who may be said to be affected by the order of tender of pardon should also be heard. When there is no judicial proceeding in existence, the hearing of any person could not even be postulated. If there should be any such hearing even at that stage the question naturally arises as to who would be the persons who should be heard. Are they the persons who are then arraigned by the police as accused? Supposing, in this eventuality, those who are arraigned as accused persons by the police are heard but some more persons are added as accused after the pardon is tendered and accepted but before charge-sheet is filed, would the order of tender of pardon, made already, become invalid as against those who were added later, on the ground that they (or any of them) were not heard? Could it be even suggested that the Magistrate is under a duty to hear the newly added persons (after tender of pardon) and review or set aside the pardon granted by him already to an accused? Supposing an order of tender of pardon is made without hearing the other or some, arraigned by the police during the stage of investigation as accused but those persons are subsequently dropped when the charge sheet is filed would that order be regarded as invalid because the Magistrate was bound to have heard those arraigned by the police as accused, even though they have been subsequently dropped by the police. Surely, one should be slow to reach a conclusion, on this portion of the case, which would give rise to so many anomalies. On the other hand, by making a distinction between the stage of investigation and the later stage of trial or enquiry, such anomalies at least are altogether avoided; for that reason itself, even if not for any other, such a distinction may well be made.

(161) We respectfully agree with B. P. Jha, J. when he made such a distinction, though he has not articulated the reasons in support of the distinction he made.

(162) The accent, therefore, is on the existence of any judicial proceeding when there are a plurality of persons arranged before the Court as accused and pardon is being tendered to one of them. When it is not even ascertained (or ascertainable) who are the persons who have to face the enquiry or trial (which can happen only after the investigation by the police is over and the charge sheet is filed) it would be idle to contend that the concerned Magistrate is bound to hear any such person.

(163) We are content to point out in this case, therefore, that it was not necessary to hear any of the other accused when pardon was tendered to P. W.1 in this case and accepted by him. No authority has been brought to our notice which requires any other accused to be heard before tender of pardon to a person accused of a crime even during the stage of investigation. In this view it would indeed be needless to be detained by those decisions which related to tender of pardon after the completion of the investigation and during the inquiry or trial. But since this point also-like so many others arising in this case-was argued at considerable length, we may also refer to the decisions cited by Mr. Jethmalani.

(164) Our attention has been invited by Mr. Jethmalani to the decision in *Lt. Commander Pascal Fernandes v. State of Maharashtra* : 1968 CriLJ 550. That was a case which arose under S. 82 of the Criminal Law Amendment Act, 1952; the Special Judge was empowered to tender pardon. After the inquiry/trial started a pardon was tendered by the Special Judge on his own motion. Hidayatullah, J. (as he then was), speaking for the court, observed that in such a case, there being no committal proceeding the fiction of proceedings for tender of pardon as arising under S. 338 Criminal Procedure Code. (old) should be invoked; there was nothing to show that the Special Judge must be moved by the prosecution; he may consider an offer by the accused in this behalf. The following observations succinctly explain the position as it obtains even after the commencement of enquiry/trial:

To determine whether the accused's testimony as an approver is likely to advance the interest of justice, the Special Judge must have material before him to show what the nature of that testimony will be. Ordinarily it is for the prosecution to ask that a particular accused, out of several, may be tendered pardon. But even where the accused directly applies to the Special Judges he must first refer the request to the prosecuting agency. It is not for the Special Judge to enter the ring as a veritable director of prosecution. The power which the Special Judge exercises is not on his own behalf but on behalf of the prosecuting agency, and must, therefore, be exercised only when the prosecution joins in the request. The State may not desire that any accused be tendered pardon because it does not need approver's testimony. It may also not like the tender of pardon to the particular accused because he may be the brain behind the crime or the worst offender. The proper course for the Special Judge is to ask for a statement from the prosecution on the request of the prisoner. If the prosecution thinks that the tender of pardon will be in the interest of a successful prosecution of the other offenders whose conviction is not easy without the approver's testimony, it will indubitably agree to the tendering of pardon..... All that he should have done was to have asked for the opinion of the Public Prosecutor on the proposal. But since the Public Prosecutor, when appearing in the High Court, stated that the prosecution also considered favorably the tender of pardon to Jagasia we say no more than to caution Magistrates and Judges in the matter of tender of pardon suo motu at the request of the accused. This practice is to be avoided. Since the prosecution in this case also wants that the tender of pardon be made it is obvious that the appeal must fail. It will accordingly be dismissed.

(165) While the above decision does not have any bearing upon the question which is now being discussed namely, whether the other accused persons should be heard or not even at the stage of investigation, it shows on the other hand, that even after the inquiry/trial commences there was practically very little which the Special Judge in that case could have done when the prosecutor, as the above observations made in that case show, had desired that pardon should be tendered to the person concerned.

(166) Mr. Jethmalani drew our attention to the decision of this Court by S. N. Andley, J. (as he then was) in *M. M. Kochar v. The State* : AIR 1969 Delhi 21 where the question arose whether a revision would lie against an order tendering pardon. It was held that no revision lay. That was a case, it may be noted where the pardon was tendered not during the stage of investigation but later. It is also brought to our notice that though an appeal was filed in the Supreme Court against the said decision the same was dismissed in Criminal Appeal No. 109 of 1968 by a judgment dated 16-9-1968. Andley, J. held that the tender of pardon in that case was proper; the Supreme Court left open the question whether the revision lay against the said order.

(167) The question whether a revision lay came up before the Supreme Court for consideration once again in *State of U.P. v. Kailash Nath Aggarwal*. : 1973 CriLJ 1196 where Vaidialingam, J. speaking for the Court, disagreed with the view of Andley, J.; it was held that a revision lay. The question, as it arises in the present form, did not arise for decision before the Supreme Court in that case either: the question whether a revision lies to this court against the said order of tender of pardon to Public Witness 1 does not arise for consideration now. It may be noted, for the sake of completeness that a revision was filed against the said order in this court (being Cri. M. No. 46 of 1974) which was dismissed by one of us (R. N. Aggarwal, J.) by order dated 26-3-1974. It is needless to be detained by this order because despite the dismissal of the said revision it will be open to the appellants to contend before us in this appeal that the said order is invalid because it was not passed after hearing the appellants in this case if such hearing was necessary in law. We permitted the above said point to be argued before us and it was done at considerable length; but we are of the view that at the stage of investigation and before the inquiry/trial commences there was no obligation on the part of the Magistrate to hear the appellants.

(168) It may be also pointedly noticed that in *Kailash Nath Aggarwal* also the pardon was tendered not during the investigation but during the later stage of inquiry/trial. The argument that the appellants should have been heard before tendering of pardon to Public Witness 1 in this case is, therefore, one without any force.

(169) (4) The two provisions in the Evidence Act bearing on the evidence of approvers are contained in Ss. 133 and illustration (b) of S. 114; the former makes an accomplice a competent witness rendering a conviction based on the testimony of an approver alone not illegal; the latter enables the court to presume that an accomplice is not worthy of credit unless he is corroborated in material particulars. The latter represents the rule of prudence; the former is a rule of law. Courts have interpreted the above two provisions to mean the rule of prudence as practically amounting to a rule of law. A discussion of this aspect would be academic because, as the subsequent discussion will show, there is corroboration in material particulars available in respect of P.W- 1's evidence. The corroboration which is required is, however, not concerning details of what the approver says; if this were so, it would tantamount to saying that the evidence of an approver is practically superfluous or unnecessary the reason for taking an accused as approver is only to overcome the difficulty of not having direct or sufficient evidence. The requirement of corroboration, therefore, has necessarily to be understood as 'corroborating or tending to corroborate' the fact of every one of the accused in a case being a participant in the crime. In other words, the courts would have to keep in mind the danger of an approver introducing even innocent persons into a framework available to the prosecution. A distinction has also to be made in this respect between confessions which run into rich details and an approver's testimony; the mere richness of details of a confession, when it is retracted from, would not be sufficient to give assurance, because the details can emanate purely from the rich imagination of an accused person, who free to say anything he wishes-even concerning other co-accused-but an approver is circumscribed not only by the framework of the prosecution but also being tested by cross-examination; the requirement of prudence is that the approver is corroborated in material particulars. The decisions, cited to us but which we do not consider necessary to set out, containing observations made with reference to retracted confessions by accused persons are not useful to us now. The testimony of Public Witness 1 in the present case running into so many details and recorded in two spells and on following dates seem to us of some significance; the greater value would be the value to be attached to the testimony of P.W- 1 since on so many particulars he seems to be corroborated including several minor details-

some of them though minor are very significant and provide 'odd coincidences' which are capable of giving us the needed assurance to safely act upon his evidence- which would, without them, be regarded as infirm, .

(170) The classical observations of Lord Reading, C.J- in *The King v. Baskerville* 1916 (2) K.B. 658 which have been either repeated or the substance of which has been embodied in the subsequent decided cases both in England and in India have doubtless highlighted the duty of care in receiving the testimony of an accomplice, It was further pointed out by Gajendragadkar, J. (as he then was) speaking for the Supreme Court in *Sarwan Singh Rattan Singh v. State of Punjab* : 1957 CriLJ1014 that the evidence of an approver has to satisfy a 'double test'. The first is that his evidence might reveal that he is a reliable witness--a test common to all witnesses, If this test were to be satisfied the second test, which would still remain to be applied, is whether his evidence receives 'sufficient corroboration'-a test which is special to cases of weak or tainted evidence like that of an approver. The canon was also sounded that it should not be acted upon merely because it is corroborated in minor particulars or incidental details for by themselves they may not afford the necessary assurance that the main story disclosed by the approver can be reasonably and safely accepted as true-hence the requirement of corroboration in material particulars. It seems well worth adding that 'corroboration in material particulars', against each of the culprits, would include telling or significant 'odd coincidence,' in the language of Lord Widgery, C-J. in *Turnbull*; they may also be described as 'joint coincidence' or 'mutual corroboration'.

(171) The 'double test' was explained by the Supreme Court in *Saravanabhavan v. State of Madras* : 1966 CriLJ949 : the approver's testimony is not to be dealt with in two water-tight compartments but must be considered as a whole and along with other evidence. The test, in other words, is whether his evidence is credible by itself; if it is not credible by itself then there is no need for the court to trouble itself with such evidence. While considering whether the evidence of an approver is credible by itself all facts bearing on whether the evidence given by him is inherently improbable are important; as already noticed, it would be unreliable if it is shown, for instance, that at the time and place where something is alleged to have happened in his presence, he was somewhere else and could not have been

present there or then. Shorn of such a feature and when his evidence can be true, reference may be made to corroborative pieces of evidence which are meaningful and lend assurance about the truth of his evidence. Chandrachud, speaking for the Supreme Court in a very recent case (vide *Dagdu v. State of Maharashtra* : 1977 CriLJ1206) has shown how the rule of law is subject to the rule of prudence. The proposition, that it is not illegal to act on his testimony alone would only apply to cases where in a given situation or having regard to peculiar circumstances it would be found safe to dispense with corroboration, was reiterated; the further observation that if he did not pass the test of reliability there will be no need to consider his evidence further was made in the above context.

(172) In *Sheshanna Bhumanna Yadav* : 1970 CriLJ1158 corroborative evidence was explained as being confirmatory evidence; it may consist of evidence of witnesses or even of circumstances ; corroboration must connect and tend to connect the accused with the crime.

(173) In the light of the above principles we may examine the evidence of Public Witness 1. There does not appear to be any inherent improbability in the version given by the approver; in this sense, therefore, his evidence does not suffer from unreliability in the sense in which the above cases have used the said expression. The defense case that P.W. 1 was away in Bombay on the date of the occurrence, not at Delhi, for the execution and swearing of the alleged power of attorney by Public Witness 1 (vide Ex D.W. 34/A) was seen to be a false one: it was an attempt to deceive the court. If it was possible to hold that P.W. 1 was away at Bombay, as it is claimed, and had sworn Ex.D.W. 34/A at Bombay on 28/09/1973 then, of course, Public Witness 1's evidence would be said to suffer from 'unreliability' of the nature described in the above cases and there would be no need to concern ourselves further with his evidence. It is worth recalling that out of 158 sample signatures of Public Witness 1 only one of them contained a loop in the letter H; C.W.I considered that this was such an uncommon characteristic of his signature; yet both these signatures appearing on Ex. D.W.34/A (as well as in the signature which appears in Ex. D.W.23/A (typed letter of blackmail alleged to have been sent by P-W. 1 (vide Ex. D.W. 34/A) was seen to be a false one; it was a feature. Evidently this was the model which was available to the forger, whoever

he was; the learned trial Judge was inclined to think so; we agree with him.

(174) Nor is there any basis for the view, which was presented by the appellants, that P. W. 1 was in Bhopal till about the 30/09/1973, support for which version was sought to be obtained from the evidence of Public Witness 67. The statement of Public Witness 67 was recorded under S. 164, Criminal Procedure Code. before a Magistrate at Delhi on 8/02/1974. In that statement (Ex. P.W-67/B) it was mentioned that Public Witness 1 promised to return the revolver 3 or 4 days after he had taken the same from P.W. 67. According to Public Witness 67, on or about 21/09/1973 (he was unable to remember the exact date), Public Witness 1 came to his house for borrowing the revolver- 'Three or four days later' would work out to 24th or 25th September. Ex.P.W.65/B contains the further statement of Public Witness 1 that P.W-67 went to Public Witness I's house after another four or five days and met Public Witness 1 ; this would take us to 29th or 30th September. For this reason it was claimed that Public Witness I's presence at Delhi along with the other appellants subsequent to the 21st till the date of the occurrence could not be correct. But these were only approximate statements from memory. Reliance was also placed, in this connection, on the second leave application which Public Witness 1 gave (Ex. Public Witness I/C) bearing date 30-9-1973: it is argued that this shows that Public Witness 1 was in Bhopal when he made the above said application, along with a certificate (Ex. Public Witness I/D), which had been prepared by Dr. Joshi, bearing date 30-9-1973. According to Public Witness 1 he had requested Dr. Joshi to ante-date the said certificate; he had obtained it from him only on 4/10/1973; this was for enabling him to have leave in continuation of the leave allied for by him earlier from September 21st; the said leave expired on September 30th. Dr. Joshi has himself not been examined. He was given up by the prosecution as having been won over; he was sought to be summoned as a defense witness but was not ultimately examined.

(175) According to his earlier leave application (Ex. Public Witness I/A) dated 20/09/1973 Public Witness 1 had applied for 10 days medical leave with Sunday to be suffixed. According to Public Witness I/C, bearing the date 30-9-1973, he had applied for 5 days leave from the 30th; 5th to 7th being holidays were to be suffixed. According to Public Witness I's testimony he reached Bhopal on

2/10/1973, but contacted Dr. Joshi for a certificate only on the 4th. The fact of his absence from Bhopal receives corroboration from Public Witness 1 having been marked absent in his office on October 1st, 3rd and 4th, 2nd being a holiday. The procedure with reference to the grant of leave in his office has been explained by M. A. Keskar (P.W. 70), who was working as Office Superintendent at Bhopal in the year 1973. The attendance register is Ex. Public Witness I/J, which the police took into their possession as a seizure memo (Ex. Public Witness 70/A) dated 30-12-1973; Public Witness 70 had attested that seizure memo. The police had also seized from Public Witness 70, on 25-2-1974, an Assistant's Diary as per memo Ex. P. W. 70/C, which also he had attested. The procedure followed in the office (of P.W.I and Public Witness 70) was that when an official arrives in the office he puts his initials against his name in the attendance register on a particular date; if the official did not come, a cross-mark was put by the group officer. If the official turns up late he puts his initials and also mentions the time of arrival ; if he did not turn up the cross-mark would remain. All the papers received in the office, including leave applications, would first reach the transit section. In accordance with this practice the earlier leave application of Public Witness 1 (Ex- P.W.I/A) had reached the transit section; it bears the seal of the transit section. This has to be contrasted with the later leave application (Ex P.W.I/C) which did not bear the stamp of the transit section; it is a fair inference that it never passed through the transit section. Ex. P.W. I/C had been received by one Moolchandani of his office. Moolchandani, cited as a witness in the charge-sheet, could naturally not be expected to speak to the fact that he had not followed the office procedure but received Ex. Public Witness I/C directly, even without passing through the transit section. P.W-70 said that that the concerned entry in the register (Ex. Public Witness 70/D), along with some others, appears to have been made by Moolchandani (Sr. Nos- 2820 to 2834) It is seen from Ex. Public Witness 70/D (Assistant's Diary) that the later leave application of Public Witness 1 (Ex. Public Witness I/C) was entered only on 4-10-1973 by Moolchandani (at Sr. No. 2825). The same had not been processed by the transit section. Ex- P.W-I/K, the attendance register, contains the entry Ex. Public Witness I/K-I which shows cross-marks against dates 1st and 3rd October (2nd, a holiday, is blank); 'A' is written against the 4th and two cross marks on 5th and 6th, respectively. According

to Public Witness 1 he had requested Moolchandani to accept the application with back date and he had put the date 1-10-1973 below his initials at his request. These facts were explained by him in the course of his evidence (vide paras 174, 175, 186 and 187, Vol. II of the record) stating that he was absent from his office on 1st and 3rd to 6/10/1973 (2nd being a holiday). Public Witness 70 also explained that mention of 'M.C.' implied that a medical certificate had been received in respect of application for leave. The testimony of P.W-70 has not at all been shaken; he was only asked about the absence of certain entries in the attendance register (Ex. P-W.I/J) after 30/09/1973 which he explained as having been due to agitation of the staff at that time. Raja Ram Sonakhia (P.W. 71), an Assistant Post-Master General also gave evidence concerning his having written the letter 'A' in the entry for October 4th as against the name of Public Witness 1 in the attendance register (Ex. Public Witness I/K) to indicate his absence. He specifically stated (p. 630 Vol. II), in answer to a specific question put to him in cross-examination, that he had personal knowledge of P. W. 1 not being present in the office on October 3. This is indeed confirmatory of P.W-I's case that P-W.I had not attended his office between September 30 and October 7; the suggestion that he had obtained the medical certificate from Dr. Joshi at Bhopal on September 30, has no support for it despite Ex. Public Witness I/C bearing the date 30-9-1973. Public Witness I's evidence cannot be said to be unreliable by reason of his allegedly being at Bhopal up to the 29th or 30th September as it is now sought to be made out on the basis of answers given by Public Witness 67. The suggestion of the defense that Public Witness I was both at Bhopal and Bombay at about the same time seems to be mutually destructive; the truth appears to be that he was neither, at Bhopal nor at Bombay but at Delhi at the time of the occurrence. The evidence of Public Witness 1 cannot, therefore, be said to be incredible on the grounds suggested.

(176) The next aspect for consideration is whether by reason of P.W-I not having given the version he gave after he has become an approver to the police he should be regarded as an unreliable witness? It is needless to refer, on this aspect, to anything more than Public Witness I's own admission that before he became an approver he made written statements and even submitted incorrect statements (p. 178, Vol. II). On this point, however, it is sufficient to note that this might be a

characteristic feature on the testimony of approvers who generally choose to state the truth only after the tender of unconditional pardon is made', as pointed out by Shelat, J, in *Madan Mohan Lal v. State of Punjab* : 1970 CriLJ898 it is only natural that such omissions or events..... in statements made to police by persons who are later on taken as approvers often exist; Shelat, J., therefore, underscored the importance of taking their testimony as a whole. In other words, it will not be proper to discard wholesale the testimony of the approver merely on the ground that prior to the tender of conditional pardon to him he had not mentioned the whole truth to the police.

(177) It does not appear that the appellants would be able to take advantage of a statement said to have been made by the approver to the police on 21-12-1973 (as per Ex. Public Witness I/DA.2) to the following effect:

'At this time accused Harjeet Singh told me, the Inspector (P.W.142) that he had kept one thing secret and now his conscience does not allow him to keep it secret. He is of the opinion that when all facts were disclosed to the police then there was no use of keeping this thing a secret.'

EARLIER (on 12th) he had stated to the police about the revolver (Ex-P. 9) leading to its recovery by taking the police to P. Ws 34 and 67. The revolver was perhaps the most important clue in this case; P.W.I 42 who was recording the statement of an accused is here referring to his having obtained what he believed to be yet another important piece of evidence. It will be useful to read, on this aspect, Vol. III rule 25.53,(2) of the Punjab Police Rules:

'25.53(2).case diaries shall be as brief as possible: shall not be swollen with lengthy explanations and theories, and shall be written either in English or in simple Urdu.

ONLY such incidents of the investigation shall be included as have a bearing on the case.'

(178) P.W.I was making such a statement in the context of his having stayed with his friend Earnest D'Cruz (P.W.33) for two nights after the occurrence to which

aspect we shall revert later, separately. Was Public Witness 1 a car lifter

(179) While P-W.I tried to make it appear that he was not involved in lifting cars and that he got released a car from Bareilly only to oblige Ravi and Sunil, the defense suggestion was that not only was P.W-Ia habitual car-lifter but that Ravi and Sunil had nothing to do with such activities of P-W.I. On this point there does not appear to be anything more than the police having chargesheeted Public Witness 1 Along with Sunil and Ravi concerning the alleged stolen car, Public Witness 1 having been discharged in this case, and the fraudulent effort made to make it appear that Public Witness 1 as in Bombay about the time of the occurrence in this case to execute and get sworn a power of attorney for sale of cars. The defense effort to paint Public Witness 1 alone as a car lifter and to dissociate Ravi and Sunil from such efforts seems ex-facie a somewhat difficult exercise. Whatever this may be, even assuming P.W-I had got the car released from Bareilly on superdari with the knowledge, that it was a stolen car as asserted by the defense and yet he denied his knowledge of it this would not have any appreciable impact on the evaluation of Public Witness I's evidence concerning that occurrence in this case. His evidence is without doubt a tainted one: it is not to be, disregarded merely on the basis of statements made by him or even his omission to disclose every thing (even if that be the case) that he knew prior to the tender of conditional pardon to him- It was seen how the test of unreliability connotes inherent incredibility; it would be inherently incredible, for instance, if it were proved that he was. at Bombay or even at Bhopal at the time of the occurrence (there is no such proof in this case)- On the other hand, his evidence, so rich in details well within and conforming to the framework of the prosecution case, seems to receive substantial corroboration in material particulars concerning the participation of each and every one of the appellants. In addition, they seem to derive support from significant details and other circumstances, some of them not even known either precisely or sufficient particulars concerning which were not available to the police when Public Witness 1 was interrogated on 26/12/1973 and 2/01/1974. There has been no major contradiction between what he stated after he was tendered conditional pardon and what he stated earlier or of the evidence of the other prosecution witnesses examined in the case, at least such as would impair his testimony substantially; not even any significant omission (except the

natural unwillingness to disclose anything or everything against himself before tender of pardon) which would necessitate the total rejection of his evidence, has been brought to our notice. On the other hand, his evidence, viewed as a whole, seems safe to act upon against all and each of the appellants. The peculiar feature of this case is that it is not even possible for any to dispute the following; the bank van was looted at Thompson Road; the money (Rs. 6 lacs) was looted; the gunman as well as the driver was killed; Public Witnesses 2 to 6 were in the van at that time; Public Witness 2 made a prompt report to the police; Public Witness 5 went to Public Witness 28 immediately and both of them reported telephonically to the control room; the driver of the bank van made a dying declaration; significant recoveries from each of the appellants, except of course from V. Jaggi, of the looted money.

(180) Counsel for the appellants contended that the evidence of Public Witness 1 because wholly unreliable because of the contradictions between his evidence and the rest or even his own prior statements to the police.

(181) Perhaps the most important among the contradictions sought to be made out in the evidence of P-W.1 relates to how much money was disbursed among Public Witness 1 and the appellants except V. Jaggi. We are afraid there has been some misunderstanding on this question as to what he had told the police. It seems best to refer to his statement to the police on 2/01/1974 (Ex. Public Witness I/DA. 1) which has been printed as follows (on P.61 Vol. V):

It was earlier disclosed that a sum of Rs. 10,000.00 had come to the share of each of them but now it has been disclosed that a sum of Rs. 2,000.00 had come to the share of each individual.

On looking at the original it is seen that he had referred to it as Rs. 2,000.00 or Rs. 2,500.00. It is necessary to note that this was not a statement which was recorded, strictly speaking under S. 161 Cr. P.C.; P.W-I was an accused at that time. The mode of interrogation, therefore, followed the procedure adopted in respect of what is usually adopted in the case of accused persons. The relevant police rule has been noticed earlier. The police officer concerned made a note in the *zimni* on the basis of what he had ascertained from the accused. The above said statement

was one of that description. It does not appear from this statement that Public Witness 1 had stated at much earlier point of time that Rs. 10,000.00 had come to the share of each of them; it seems that while he was being interrogated by Public Witness 142 he at first stated about Rs. 10,000.00 having come to the share of each of them and shortly thereafter corrected himself in the above said manner (Rs. 2,000.00 or Rs. 2,500.00)-P.W.I had stated on this subject as follows when he was cross-examined about it (pp. 242-243 vol. II):

'QUESTION: Did you state at any time anywhere, that is before any authority that you and your companions had distributed by taking Rs. 10,000.00 each out of the booty?

ANSWER: To the police I had so stated. I did not tell the committing court like that,

QUESTION: Did you tell the committing court that you had not told the police like that?

ANSWER: Yes (Voltd: We had not taken Rs. 10,000.00 each. I had only taken Rs. 20,000.00 (sic for 2,000.00).

QUESTION: When did you hide this from the committing court of having told the police this fact?

ANSWER: I did not hide this fact. We had not taken Rs. 10,000.00 each.

QUESTION: Did you state before the committing court, 'that it was further incorrect to suggest that I had told the police that we all five had shared Rs. 10,000.00 each'?

ANSWER: Yes.

QUESTION: Which version is correct out of the versions given before the committing Court and before this Court?

ANSWER: Before this Court.'

(182) It is thus seen that his version to the court was that only Rs. 2,000.00 had been taken by each of them; he had volunteered that they had not taken Rs. 10,000.00 but only Rs. 2,000.00 and, added that this answer alone was correct. According to the counsel for the appellants P.W-I was obliged to make this change from Rs. 10,000.00 each to only Rs- 2,000.00 or Rs. 2,500.00 each because if it was Rs. 10,000.00 each it would exceed Rs.6 lakhs which were looted, i.e. if the same was added to the amount which had been recovered during the course of investigation out of the looted money. According to Public Witness I, however, he had initially stated 'Rs. 10,000.00 as requested by Sunil, in order to cover up the amount of Rs. 20,000.00 which had been recovered from his maternal uncle Sri Krishan Dawar as a result of the further disclosure statement made by Sunil over and above the sum of Rs. 50,000.00 recovered from inside the brief case from Sri Krishan Dawar. Since Rs. 20,000.00 were not actually recovered from Sri Krishan Dawar as stated by Sunil the statement made by Sunil to that effect did not fall within the scope of S. 27; it could not be considered. These are, however, two rival Explanations given by either side on this question. But it does not even seem necessary to be detained by a discussion as to which of the two versions is true since it is clear from a perusal of the statement in the Zimani made by P.W. 142 after interrogating Public Witness I that an assertion had been made by him even at the time of his examination on 2-1-1974, that only Rs. 2,000.00 or Rs- 2500.00 had come to the share of each of them. It would thus appear that there is no serious contradiction on this question.

(183) Yet another contradiction pointed out is said to be between the evidence of P.W-I before the trial court and his statement to the police regarding the amount he had spent for bringing the car on superdara from Bareilly, as required by Ravi.

(184) It appears from the statement of Public Witness 1 recorded by the police on 26/12/1973 (Ex. Public Witness I/DA) that he had spent Rs. 1400.00 for bringing a car and further given a sum of Rs. 1600.00 to Sunil Batra (page 48, volume V).

CAR ko lane ke liye us ko choda so rupaye aaye. Sola so rupaye us ne Sunil Batra se lene the jo unhone car ko Harish Singhani Ki marfat Bombay mein farokhat kardiya aur us ko teen hazar rupaye.

THE crucial words are 'lene the' not 'liye the'; it is only 'aaye', not 'ayee the'. The word 'aaye' conveys the idea that the expenses came to the sum mentioned, namely, Rs. 1400.00. The vernacular expression 'kharach', meaning expenses, is not written but seems to be implied in the context. The said statement only means, in simple terms, that he had spent a sum of Rs. 1400.00 not that he 'was given' a sum of Rs. 1400.00, as wrongly translated, for bringing the car. Public Witness 1 explained before the trial court that he had not taken a sum of Rs. 1600.00 from Sunil but that he had only 'to take' Rs. 1600.00 from Sunil ('lene the' and not 'liye the'). Even regarding the sum of Rs. 3000.00 there was an error in translation, because the intermediary was not given Rs. 3000.00 for the sale of the car; Rs. 3000.00 was realised through the intermediary by sale of that car. The sum of Rs. 1400.00 spent by Public Witness 1 coupled with Rs. 1600.00, Public Witness 1 claimed to have given to Sunil, make up Rs. 3000.00. Reading the entire statement made by Public Witness 1 to the police, as it is recorded in Urdu, one is left clearly with the impression that the sum of Rs. 1400.00 had not been given to Public Witness 1 in advance. When cross-examined about this P.W. 1 stated (page 179 Vol. II) that he had spent Rs. 1400.00 by going to Bareilly from Bhopal, a distance of 70 or 80 miles, three times; He paid to 'the advocate, for snacks and for taxi fare, the last amounting to Rs. 1250.00 per round trip. Even before the vehicle was sold Sunil had taken Rs. 1600.00 from him stating that the vehicle had to be got repaired. After the sale of the vehicle he was paid Rs. 1400.00, spent by him, and Rs. 1600.00, which Sunil had taken from him. There is, therefore, no contradiction between his statement in court and his earlier statement made to the police. It was, however, argued that Public Witness 1 could not have spent Rs. 1400.00 out of his pocket or advanced Rs. 1600.00 because his salary in those days was only Rs. 400.00. But this is hardly determinative of this question. We are only concerned here with the so-called discrepancy which was pointed out; these seems to be none.

(185) Whereas Public Witness 1 had stated before the court that though Ravindar Kapur purchased bullets by going along with him to the house of Anwar Shah and came out with the bullets, which he said he had bought for Rs. 80.00, Public Witness 1 had stated to the police that Ravindar Kapur had purchased the bullets through Shahwar. In his examination-in-chief P.W. I had stated that

Ravindar Kapur had arranged 20 bullets from Anwar Shah, owner of the Shah Armoury in Bhopal. Even in his examination-in-Chief he had thus not implicated Shahwar. It was only a case of his having stated to the police that Ravi had purchased bullets through Shahwar; it may even be consistent with Shahwar having mediated the said purchase; the crux of Public Witness 1's evidence on this matter is not against Shahwar but only against Ravi. In the very nature of things it is also not possible to get the direct evidence of, persons who sold the bullets because without the license of the revolver being produced and the sale of bullets being endorsed no purchase of bullets would have been possible- In respect of a transaction of this kind, therefore, no further evidence concerning it could be obtained in the very nature of things. The mere fact that on any detail no corroboration is available would not by itself render the evidence of the approver on that particular unacceptable for what is to be expected and is likely to be useful is only corroboration in material particulars in respect of the evidence of P.W. 1. Similarly the question whether Public Witness 1 secured the revolver from Public Witness 67 prior to the trunk call which was received from Sunil from Delhi by Ravi (on 28/09/1973 or afterwards) is again not a matter of much significance; this may after all be a matter of recollection. While giving evidence in examination-in-chief (p. 152, Vol. II) Public Witness 1 had stated that the trunk call had been received by Ravi from Sunil on 20/09/1973 and that on September 21 he and Shahwar went to Public Witness 67's house to borrow his revolver, but when he was examined by the police he seems to have fixed the time of borrowing of the revolver as prior to Sunil leaving for Delhi and giving a trunk call as would appear from the portion marked K to K (page 49 Vol. V) of his statement under S. 161 Criminal Procedure Code. marked as Ex. P. W. 1/DA). This is a mere matter of sequence. The above discrepancy pertaining both to the revolver and the bullets has not much of an impact on the question Whether Ex. P. 9 was the revolver from which the two crime bullets were shot; our earlier discussion on this point shows that it has been proved that the two crime bullets in this case were fired from Ex. P. 9 and no other fire-arm; Ex. P. 9 as well as similar bullets were seized from P. W. 34 (father of P. W. 67) when P. W. 67 and P. W. 1 were also present; P. W. 1 had taken the police party to P. Ws 34 and 67. The recovery of Ex. P. 9 and the bullets from P. W. 34 is the most important feature of the prosecution case and P. W. 1 had been

undoubtedly responsible for its recovery, quite apart from whether Shahwar's interrogation by The police was also responsible for this or no. The importance of the corroboration that P. W. 1's evidence receives in this respect can hardly be exaggerated.

(186) Even regarding the pistol (Ex. P. 8) it was pointed out that Public Witness I had stated that the same was unserviceable because the trigger used to get jammed; it was pointed out that he had not made such a statement when he was examined under S. 164, Criminal Procedure Code. Reference has also been made in this connection to the fire-arm expert (P. W. 109) who considered that the pistol was serviceable. It is worth recalling that he had also referred to the pistol having been conditioned so as to take in a bullet also; this might have led to the difficulty in operating the trigger. This has not much bearing on the appreciation of the evidence of P. W. 1 for it is conceivable that P. W. 1 and the rest were under the impression that the pistol was an unserviceable one. The pistol, despite the original plan, was not used; no one saw Shahwar or any one else, using the pistol. The recovery of the pistol has not much importance especially in view of Mr. Kalra's concession that the conviction of Shahwar under the Arms Act for illegal possession of the pistol at Bhopal (where it was seized) could not be tried at Delhi and even Public Witness 35 not being sufficient to identify Ex. P. 8 as the pistol which was used for target practice. Public Witness I's evidence of Shahwar having it at Delhi would not be sufficient in law to sustain the conviction of Shahwar under the Arms Act, this being a distinct offence and there is no other corroboration in this respect concerning it; Mr. Kalra's concession in this respect seems to be only proper and fair. But this does not in the least impair Public Witness I's testimony concerning the pistol and Shahwar procuring it—a fact which receives substantial corroboration from the same having been recovered by using the key taken from underneath his bed to open the almirah to take Ex. P. 8 out of it.

(187) According to his evidence before the court P. W. 1 had not seen Ravi actually entering the van at any stage; he had seen Ravi having the gun; he only later later on that the gun had been given to him by Sunil, But he stated before the police that Ravi took the gun from Sunil at that time and went inside. When confronted with the above portion of the statement (marked D to D and printed on page 56 of

vol. V) he stated that he had not stated before the police about Ravi taking the gun from Sunil and going inside. As it is printed the portion D to D reads as follows:

'AT that time Batra snatched the gun from the gunman and went inside.'

BUT it is seen from the original that 'Batra' is a mistake for Ravi. The said statement (D to D) should read as follows :

'AT that time Ravi snatched the gun from the gunman and went inside.'

IT was nobody's version that Ravi snatched the gun from Batra. The learned trial Judge had made a note in the deposition of P. W. 1 (p. 253 Vol. 2, lines 17 to 20) in this regard setting out Public Witness 1's assertion that he had not referred to Sunil as going inside the van. Even about who went inside the van Public Witness 1 explained in court that he had not, actually seen Ravi entering but presumed his having done so. These are details pertaining to observation concerning which a bona fide mistake is possible while recalling the same. This so-called discrepancy, therefore, is not such as to give rise to the inference of P.W. 1's evidence being unreliable-

(188) Facts, at least some details, pertaining to them which were not known to the police when Public Witness 1 was interrogated by the police on Dec. 26, 1973 & Jan. 2, 74.

(189) Mr. Garg laboriously argued that the raw material for the prosecution case was got into shape after the appellants and P.W. 1 were exposed to P.Ws 2 to 7 and the rest of the story given by Public Witness 1 was tailor-made. It seems to us that this contention has no force at all for several reasons, the Chief among them being the following features of P-W. 1's evidence which received substantial and significant corroboration from what was discovered subsequent to his being examined by the police, in two stages, namely, 26/12/1973 and 2/01/1974.

(190) (1) Reference may first be made to the trunk-call made by Sunil to Ravi (a particular person call) from Telephone No. 623512 in the name of his father A. C. Batra at 27 Sundar Nagar to Tc). No. 3007, which is in the name of Gopal & Company at Bhopal. The fact of Tel. No. 625312 being in the name of the father

of Sunil has been sufficiently proved, found by the learned trial judge on ample material and has not also been seriously disputed before us. The fact of the call having been booked and the call having materialised has been spoken to by the concerned witnesses (P.Ws II and 18). Ex. Public Witness 1 I/A 1 to 9 are the trunk call tickets which were seized from Public Witness II under Ex. Public Witness 11/B on 31/01/1974, several days after Public Witness 1 mentioned about this during his examination on 26-3-1974. Public Witness I had not referred in the course of his statement under S. 161, Criminal Procedure Code, specifically to any date or the relevant numbers, not even the manner in which the call was made, particular person call or an ordinary call. He had merely stated (vide Ex. P. W. I/DA, p. 49 Vol. V) that 10/12 days after Ravi had obtained the revolver from him and obtain bullets from Anwar Shah Armoury. Sunil made a trunk call from Delhi to Ravi at Bhopal calling upon them to reach Delhi on Saturday (22/09/1973) and thereupon Shahwar, Ravi and Public Witness I left for Delhi on the night of September 22, by Shahwar's jeep (No. MPB 9828). The point that matters for our present discussion is that without P. W. I giving more particulars P. W. 110 seized, from the Eastern Court New Delhi, on 21/01/1974, the four telephone trunk call tickets (Exs. Public Witness I I/A. 1 to A.4), as stated above. The other relevant witnesses bearing on this aspect has been noticed already. The fact of the trunk call having been booked from Delhi (625312) to Ravi (P.P. Call) at No. 3007 at Bhopal (in the name of Gopal & Co.) has been proved. When questioned about this fact Ravi denied having had a trunk call from Delhi or from Sunil and even said that he had no knowledge of the telephone No. 3007 being in the name of Gopal & Co. The facts pertaining to this telephone number have been discussed in detail already and we have explained how Ravi was transacting business in the name of Gopal & Co. and using the said telephone. It may be recalled that Ex. Public Witness 78/B (the driving license of Ravi) and Ex. Public Witness 76/B (the college admission form filled by Ravi) mention Ravi's address as Gopal & Co. Even D.W. 16, who was examined by Ravi, admitted in cross-examination that there was a telephone at 30 Civil Lines, Bhopal; he could not say whether it was in the name of Gopal & Co. though the number is 3007.

(191) Secondly Public Witness I had told the police only about having heard from V. Jaggi that V. Jaggi's father had given a telephone call to the maternal uncle of

Sunil and his father had come and taken back V. Jaggi with him to Delhi. No further details were mentioned by him at that stage. But we find that P. W. 110 had recovered that trunk call tickets, as noticed above, even without getting any further particulars concerning the telephone number etc. Ex. Public Witness 11/A3 is the trunk call ticket in respect of the telephone installed at 7/31 Darya Ganj, Delhi in the name of M. L. Jaggi with Tel. No. 271610: a trunk call was made to No. 3566 at Bhopal in the name of Sunil's maternal uncle (Avtar Krishan Dawar). The fact of a trunk call having been made on the night of 1/10/1973, from Tel. No. 271610 was itself disputed and V. Jaggi had denied that any such call was made. But there was a volte face when V. Jaggi's uncle (D.W. 18) was examined to swear that he had himself made a trunk call to the said No. 3566 but it was for the purpose of arranging to see a girl for V. Jaggi's brother J. Jaggi who had come from Canada to India. An adverse inference has to be drawn from this change in the defense stand so far as V. Jaggi is concerned; the fair inference is that the entire version given by D.W. 18 in this respect in addition to the cassette vis-a-vis Public Witness 5 is false; not merely that : not only was the trunk call made from M. L. Jaggi's number to Bhopal on 1/10/1973 but it was V. Jaggi's father who flew to Bhopal on 2nd and came back with V. Jaggi on the 3rd. On 20/04/1974, P. W. 110 went to the Indian Airlines office at Connaught Place and obtained copies of the air tickets and reservation chart.

(192) Thirdly, Public Witness I had merely stated to the police on 26/12/1973 that about the middle of October he along with Sunil, Sharad Kapur (younger brother of Ravi) left for Delhi by the de luxe train. The next day they reached Delhi and went to V. Jaggi's office from the Railway Station. The date was not mentioned. Public Witness I had also mentioned, when he was examined under S. 164, that he had gone to Delhi only in the middle of October; he had not given the exact date. He had further stated that he had left Delhi by night train along with two suit-cases furnished by Sunil leaving Delhi at 7 P.M. Public Witness 110 seized on 11/04/1974 from the New Delhi Reservation Office copy of the reservation Form (Ex. Public Witness I/O and on 16/04/1974 seized the original form itself.

(193) A few more details, of a comparatively minor nature, were also adverted to by Mr. B. L. Kaira, One such detail was that the entries in the registers of Hotel Bright

containing three fictitious names could not have been known to Public Witness I when he made the statement on 26/12/1973; unless he was personally aware of it. Public Witness I stayed in the Jeevan Lodge under the assumed name of Swam Singh. But in appreciating this argument we have also to remember that P.W. I had admitted that the registers had been shown to him. Whatever the above may be, Mr. Kaira is justified in saying that Ex. Public Witness 1/R contains entries made by Sunil and Avtar Kishan Dawar; the expert (P.W. 97) also says so; the sample writings of Avtar Kishan, for instance, were obtained on 14/03/1974. In this sense M. Kaira is right in stating that P. W. I's evidence concerning Ex. Public Witness 1/R having been written by both Sunil and Avtar Kishan Dawar gets additional support.

(194) There was some discussion concerning whether Shahwar accompanied P.W. I when Public Witness I went there to borrow the revolver. When Public Witness I was examined under S. 164, Criminal Procedure Code. Public Witness I had stated that he and Shahwar went to the residence of Public Witness 67 and he got the .455 revolver with bullets belonging to Public Witness 34. Before the trial court however, Public Witness I had explained that he went along with Shahwar for this purpose but Shahwar was standing outside Public Witness 34's house when he went inside to get the revolver (page 152, Vol. IT). He was confronted with the omission to state specifically when he was examined under S. 164 Criminal Procedure Code. about Shahwar staying outside; P.W. I admitted that he had not stated so but it is such a trivial matter of detail eliciting which would depend upon the manner of questioning.

(195) There is hardly any substance in criticism advanced by Mr. Garg that the statement made by Public Witness I on 11/12/1973 was not deliberately recorded in order to leave room for integrating details securely into the final theory of looking and shooting. This criticism overlooks the fact, already stated, that Public Witness I was being questioned only as an accused in the case. It was rightly explained by Mr. Kaira that not all the details spoken to by the accused, at least to start with, should be invariably recorded. The relevant police rule 25.53 has been already noticed.

(196) It is worth recalling that the statement recorded by Public Witness 142 in the zimini dated 21-12-1973 does not by itself show that P. W. I had either made a full statement earlier or this is all that he had to say further in the matter. The above statement related to the fact of his having made an extra judicial confession to Public Witness 33. Public Witness 142 obviously made the record in the above said manner (Ex. Public Witness I/DA. 2) because he had come to know about the above said important fact which Public Witness I had not revealed earlier. It is necessary to remember, even in this context, that Public Witness I had not then made up his mind to become an approver. There was probably ambivalence in this regard; he had according to his own statement, thought of becoming an approver since February 1974; his statement under S. 164 was recorded on March 29th, 30th, 1974.

(197) Nor would it be correct to say, as Mr. Garg described that the truth of Public Witness I's revelation to the police on 21/12/1973 is destroyed by what he had stated in his application dated 20/12/1973 to the Magistrate (vide Ex. Public Witness 1/D.B.) that he had been beaten by the police and he was being pressurised to make false statement against the other accused. These are consistent with the strategies employed by all the accused then, and his ambivalent attitude which continued till he finally made up his mind to become an approver, despite pressure from the other accused not to do so.

(198) There is not much force in the criticism of Mr. Garg concerning the non-examination by the prosecution of two superior police officers, Ashok Patel and Avtar Singh. They only verified the investigation and were not required to maintain any record of it themselves; one of them, Avtar Singh, was examined as D.W. 14.

(199) P.W. 1 - being taken into police custody for being questioned concerning the auto theft case was not something impermissible; the case of auto theft was - charge-sheeted against him, Sunil and Ravi; the same unless fully investigated it would have been expected that it might give clues or reveal the association between Public Witness I and other culprits, Public Witness r having obtained that car on superdari. Subsequently, in October/November 1974, Public Witness I was discharged from that case. The only danger to guard against will be whether,

by reason of his having been so taken into police custody any undue advantage was sought to be taken by the police. On a scrutiny of the evidence of Public Witness I as a whole we are convinced that he was a party to the conspiracy; the material and significant details spoken to by him are seen to be amply corroborated: his evidence concerning the occurrence seems to have a ring of truth. We have the additional advantage in this case of Public Witness I's implication of the appellants by reason of the identification by P.Ws 2 to 7 in the manner and to the extent explained above.

(200) The facts' relating to Sunil who was not only the arch conspirator but the prime actor need not be recounted at any length. Public Witness I's evidence concerning the part played by him has as already noticed, been corroborated in so many important particulars. The recovery of the stolen notes from him not only when he was personally searched but from his locker in the Canara Bank, Bhopal as well as from Sri Krishan Dawar do clinch the case against him particularly in view of the fact that he claimed the said amounts but was unable to even suggest how he could come by such large sums of money. After the occurrence we find that the money handled by him was so plentiful. The recovery of blood stains of the same group as that of the gunman as a result of the blood flowing on the cash boxes and ultimately finding its way into the bath room on the terrace of Sunil as proved by Public Witness 53 is yet another pointer. Despite the want of sufficient precautions concerning the Ambassador car (Ex- P. 12) after the same was seized by the police on December 12, 1973 before it was sent to the C.F.S.L. the next morning we have found that there are certain inherent circumstances including the nature of the tell tale blood stains in the dicky and edges of the dicky of the car, coupled with the presence of vegetable matter identical to that which was seized later from the secluded spot at Barren Road lane further support to the evidence of Public Witness I in the matter of his participation. Among the appellants, he had a distinctly oval face (long or pointed chin as it is variously called) and this is a much more important feature than whether he had or did not have thick moustaches as per the statement attributed to Public Witness 2 when he gave Ex. Public Witness 2/C.P. W. 2 identified him and Shahwar alone and no other; the rest except P. W. 7, among the eye witnesses, identified him-. Ex. P. W. 1. /R, containing the five names of accused including himself and proved to be in

his own handwriting, a document which was filled' in later by his uncle Avtar Krishan Dawar and the circumstanees in which it was written by him as explained by Public Witness I, makes the case against Sunil unarguable. The heroic effort by Mr. Rajindar Singh to show that there was some effort to plant the stolen notes on Sunil has, as we have discussed in detail, nothing to commend it. The prosecution case concerning the conspiracy as well as the part played by him along with the other appellants has been amply proved; it was he who shot at both the gunman and the driver- The shooting was intentional; the injuries, on each of them, were sufficient in the ordinary course of nature to cause death; the gunman died soon thereafter but the driver lingered on for a few days.

(201) P. W. I' fixed the presence of Ravi, at the time of the occurrence on Thompson Road and when the gunman was fired at, on the left side of the road, a yard or two from the edge of the pucca road; Ravi was going towards the bank van but he did not rush; he should have covered 5 to 8 yards to reach the van. Public Witness I saw Ravi after the second shot was fired; two persons got down from the van and ran towards the lane on the left; at that time Ravi also was running towards that lane; those two persons ran from the right of the Ambassador car: they were at distance of 4 or 5 yards. P.W. 5 and 6 and Ravi were in the lane when the Ambassador car moved 'into the lane. Ravi got into the Ambassador car from distance of 15 to 20 yards from the point of entry into the lane. As the Ambassador car entered the lane it stopped for a second or two Ravi was in the lane when Shahwar started the bank van. Later on Public Witness I saw Ravi entering the bank van at about the time when cash boxes were shifted from the van to the car. Ravi was standing at the back of 'an when unloading took place. Public Witness I, however, made it clear, during cross examination, that he did not see Ravi actually entering the van. He was confronted with' his earlier version to the police about Ravi taking the gunman's gun from Sunil; it is recorded by trial Judge that he had denied it-it may be noted that 'Ravi' was mentioned in the question wrongly for 'Sunil' the (translation of this on page 56 of Vol 5 as 'Batra' is not correct). He maintained that what he stated in court was correct-which was that he saw the gun with Aavi but learnt later that Sunil had given the gun to him. The evidence of Public Witness 4, it may be recalled, is that Ravi got into the van when he alone was sitting inside it, with his gun; Ravi stepped on the front seat, to get out through the

door near the driver on the right, thus leaving a blood-stained foot-or-shoe-print on the front seat in the bargain. Thus there is no contradiction, between what Public Witness 1 stated earlier or what was stated by the other witnesses (who only corroborate Public Witness 1 on this question-regarding the participation of Ravi).

(202) P.W. 7 also identified Ravi as the boy who was carrying the gun. Regarding the presence of Public Witness 1 himself at the secluded spot Public Witness 7 swore that Public Witness 1 (boy with beard) opened the dicky of the Ambassador car, after which the two boxes were taken out of the van one by one. After opening the dicky of the car Public Witness 1 again took his seat in the car. When Public Witness 7 was about to enter the open plot Public Witness 1 (who had a beard, as distinguished from Shahwar who did not have a beard at that time) came out of the car, took a couple of paces and reprimanded Public Witness 7, when he went away.

(203) It is thus seen that the evidence of Public Witness 1 concerning the participation by Ravi in the occurrence has been substantially corroborated by P.Ws 4 and 7, in particular. By far the greatest and telling corroboration concerning Ravi's participation is the recovery of the stolen money, of nearly Rs. 4 lakhs from his office-table-drawer, on being pointed out by him, in pursuance of a disclosure statement by him (Ex. Public Witness 82/D-1) to Public Witness 140 that he had 'kept concealed currency notes of the Union Bank of India, Delhi, in the sum of about rupees four lacs, in the lower right side drawer of the office table lying in the outer room of my residential house No. 30 Civil Lines'. As undertaken by him in the disclosure statement he took Public Witness 140 and party to his house and pointed out the drawer, which opened with iron key, which had been recovered from him on personal search (as per Ex. Public Witness 82/A) ; the notes were recovered under Ex. Public Witness 82/E, all on 11/12/1973. It is worth recalling that Public Witness 82, whose evidence we have discussed at length, has attested all these memos. Ravi gave no explanation but denied the whole thing. The disclosure statement itself (even apart from his living in 30 Civil Lines and being associated with the business carried on there under the name and style of Gopal and Co. 'how his exclusive possession of those currency notes, recovered from the said drawer.

(204) There is no truth in the denial by Ravi of his being the class-mate of Public Witness 1; it was only urged in this respect that according to the evidence of sister Alosia (P.W. 57) Public Witness 1 had left the school in the year 1965 after the Tenth class whereas Ravi had left it in the same year in the 11th class. This does not preclude their having been class-mates. When questioned about this Ravi himself admitted in his answer to Question No. 8 that Public Witness 1 was in his school; he probably left in 1961 but he was not certain about the year nor could he say for how long he had been in the school; however, he admitted in answer to Question, 9 and 10 that Public Witness 67 was in a different section but he also left in 1965 ; P. W. 33 was also in the same school and was his class-mate but in a different section.

(205) MR- S. C. Bhargava commented upon the risk taken by the police in not even posting anybody at Ravi's house in spite of the same having been a furlong and a half from the Cafeteria; there were also employees of the Cafeteria; he urged, who could have given information to Ravi's family who could have made good with the amount. Comment was also made about the search warrants having been obtained against the appellants (except V. Jaggi) and not used; the pros and cons of the feasibility of searching their houses as against eliciting information from them leading to discoveries of facts deposed by them have already been considered in detail. By hind-sight, it is seen, that this strategy adopted has paid. The steps taken by the police in the matter of making the recoveries does not appear to admit of much criticism, based on pre-conceived theories, as to how they should have gone about it. The personal searches were also conducted in an open place in the Cafeteria in the presence of so many persons which exclude the possibility of anything being planned; the criticism that the police officers did not offer themselves to be searched before they made the personal searches or the appellants except V. Jaggi and of Public Witness 1 at Kilol Cafeteria lacks force in the circumstances, The presence of an independent witness like Public Witness 82 at not only the Kilol Cafeteria but even later, huge amounts including in currency notes were recovered from Ravi, seems sufficient assurance to act upon the recoveries safely. The fact that these currency notes were out of the notes of the Bank in question and were those sent by the bank in the van and looted on 28/09/1973 admit of no doubt at all.

(206) The argument by Ravi's counsel that even if they were recovered from him. his exclusive possession' of those notes has not been made out is rather feeble. It was not suggested that he did not know about those notes being there: such an argument stands contradicted by the statement that Ravi himself made under S. 27 Evidence Act clearly revealing his knowledge of the notes being in the drawer of his office table. The decisions of the Supreme Court, noticed already, do enable a court to draw an inference from the recovery of these notes that the person from whom the recovery was made was a participant in the crime not only of looting the money but also of murdering the guard and the driver of the van especially in a case like the present one where the robbery/dacoity and the murder were committed simultaneously. The circumstances also point to Ravi, among other appellants, as the probable culprit; he has given no explanation himself about the recovery of the said currency notes from him, both as a result of the personal search as well as from the drawer of his office table. There was no possibility of any other person having access to his office table and placing the notes there without his knowledge especially when the key of the drawer was with him and had been recovered from him. The decision of the Supreme Court relied upon, cited but explained already 1976 Cr. L. J. 482 is of no assistance to Ravi because (in that case) the recovery of the drums in question from an open place was consistent both in the guilt as well as the innocence of the accused persons in this case. The prosecution case against Ravi receives further corroboration from the proven signatures of his in assumed names in the registers of the Hotels Bright and Prabhat as discussed above.

(207) A comment was made by Mr. Bhargava that no effort had been made by the prosecution to prove the letter, one of the items stated to have been recovered (No. 2) (vide Ex. Public Witness 82/F) from Ravi during his search of his premises and that, therefore, no effort had been made to make out the exclusive possession of the premises by Ravi. But this is hardly of any significance because the memo itself says that the name of the writer of the letter was illegible though it was addressed to Sunil. It may be noted, however, in this connection that some of the articles (Sr. Nos. 3 to 6) recovered under Ex. Public Witness 82/F) had been converted into a parcel of cloth and sealed with the monogram Kds and this was itself handed over to Phool Chand witness. Whether the same seal which was

used or a different one had been discussed already- There can be that the above recoveries from Ravi and other circumstance tends to show that Ravi was a participant in the crime; this is yet another item of corroboration in a very material respect of Public Witness 1 against Rayi.

(208) It was also contended by Mr. Bhargava that the evidence of identification by Anil Kumar Puri (P.W. 35) of Ravi during the target practice at the house of V. Jaggi under construction at Greater Kailash is weakened by the fact that Public Witness 35 was not mentioned as an identifying witness who had to identify the culprits at the identification parade to be held on 18/12/1973. But this omission is not of much significance since the concentration at that time was mainly on identification of culprits by the eye witnesses Public Witness 2 to 7. It may be noticed, in this connection, that P. W. 35 was one of those witnesses who was present at Dev Nagar police post on 25/12/1973.

(209) There is no need to recall other facts and the circumstance which exist against Ravi except the most important among them namely, that the entry made of his stay in Bright Hotel along with Public Witness and Shabwar in assumed names and the same being in his hand-writing.

(210) Mr. Ram Jethmalani pointed out that Public Witness 1 referred to V. Jaggi in 31 contexts, of which, he said, corroboration has been attempted only in respect of two, namely, the target practice on 27/09/1973, the day prior to the occurrence, and V. Jaggi's visit to Bhopal-his father coming there on 2/10/1973, and going back to Delhi from Bhopal by air on 3/10/1973. Both these incidents have been discussed fully already and we have held that these two incidents did happen in the manner stated by the prosecution. These two items are material particular which connector at least tend to show V. Jaggi's participation in the crime. In the very nature of things the above participation cannot be explained as 'innocent', the defense version concerning the latter having been found to be unacceptable.

(211) It does not appear accurate to say that Public Witness 1's evidence is corroborated only in respect of two out of 31 acts of participation by V. Jaggi as stated by Public Witness 1. In many more particulars, as following discussion will show, Public Witness 1's evidence concerning the participation by V. Jaggi also in

the crime receives corroboration in material particulars and the significant manner. Mr. Jethmalani's contention is not only not actually supported, but it also overlooks the true legal position that as against each participant it is sufficient if there is evidence showing, or even tending to show his participation, generally speaking, the approver's evidence may be safely acted upon even, if there is sufficient corroboration in one important respect for which alone he may be regarded as a truthful witness of the occurrence. In the present case there is ample corroboration of his evidence against V. Jaggi in important particular; even as against each of them there is such corroboration.

(212) M. L. Jaggi (B. Jaggi's father) proceeded to Bhopal on October 2, 1973, and came back with V. Jaggi on 3rd; according to the evidence of the officials connected with the Indian Airlines showing that two tickets had been reserved for the return journey in the name of 'V. Jaggi', not 'J. Jaggi', as it was sought to be made out. The prosecution evidence in this respect has been already discussed at length; it remains to discuss the evidence of O. P. (D. W. 6) of the Indian Airlines who referred to the name in the passengers list (Ex. D.W. 6/A) reading 'J. Jaggi.' D.W. 6 admitted that he was discharged from the Army earlier, i.e. before he entered with Indian Airlines; he claimed, however, that his discharge was due to his being 'a staunch Congressman'. Even when he was asked to look at Ex. Public Witness 135/C (the air ticket) he maintained it showed this name 'J. Jaggi'. He volunteered that his reason for saying so was that in case of difficulty in regard to name, the passenger would give his correct name and that name would be entered in the passenger list. But what was the difficulty in this case except what was contrived (even without justification) by D.W. 6 himself? It was suggested to him, though he denied it, that Satpal Jaggi, uncle of V. Jaggi and S. Ramani, an official of the Indian Airlines who had signed Ex. D.W. 6A were class mates and that they had approached him for giving false evidence. The question that matters is not even whether we have to act on, his evidence, which seems rather difficult to act upon, but whether the passenger's list itself should follow the name in the reservation chart or not. The entry in the reservation chart is the primary entry from which other entries are made. It is clear that D.W. 6 deliberately read 'V. Jaggi' in the reservation chart as 'J. Jaggi'. J. Jaggi has not been proved to have been in India, at that time; even the contrived cassette (Ex. Dw 18/D2) said to contain the

voice of Public Witness 5, does not reveal that J. Jaggi, who is said to have been present then, had spoken anything; even if he was asked to keep quiet during that conversation, as it is stated, it is still more surprising that no other person present and conversing did not refer to the presence of 'J. Jaggi' at that time. In addition to the above feature it is worth noting that the disembarkation and embarkation cards of 'J. Jaggi', to show his arrival in and departure from India have not been filed; on the other hand, Public Witness 142 claimed that he had personal knowledge of 'J. Jaggi' not having been in India at that time. Whatever this may be, the story of D.W. 18, the uncle of 'V. Jaggi' (not his father) making a trip to Bhopal on 2/10/1973 for fixing a girl, or even seeing her with a view to getting her married to J. Jaggi, has not been proved; there is no truth in the claim (which was completely disproved and not even pressed before us) that D.W. 18 alone (not V. Jaggi's father) was known as 'M. L. Jaggi'. For this reason alone the air tickets both ways reading 'M. L. Jaggi' must be taken to refer not to D.W. 18, but to V. Jaggi's father. Not merely this; the fact of a telephone call having been made from V. Jaggi's father's telephone in Delhi to Bhopal, which was denied to start with, was admitted related by D.W. 18; he made it appear that he had made the call to Bhopal from the telephone of V. Jaggi's father. The reason for not examining Ramani, who is said by D.W. 6 to have written Ex. D.W. 6/A, has not been mentioned; it was suggested to D.W. 6 that Ramani had not written Ex. D.W. 6/A; evidently it was thought better not to let Ramani face any cross-examination in this respect, even as V. Jaggi's father did not choose to give evidence. We have reversed to this aspect of the case to show (1) how even an Airlines official (D.W. 6) who never worked as Traffic Assistant at the Airport Counter had been pressed into service for persistently reading 'V. Jaggi', found in the air ticket and in the reservation, chart, as 'J. Jaggi'; (2) the extent to which P. W. 1's evidence concerning V. Jaggi having gone on 1/10/1973, from Delhi to Bhopal by jeep and being taken back to Delhi on 3/10/1973, by air is supported by the trunk call and air-tickets; (3) how D.W. 18's claim that he did not return to Delhi by air on 3rd and hence did not utilise the air ticket for the return journey is falsified by the passenger's list (D.W. 6/A) in the name of M. L. Jaggi showing that he travelled with baggage (the baggage ticket being 534383); D. W. 18 exposed himself as being utterly untruthful when he went so far as to say that he stayed on at Bhopal and went to Indore reaching Delhi

thereafter by car (at 11p.m. on 6-10-1973) he was pressed to admit that his attache case, alleged to be sent along with J. Jaggi, who alone undertook the journey to Delhi from Bhopal by air on 3/10/1973, contained articles of daily use like clothes, razor machine, shoes etc. The learned Judge rightly asked how, if M.L. Jaggi was held up at Bhopal, he sent the attache case containing such articles to Delhi on 3rd itself through J. Jaggi. One lie led to another ; it is a issue of falsehood.

(213) P.W.1 has referred to V. Jaggi's participation in other (29) respects also; Mr. Jethmalani's claim that none of them is corroborated but that a few of them even stand contradicted, does not appear to be correct, as the subsequent discussion, of only the most important among them, will show.

(214) In August 1973 Sunil had come to Bhopal after staying for sometime in Delhi; Ravi told him about Sunil's plans to launch on a few schemes including looting a Bank at Delhi and that they-the appellants-would rather do some 'big work' than indulge in 'small businesses' like running a cafeteria or lifting cars. Mr. Jethmalani brought to our notice what he thought was a discrepancy in, this respect; but on closer examination there seems to be none-it is seen that Public Witness 1 had attributed such a statement to both Sunil and Ravi, whereas before the trial Court Public Witness 1 had attributed it to Ravi alone (not Sunil also).

(215) After reaching Delhi at about 8 p.m. on 22/09/1973, P. W. 1 and others drove to V. Jaggi's office at Ajmeri Gate, Delhi; there Sunil introduced Shahwar and Public Witness 1 to V. Jaggi. Public Witness 1 was also present along with V. Jaggi when Ravi made the fictitious entries in the register of the Hotel Bright posing himself as 'Rakesh Dixit', Shahwar as 'Bhargava' and Public Witness 1 as 'Dilbagh Shah'; V. Jaggi also paid a sum of Rs. 100.00 as advance to the hotel; his evidence is supported by the entry.

(216) P.W.1 had also referred to Narinder Aggarwal, an employee of that very Bank, who is stated to have conveyed information concerning the movement of cash from the Bank (Chandni Chowk Branch of Union Bank of India), accompanying V. Jaggi in the latter's car to Hotel Bright and Public Witness 1 and

others following them. Mr. Jethmalani pointed out that Public Witness 142 had opposed bail being granted to V. Jaggi (as per Ex. Public Witness 142/DB, written reply opposing bail) on the ground that V. Jaggi had played a prominent part in the crime by getting all the information pertaining to the movement of the Bank van and conveying it to Sunil. The absence of this seems in no way contrary to what Public Witness 1 had stated. Public Witness 142/DB dated 5-2-1974 was prior to Public Witness 1's statement under Section 164 Criminal Procedure Code. Mr. Jethmalani also drew our attention to the earlier application for remand dated 20-12-1973 where Public Witness 142 had merely stated that V. Jaggi may be remanded to police custody for seven days for the purpose of confronting him - remand was granted till 26th After hearing his counsel. But no inference adverse to the case of the prosecution against V. Jaggi can be drawn from the mere absence of specific mention about the disclosure statement of V. Jaggi. Normally the case diary up to that moment is submitted to the Magistrate before obtaining remand ; it has not even been suggested that there was any departure in this respect from the usual practice/requirement. According to Public Witness 1 it was Sunil, who came to Hotel Bright on 2/09/1973 and revealed about the scheme thought of by himself and V. Jaggi to loot the van of this bank, which was believed to carry about 50-60 lacs rupees every day; V. Jaggi was not, however, present then. D.W. 142/DB was hardly the place or occasion to go into the details, which were numerous, of the prosecution case ; however, all the facts concerning V. Jaggi were not fully known till Public Witness 1 was examined under Section 164 Criminal Procedure Code ; nor could any reliance be placed by the investigating agency solely on whatever Public Witness 1 had stated when he was arraigned as an accused in the case.

(217) According to Public Witness 1 they were waiting at Hotel Bright on 23/09/1973 for V. Jaggi to turn up; since he did not come as expected P-W. 1, Sunil, Shahwar and Ravi went at 11.30 a.m. to the Bank at Chandni Chowk. The jeep brought from Bhopal. This is some indication, if any is needed, showing that Public Witness 1 was not anxious to implicate V. Jaggi with every step; this was not the only occasion when according to Public Witness 1, V. Jaggi came late; even on that fateful day, Public Witness 1 said, he came later than intended. V. Jaggi came to their hotel only at 1 p.m. that day after they returned to the hotel when they told

him about their trip to see the van. Sunil said that they would go and see it next morning; it was V. Jaggi who told them that the van carried about 60 lacs. All of them went to Shah Andaz restaurant and spent the day merry-making. On 24th also V. Jaggi did not turn up in time; as suggested by Sunil they went to see the van themselves; after they returned to the hotel V. Jaggi came at 11.30 a.m. and they said that though they went to see the van it had already left. V. Jaggi invited them to his house next morning at 9 a.m., since the van left usually at 9.30 a.m. When they went to V. Jaggi's house accordingly on 25th morning and proceeded to the bank they saw the van there and the boxes being lifted into it. V. Jaggi came to their hotel in the evening where it was decided that V. Jaggi would intercept the van by Sunil's Ambassador car; Shahwar. not Public Witness 1 as originally agreed upon. was to shoot the guard. Next morning they agreed to go and see the van again and observe how the cash was being transported. Thompson Road was agreed upon as the venue of operation; the place of interception was near the lane. On 27th V. Jaggi also went to the hotel at 8.30 a.m. and they went to the bank in Sunil's Ambassador car DHB 9254 in order to again watch the loading of the cash boxes in, to the van. This portion of Public Witness 1's evidence receives clinching support from the record of the Bank (Ex. Public Witness 89/DD) which shows that cash was taken from the said Bank on the material dates spoken to by P.W. 1, in the above said manner, on September 25, 26 and 27, 1973. The importance of this piece of corroboration, is enhanced in view of the above details, were not known even to the police when Public Witness 1 was interrogated on 26/12/1973 and on 2/01/1974. The said record was summoned from the Bank by the accused.

(218) On 27/09/1978, itself all of them had a full rehearsal; it was also timed. Public Witness 1 stated that it took about 12 minutes from the interception of the Bank van to reaching 27 Sundar Nagar. V. Jaggi fully participated in it. Public Witness 1 had given graphic and minute details of the rehearsal. He also spoke in detail about what was planned originally and the changes from time to time; these have been noticed even to start with. They vacated Hotel Bright and went to V. Jaggi's office at 4 p.m. as suggested by V. Jaggi. After lunch they went to V. Jaggi's house under construction at Greater Kailash in the evening and had shooting practice, when Public Witness 35 came there. They returned to V. Jaggi's office; Sunil cleaning the revolver with a pin-rod wrapped in cloth and keeping the bullets with him on the

way. They then, went to Con-naught Place. V. Jaggi took Ravi and Shahwar to Hotel Prabhat near Odeon Cinema and Sunil took Public Witness 1 to Jeevan Lodge. All the details are fully corroborated by the concerned entries in the Hotel registers. There is little force in the criticism that according to the statement of Public Witness 1 dated 26/12/1973, to the police V. Jaggi was dropped at his office after the shooting practice; he had also stated V. Jaggi going along with them thereafter to Connaught Place. What is so telling a piece of corroboration is the fact of Public Witness 1 getting into Jeevan Lodge at 6.10 p.m., as per the entry in that hotel's register. The target practice is supported by Public Witness 35, whose evidence is discussed separately. Afterwards they went to Rambles Restaurant, where Shahwar refused to shoot the guard; Sunil took upon himself the job of shooting the guard; Shahwar was to drive the van away as planned.

(219) On the fateful day, 28/09/1973, V. Jaggi joined the rest in Hotel Prabhat at about 9 a.m.; though it was 'probably late they still went ahead with their plan-the details of what happened thereafter have already been noticed. When they got back to Sunil's house V. Jaggi accompanied Sunil to the first floor of the house. Public Witness 1 asked Ramdayal, the servant of Sunil, to clean the stairs of blood and he did so. Whether Ramdayal himself burned the clothes on the terrace in the presence of Public Witness 1 or Public Witness 1 got it done through him is hardly of importance. What is of importance, however, is that the ash recovered from the terrace by the police is said to contain (vide Ex. Public Witness 142/J-2, p. 284 Vol. Va item 5) microscopic pieces of burnt synthetic fabric. Public Witness 1's version concerning what happened in Sunil's house at Sunder Nagar, after the two cash boxes were taken there (cleaned in the garage and washed later in the bath room on the terrace) gets confirmation from the human blood of group A (of the deceased gunman) being found in the blood stains scratched from the wall of the bath room: they were not otherwise visible and became visible after the application of chemicals. Not merely that; numerous minute specks of blood stains were detected on the under-surface of the roof of the dicky of the Ambassador car; one faint brown blood stain was present on the back seat of it: there were traces of blood detected in many parts such as floor and edges of dicky, back seat, driver's seat and back rest and left rear door etc. of the said car: the blood was also found to be of group A. In addition some vegetable debris, including small

and large size dry leaves from grooves on right and lefttop of dickey were the dickey door fits on the body of the car, werecollected by the C.F.S.L. of its own, Inspector Hira Singh (P.W. 127)having initially missed it. The blood stains from the bath room wallwere collected later (on 24/12/1973) under Ex. Public Witness 54/A,which Rajinder Singh (P.W. 54 attested), but the C.F.S.L., having discovered the said vegetable matter in the car even on 13-12-1973,wrote as per Ex. P. W. 97/0 to the police on 19/01/1974, pointing it out to the police and requesting that they send such vegetablematter collected from the place where the car might have been. Thereupon P.W. 142 recovered the Mehndi twigs and Kicker shrubs available at the secluded spot in the presence of Bishan Singh and ThakarSingh (P.Ws 8 and 9 respectively) under Ex. Public Witness 8/A on 29/01/1974. The last mentioned fact is very significant because it showsthat vegetable matter in the grooves of the car where the dickey doorfitted the dickey was not even noticed by Public Witness 127 who was not theofficer investigating the case. He had undertaken the above, amongother things, on receiving a direction to that effect from Bhopal, beforethe police party with the accused (except V. Jaggi) arrived at Delhifrom Bhopal. We have thus a valuable clue from what the C.F.S.L.found : similarity of small leaves and twigs recovered particularlyfrom the secluded spot with those found in the dickey of the car-thisis more than a coincidence: even if it is a coincidence it enhances verymuch the value of the positive testimony of Public Witness 1 concerning the saidcar, used by the accused during the occurrence and taking it to Sunil'shouse at Sunder Nagar. Reference is being made here to the presenceof such vegetable matter in the car, because though the learned judgerealisised its importance he has not looked at it and the other featuresin the same way we have done ; he was worried about sufficient safeguards not being taken to prevent tampering with it after it was seizedby the police on 12/12/1973. These features no doubt constitute to material corroboration of the evidence given by Public Witness 1 concerningthe car having been used as stated by the accused and cash boxesbrought to Sunil's house, which were' sought to be got rid of in themanner spoken to by Public Witness I. Inspector Hira Singh (P.W. 127) hadseized the Ambassador Car, under Ex. Public Witness 53/D, on 12/12/1973 itself, even before the police party arrived from Bhopal Along with the accused except V. Jaggi; n was parked in the Kamla MarketPolice Station. It was sent to

the office of the C.F.S.L. on December 13 and was inspected the same day; the car was sent back from there, after removing the dickey cover. The same was handed over to one Inspector Shadilal at the C.F.S.L. on the morning of December 13; his non-examination does not affect in any way the weight to be attached to the above features which were noted by the C.F.S.L. on that very day - these happened much before the car was taken to the police station'. The feet of the car having been in the police station from December 13th is, therefore, hardly of any consequence. We are not in any way lessening the importance of the precautions, the investigating agency will have to take in this respect; the precautions taken were pointed out in State vs. Mote Air 1955 Raj 82 a decision noticed by the learned trial Judge. We are only observing that in the circumstances of this case there are certain features which appear to be sufficient to exclude the possibility of fraudulent manipulation in this respect by the police despite the precautions not being taken; these are uniquely significant features which are hardly likely to be present in other cases, either individually or in combination - the bloodstains in the bath room containing the blood stains of the group of the deceased gunman; the ash recovered from the terrace revealing macroscopic burnt synthetic fabric the kind of stains, especially on the roof and edges of the dickey and rear door, caused by coming into contact with the cash boxes kept in the dickey and back seat containing the same blood group; the leaves pressed into the grooves of the dickey discovered casually in the above manner tallying with those of the bushes seized from the secluded spot off Barren Road. These are more than even 'odd' coincidences; they are confirmatory of the evidence of Public Witness 1 in particular in such important respects.

(220) At about 7 p.m. that evening it was decided that Public Witness 1 would vacate Jeevan Lodge and stay with Public Witness 33, for which place Public Witness 1 would go in Shahwar's jeep. Public Witness found out the address of Public Witness 33 (in J.J. Colony Dhaura Kuan) from P. W. 33's brother John Pacheko (P.W.23) and reached there on the night of the occurrence. Public Witness 33 asked Public Witness 1 to stay with him and took him to Rambles for food. It was next morning that Public Witness 1 disclosed to Public Witness 33 about the occurrence and the participants, including himself. The learned trial Judge has discussed this under the heading 'Extra Judicial Confession'. It seems to

us that this may not be an accurate' description of What Public Witness 1 said to Public Witness 33 because the former did not continue to be an accused in the case. After he was taken as an approver it may not be accurate to regard it any longer as an extra Judicial Confession; it does not fall within S. 30 of the Evidence Act. Whatever he is alleged to have told Public Witness 33 would only be a piece of corroboration concerning his evidence and nothing more; we only wish to point out that the same could not be regarded as a statement under S. 30 of the Evidence Act.

(221) It only remains to consider whether P. W. 33 can be regarded as a witness of truth and can be -regarded as materially corroborating P.W.I. Public Witness 33 and Public Witness 1 were school mates at Bhopal; so was Ravi. He also knew Public Witness 67, who was his class fellow. He had been introduced to Shahwar also. Public Witness 33's sister was married to John Pacheco (P. W. 23), who was working as a contractor, since 1969. In 1967 P. W. 23 and P. W. 33 lived at 18 J.J. Colony. On 28/09/1973, P.W.I. went to Public Witness 23 and inquired about the residential address of P.W. 33. Public Witness 23 also had known Public Witness 1 as a student. Public Witness 23 gave the address of Public Witness 33 to Public Witness 1. If so, thereafter that Public Witness 1 was able to trace where Public Witness 33 was living and reach it at about 11.30 p.m. in the jeep (bearing MPB 9828 and said to be in the possession of Shahwar) in which P.Ws 1 and others had left Bhopal for Delhi on the night of 22/09/1973. Public Witness 1 slept at Public Witness 33's house that night. Next morning, at about 8.15 a.m., when Public Witness 33 was going through the newspaper containing the headlines of this bank robbery, Public Witness 1 asked Public Witness 33 if any Sikh was mentioned therein. Public Witness 33 told him it was not so. Thereupon Public Witness 1 requested Public Witness 33 to swear on his parents and not let him down if he told him something; after getting such assurance Public Witness 1 gave the names of Sunil, Shahwar and Ravi as having participated in the crime (Turning to the evidence of Public Witness 1, on this point, he has stated (vide p. 166 Vol. II) that he had disclosed to Public Witness 33 the name of V. Jaggi also. No such omission on the part of Public Witness 1 to mention the name of V. Jaggi when he was examined either under S 161 Criminal Procedure Code. or S. 164 Criminal Procedure Code. was elicited from him. It is important, on this aspect, to appreciate

that Public Witness 33 was mostlikely to remember only those persons mentioned by Public Witness I, whom heknew; he had not known V. Jaggi. If Public Witness 33 was deliberately introduced into the case as a false witness nothing. would have been easierfor him' then to include the name of V. Jaggi also among those mentioned by P.W-I). V. Jaggi was at his office at Ajmeri Ga'e whenP.W.I was taken there by Public Witness 33 on the morning of 29/09/1973. Public Witness 1 had told PIW.33 that he could not find his way to thatplace ; Public Witness 33, thereforee, followed Public Witness 1, on- his own motor cycle ;P.W.I drove the said jeep. Public Witness 33 took Public Witness 1 to Ajmeri Gate firstand then to V. Jaggi's office, was was only about 200 yards fromAjmeri Gate Public Witness 33 may have done so without returning fromAjmeri Gate for a variety of reasons, from mere curiosity upwards.

(222) On the night of 29/09/1973, when Public Witness 33 returned homehe found Public Witness 1 sleeping there; Public Witness 33 returned home late after seeinga picture. Public Witness 1 had gone there again despite Public Witness 33 having askedP.W.I not to come to his house again. But such conduct of Public Witness I, or unusual as it may seem, cannot be rejected out of hand,for P-W. 1 was naturally under extreme stress and fear; he could notbe expected to behave in a natural manner. The position of Public Witness 33was also difficult; here was a friend disclosing his having committeda daring crime along with some others.

(223) P.W.33 was himself contacted by the Investigating Officer on 21/12/1973, after interrogating Public Witness 1 ; the statement of Public Witness 33under S. 164 Criminal Procedure Code. was recorded without much delay-on 24/12/1973.

(224) The learned Additional Sessions Judge who had the advantage orseeing Public Witness 33 depose has recorded as follows (vide para 400 page941 Vol. IV):

EARNESD'cruz has given the impression of being a thoroughlyreliable witness. Despite lengthy cross-examination, defensecould not shake his credit nor succeed in showing that hewas in any way under the influence of police. He has noanimus against accused persons.

(225) What we have already observed with reference to Public Witness 35 would equally be applicable to Public Witness 33 as well. Public Witness 33 was an intimate friend of Public Witness 1 who was then an accused in this case; Public Witness I was granted pardon on 22/03/1974, nearly three months after he was contacted by the Investigating Officer and made a witness in this case. It is not likely that the police would have taken the risk of making Public Witness 33 also as a witness in the case despite his being a friend of Public Witness 1 who was only an accused in the case then. At the time when Public Witness 33 was examined by the police and also under S. 164 Criminal Procedure Code, it was not the intention of the police to take P.W.I as an approver despite all the appellants and Public Witness 1 together making representations, as noticed already, concerning their apprehension of being beaten by the police and pressurised to make state-made only for the purpose of the record and not even for any action being taken on such representations.

(226) The learned trial Judge has endeavored to use the previous statement of Public Witness 1 to Public Witness 33 as attracting S. 157 of the Evidence Act. It seems hardly necessary to rely upon the same as a previous statement by P. W.I to corroborate his subsequent statement before the Court. Any such reference will be necessary only to evaluate any omission to state a fact stated either in the 164 Criminal Procedure Code, statement or before the trial court; contradictions, if any, would, however, stand on a different footing. The true approach to this aspect of the case is seen to be one which we have indicated; agreeing with the learned trial Judge we hold that Public Witness I's evidence in this respect is materially corroborated by the evidence of Public Witness 33. We find nothing improbable in Public Witness I, who was in that situation, seeking out an old friend despite his not having been very close with him after he left school. In such a situation there is nothing surprising an old friend and school-mate being sought, even though the friendship might not have been actively kept up. Public Witness 23, from whom Public Witness I says he got the address of Public Witness 33, was examined by the police as early as 3-1-1974. There was also nothing inherently improbable in Public Witness 1 not having made any such statement to Public Witness 23, who was not boyhood friend that Public Witness 33 was.

(227) It is no doubt true that there was no mention of one of the culprits being a Sikh in the Times of India which was in the hands of Public Witness 33 at the breakfast table on the morning of 29/09/1973. During re-examination of Public Witness 1 his attention was drawn to the Evening News dated 28/09/1973, wherein there was a mention of one of the culprits being a Sikh (the same was marked as Ex. Public Witness 1). This gives credence to Public Witness 1 having been so nervous and being anxious to know whether the press had reported the participation by a Sikh. Public Witness 1 was most vulnerable in this respect; he was the only person among the accused to have long headhair and beard. He could not be sure that his attempt to conceal and identify during the occurrence by taking off his turban and putting his handkerchief instead, was sufficient to conceal his identity as a Sikh. We shape the impression of the learned trial Judge that P.W. 1 became frightened when he saw Times of India in the hands of Public Witness 33 at the breakfast table; we feel like further observing that in that situation it is exceedingly natural for Public Witness 1 to have become so frightened as to not being able to suppress his fear, losing self-control, as the learned trial Judge points out both over his tongue and emotions, and coming out with the whole story to P.W. 33 after imploring him not to reveal it to anybody and asking him (P.W. 33) and making him swear that he would not let him down. The conduct of Public Witness 33, in such an uncommon and unenviable situation, asking Public Witness 1 not to embarrass him by coming again to his house was by no means odd; Public Witness 1 coming again the following night despite Public Witness 33's request to Public Witness 1 not to come again was also not odd; being an old friend 'P.W. 1 had sought asylum for two nights, of 28th/29th, after finding out P. W. 33's address from P.W. 23; he had somehow managed to reach Public Witness 33's house by making inquiries on the way. This is not impossible. Since he did not know the way back he requested Public Witness 33 to help him out of it. Since P.W. 33 had to get back to his house, after showing Public Witness 1 the way, he piloted on his own motor cycle.

(228) Though Public Witness 33's evidence would not be helpful to corroborate by Public Witness 1's evidence to the extent that he did not mention the name of V. Jaggi at that time Public Witness 33's evidence that he had also met V. Jaggi at his office on the morning of 29/09/1973 would indeed afford specific corroboration

showing or tending to show V. Jaggi's participation in the crime. On this last point, it is possible, however, to contend (as it was in fact contended by Mr. RamJethmalani) that the meeting of V. Jaggi by Public Witness 1 in his office would not by itself tend to show that V. Jaggi was a participant in the crime. The clear and simple answer to this contention is that this is only a link in the chain of evidence showing association among the culprits inter se, this was so shortly after the occurrence - the next morning. While appreciating the evidence of Public Witness 33 against V. Jaggi when he stated that he saw V. Jaggi at his office on the morning of 29th along with two of his compatriots Sunil and V. Jaggi to whom P-W.33 was introduced by Public Witness 1, it has to be prominently borne in mind that at the time when both Public Witness 1 as well as P. W. 33 were examined by the police P. W. 33 was a witness against P. W. 1 also; the tendering of pardon to P. W. 1 by the prosecution was not even in contemplation then. That is the reason why P. W. 1 was arraigned along with the other four accused (appellants) by the police on 25/12/1973 for being identified by the witnesses; it was not as a witness but as an accused person only; this aspect of the matter has been already touched upon. What is, however, of relevance to the present discussion is that even though Public Witness 33 was a friend of Public Witness 1 he had referred to only Public Witness 1 coming to him on the night of the occurrence but even on the following night and about his having made a confession to him of his participation in the occurrence. These statements could not be said to have been motivated against Public Witness 1 in any manner; there was no suggestion to the above effect. We have also indicated how it was more natural for P-W.33 to remember the names of the culprits other than V. Jaggi, because only the others were known to him, not V. Jaggi. As we understand the reference made by Public Witness 33, as recorded by the police on 26/12/1973 itself, it appears that Public Witness 1 had made a reference to V. Jaggi only incidentally by finding him also along with other culprits in the office on the morning of 29/12/1973, the day after the occurrence. The importance of the evidence of P. W. 33 is that it lends material corroboration not only in the matter of P. W. 1 having stated to him about the participation by him and some others in this occurrence but specially against Sunil and V. Jaggi also because according to both P.Ws 1 and 33 V. Jaggi was in his office along with Sunil on the morning of 29/09/1973 and Public Witness 1 introduced both of them to

Public Witness 33. Obviously with a view to provide an alibi for Sunil, and probably with a view to even explaining away Public Witness 33's evidence of Sunil being found in V- Jaggi's office then, Major A.H. Mehra (D.W.19) swore that Sunil, the son of his wife's elder sister who was staying with him at Bhopal since December 1971, left Bhopal for Delhi by train on the night of 28/09/1973 and returned in about 7 or 8 days. The reason for the said trip was said to be the Sherwoodian's old boys meet at Delhi was to take place on 29/09/1973. D.W. 19 was cross-examined about why he did not make any application at Bhopal, though he was there when Sunil was arrested in connection with this case, to the effect that Sunil had been at Bhopal on the date of occurrence; his feeble answer was that he was about to retire then and that being an Army Officer he did not want to involve himself in anything which might affect his career; he claimed that he was so advised by his seniors- Nothing could be more unconvincing because a close and older relative like him would have normally left no stone unturned if this was so- Mr. Jethmalani's contention that even if Public Witness 33's statement against V. Jaggi, of finding him in the office along with Sunil, was true it was innocuous, has to be appreciated in the entire context of Public Witness 1's evidence against him, receiving corroboration concerning V. Jaggi's participation in the occurrence in other material respects; the evidence of P.W.1 and Public Witness 33 is only one among several other pieces of evidence concerning V. Jaggi's participation in the crime and is not to be viewed in isolation. We have also to remember that if it was Public Witness 33's intention to falsely implicate V. Jaggi in this case nothing would have been easier for Public Witness 33 than to have mentioned the name of V. Jaggi also as one of the participants in the crime as a fact emerging from the extra-judicial confession which P-W.1 is alleged to have made to Public Witness 33. This is yet another circumstance which supports our thinking that it was only a mere failure of memory on the part of P-W.33 to include the names of V. Jaggi also in the statement which Public Witness 1 made to him concerning the participants in the crime along with him (P.W.1). This has also considerable bearing on the naturalness of the evidence of Public Witness 33 when his own evidence is viewed in its total perspective, even though it may appear at first blush that Public Witness 33 merely supplied the necessity felt by the prosecution to strengthen this case against V. Jaggi.

(229) The evidence of P. W. 1 against V. Jaggi gets significant support by reason of his having referred to his seeing Hooda and Brar along with Sunil and V. Jaggi ; the details concerning this have been noticed event to start with. Reference is pointedly made to this circumstance in this context because Public Witness 1 did not know them at all and he could not have mentioned their names but for his having seen them in the company of Sunil and V. Jaggi. This is the reason why V. Jaggi tried to make it appear that he was the leader of some faction at school which was opposed to that of those two gentlemen. This was elicited only by putting a leading question to P-W-35 and has to be appreciated as an answer got in the aforesaid manner. Sunil, V. Jaggi, Handa and Brar were classmates at school and knew very well one another.

(230) P.W. 1 stated that V. Jaggi had also helped dispose of the cash boxes; Public Witness 1 was confronted with his omission to tell the police about the same having been done in two stages; his version before the court was that when they took out the first box Sunil's mother had come and, therefore, they had to wait for some time to shift the other box. This was only a matter of detail and could not be regarded as a significant omission; besides, his was only a statement by Public Witness 1 to the police, before he was examined under Section 164 Cr. P.C. By far the more important circumstance would have been the blood found by the C.F.S.L. on the rear door of the Fiat car of V. Jaggi; this would have afforded very material corroboration of the evidence of Public Witness 1 to the effect that the Fiat car of V. Jaggi was used to transport at least one of the cash boxes for disposing of it. The same assurances that we are able to get in respect of blood and vegetable debris being found in the Ambassador car are absent in the case of the Fiat, though it seems possible that blood stuck to the front door of the Fiat car due to the 'blood stained portion of the box coming into contact with the rear door in the act of placing it on the rear seat ; blood was detected on the mat (as suspected) or the other box placed in the dicky. Agreeing with the learned trial Judge we exclude from consideration the presence of 'blood on the Fiat car merely because all or any of the assurances we have in respect of the Ambassador car are not present in the case of the Fiat car. The fact of recovery of the Fiat car, having the same registration number, from the house of V. Jaggi and his father, lends assurance to the evidence of Public Witness 1 concerning the use of it by the

culprits in this case.

(231) P.W. 1 also referred to V. Jaggi calling on Public Witness 1 along with Mr. and Mrs. Brar on 30/09/1973, and meeting the Hoodas :Mr. Jethmalani explained that these, even if true, were of a social nature and, therefore, innocuous; but even such details can become important as part of chain of events, especially in the view that P. W. 1 did not know them earlier.

(232) On 1/10/1973, Public Witness 1, Sunil and V. Jaggi left Delhi for Bhopal by Shahwar's jeep; when they were crossing the Chambal river it was Sunil who drove the jeep. This is supported by the entry in the concerned book maintained for the purpose (Ex. Public Witness 72/A) there is said to be an over-writing concerning 'Batra' but this seems innocuous. The entry was proved (by Vishnu Gopal, Public Witness 72) to be in the hand-writing of Mohinder Sharma, who was then the Time Keeper in charge. The same had been seized by the police on 21/12/1973, under Ex. Public Witness 72/B, from the store of the Time Keeper. On the same day the concerned record showing the crossing by ferry of the same jeep (on 20/09/1973) was also seized by the police under Ex. Public Witness 77/A. The driver had been shown as Shahwar ('V' appearing by way of correction for 'The' is also innocuous since the same may be unfamiliar to the writer). P.W. 1's evidence in regard to these thus stands fully corroborated. We have considered the criticism of these words and find no merit in them. Reference is made to this here because they went straight to V. Jaggi's office.

(233) After reaching Bhopal, on Oct. 2nd, V. Jaggi went with Ravi to stay in his house and Public Witness 1 went to his house. On the following morning when Public Witness 1 went to Ravi's house, where he met Ravi and Sunil, Sunil told him that V. Jaggi's father had given a trunk call the previous night and that V. Jaggi's father came there and took V. Jaggi with him in the afternoon flight to Delhi - the details of which have also been fully discussed already. Mr. Jethmalani rightly contended that Sunil's above said, statement to Public Witness 1 was only in the nature of hearsay and should not be acted upon. What is, however, important is that the corroboration, in this very material respect, is available in the shape of the concerned documents pertaining to the trunk call.

made from Bhopal to Delhi on 1st night (later admission, after previous denial, of D.W. 18 having made that call) the travel documents, in the name of 'M. L. Jaggi' and 'V. Jaggi' (not 'J. Jaggi' as sought to be made out falsely), J. Jaggi not being shown to be in India at all at that time but all attendant circumstances pertaining against his being in India then, etc. The entire defense version in this respect, as in some others too, smacks of concoction. Regardless, therefore, of P-W. I's evidence in this respect being hearsay there is ample corroboration in respect of Public Witness I's statement that V. Jaggi who had travelled to Bhopal with him and Sunil on 1/10/1973 had left Bhopal, by air, on 3/10/1973.

(234) Yet another important piece of corroboration on a rather material particular is that the name of V. Jaggi had been written by Sunil in Ex. Public Witness UR; the same was undoubtedly recovered from him on a personal search. There was no serious contradiction of this by Sunil. The genuineness of Public Witness I/R cannot be doubted because the testimony of Public Witness 97, the expert, fully supports Public Witness I's version—that he saw P.W. 1 writing the words and Avtar Kishan, maternal uncle of Sunil, the figures therein. Mr. Jethmalani's chief effort in this respect was to show that the crime having been committed earlier than Ex. Public Witness I/R the conspiracy had come to an end and the same would not fall within the ambit of S. 10 of the Evidence Act. This contention, however, seems to have no force; the planned crime (conspiracy included) would not come to an end till the loot is distributed; the ambit of the conspiracy was not merely to look out to invest the booty by making investments in the names of the conspirators. Sunil had told Public Witness 1 that along with V. Jaggi and Ravi they had decided to start some industry with that loot. The reference to V. Jaggi in Ex. P.W. I/R is yet another piece of material corroboration showing or tending to show the participation of V. Jaggi in the crime. Mr. Ram Jethmalani is, however, right in saying that Public Witness IR is only said to contain the names of the appellants and Public Witness 1 (even if Jaggi) there that can be said to refer to V. Jaggi in Sunil's hand and the other writings not being in Sunil's hand, what is seen in Ex. Public Witness I/R could not be said to be a complete statement. But this could make no real difference because Public Witness 1 has given full evidence concerning it and the importance of Ex. Public Witness 1R consists in the material corroboration in respect of the evidence of Public Witness 1 concerning their

participation, there having been no doubt that Public Witness 1 written in Ex. Public Witness I, the names of five of the accused, not even that of Kiran Singh-a 6th person whose name was written by Avtar Kishan. Mr. Kaira rightly contended that the writing of the names of only five persons, including himself by Sunil and the name of Kiran Singh having been written by Avtar Krishan Dawar, is significant because Sunil was only concerning himself about the persons who are parties to the conspiracy, as alleged by the prosecution, and was entering the names of those persons including V. Jaggi as persons in whose names investments are to be made as part of the arrangement for distributing the loot. The aim of the conspiracy was not merely to loot but invest it in the name of conspirators. According to Public Witness I, Sunil had stated that it had been decided to start some new industry, out of the looted amount, along with V. Jaggi and Ravi. After identifying Sri Krishan Dawar in court Public Witness 1 swore (page 170 Vol. IT):

WHILE Sunil and Sri Kishan Dawar were talking another uncle of Sunil i.e. Avtar Kishan Dawar came there. Sunil wrote out the amount of investment on the pad of Sri Krishan Dawar. Avtar Kishan Dawar also made out some writing on that pad paper. While leaving that place Sunil gave the brief case which he had brought along to Sri Krishan Dawar and said that the rupees fifty thousand were lying in the brief cases..

(235) It was in the same evening, at about 7.30 P.M' when Public Witness I, Ravi and Shahwar were sitting with a few of their friends at Kilol Cafeteria, Bhopal that the police seized a ten rupee note out of the said sum of Rs. 600 from Public Witness 1 vide Ex. Public Witness I/I), which contained the seal of the U.B.I. Public Witness 1 also identified the briefcase (Ex. P. 7) as the one which Sunil had handed over to Shri Krishan Dawar as noticed above. Read along with the evidence of Public Witness I whose evidence in this regard is materially supported as against Sunil by the said five names (of the culprit) being in the handwriting of Sunil there seems to be no force at all in the contention of Mr. Jethmalani that Ex. Public Witness 1[R could at best said to be only partial or, in any case, of not much use. This kind of supporting evidence seems to be what Lord Widgery, C.J., had in mind in .

(236) The further argument of Mr. Jethmalani that the addition of the name of Kiran Singh to the names of the five other culprits even assuming (Jaggi referred to therein V. Jaggi) destroys the case of conspiracy is also without force. It does not avail Mr. Jethmalani to rely upon the admission of Public Witness 1 (Vol. II, page 268) that V. Jaggi did not meet him after he had taken away the money from Delhi and that he had no discussion regarding the setting up of a factory with V. Jaggi. After the occurrence Public Witness 1 had himself spent considerable time with V. Jaggi, he had also travelled with V. Jaggi. Ravi and Sunil to Bhopal in Shahwar's jeep on 12/10/1973, the above admission, relied upon by Mr. Jethmalani, refers to the time that after the amount had been taken away from Delhi, which was on 17/10/1973.

(237) Mr. Jethmalani further criticised Public Witness I's evidence in general on a few minor particulars. They are as follows :- P.W.I's statement concerning the participation of V. Jaggi in August 1973 itself was not having been mentioned by him during his examination under S. 164 Cr. P.C. But it is not proper to attach any undue weight to a mere omission in a statement made under S. 164 Criminal Procedure Code ; it is not made after detailed questioning as unless it is so important when a person is, during his examination-in-chief in Court that he would not have failed to mention it of his own accord and even in that being examined by counsel. There is also the further circumstance that P. W. 1 himself was making a statement under S. 164 Criminal Procedure Code. in the circumstances which have been adverted to at length; these circumstances have at least some bearing on any omission of P. W.I to mention some more details at least. The above said statement by Public Witness I relating to what happened in August 1973 was merely one pertaining to Ravi having stated, in the presence of Shahwar and Sunil, that Sunil's friend V. Jaggi as well as Ravi would do some big work rather than indulge in small business of running a cafeteria or lifting of cars which they have been doing. This was only a statement of a general kind. The only importance lies in such a statement having been made in August 1973 itself. This is the earliest mention of the formation of a conspiracy, by P. W. I in this case.

(238) Mr. Jethmalani also urged that there had been a desperate search in this case to find out corroboration in respect of Public Witness I concerning the

participation of V. Jaggi. As the subsequent discussion will show this is no: a valid criticism. Even without Public Witness I giving the necessary details the police were subsequently able to unearth the concerned trunk call bills, the air travel documents, all of which involve V. Jaggi. This is something specially valuable for the prosecution case against V. Jaggi because this unmistakably shows, that Public Witness I was not merely speaking about the facts within a given framework already given to him by the prosecution or of details previously picked up by him the discovery of material connecting V. Jaggi with the crime subsequent to the examination of P. W. I can hardly be minimised by the kind of submissions the above kind-of a purely general nature.

(239) According to P. W. I on 23-9-1973 (Vol. II, page 15) Sunil came to the Hotel Bright in Shahwar's jeep brought from Bhopal-the jeep having been taken by Sunil the previous night-by which time Sunil, Ravi and Shahwar had shifted to a double bed room, from a single bed room which they had initially occupied, when Sunil told them that he and V. Jaggi had decided upon a scheme of looting the cash amounting to Rs. 50 to Rs. 60 lakhs was carried daily by the van of the U. B. I, Chandni Chowk to the Reserve Bank of India. Admittedly, V. Jaggi was not present at that time. But this does not make the statement inadmissible against V. Jaggi since it squarely falls within the purview of S. 10 of the Evidence Act. The only question to be considered therefore, is the weight to be attached to the testimony of P. W. I in general and concerning V. Jaggi's participation in particular. P. W. I's testimony cannot be brushed away, as Mr. Jethmalani sought to do, that P. W. I is only a mouth piece for the prosecution, especially against V. Jaggi. Mr. Jethmalani only sought to derive support from the statement which P. W. I had made when he was examined under S. 164 Criminal Procedure Code. (Vol. V. page 28) about Sunil having told them in the following manner:

I have got a scheme that a bank's van carried cash of about Rs. 50 to 60 (fifty to sixty) lakhs daily from its branch to the Reserve Bank and we have to loot it on its way.

(240) The only difference between P. W. I's statement in the trial court and that under Section 164 Criminal Procedure Code. is that whereas he had attributed the

said plan to Sunil and V. Jaggi in his statement under S. 164 Cr.P. C. P. W. had referred to Sunil alone having mentioned about his above-said scheme, not the joint scheme of Sunil and V. Jaggi- We have alluded to details being elicited from him in the manner it is done in examination-in chief in court. Moreover, if this difference stood in isolation, without more, there might be some substance in the above criticism of Mr. Jethmalani. But on a perusal of the statement under S. 164 Criminal Procedure Code. it is seen that P. W. 1 had also referred to the part played by V. Jaggi in detail, especially in fixing up hotel accommodation for the other three culprits, it was V. Jaggi who went out Along with Narender Aggarwal. P. W. 1 had not omitted to refer to V. Jaggi's participation in so many ways. It has also to be borne in mind that it was V. Jaggi who was able to get the information concerning the movement of the bank van and the amount of cash it carried everyday; this suggestion of the prosecution, however, could not be proved positively owing to the non-examination of Narender Aggarwal, an employee of the said Bank and stated to be a friend of V. Jaggi. Though the positive connection of Narender Aggarwal with the incident has not been proved (it would not be natural to expect that Aggarwal would own it) it is significant that P. W. 1 said, that when the party from Bhopal, including P. W. 1 Shahwar and Ravi went to V. Jaggi's office at 8.00 p.m. on 22/09/1973 they not only saw Narender Aggarwal but that P. W. 1 and Shahwar were introduced to V. Jaggi as well as Narender Aggarwal by Sunil.

(241) P. W. 1 had also referred to his submitting some applications to the court, of Shri R. L. Gupta at instance of V. Jaggi and Sunil, similarly his application (Ex. P. W. 1T) was due to threat by affected parties. The attempt of V. Jaggi to show that P. W. 1 had sought to black mail V. Jaggi and reliance on Ex. D. W. 23 (A has miserably failed as already explained at length. Mr. Kalra wished to reply upon such efforts made by the appellants as showing a defense pattern, with V. Jaggi at the core, to deceive the court and hence meriting adverse inference being drawn against all of those to the extent they or any of them did so. While any false defense including that of alibi, will not by itself show that the prosecution case as put forward is true, it seems permissible to draw certain adverse inferences on the basis of any deliberate effort to mislead the court. There has been recourse to forging signatures of the eyewitnesses, including that of P. W. 1 (especially of the

latter on Exts. Dw 23 A and 34A. On this point the following observations of Lord Widgery, C. J. in 'R. v. Turnbull (All England Law Reports (1976) 3 p. 549) seem well worth setting :

'Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons : an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury are satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward, that fabrication can provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was.

In setting out these guidelines for trial judges, which involve only changes of practice, not law, we have tried to follow the recommendations set out in the report which Lord Devlin's committee made to the Secretary of State for the Home Department in April 1976. We have not followed that report in using the phrase 'exceptional circumstances' to describe situations in which the risk of mistaken identification is reduced. In our judgment the use of such a phrase is likely to result in the build-up of case law as to what circumstances can properly be described as exceptional and what can not. Case law of this kind is likely to be a fetter on the administration of justice when so much depends on the quality of the evidence in each case. Quality is what matters in the end. In many cases the exceptional circumstances to which the report refers will provide evidence of good quality, but they may not; the converse is also true.

(242) A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if in the judgment of this court all the evidence the verdict is either unsatisfactory or unsafe. Having regard to public disquiet about the possibility of miscarriages of justice in this class of case, some explanation of the

jurisdiction of this court maybe opportun. That jurisdiction is statutory : we can do nomore than the Criminal Appeal Act 1968 authorises us todo. It does not authorise us to retry cases. It is for the juryin each case to decide which witnesses should be believed.On, matters of credibility this Court will only interferein three circumstances : first, if the jury has been misdirected as to how to assess the evidence; secondly, If there has been no direction at all when there should havebeen 'one; and. thirdly, if on, the whole of the evidencethe jury must have taken a perverse view of a witness, butthis is rare.'

(243) In the present case we have considered it fairer to the appellantsto steer clear of not drawing inference adverse to the appellantsfrom the many false suggestions that have been made on their behalfby their advisers, except to the extent to which they or any of themadopted the same as part of their defense.

(244) V. Jaggi's statement about his knowing Hooda and Brar when theywere in the Sherwood College but not being on good terms with themhas been made for the purpose of the defense in order to falsify, ifpossible, the evidence of P. W.I that he had seen V. Jaggi in theircompany. V. Jaggi's denial of want of a'ssocioation between himself,Shahwar and Ravi has also been made for the purpose of defense, IT is true, however, that he did not know P. W. I previously; P. W. Ihimself has said so. He had gone to the extent of falsely claiming thatP. W. I had sent him the letter Ex. V. J. I (Ex. D. W. 23A) demanding Rs. 50,000 from his father by way of black-mail and on threat ofimplicating him falsely. V. Jaggi had let in evidence of handwritingexperts to prove that the said letter was a genuine one and had beensent to him. He also let in the evidence of D. Ws 33 and 34 in, order toprove that P. W. I was in Bombay on the day of occurrence and thathe could not have been present along with them at Thompson Rooda; the time of occurrence. He also denied his having gone to Bhopalalong with P.W- 1 and Sunil by jeep on 1/10/1973 and havingbeen brought back by his father by air on the 3rd. inspire of denyingknowledge of any trunkcall made' to Bhopal on 1/10/1973 fromhis father's telephone number V. Jaggi subsequently examined his ownuncle (D. W. 18) admitting that such a call had been made but, fora different purpose, namely, of D. W. 18 alone proceeding to Bhopalto see a girl at Bhopal to get her married to V. Jaggi's brother J. Jaggiwho had come to India from Canada. There is also the

question of V. Jaggi and the other appellants having refused to take part in the identification parade arranged for December 18/19, 1973. In considering the truth of the prosecution case about V. Jaggi's participation in the crime all the above would be relevant and admissible for being considered against him under S. 8 of the Evidence Act. It will none the less bear repetition to state that we have endeavored our utmost to keep out of consideration to the extent possible some of the extreme and false suggestions put forward on his behalf except to the extent to which they became an essential part of his statement under S. 313 Cr. P. C. in particular and his defense in general, he even examined witnesses in his defense to substantiate some of them. Concerning his refusal to participate in the identification parade we consider that not only V. Jaggi, but also the other appellants were not justified in doing so. Unjustified refusal to participate in an identification parade may visit the persons who so refuse with adverse consequences. (Vide : 1974 CriLJ1171 already noticed). Regardless of this consideration (and which is of greater importance in this case) is the fact that this refusal led to the necessity of eye witnesses (P. Ws. 2 to 7) being assembled at the Dev Nagar police post on 25/12/1973 behind the police post and outside the view of the culprits until each one of them was called upon to identify those whom they had seen previously on the date of occurrence. The police do not appear to have taken any undue advantage of this situation; the same had not resulted in any of the eye-witnesses identifying anybody else in addition to those about whom they had given descriptive particulars.

(245) This also seems a convenient occasion to refer to the manner in which P.Ws. 2-7 are stated to have identified the culprits when they had seen Thompson Road and/or the secluded spot. This has a bearing on the prosecution against all the culprits and was commented upon by all the counsel who appeared for the appellants for this reason the criticism made by the counsel also, for convenience of treatment, would be referred to here.

(246) The question whether the mere pointing out by a witness of a culprit during the investigation even where it was a case of identification before a panch witness, arranged by the police but without completely dissociating themselves from the same is hit by S. 162 Criminal Procedure Code. (as a communication or a

statement made to the police despite the said identification being a mental act by reason, of mere pointing out) was answered in the affirmative by the Supreme Court in Ramkishan Mithanlal Sharma v. State of Bombay : 1955 CriLJ196 already noticed, while considering the legal positions that arise for decision in this case under S. 27 of the Evidence Act. Bhagwati J., speaking for the Court, differed from the Madras and Nagpur decisions and agreed with those of Calcutta and Bombay. The point the, at arises here different : whether a witness can depose before the court that he had identified a certain witness before the police at any particular place during investigation, as in this case at the Dev Nagar police post on 25/12/1973? There is judicial dicta (with which we agree) in support of the view that the same not being a statement to the police the bar of S. 162 Criminal Procedure Code. does not apply; the said bar would apply if the police officer told the court that the witness identified a certain culprit because that would be a statement (may be of mental act even by merely pointing out on a finger or some thing like that) which the witness made to the police officer that would be a statement by the witness to the police officer. For this last proposition it would be sufficient to cite only two cases, namely, Daryao Singh v. State : AIR 1952 All 59 and Surendra Dinda v. The Emperor 1947 Cri. L.J. 804. In the former case a tracker was allowed to give evidence before the court that he had been able to trace in the presence of the police the tracks of the culprit known to him.

(247) For this reason, therefore, all the statements which P.Ws. 2 to 7 made before the trial court, elicited in cross-examination, about their having identified the concerned appellant(s), would be admissible. It is not as if the concerned appellant(s) were even 'shown' to the witnesses; the observation of the learned Trial Judge (vide para 395) that they were 'shown' can not properly be regarded as a finding, as Mr. Garg wanted us to read it; it seems that it is only, at best, not a very accurate reading of the evidence. This may become clearer if what has been elicited from the concerned witnesses is briefly noticed.

(248) It was elicited from Public Witness I, during the cross-examination on behalf of Shahwar, that on 25/12/1973 some witnesses came and identified him and other : it was still further elicited from him, during the cross-examination of Sri Krishan Dawar (acquitted accused) that five bank employees had come and seen

him while he was in police custody out of whom only two or three identified him. A suggestion was made to P. W. 2 on behalf of Shahwar that the police 'showed' to accused persons by pointing out who was who: Public Witness 2 denied the suggestion. P. W. 2, however, asserted that he saw Sunil and Shahwar in the said police post that day but had not seen V. Jaggi or Ravi or P.W. 1 at the said police post. This only shows that he was not in a position to identify them. With reference to Public Witness 1 Public Witness 2 had said that he did not know Public Witness 1. It is worth repeating by way of emphasis that Public Witness 2 did not seek to identify any of the other appellants (not even Public Witness 1) except Sunil and Shahwar.

(249) P. W. 3, a peon of the Bank, had stated that he also went to Dev Nagar police post on that day along with Public Witness 2 and P.Ws. 4 to 6; they went there individually not 'all together'. They assembled there between 10.30 and 11.00 a.m. and were there till about 1.00 or 1.30 p.m. When he saw five persons including Sunil. In answer to a specific question put to him whether he had seen V. Jaggi he only stated that he recognised three persons at Dev Nagar police post out of five that were there. He was confronted with his prior statement to the police that he had been 'shown' five accused and he identified Ravi, Public Witness 1 and Shahwar. The recorded answer reads as follows :

ANSWER I was shown five accused persons and I identified the aforesaid three persons but I did not give their names. Their names were given by the police to me after I had pointed out. (Confronted with portion A to A of statement copy Ext. Public Witness 3/D-A-1 where three names are mentioned.)(Vol. II, p. 333)

(250) The manner in which P.Ws. 2 to 7 identified those, whom they could, being important, reference is made to this aspect, here, concerning all the appellants, including V. Jaggi.

(251) Yet another peon of the U.B.L, P-W. 4, also stated in cross-examination, that he identified three out of five persons at the Dev Nagar police post on 25/12/1973- Ravi and Sunil he identified during the trial as well. Though it was elicited from him that he was 'shown' the five accused persons out of whom he identified three- he also asserted that he did not mention their names but the names of those

three persons were mentioned to Turn by the police after he pointed them out. This gives us the feeling that the expression 'shown' was itself either used or understood somewhat loosely-especially by the police and the witnesses, but he denied the further suggestion that neither he nor his colleagues were at Bhopal from 11th December or that he was taken back by the police by air to Delhi on the 13th. Public Witness 4 admitted in cross-examination that he went to the Dev Nagar police post that day and that he had seen the accused there but he also added that they were with the police 'on the back side of the place where we were sitting and they were not visible from there'. A few minutes after he reached the police post (at about 10.30 a.m.) he met P-W. 142 but was only asked whether he had come to which he replied in the affirmative; there was no other talk. He did not see Sunil at that time; he saw Sunil at the post only later; he returned by about 1 or 1.15 p.m.

(252) When P. W. 5 went to the Kamla Market police station in the afternoon of the day of occurrence he saw P. Ws. 3 and 4 there between 1 and 2 p.m. He did not inquire then as to what happened to the driver he had no talk with them. Concerning what happened at the Dev Nagar police station on December 25, 1973, he was put the following questions to which he gave the following answer:

Q. To which officer did you report at the Police Post

A. Reaching there, I sat there and did not report to any officer. There was some person sitting there and he asked me and I told him that I had been called. I told him my name and also told him that I had come from the Union Bank of India.

Q. Which Police Officer showed you accused Sunil Batra at The police post?

A. It was Inspector Chopra.

Q. Was Sunil Batra shown to you at 1.30 and thereafter you were asked to go away-

A. It did not happen like that. When my turn came I was shown Sunil Batra and I identified him and then I did so in regard to others.

Q. At what time did your turn come?

A. I am not definite about that. It may be at about 12.00 or 12.30.

Q. Did you stay there at the Police Post thereafter to await that your other colleagues may be relieved?

A. No-1 waited for my turn and thereafter my statement was recorded and I went away.'

(253) Mr. B. L. Kaira has urged, and not without force, that there had been some kind of loose phraseology employed in the said questions and equally in recording them, even if they were not calculated to mislead the witness to which the answers were given in the aforesaid manner. In the whole context it does not appear that any particular person was shown to the 'appellants' by mentioning their names or identity; that does not appear to be either the spirit of the questions or of the answers, though some witnesses have reacted sharply to the expression 'shown' when it was employed in the questions addressed to them.

(254) For instance, P. W. 6, who said that he merely pointed out Sunil. He stated that he stayed in the police post for about an hour and had pointed out Sunil who was also asked whether the police 'showed' Shahwar and the boy with the beard (meaning P.W- 1) to him to which he replied that he 'identified them'. He had seen five culprits that day at the police post; at that time alone he learnt that there were five culprits; he also found then that one of them was a Sikh; after his pointing out he was told the names of the five culprits; before that he did not know their names. Public Witness 7 learnt about the name of Ravi only at the said police post on the said date from Public Witness 142; the name was mentioned to him after he was pointed out Ravi. There were five accused persons including Public Witness I but they were not mixed up with others.

(255) In the state of the above evidence there seems to be little force in the contention of Mr. R. K. Garg that the learned trial Judge had himself found that there was 'showing' of the culprits to the concerned witnesses. There is no other support for Mr. Garg's contention that what the learned Judge made the undermentioned doubts in paragraph 395 of his judgment; he was giving a finding that the culprits were 'shown' to the concerned witnesses.

AS regards the showing of the accused persons on 25/12/1973, by the -police it had a different intent and purpose than the holding of identification parade. The eye-witnesses were called to the police post and they saw the accused persons and their supplementary statements were recorded. The showing was -just an act of investigation. The accused persons were not previously known to the eye witnesses. Police wanted satisfaction that the persons who had been arrested were culprits. Still another reason was that five accused had been arrested while according to F.I.R. the number of culprits was only four.

(256) It does not appear to be correct to read the learned Judge's finding, as a fact, that any of the culprits was 'shown' to the concerned witnesses ; (this seems implicit in the language employed by the learned Judge -that the 'showing' was just an act of investigation. Properly understood it would mean that the learned Judge was only referring to the acquiring the needed satisfaction by the police concerning the persons who were arrested being the culprits -surely that satisfaction would not have been got by 'showing' the culprits to the concerned witnesses, if by that expression is meant that each and every culprit was 'introduced to (the concerned witnesses by name ; if this happened it might have 'been a real mockery. None of the witnesses have in fact said what Mr. Garg discussed. The evidence of the eye witnesses bearing on this aspect has been set out by us at some length in order to show that they had, by and large, stated that they first pointed out that the persons concerned, whose names were mentioned to them only after the concerned culprits had been pointed out by them.

(257) On a total view of this aspect it seems to us that the provision of this opportunity to P.Ws. 2 to 7, necessitated by the unjustified refusal of the appellants to participate in the identity parade, was not abused ; the concerned witnesses did not identify any more than those, concerning whom they had given such identifying particulars as they were able to.

(258) We have endeavored to set out the entire argument of Mr. Jethmalani on some of these aspects, even at the risk of some repetition in order to faithfully reflect to the extent possible the scope of his contention pertaining to V. Jaggi. The above discussion would show that material corroboration has been admitted

concerning Public Witness 1's evidence vis-a-vis the participation of V. Jaggi in the crime only in two material respects and not other is not correct. There have been many more pieces of corroboration in material respects; they undoubtedly show not only that Public Witness 1 is concerning the occurrence a truthful witness but that his evidence concerning the participation of each and every appellants is true.

(259) We may now notice the circumstances in which V. Jaggi came to be arrested. As a sequel to the interrogation of Sunil during the night between 11th and 12/12/1973 Public Witness 142 asked his senior police officials to take steps for the arrest of V. Jaggi at Delhi. Inspector Inder Raj Chopra (P.W. 101) was made responsible for the investigation to be conducted at Delhi along with some police officers who were directed to assist him. After directing Inspector Hira Singh (P.W. 127) to proceed to No. 27, Sunder Nagar for keeping surveillance there Public Witness 101 proceeded along with D.S.P. Jagdish Pershad Saxena (Not examined) to 27, Curzon Road, New Delhi, the residence of V. Jaggi's father. Finding nothing incriminating there they proceeded to 7/31 Daryaganj, Delhi. After searching a few lockers of some members of V. Jaggi's family S.I. Jagjit Singh (& examined) had already searched that place and found nothing incriminating. Public Witness 110 and party left 7/31 Daryaganj leaving word with Jagjit Singh to inform them by giving a ring at a particular place of the arrival of V. Jaggi and to keep a secret watch. On receipt of information concerning the arrival of V. Jaggi P.W. 101 had left to go with D.S.P. Saxena and found both V. Jaggi and his father HCD/78-10 at 7/31 Daryaganj. P. W. 101 arrested V. Jaggi after interrogating him at about 8 or 8.30 p.m. V. Jaggi was instructed to keep his face muffled and he did so. V. Jaggi was wearing spectacles at that time out of which he was before the court. Public Witness 101 instructed Inspector Shiv Darshan Lal (P.W. 116) to lodge him in the lock up of the Police Station, Original Road, Delhi. Public Witness 101 had verified that curtain was hanging outside the police lock up and also gave instructions to the sentry guard that V. Jaggi was not to be shown to any person. Next morning Public Witness 101 instructed Inspector Jagmal Singh (P.W. 117) to bring V. Jaggi from the police station lock up to the office of the Crime Branch. V. Jaggi was produced with his face so muffled. Public Witness 101 prepared an application (Ex. Public Witness 101/A) praying that V. Jaggi be kept in police custody till 20-10-1973 for the purpose of identification proceedings and that he may be, directed to keep his

face muffled. Ex. Public Witness IOI/A contains a note by Public Witness 101 [separately by marked Ex. P.W. IOI/A(I) to the following effect ; 'No sooner did the accused enter the court with his face muffled that he removed the muffler from his face'. Not only did Public Witness 101 bring the fact of V. Jaggi unmuffling his face on entering the court room of the Magistrate but also made a note to this effect in the application. It may be noticed that this application, in original, has remained with the police and has been filed by them later; it was not left with the Magistrate ; this was said to be due to a mistake V. Jaggi's father (M. L. Jaggi) appeared before the said Magistrate along with a few others and made an application (as per Ex. Public Witness IOI(B) on that very day refusing to be present at any identification parade on the ground that he had been shown to various persons by the police. On the same day, Public Witness 101 made an application as per Ex. Public Witness 101 C for remanding the accused to police custody for 14 days till 27-12-1973 since the accused refused to join the identification parade. That contained an endorsement'. (marked separately as Ex. Public Witness 101C requesting police remand. The Magistrate (Shri R. L. Gupta) passed an order as per Ex. Public Witness 99113 on the same day; police remand was granted till 20-12-1973. V. Jaggi 'was directed to be medically examined. It was pointed out on behalf of V. Jaggi that Ex. Public Witness , 99(E) does not reflect the fact of V. Jaggi having unmuffled his face in court or the same being brought to the notice of the Magistrate. This argument overlooks the point that remand, application itself (Ex. Public Witness .101/C) .specifically states as follows ; 'On entering the court the accused got his face unmuffled'. The public prosecutor, the cost clerk and police officials, V. Jaggi, his father and counsel were all present in court. Nothing significant turns upon 'Ex. Public Witness 101(1 having been mistakenly taken back from court and the same not being noticed ; thereafter ; it is not difficult to imagine how much excitement there should have been at that time in the court.

(260) It does not admit of much doubt that V. Jaggi was arrested at about 8 or 8.30 p.m. on 12/12/1973. Regarding the time of his arrest it was mentioned by his father in the application (Ex. P.W. 99jF) dated 13th, that V. Jaggi had been in police custody since 5 a.m. on 12/12/1973 ; V. Jaggi's application bearing the same date (Ex. Public Witness 10113) and refusing to join any identification parade, mentions

that he was taken from his house by the police at 5 a.m. on 12/12/1973. The suggestion to Inspector Inder Raj Chopra (P.W. 101) was that the time of arrest was 8.30 a.m. According to V. Jaggi's statement under S. 313 Criminal Procedure Code, he had been in police custody since 6.30 a.m.. On this question the most telling feature, however, is that in the order of the Magistrate of 13/12/1973, passed at about 3 p.m. Shri R. L. Gupta had mentioned that V. Jaggi had f.o be remanded to the police for interrogation (vide Ex. Public Witness 99jE) till 20/12/1973 because V. Jaggi had been arrested only less than 20 hours previously. The importance of this statement lies in the fact that the said order was passed in the presence of his counsel Shri P. P. Grover and after hearing him. It was explained by the learned Special Public Prosecutor that this order was passed at 3 p.m. on 13/12/1973 and hence is consistent with (perhaps makes out) the arrest of V. Jaggi the previous evening at about 8.30 p.m. in his house.

(261) This has a considerable bearing upon the possibility of Public Witness 1 having been seen by other witnesses in this case. As it was in the case of some other mutually conflicting suggestions by the various counsel for the accused in this important particular also the suggestion made to Public Witness 5, who was the first among the witnesses, who identified V. Jaggi in addition to P.Ws 6 and 7, was that Public Witness 5 had not attended office on 12th and 13/12/1973. It is seen that he had attended office on 12th; the attendance register for the 13th is said to be not available; he had asserted that he had attended his office both on December 12 and 13, 1973. In other words, he was not specifically asked whether the accused were shown to him on 12th and 13th December P.Ws 6 and 7, other two witnesses who identified V. Jaggi, were asked whether the accused were shown to them on 12th and 13th; they denied the suggestion. What is curious about this and similar suggestions is that the other accused had suggested to the concerned eye witnesses that they were at Bhopal on 12th and 13/12/1973 when V. Jaggi had been arrested and that all of them travelled from Bhopal to Delhi by plane on 13th December with the police.

THERE was no suggestion to Squadron Leader Tarlok Singh Dhaliwal (P.W. 88), who brought the accused (except V. Jaggi) from Bhopal in the Border Security Force plane piloted by him, that any of the witnesses travelled in the plane. Even

the suggestion bearing on the above aspect have been mutually destructive of each other.

(262) In order to make it appear that V. Jaggi's face was unmuffled when he was produced before the Additional Judicial Magistrate Shri R. L. Gupta on 13/12/1973, it was urged that the endorsement (Ex. Public Witness 101/A-1) on the application (Ex. Public Witness 101/A) for remand made by Inspector Inder Singh Chopra (P.W. 101) is a manipulation. But this suggestion is belied by Public Witness 101/C which is an application presented by Inspector T. C. Chopra (P.W. 142) for remand wherein also it has been stated that the accused (V. Jaggi) had got his face unmuffled on entering the court room. It has been explained to us by Mr. Kalra that the court of Shri R. L. Gupta was so constructed that from where the Magistrate was sitting he could not see the accused entering; therefore, he could not himself make any reference, in the order passed by him, to the accused unmuffling his face as he entered the court room. The truth of this version has to be tested therefore, only by reference to contemporaneous records other than the order of the Magistrate (P.W. 101). Public Witness 101/C is one such record which mentions that the accused had got his face unmuffled as he entered the court. No police officer of any experience would produce a person accused of a grave crime before a Magistrate without his face muffled. As part of efforts that appear to have been made on behalf of V. Jaggi, his father had gone the length of stating that even the remand papers pertaining to V. Jaggi were 'changed.' He had made a written application containing such allegations which were enquired into by the Chief Judicial Magistrate Shri K. B. Andley, who obtained the remarks of Shri Gupta on the said application (Ex. P-W.102/DB) ; the comments of Shri Gupta are contained in Ex. Public Witness 102/DC. Shri Gupta had been so careful to always ask the Ahlmad of his court to prepare whatever copy of records of this case as might be required by the accused in this case in his own chambers and under his supervision. All the false accusations made against Shri Gupta were denied by him ; there had been no tampering with the application filed into his court on 13-12-1973; he had looked into them again carefully and was sure that there had been no tampering with them; all the papers were in their proper places in the file; nothing was missing - there was no reference to any particular missing document. - Nothing had been changed. The allegations made against Shri

Gupta were of the wildest character; they were like those made against so many others; no one had been spared. It is really unfortunate that such an extreme attitude had been taken. We have taken the utmost care to ensure that the case against V. Jaggi is in no way prejudiced because of such unfortunate measures resorted to in such a reckless manner, taken on his behalf. Mr. Kalra was indeed so fair as to omit, on our suggestion, any reference to such wild accusations, except to any repeated before us also.

(263) Advantage was also sought to be taken of the fact that the date put by Public Witness 101 on the endorsement (Ex. Public Witness 101/A-1) on the application Ex. Public Witness 101, looks like 17-12-1974 instead of 1973, (as we see it is). We have examined this carefully. It seems to us that having regard to the manner in which P.W. 101 writes '3' it is only 1973 and not 1974. But Public Witness 142 had subscribed to an application in the Supreme Court when V. Jaggi had applied for a transfer of this case outside Delhi. Therein Public Witness 142 had said : 'I say that the date mentioned there under by the Investigating Officer (P.W. 101) was by way of slip of pen mentioned as 13-12-1974 instead of 13-12-1973'. This may be the way Public Witness 142 read it then ; but that has no impact whatever on what we see it is. The suggestion regarding this aspect, which P.W. 101 denied, was made in the following specific manner: 'Question : I suggest to you that remand from Ex. Public Witness 101/A was not the Remand Form which was submitted by you before the Additional Chief Judicial Magistrate. I also suggest to you that the remand form which was submitted and which bore the order of the Magistrate and on which there was no mention of Vipin Jaggi being with a covered face or that Vipin Jaggi uncovered his face while entering the court-room had been destroyed by you?

(264) It seems needless to be concerned with this criticism any more than we have done. Having anxiously considered it we find that the above accusations, made on behalf of V. Jaggi and by him are without any force whatever. The concerned papers in this respect which were produced before the trial court were only those from the file of the Magistrate ; they were not kept by the police privately. In the above light a reading of the order of Shri Gupta (Ex. Public Witness 99/E) on 13/12/1973 remanding Vipin Jaggi to police custody shows that though this order

was passed on a separate sheet of paper by him, there could have been nothing sinister about it unless Shri Gupta himself was a party to any such ugly effort; it is not stated that he passed some other order and that the same was also substituted the only relieving feature is that none of the extreme allegations involve Shri Gupta himself.

(265) A La Mode Mr. Jethmalam, Mr. Garg also referred to 24 points of reference to Shahwar by Public Witness I, but not with any more success. It seems needless to refer to them all for most of them are included in the points discussed already where reference to Shahwar was also made.

(266) The discussion regarding Shahwar will, therefore, be confined only to those not covered by the earlier discussion. Public Witness I had referred to all of them (except V. Jaggi) leaving for Delhi in Shahwar's jeep bearing No. MPB 9828 on the night of September 21/22, 1973 till returning with Shahwar and Sunil on 1/10/1973. Having regard to the fact that there is other evidence concerning the jeep being at Delhi at about this time, including its repair by Public Witness 15 and servicing at Esso Service Station, Mr. Garg wanted to concentrate more upon the part actually attributed to Shahwar rather than the use of the jeep itself. The recovery of the jeep from his house is not a very serious question; nor is the title to the jeep. The use of the jeep, therefore, would be an important circumstance tending to connect Shahwar who was indisputably in possession whether he was the owner or not) with the crime.

(267) P.W.1 used to meet Sunil, Ravi and Shankar at the Kilol Park Cafeteria at Bhopal. Shahwar was also present when Ravi told Public Witness I, time in August, 1973, about some of the schemes of Sunil to smuggle wheat or rice or loot a jewellery shop or bank, in the presence of Sunil. Public Witness 1 also gave evidence about Shahwar managing a pistol and his standing outside Public Witness 67's house when Public Witness 1 went there to obtain a revolver. Public Witness 1 had referred to Shahwar driving his jeep on September 21/22, 1973; at the Chambal river ferry an entry was made (vide Ex. Public Witness 77/B) disclosing the number of the jeep and Shahwar as driver. This jeep was recovered from Shahwar's approach under Ex. Public Witness 98/C on 12/12/1973. The said

jeep had been serviced in the Esso Service Station at Delhi on 25/09/1973 where Sunil's Ambassador car (Ex. P. 12) was also serviced on an earlier date (30/08/1973); the same address No. 27 Sunder Nagar, was given in respect of both the spring leaf of the jeep was changed at Delhi on 30/09/1973 by Public Witness 15. On the return journey another entry was made in the Chambal ferry on 2/10/1973 in respect of that jeep with Sunil's name noted therein as driver (vide Ex. Public Witness 72/A.1). Shahwar had himself applied for return of that jeep on superdari to his brother Waqar Mohd. Khan under Ex. Public Witness 142/K; yet Shahwar made a vain attempt to deny his signature in Ex. Public Witness 142/K despite the said application having been not only presented to court but also argued by his lawyer.

(268) P. W. I had sworn that Shahwar also was present when Ravi made an entry in the hotel Bright as per Ex. Public Witness 1/L.I. mentioning the fact of Shahwar also staying in that hotel under the assumed name of Ashok Bhargav; Public Witness 97 found for very good reasons, with which the learned trial Judge agreed, and we also, on the basis of our own comparison of the same with sample and proved writing agree, that it is in the handwriting of Ravi, despite Ravi denying his handwriting therein. Shahwar had managed the pistol (Ex. P. 8) according to Public Witness 1 (it is not known by whom) and the same was brought to Delhi. In view of Mr. Kalra's concession this is not important by itself. As a result of the disclosure statement of Shahwar (Ex.. Public Witness 82/H) made on 12/12/1973 Public Witness I, already noticed, took Public Witness 107 to the house of P.Ws. 67 and 34 for pointing out the revolver (Ex. P. 9), with 23 cartridges, which were taken into possession vide Ex. Public Witness 34/B. It was seen that there is clinching evidence about the two crime bullets used in this case to kill the gunman and the driver of the bank van. We have also explained how Ex. P. 9 is proved to have been taken from Public Witness 67 by Public Witness 1. This establishes that Public Witness 1 was himself involved in the planning, preparation and execution of this plan. So far as Shahwar is concerned his participation is made out by the corroboration Public Witness I's evidence receives in respect of not only the jeep being seized from his porch (which may be in the view most favorable to him may be one jointly owned or even possessed by himself and the members of his family) but also by the jeep having left for Delhi on September 21/22/1973 and coming

back to Bhopal on 11/10/1973, as spoken to by Public Witness 1, it is also supported by the ferry records, which were seized by the police later than Public Witness 1's examination, and the records pertaining to the servicing of the same at the Delhi Esso Service Station on 25/09/1973 in which the car (Ex. P. 12) had also been serviced (this is in addition to the spring leaf being changed by P.W. 1 on 5/09/1973). These are undoubtedly strong pieces of corroboration in respect of Public Witness 1's evidence, which show that the jeep was used at Delhi on 23/09/1973 (for Public Witness 1, Ravi, Sunil and Shahwar going to U.B.I. Chandni Chowk) as well as for going to the Shahi Andaz Restaurant on September 24 for their going again to the U.B.I. Chandni Chowk. On the next day all of them going to V. Jaggi's house, for Public Witness 1's going to Public Witness 33's house on the night of September 24 to Ramble the same night with Public Witness 33, to V. Jaggi's office the next day and for Public Witness 1 to go to Public Witness 33 once again on the night of 29th. Regarding the visits to the U.B.I. Chandni Chowk, there is the confirmatory evidence in the shape of the bank records concerning sending cash in the van on the relevant dates. Beyond these, the jeep did not by itself play any part in the occurrence itself or to dispose of the loot or incriminating or blood stained articles involved in this case. The reference herein to the jeep is only for showing that there is the confirmatory evidence available in this respect to the evidence of Public Witness 1.

(269) Mr. Garg referred to the discrepancy in the evidence pertaining to the recovery of the revolver which has been proved to have been used by S. 164 Criminal Procedure Code. Public Witness 1 had stated that on 21/09/1973 he and Shahwar had gone to Public Witness 67's residence and having borrowed Ex. P. 9 belonging to Public Witness 34; he gave it to Ravi, who arranged for 23 cartridges from Shah Armoury, Bhopal; while nothing had been stated earlier about where Shahwar was at that time. Public Witness 1 stated at the trial that he was standing outside Public Witness 67's house. This is in consonance with Public Witness 67's evidence that Public Witness 1 had come to him; he did not mention about Shahwar. The seizure of Ex. P. 9 from Public Witness 34 by Public Witness 10 on 7/12/1973 (with cartridges was made under a memo Ex. Public Witness 34/B, which bears the attestation of a Bhopal Advocate, Shri Dhanajay Singh (P.W. 81). The evidence of P.W. 81, 34 and 67 not being

open to question the only further point for consideration is whether Shahwar was connected with this in any manner. The broad fact is that Public Witness 142 had questioned Shahwar earlier than P.W. 1 on this aspect and had lost no time in getting it recovered from P.W. 34 and 67; this was the most significant gain in the case; what is also of importance is that the recovery of Ex. P. 9 was in the wake of Ex. P. 8 (pistol) having been taken from Shahwar's steel almirah in his residence on the same night earlier, after Shahwar himself had made a disclosure statement concerning it. The fact that for various reasons, mostly technical, it has become necessary to set aside the conviction of Shahwar under the Arms Act vis-a-vis the pistol (Ex. P. 8) or even the fact that there is no evidence that it was actually used at the time of the occurrence despite the same being brought to Delhi for at least being used for scaring away people will have no adverse impact on the evidence of Public Witness 1. On the other hand, Public Witness 1's evidence does receive corroboration from the evidence pertaining to the pistol. From the point of view of the progress of the investigation the recovery of the pistol (the fire-arm believed to have been procured for committing the crime) and the recovery soon thereafter of the weapon of offence Ex. P. 9 were important. The subsequent statement of Public Witness 1 to Public Witness 142/12/1973/Ex. Public Witness 1/DA-2), that when questioned earlier he had kept 'one thing secret' was obviously a reference to Public Witness 1 having stated only about Ex. P. 9 but not about Public Witness 33, whose evidence was also important. It is on this point that Mr. Garg urged that the police officer interrogating an accused person should note down 'all' that he said and could not choose to record only what he liked, but Mr. Kair referred us to Rule 25.53 of the Punjab Police Rules which seems to visualise a record having to be made of only major events leading to the progress of the investigation. We do not feel called upon to pursue this aspect further in this case because it seems to us that when an accused (as distinct from witnesses) is being interrogated, especially at the commencement of the investigation, it may not be necessary to record 'all' that the accused says except to the extent to which it may help further the investigation. Disclosure statements under S. 27 of the Evidence Act have necessarily to be recorded: recoveries made in pursuance thereof have also to be noticed. In appreciating the evidence of P.W- 142 on this point it seems necessary to remember that Public Witness 1 was then being interrogated as an accused person

and not as a witness in the cafe. Our own perusal of the case diary for the relevant period does not indicate that Public Witness 1 was treated any differently from the other accused who were also being interrogated. On the night of December 11/12, 1973 the task of interrogation of the accused and recording of discovery statements from them was distributed to different police officers, especially in this situation it may not be proper to expect that every one of those officers should record every thing that each accused stated; the concentration then was on making as much progress with the investigation as possible. All the four of them being arrested, the personal searches yielding stolen money as noticed already, gave the investigating officers a dynamic opportunity, which was not to be frittered away by mere preoccupation with recording long statements or whatever the accused stated without making such further progress in the investigation as seems to have been possible that night; there was sufficient time later to do all this, for verifying the investigation and checking the evidence in the light of what they stated. More than everything not all of them might have even been in a mood to state everything freely at the first blush; whatever they stated the same would also have to be verified. There is no substance in the criticism that the record of the interrogation of Public Witness 1 on the night of 11th/12th was not kept; the disclosure statements had been recorded from him then.

(270) P.W. 1 had gone into several details pertaining to how the planning was done: he had said in particular that Shahwar was to shoot the gunman, but Shahwar developed cold feet on the eve of the occurrence whereupon Sunil took it upon himself. We find that even Ravi, who was given the task of snatching the gunman, did not do so. Shahwar was at least to snatch the keys from the van from the driver and drive away the van; even here Shahwar failed, necessitating Sunil's intervention. P.W.'s 5 and 6 had seen the driver catching hold of the hand of Shahwar; probably this was at a slightly later stage of the occurrence we do not know sufficiently.

(271) The participation of Shahwar is spoken to by Public Witness 1. It was seen that there is ample corroboration in the shape of Shahwar's disclosure made on 12/12/1973, which led to the recovery of the pistol (Ex- P.8) from the steel almirah in Shahwar's house in Bare Mahal, Shahjahanabad, Bhopal by opening the

same with the key which was kept concealed under the bedding of his cot (as per Ex. Public Witness 82/K) as well as P. W. I himself having been contacted after Shahwar made the disclosure (as per Ex. Public Witness 82/H) and Public Witness 1 later on taking P.W. 142 to Public Witness 34 and 67 resulting in the recovery of the revolver (Ex. P. 9) with the bullets. The disclosure statement (Ex. Public Witness 82/K) also refers to Shahwar's 'own' jeep Mpb 9828 also being in the said house ; the same was seized by the police the same night. Mr. R. K. Garg, learned counsel for Shahwar, contended that it had not been satisfactorily proved, at least beyond reasonable doubt, that Shahwar used the said jeep in connection with the perpetration of the crime; the jeep as such was not used for commission of the crime. He went on further to say that it has not been proved that the jeep itself was in his possession. The question of the title to the jeep itself is not in question ; the registration certificate of Ex. P. 14 shows that it was the name of Mrs. Badre-ealam but the previous discussion itself shows that Shahwar had applied to the court (vide Ex. Public Witness 142/K dated 13-2-74) for delivering the jeep on superdari to his brother Waqar Mohd. Khan. The effect of Shahwar to go back even upon his having so applied (Ex. Public Witness 142/K) has already been considered in detail. The above itself is sufficient to show, unless Shahwar succeeds in proving the contrary, that he was in possession of the said jeep. In fact, in the disclosure statement (Ex. P.W. 82/K) Shahwar had gone the length of claiming the jeep as his own. but the question of title to the jeep is not important. It was also noticed that on the night of September 21/22, 1973, according to the evidence of Public Witness I, he (P.W. 1) had left along with Shahwar and Ravi for Delhi in that jeep and that they had crossed the Chambal ravine by a ferry bridge where Ravi had caused an entry (Ex. Public Witness 77/B) made at the check-post in the morning. Public Witness 1 had stated that Shahwar was driving the jeep at this time and that it was Ravi who gave this information at the check post. The number of jeep has been mentioned in the said entry. The only mistake that was made in writing the name of Shahwar, which was given by Ravi was that 'Savadh' was written initially but 'dh' was scored out and 'r' was written in its place. It seems to us that this was just an innocent mistake which had probably happened in the act of the name being written by a person who was obviously not familiar with the said name- 'Sa' for 'Sha' was probably the usual manner of writing in that

area. That the said jeep was used for going to Delhi from Bhopal; that the said jeep was also brought back to Bhopal from Delhi is also confirmed by the entries made at the ferry check post; the relevant entry (enroute to Bhopal) was made on the morning of 2/10/1973. Sunil was driving the jeep then and the same jeep number has been mentioned in the said entry (Ex. Public Witness 72/A) the name of the driver of the jeep was mentioned as Batra. It matters little for the purpose of this case that names of the owner of the jeep in the two ferry records while going and coming back do not tally; they would have been entered as given out. The number of the jeep found in both the entries do not have any perceptible difference in the ink or manner of writing the number of the jeep in the two vouchers; it seems fair to infer that the said entries related to this jeep itself. Having regard to the fact that both these documents were recovered by the police at a time when even the persons who wrote these entries were not there and the further fact that some of the ferry officials of Madhya Pradesh need not be obliged to bring about forged documents merely for the purpose of this case Public Witness 1's evidence of this particular concerning the jeep being used for going to Delhi from Bhopal and back to Bhopal from Delhi, as spoken to by him, receives material corroboration. More corroboration in respect of the evidence to be found on this aspect, of the use of the jeep is to be had from Public Witness 33 who said that Public Witness 1 had gone to his house on the night of 28th and on the following night in a jeep having a Madhya Pradesh Registration number. The desperate attempt made on behalf of Shahwar was to show that the jeep itself did not belong to him or that it was not even in his possession, which is contrary to the facts proved (or even admitted) in this case.

(272) An even more extreme effort by him was to say that he did not even live in Nawab Manzil but that he was living only in Bare Mahal since 1970 (vide answer to Q. 220). But it is seen from the evidence of Yoginder Nath (P.W. 78) that in the driving license of Shahwar which was issued on 30/01/1971 and valid until 29/01/1974, Shahwar had been shown as resident of Nawab Manzil, Bhopal. He identified the handwriting of those who made the entries, of which Ex. P.W. 78/A was a true copy. The important fact to notice is that whereas no cross-examination by Shahwar of Public Witness 78 concerning this fact. Even regarding the statements made in the disclosures recorded from him (Ex. Public Witness 82/H

and K) the suggestions made to the concerned witnesses was that he had signed them when he was in a dazed condition ; when he was questioned under S. 313 Criminal Procedure Code. there was a distinct change, namely, that his signatures had been obtained on a blank paper The participation of every one of them including Shahwar as spoke) to by Public Witness 1, has been amply corroborated.

(273) After the arguments on the appeals were heard at great length commencing from 11/11/1977 (and heard continuously thereafter by this Bench on all the days it sat) Cr. Misc. 84/78 dated 17-1-78 and Cr- Misc. 110 of 1978 hearing date 23-1-1978 were filed on behalf of Shahwar.

(274) In the former application (Cr. Misc. 84 of 1978) it was prayed that additional evidence may be taken as mentioned in paragraphs 8 and 11 of the application. In paragraph 8, the following documents were mentioned as having to be summoned in order to test the credibility of the police witnesses and the only public witness Girdhar (P.W. 82):

(I) The general diary entries in police stations and outposts visited by Shri Yusuf Rahim, Dig, Shri Ashok Patel, Sp, Avtar Singh, Deputy S.P., Shri Tek Chand Chopra, Inspector and his other colleagues during the period December 5 to December 12.

(II) Copies of general diaries maintained on 12/12/1973, at police post Gandhi Nagar, especially the entries relating to arrival of the police officers with the arrested persons and the entries relating to memos, based on personal search and seizure, and departures of respective police officers from police outpost Gandhi Nagar for execution of search warrants obtained in Delhi.

(III) Entries made in police station Shahjahanabad for departure for recoveries at Nawab Manzil and entries relating to return after recoveries made at Nawab Manzil and other places in which search warrants had been obtained.

(IV) Records of police messages exchanged on December 11 and 12 between Bhopal and Delhi leading to the arrest of Vipin Jaggi.

(V) Record of entries made in relation to police officers leaving by jeep and other vehicles from Bhopal to Delhi supported by T.A. Bills submitted by them for journey performed between Delhi, and Bhopal.

(VI) Bills for expenditure involved by the police investigating this case between December 5 and December 25.'

(275) In paragraph 11 it was mentioned that the said general diary of police Station Lock Up Parliament Street dated 14-3-1974 may be i. Is summoned. This was said to relate to Public Witness I's interview with his lawyer Shri B. D. Batra on that day.

(276) By the latter application (Crl. Misc. 110 of 1978) a prayer was made to summon Sarvashri Yusuf Rahim (DIG), Ashok Patel (SP) and Avtar Singh (Dy.S.P.) as court witnesses with opportunity to cross-examine them.

(277) It is not mentioned in either of these applications that the appellant Shahwar did not have any opportunity of summoning or adducing the additional evidence as now sought. On the other hand, it has been pointed out in the reply dated 30-1-1978 filed by Mr. B. L. Kalra, Special Public Prosecutor for the State (in Crl. Misc-84 of 1978) that the facts which are now being challenged by Shahwar were never questioned during the trial. The importance of the said allegation consists in the fact that even though a rejoinder was filed on behalf of the appellant Shahwar the said allegation, concerning the facts now challenged not being disputed at the trial has not been controverted. Nor was any oral submission made to us in this respect.

(278) Before dealing with the averments in the two applications it may be convenient to note what has been admitted in the said replies filed by Mr. Kalra to both these applications:

REPLY to Cr. Misc. 110/78 :

(1) There was no information with the police about the complicity of V. Jaggi on the 5th and 6/12/1973

(2) Against other appellants there was Only credible information which was verified by Sarvashri Ashok Patel, AvtarSingh (D.W. 14) and Public Witness 142. The case diaries for the entire period from 28/09/1973, to 6/12/1973 had been produced into Court. Whenever needed they were not only pursued but also explained to us by Mr. Kalra. Whatever evidence was necessary to unfold the prosecution version was brought on record; any other material, desire of the defense, could be brought out by the defense during cross-examination.

(3) The case diary was maintained according to the Punjab Police Rules as applicable to Delhi and were complied with as far as possible, except to the extent that some entries in the general diaries at Bhopal were not made on some occasions in order to maintain secrecy.

(4) The senior Police officers used to interrogate the culprits some times 'to verify' the investigation; they are not supposed to record such interrogations or to write a case diary. P.W. 1 himself had admitted that he was interrogated by the said police officers, though not repeated as alleged by appellant Shahwar. The accused were not shown to the witnesses to facilitate their later identification as alleged by the appellant. P.W. 142, the chief investigating officer in this case, was examined and cross-examined at length. The superior police officers Mr. Ashok Patel (SP) and Mr. Avtar Singh (D.S.P.) did not conduct any independent investigation or record the statement of any witness.

(5) It has been rightly pointed out in the reply filed by Mr. Kalra that so far as Mr. Avtar Singh (DSP) is concerned he has himself appeared as a defense witness (DW 14) on the request of V. Jaggi, but he was not put any question, on the lines contended on behalf of Shahwar or any other appellant; there was no cross-examination on their behalf. The prosecution closed its evidence in the trial court on 25/05/1976; the examination of all the accused was concluded on 2/06/1976; thereupon the accused had entered upon their defense and the defense evidence was closed on 21/08/1976. Appellant Shahwar produced only 2 defense witnesses and closed his defense without any prayer to summon either Mr. Yusuf Rahim (DIG) or Mr. Ashok Patel (SP).

(279) Reply to Cr. Misc. 84/78 -: the following admissions have been made by Mr. Kalra.

(1) No entry whatsoever was made by any Delhi Police Officer (Gazetted or non-Gazetted) at Bhopal between 5/12/1973, and D 10/12/1973 ; it was a precaution to keep the movement secret.

(2) Up to mid-night of 11/12/1973 only one entry was made at the police station Talliyan, Bhopal under orders of Officer in charge A.R. Sublok (P.W- 111), concerning which entry he has given evidence; there has been no cross-examination regarding this matter.

(3) Thereafter entries were made in the general diary of The police station, on December 12 and 13. 1973 which have also been proved in the case (no specific questions or suggestions had been made concerning such entries; they were not asked to be produced.

(4) An entry has been made at the police station Shahjahanabad by S. I. Babu Ram (P.W. 115) after recovery of jeep No. MPB 9828 and the pistol (Ex. P. 8) at the instance of and from the possession of Shahwar.

(5) After the recovery of Rs. 50,000 from Shri Krishan Dawar's office and Rs. 65,000 from Sunil's locker from the Canara Bank, Bhopal, entries were made at the police station Jahangirabad on December 12 & 13, 1973. It was specifically stated that the copies of these entries were available with the investigating agency and could be perused by the appellant's counsel. This matter was not pursued further nor was any submission made to us on behalf of Shahwar, in this respect.

(6) No entry was made in the general diary of the police post Gandhi Nagar, Bhopal at any time, a fact which P.W. 142 has already deposed at the trial regarding which no suggestion to the contrary has been made.

(7) No departure entry from Shahjahanabad by S.I. Babu Ram (P.W. 115) has been made since according to his own evidence he did not go inside the police station. After the recovery of the jeep and pistol an entry was made at that Police station; entries were made at the police station Talliyan and Jahangirabad as stated above.

(8) No wireless messages were exchanged between Delhi and Bhopal police officers concerning the arrest of V. Jaggi. In order to keep it secret some police officers of Delhi used a telephone installed at the house of a private party commanding his confidence (the sources were not disclosed and disclosure of them could not be insisted upon).

(9) No entry about the Gazetted police officers was made at Bhopal, as the same was not required to be made. The departure of the accused and police officers was made in the general diary of police station Tallian which has been proved in the case.

(280) Since a reference was made in the appellant's petition (Cr. Misc. 84 of 1978) for the production of T. A. bills of the concerned officers, the reply of Mr. Kalra is that the records are maintained by the Accounts Branch.

(281) As already noticed no entries could be expected to be made between December 5 and December 10, 1973 because the police were only carrying on some secret investigations. The entire purpose would be frustrated by making any entry in any general diary of any police station at Bhopal. This was expressly admitted by Public Witness 142 when he stated that they did not even make an entry concerning his arrival at Bhopal on 5/12/1973, he further admitted that on the 5th and 6th he had not visited any police station or entered appearance in any court; he had not even contacted any police officer at Bhopal; he had been making inquiries under the supervision of Superintendent of Police Ashok Patel. He categorically denied that it was incumbent on him to get his presence in the State of Madhya Pradesh recorded at any of the police stations. The documentary proof regarding his visit to Bhopal on 5th and 6th, in reply to questions put to him in this behalf he stated, were similar, copies of which he had been submitted to superior officers in the usual course. An entry had been got recorded at 6.45 P.M. by the Town Inspector of Kotwali Bhopal (Sublok Public Witness 111) on 11/12/1973 concerning the help which D.S.P. of Delhi Avtar Singh had asked in connection with this case. P.W. 111 along with two other Constables joined D.S.P. Avtar Singh and had also directed the Head Constable Moharrir to make an entry in the daily diary regarding their departure. Public Witness 111 had himself not known

even the (identity of Ashok Patel, S. P. previously; he was informed about his identity only when he met him on the road. The entry which Public Witness 111 thus got recorded in his police station through the Moharrir was to the effect that he was accompanying Dsp Avtar Singh. Public Witness 111 also had spoken about the practice obtaining in his station, namely, that no entries were made in the daily diary when another police station is visited in the same city or on leaving the station; there was a rule regarding entries to be made at other police stations in the same city; entries were made only concerning the arrival and departure at the police station of each police officer. There is also a similar provision (Rule 1.13) in the Punjab Police Rules, which defines an enrolled police officer as including Inspectors and downwards, but not gazetted officers. Rule 22.49 (c) of the said Rules requires that the arrival and departure on duty at or from the police station of all 'enrolled police officers' or whatever rank whether posted at the police station or elsewhere, is to be recorded with a statement of the nature of their duty. This entry is to be made immediately on arrival or prior to the departure of the officer concerned. Such a practice of non-gazetted officers is also in vogue in Madhya Pradesh as admitted by Public Witness 111. Public Witness 111 denied the specific suggestion made to him that details of places visited are required to be made in the daily diary. In accordance with practice Public Witness 111 had, when he returned, made an entry in the daily diary of the police station at the time of his arrival but did not mention the places which he had visited like the visit to the house of Ravi etc. He returned to his police station at 6.30 A.M. on December 12, 1973- this entry was also got recorded through the Head Constable Mohamr. Public Witness 111 had got it confirmed that it was made but it was not signed by him since there was no such requirement, Public Witness 111 also stated that if some police officers from outside the state approached him for help he was required to make an entry in the daily diary in his own hand-writing. There has been no basis at all for any of the suggestions of the above kind made to Public Witness 111 on behalf of the defense. Even when Public Witness 111 was asked as to whether the departure entry directed to be made by him on 11/12/1973 was timed as 6.45 or 7 or 7.50. Public Witness 111 stated that he could not mention it without referring to the entry. He could not state the exact time mentioned in the entry without seeing it. He was asked whether the daily diary was destroyed after some time to which he

replied that he thought it was liable to be destroyed after three years.

(282) P.W. 142 had stated that no entry was made at the police post Gandhi Nagar. It was Babu Ram (P.W. 115) who had caused the entry to be made in the daily diary of the police station Talliya at 6.30 A.M. on 12/12/1973 ; Ex. Public Witness 37/A is a translation of that entry at Sr. No. 1094 concerning the lock up of the four accused persons (P.W. 1 and the other appellants except V. Jaggi). The recoveries made were entered as having been deposited in the malkhana of the said police station after being duly sealed. A criticism was, however, made that details of the property had not been mentioned therein to which Mr. Kalra has given an appropriate reply, namely, that as would appear from Ex. Public Witness 37/D the entry of the general diary of 13/12/1973 of the same police station concerning the said properties being taken out for being carried to Delhi at 12 Noon, these were described as comprising currency notes etc. which had been deposited in the malkhana as property in trust (amanat).

(283) After recovering the pistol and the jeep No. Mpb 9828 from Shahwar under Ex. Public Witness 98/C Babu Ram (P.W. 115) recorded the statements of H.C. Kidar Pandey (P.W. 98), who had attested Ex. P.W. 98/A along with Phool Chand Jain; Public Witness 15 examined the said Phool Chand Jain also under S. 161 Criminal Procedure Code. At that stage Public Witness 98 left for police station Shahjahanabad. with the ruqa. These were deposited in the said police station as amanat. No entry, however, was made at the said police station in regard to Shahwar because Shahwar was standing outside the police station and from there the police party was led by Shahwar. It is significant that there has been no request made to the trial court to have sent for general diaries) of any of these police stations other than the entries concerning which had been exhibited in the case. It is already noticed that Dsp Avatar Singh was examined as a defense witness by V. Jaggi and no question had been put to him on behalf of any of the appellants including Shahwar who has made these two applications. It has been explained by Mr. Kalra that there was no lock up at Gandhi Nagar, it being only a police post; there was also no midkhana there. Both the malkhana as well as the provision for lock up were available at police station Talliya. Hence it is that entries concerning the lock up as well as the deposit of properties at police station Talliya

were not only made but exhibited before the trial court.

(284) No such roving inquiry could be made for the first time in this appeal especially when no such questions were even put concerning them at the trial. The expenditure incurred for the purchase of fuel for use of government vehicle which was taken to Bhopal is stated to be on record. No attention, however, was paid to this aspect.

(285) Regarding the allegation that one Mr. B.D. Batra, Advocate ever interviewed Public Witness 1 in the judicial lock up at police station Parliament Street, New Delhi on 14-3-1974, it is stated that the same is not within the knowledge of the prosecution. It is further stated that the daily diary of that date was destroyed on 7/02/1977. Mr. Garg could derive no assistance whatever from the decision of the Supreme Court in *Habeeb Mohammad v. The State of Hyderabad* : [1954] 1 SCR 475 because in that case the Supreme Court had only commented upon the absence of examination of an important eye witness, a top ranking police officer, who was present at the scene and had given orders for firing. The present is not a case of that description—it is totally different.

(286) It only remains for us to notice the prayer, of an unusual kind, to pass an order on these applications for additional evidence even before completing the hearing or proceeding to judgment. It is only necessary to recall the higher belated stage when this application was made in this Court to appreciate the above—as we consider it unusual request.

(287) We considered it proper to consider those applications also. Along with the other contentions made on the merits in the appeals and we do not feel any necessity to summon any officer or record, as suggested. The request, as we said, is to make a roving inquiry for the purpose, as it was explained orally to us by Mr. Garg, to test the 'honesty' (as he called it) of the investigation. It is needless to mention that, as pointed out by the Supreme Court repeatedly *vide Aher*, it is not for the court to presume dishonesty on the part of the police.

(288) The arguments which Mr. Garg advanced, even on the basis of the assumptions made in the replies made by Mr. Kalra, do not seem to carry on any

further especially in the light of the Punjab Police Rules, referred to above, as well as the evidence of Public Witness 111 regarding the practice that is said to obtain in Madhya Pradesh on which matter there has not been even cross-examination.

(289) Both these applications Cr. Misc. 84/78 and Cr. Misc. 110/78 are accordingly dismissed.

(290) Those in charge of V. Jaggi's defense-singularly among all those interested in the other appellants-concentrated their might on Public Witness 1. It was seen how Public Witness 1 emerged unscathed out of the ordeal, both before and during the trial, to which he seems to have been intensely subjected. Once the evidence given by P.W. 1, after he became an approver, is considered safe to act upon not only in its details-but broadly--but also concerning the participation, of each of the appellants (ample corroboration being available in respect of the participation by each of them or tending to show such participation) there was indeed little scope for the defense. One way out was to challenge the quality of the identification evidence (taking advantage of the appellants own refusal to participate in the identification parade) but all attempts to do so seem about foreclosed. We seem to have laboured the point of identification much beyond what was perhaps needed because it had been the subject of so much argument by counsel for every appellant. It was urged that the courts in India had not come to grips, yet, in the manner said to be necessary, with the difficulties of identifying evidence, especially of culprits not previously known to witnesses, pose. If we have made an effort to survey the available legal literature on this point, it was purely by way of response to the submission of counsel before us. In the final analysis what lies at the heart of the issue seems simple. It is not as if we deliberately set out to reach an 'Occam Razor' solution; without, however, intending to do so our labours have yielded solutions which appear too simple, both factually and legally.

(291) If identity-evidence is worthless it will, doubtless, be disregarded. Identity-evidence, which is not worthless, can range from what is described as 'poor' to that of the highest quality. Even when 'poor' and it is, for that reason, not sufficient by itself to act upon, it can become enriched by supporting evidence : such supporting evidence can take in a wide spectrum of differing fact-situations; they

would include 'odd coincidences' and corroboration which may be described as 'mutually-supporting'. Sometimes, even weak or infirm evidence, which itself receives sufficient corroboration from other circumstances, can be regarded as sufficient to support identity-evidence originally regarded as 'poor' by itself; what circumstance (s) may be regarded as sufficient corroboration would be, however, for the judge of fact to consider. It is only necessary here to underscore the point that even as the need for a 'general caution to the jury' in England vis-a-vis identity-evidence, insisted upon in some cases previously, had been abandoned by the House of Lords, especially in cases where the 'specifics' of such evidence are adverted to in cases tried with jury, there could be no legal impediment whatever to courts in India acting upon identity-evidence concerning culprits previously unknown to witnesses (there being no trial by jury in our country today) in the manner above described. This is always a question of appreciation for the judge of fact; who will bear in mind the rule of prudence concerning the need for corroboration where the identity evidence is poor. If with all these aspects in mind the judges of fact act on identity-evidence, there is no legal principle which would still require an appellate court to interfere with the finding of the judge of fact. It is worth repeating that identity-evidence of good quality, even where the culprit is not previously known to the witness, could be acted upon by the judge of fact, even without corroboration.

(292) The factual difficulties pointed out by the counsel for appellants are also easily resolved, though we are afraid that this judgment has become overburdened with so many details which the learned counsel for each of the appellants pressed upon us; the case of each of them was fought every inch, tenaciously and arduously. The discussion of the evidence of P.Ws. 2 to 4 has shown that the evidence of not one of them against any of the appellants can be regarded as worthless. Among the appellants Sunil had the most distinctive face-oval. At the worst the evidence of P.Ws 5 and 6, who were no longer in the bank van after they got out of it at Thompson Road, could only be described, at the worst, not as poor but only as not being so good as that of the other witnesses-this is because they saw the culprits for a lesser period of time than the others. But so far as Sunil and Shahwar are concerned P.Ws 5 and 6 saw both of them from fairly close distances and they must have received most powerful optical impressions concerning both of them. In addition, there is plenty of supporting evidence against

both Sunil and Shahwar to be had not on

(293) Regarding Sunil, the recovery of Rs. 1,000 worth of stolen money immediately after his arrest at the Kilol Park Cafeteria at Bhopal on 11/12/1973, Ex. Public Witness 1/R containing the names of five culprits, including himself, in his own hand, the disclosure statements leading to the recovery of stolen currency notes (Rs. 40,000 from Sri Krishan Dawar and Rs. 65,000 from the Canara Bank, Bhopal, in addition to some other sums discussed earlier), search of 27 Sunder Nagar, New Delhi, unearthing not only human blood stains (of the blood group of the gunman of the bank van) from the bathroom wall of the house admittedly occupied by him and his mother and sister, recovery of ash of burnt cloth made of synthetic fibre from the terrace of 27, Sunder Nagar, recovery of human blood stains of the same blood group and vegetable matter of the same kind as that seized from the secluded spot off Barron Road from inside the dicky of the Ambassador car (Ex P.12), the reference to the driver of jeep (Ex.P. 13) being noted as Batra in the book maintained at Chambal valley ferry bridge, on 2/10/1973, the evidence of Public Witness 35 concerning the target practice on the roof of V. Jaggi's house under construction at Greater Kailash on 27/09/1973, the evidence of Public Witness 33 (taken along with that of Public Witness 1) concerning Public Witness 1's statement to him about Sunil also having joined them in the commission of the crime and Public Witness 33 finding Sunil (to whom he was introduced by Public Witness 1) at V. Jaggi's office on the morning of 29/09/1973 and last, but not least, the evidence concerning Public Witness 1 regarding Sunil being supported in so many important particulars including the evidence of Public Witness 109 that the two crime bullets in this case were fired from the revolver Ex. P. 9 (recovered afterwards from P.Ws. 34 and 67, after being pointed out by Public Witness 1) but no other, clinch the case of the prosecution against him without any possibility of the same being seriously controverted. What indeed seems to take the prosecution case against him most is that when all the above point to him as the chief culprit in this case, he falsely claimed the stolen currency notes recovered from him as his own.

(294) Shahwar has the most dominant and distinctive appearance among the appellants. We have against him not only the identity-evidence of P.Ws 1 to 7, but

also the recovery of the jeep (Ex. P. 14) from under the porch of his house but ample evidence of its use, as we find from the entry showing him as the driver of the same at Chambal ferry on 22/09/1973 (coupled along with the return entry of the jeep on 2/10/1973), the servicing of the said jeep at the same Esso Service Station (on. 25/09/1973) at Delhi where the Ambassador car (Ex. P. 12) had also been serviced earlier as well as its repair by Public Witness 1 5/09/1973. Since for a technical reason we are unable to rely on the recovery of the pistol (Ex. p. 8) from his almirah (in pursuance of his disclosure statement and pointing out the key which was taken from underneath the bedding to open the said almirah) still it substantially corroborates the evidence of Public Witness 1 concerning the participation in the crime by Shahwar. All these amply support the evidence of P.Ws 1 to 7 against him. To crown all though Rs. 1,000, out of the stolen notes, were recovered from him on personal search made at the Kilol Park Cafeteria on 11/12/1973 he not only failed to give any Explanation but denied falsely the recovery itself. Ravi's entry in the register of hotel Bright that Shahwar stayed there, initially, in the assumed name of Ashok Bhargava, and Shahwar signing as D.B. Shah in Hotel Prabhat Register gives still greater assurance concerning Shahwar's participation.

(295) The case against Ravi rests upon the evidence of Public Witness 1, in the main; that is the obvious reason why those responsible for V. Jaggi's defense went to the extreme lengths noticed by us. P.Ws 4 and 7, among the eye witnesses, identified him; he is the shortest of the lot. Such a large sum of stolen money, nearly Rupees four lacs, was recovered from the drawer of his office table, in pursuance of his disclosure statement wherein he had admitted that he had kept the same concealed there; concerning this, however, not only did he fail to give any Explanation but also made a false denial which went to ridiculous length. Chiefly on account of Public Witness 1's evidence concerning the receipt of a particular person trunk-call in Ravi's name on 20/09/1973 from the telephone at 27 Sunder Nagar to Bhopal Number 3007 (which was in the name of Gopal & Co., with which Ravi was doubtless connected, Ravi falsely denied that he had nothing to do with that telephone or of Gopal & Company in whose name the telephone stood, despite his having earlier given his address as 'Gopal & Company, 30 Civil Lines, Bhopal'. The fact of the entries, in fictitious names, having been made by Ravi in

the register of hotelBright is yet another confirmatory piece of evidence, of a telling kind,against Ravi. Later on Ravi and Shahwar were taken to hotel Prabhatand Public Witness 1 to Jeevan Lodge.

(296) Concerning V. Jaggi's participation we have the evidence of P.Ws 5 to 7. The identity evidence of P.Ws. 5 and 6 against even V.Jaggi cannot, as explained earlier, be regarded as poor; they sawhim and Public Witness 1 sitting in the Ambassador car (Ex. P. 12) in that narrowlane off and close to Thompson Road, in broad day light. Hisparticipation in the crime gets added confirmation from the evidenceof Public Witness 7, who saw him, at a different place, not Thompson Road,but at the secluded spot near Barron Road. On such identity-evidenceatone, which seems both acceptable and sufficient, the conviction ofV. Jaggi has to be confirmed. The evidence of Public Witness 1 supportedin so many material particulars generally concerning the .commission ofthe crime and participation by all the appellants, receives additionalsupport concerning V. Jaggi's participation in the crime from theevidence of Public Witness 35, who spoke about the target practice at V. Jaggi'shouse under construction, in which V. Jaggi participated, but alsofrom that of P. W. 33, who took P. W.1 to V. Jaggi's office on themorning of 29/09/1973 and was introduced to V. Jaggi alsoby P. W. 1. P. W. 1's evidence concerning V. Jaggi's participationin the crime receives further and substantial support from not only thetrunk-call from his father's telephone at Delhi to Bhopal precedingthe air dash by his father to Bhopal on 2/10/1973, to bringhim bade on 3rd. Even though we axe unable to act on the evidenceconcerning the Fiat car containing blood stains by reason of suchassurance as we have in the case of the Ambassador car (Ex. P. 12)being un-available; the recovery of the same from V. Jaggi's house supports Public Witness 1's reference to that car and the use of the same both beforeand after the occurrence. P. W. 1 did not know V. Jaggi before P. W.1did not know Hooda and Brar (in whose company P. W. 1 saw V.Jaggi daring the relevant period at Delhi) either; the effort madeby V. Jaggi to say that he was on inimical terms with both of themwas not successful. It has also been made out, despite the witnessesfrom the concerned hotels at Delhi having turned hostile, that V.Jaggi, had extended his support to get hotel accommodation at Delhifor P. W- 1, Ravi and Shahwar and paid Rs. 100 as advance tohotel Bright. It is needless to sum up the entire discussion pertainingto V. Jaggi, which had to belonger than that

pertaining to any other appellant in the view there has been no recovery of stolen money from him and it not being possible to act on the recovery of the key of the bank van from him, for the reasons explained (again at great length) already. The non-recovery of any stolen money from V. Jaggi cannot, in the circumstances explained by us, minimise the strength of the prosecution case against him even as the recovery of a huge amount (stolen, money) from Ravi cannot by itself strengthen, for that reason alone, the prosecution case against Ravi. This only means that the arrest had taken place before the actual division of booty took place.

(297) To bring home the participation of each of the appellants in the crime, evidence, however, slight but significant, against each of the appellants would be sufficient to support the evidence of Public Witness 1. In the case of the appellants other than V. Jaggi, the recovery of stolen currency notes from them without any proper or adequate explanation by them would, in the circumstances of the case, as explained in detail and in length, be sufficient; the false denials only make it even worse for them.

(298) A lot of fuss was made on behalf of V. Jaggi to make it appear that he was falsely implicated because of his father's ill feeling with the then Lt. Governor. There is no substance at all in this accusation; even the lesser-key adopted by his counsel before us, namely, that it was responsible for at least excessive zeal on the part of the investigating officers to implicate him, he being a friend of the appellants, is also one without any support whatever. The prosecution case seems remarkably free from 'padding'; it has, however, been the turn of the defense in this case, with V. Jaggi at the core to indulge in large-scale falsity and even forgery necessitating our having to carefully keep out of our minds several ugly efforts except those which were an essential part of the defense of the concerned accused; Mr. Kalra fairly adopted our suggestion and modulated his submission to us accordingly.

(299) Every one of the appellants unjustifiably refused to take part in the identity parade. The so-called exposure of them at the police post Dev Nagar on 25/12/1973 has had no impact on the prosecution case against any of them.

(300) Convictions All the appellants were properly found guilty on the various counts as found by the learned trial Judge except that the conviction and sentence of Shahwar under the Arms Act has to be and is hereby set aside. The criminal conspiracy, as explained at length by us, 'germinated', as the learned trial Judge describes it, in August 1973; it came to be 'hatched' by all the appellants and Public Witness 1/09/1973 when V. Jaggi confirmed what had been stated by Sunil and all the five of them decided to intercept the van of the Union Bank of India believed to carry about Rs. 50160 lacs daily. The final plan was made at Rambles, Connaught Place, New Delhi on 27/09/1973. A few minor modifications made later or even some unintended deviations from the original plan did not have any impact on the core purpose of the culprits. Whatever was the original intention the one articulated was on the eve of the occurrence; it was not merely to loot but also to shoot the gunman, which meant, in the context to kill him. This was only natural because there was possible danger from the gunman; he had to be eliminated.

(301) It is in evidence (vide Public Witness 6) that a gesture was made by Shahwar to Sunil and he shot at the driver later. The evidence of Public Witness 1, supported in so many important particulars and concerning the participation of each of the appellants clearly makes out the offence of conspiracy beyond any reasonable doubt. The conspiracy was not only to intercept the bank van, to kill the gunman, at least and loot the money but also to distribute it among themselves by investing the money; until such investment was made of the looted money the conspiracy would not terminate. The further offences committed were dacoity with the two murders of the gunman and the driver. Sunil was primarily liable for each of these murders.

(302) The learned Judge has rightly held Sunil guilty under S. 302 Indian Penal Code; S. 34 Indian Penal Code. could also be invoked against each of the other appellants in respect of the two murders despite the verbal insufficiency in the trial court in the matter of recording the conviction concerning Shahwar vis-a-vis the driver. One of them had been previously intended by all of them to be killed; the other developed at the time of and during the course of the occurrence. The other three appellants (other than Sunil) were thus rightly held constructively liable, by invoking S. 34 I.P.C., in respect of the two murders. There is hardly any force in

the contention of Mr. Garg that the original intention was only to shoot but not to kill and that the other appellants except Sunil could not be guilty of any thing higher than an offence punishable under S. 396 Indian Penal Code, not under S. 302 Indian Penal Code. The convictions of Sunil under S. 302 Indian Penal Code for the murders of the gunman and the driver and the rest of the appellants constructively under the said section in respect of both these murders by invoking S. 34 of the Indian Penal Code. are unexceptionable; equally unexceptionable are the convictions of each of the appellants under S. 396 and S. 395 read with Ss. 397 and 398 Indian Penal Code. and under S. 27 of the Arms Act. All of them were also rightly convicted under S. 120-B I.P.C., the punishment for which would be the same as for the substantive offences, for which each of them have been convicted. The above said convictions imposed by the trial court are all confirmed (except in respect of Shahwar under the Arms Act.)

(303) Sentences regarding the extreme penalty imposed on Sunil we have given the matter our most anxious consideration. Mr. Rajinder Singh made the most powerful plea any counsel can to reduce the penalty in case of Sunil. We have already referred to the medical evidence pertaining to the gunman and explained how no difficulty has really been caused in this respect by the evidence of the doctor who conducted the autopsy. In addition, Sunil shot and killed the driver also. Mr. Rajinder Singh further referred to his being a young and educated man, the manner in which he conducted himself even before us during the hearing of the appeal, his mother having to heroically fight life's battle to look after her only son and daughter after her husband—a former army official—took to a religious life reducing his family to a shambles. It is true as he pointed that young men, coming from good families also, maybe accidentally led into an erroneous path and that effort should be to rehabilitate the offender by 'matching', as it is often stated, 'the criminal to the crime'. We have listened sympathetically to these submissions though they do not appear to be based on the record of this case but they do not appear sufficient to either lessen the enormity of the crime, or mitigate the sentence.

(304) The learned trial Judge has referred to Santa Singh v. State of Punjab A.I.R. 1976 S.C. 2286 as affording some guidelines on the question of sentence. In

singling out Sunil, among the appellants, for the imposition of the extreme penalty, the learned trial Judge has been pressed by Sunil not only having been the originator of the idea of committing these ghastly crimes, but also having persuaded the others to become involved in them. In addition, he was the chief actor; he not only agreed to shoot the gunman himself, when Public Witness 1 originally and Shahwar later refused to shoot the gunman, but he actually shot at him. He also shot at the driver when Shahwar was apparently bungling in the matter of snatching the key of the van from him. If more murders were not committed in the bargain it was only fortuitous. Persons, especially young ones, seized by ambition to become richer too quickly, can often act like mad: the fact that such persons are already fairly well off economically only adds to the city of it. Sunil had already made himself a beneficiary of the booty by appropriating for himself a share of it even before actual division of the spoil took place. Every conspiratorial group has its leader; it seems plain that Sunil was that leader in this case. By every known canon of modulating the punishment to suit both the crime and the offender we feel compelled to confirm the capital sentences imposed on Sunil in respect of each of the two murders. This is not to say that we do not sympathise with the plight of his mother, but this seems utterly irrelevant to the issue of sentence concerning Sunil.

(305) Regarding the other appellants Shahwar probably comes closest to Sunil in this respect. That he incited Sunil to shoot the driver, is a factor which does weigh against him, but the mitigating factor probably is that this happened during the thick of the moment. This has also to be viewed in the background of his refusing to shoot the gunman. Only next to Shahwar comes V. Jaggi. He was in a sense as much the originator of this idea as Sunil because, on a total view of the case, it seems that but for V. Jaggi Sunil may not have thought of looting the bank van. But, the mitigating factor in his case, however, seems to be not, as the learned trial Judge said he did not have the share of the booty for before this could be done, even by an investment as ex.P.W. 1/R suggests, the culprits had been nabbed by the police but that he had not taken any active part in killing any ; no such part was according to the evidence of Public Witness I, ever assigned to him. Regarding Ravi, the learned trial Judge pointed out that he did not snatch the gun from the gunman as intended, but this could be consistent with cowardice-

even like Shahwar developing cold feet on the eve of the occurrence and declining to shoot the gunman. The fact of Ravi having nearly Rupees four lacs with him does not seem to aggravate his guilt; he was probably a mere care-taker of the money till it was divided. Unlike. Sunil who went ahead to appropriate at least some appreciable part of it himself, he did nothing himself with it.

(306) In essence the learned trial Judge has exercised the discretion, which vests with him in law as a trial Judge more than with 'the appellate court. Dua, J., speaking for the Supreme Court, observed as follows in Ram Narain v. The State of U.P. : 1971 CriLJ649:

MERELY because the appellate Court feels that left to itself IT would have preferred to impose the sentence of death is by itself and without more not a sufficient ground to justify enhancement. It is only when the sentence appears on the facts and circumstances of the case to be so manifestly inadequate as to have resulted in failure of justice that enhancement of the sentence may be justified by the appellate Court.

(307) Though the State has filed an appeal (Cr. App. 164/77) against the award of the lesser penalty against the appellants other than Sunil, Mr. Kalra fairly (it seems to us, rightly too) left the question of sentence to us. Even in the view if we had tried the case ourselves we might have each of us, imposed the extreme penalty in the case of the other appellants also, in the circumstances of this case, we feel that no cogent or compelling reason exists for us to interfere with the exercise by the learned trial Judge of the discretion vested in him when he awarded the lesser sentence alone on the appellants other than Sunil.

(308) We have already stated that we are setting aside the convictions and sentences under the Arms Act on Shahwar ; we hereby do so. Cr. Appeal 187/77 is allowed. The rest of the convictions and sentences on each of the other appellants are confirmed.

(309) The death reference is accepted and the imposition of death sentence in respect of both the murders on Sunil is confirmed. The appeal preferred by him (Cr. App. 43/77 and 44/77) are dismissed.

THE appeals preferred by the other appellants (Cr. Appeals 68/77, 123/77 and 186/77) are dismissed.

THE appeal preferred by the State (Cr. Appeal 164/77) is also dismissed.

RETURN of currency notes :

(310) The learned trial Judge has directed that out of the currency notes recovered by the police from various sources and treated as case property the following sums making a total of Rs. 5,03,060.00 should be returned to the Union Bank of India made up of the following sums:

(1) Rs. 3,94,710.00 (out of which Rs. 180.00 is found to be short as explained in the body of the Judgment) recovered from Ravi;

(2) Rs. 1,000.00 (marked as Ex. P. 19) recovered from Sunil's person;

(3) Rs. 1,000.00 (marked as Ex. P. 20) recovered from Shahwar;

(4) Rs. 65,000.00 recovered from the locker of Sunil in the Central Bank of India, Bhopal;

(5) Rs. 40,000.00 recovered from the possession of Sri Krishan Dawar and said to be in the brief case (Ex. P. 7) ;

(6) Rs. 340.00 (Exs. P. 90 to P. 123) recovered from the Central Bank of India, Bhopal containing the seals of the U.B.I.;

(7) Rs. 1,000.00 said to be recovered from the State Bank of India, Bhopal; and

(8) Rs. 10.00 (marked as Ex. P. 1) recovered from Public Witness 1 as a result of his personal search.

(311) So far as the above directions given by the learned trial Judge are concerned they are the unexceptionable. Mr. K. K. Uthra, learned counsel for the Ubi, further submit that the following sums, in, addition, should have been directed to have been returned to the Union Bank of India:

(1)Rs. 10,000.00 being the amount (marked as Ex. P. 5) seized from Sri Krishan Dawar ;

(2)Rs. 10,000.00 being the amount of a Draft obtained by Sunil on 11/10/1973 in the name of M/s. Nishan Springs Pvt. Ltd. and cancelled on Sunil's application made the next day;

(3)Rs. 3,003.25 being the amount deposited by Sunil from 21-11-1973 onwards in the Savings Bank Account No. 3518;

(4)Rs. 9789.00 said to be the money of Sunil in the Punjab & Sindh Bank as per copy of the Account (Ex. Public Witness 63/E), and

(5)Rs. 20,000.00 from out of the sum of Rs. 37,557.00 recovered from various places in the house which was said to be in the possession of Sunil's mother as early as on 12/12/1973 by Inder Raj Chopra (P.W. 101).

(312) The sum of Rs. 9,789 (No. 4) having been deposited by Sunil as a customer of the said Bank, Mr. Luthra fairly conceded, on the basis of the decision of the Supreme Court in *State Bank of India v. Rajindar Kumar* : 1969 CriLJ 659 that he could not object to the direction made by the learned trial Judge directing that the same be returned to the Punjab & Sindh Bank Ltd. He also realised that if he wanted any contradictory direction to be made now a notice of the same would have to go to the said Bank before the said order is revised or altered. The Bank has not filed any appeal or taken any steps in this regard. Mr. Minocha, appearing for Sunil, contends that unless the portions of the statements made by the accused over and above those portions which are clearly admissible under S. 27 of the Evidence Act, are proved by letting in evidence aliunde they can not be taken into account for the purpose of order of return under S. 517 Criminal Procedure Code, 1973. To appreciate this contention the relevant portion of S. 452 of the Code corresponding to section 517 of the old may now be read:

'452.(1) When an inquiry or trial in any criminal court is concluded, the Court may make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise, of

any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

(2) An order may be made under sub-section (1) for the delivery of any property to any person claiming to be entitled to the possession thereof, without any condition that he executes a bond, with or without sureties, to the satisfaction of the Court, engaging to restore such property to the Court if the order made under sub-section (1) is modified or set aside on appeal or revision.

(3) xx xx xx

(4) xx xx xx

(5) In this section, the term 'property' includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

(313) The learned trial Judge seems to have assumed, we are afraid erroneously, that unless the identity of the UBI's notes are traced in specific that is, the condition in which they were when the property was stolen, there could not be an order of return under S. 452 Criminal Procedure Code. in favor of the person or institution whose money was the subject matter of decoity and looting. This assumption is contrary to S. 452(5) ; where some portion of the currency notes looted had been exchanged in other currency notes that would be distinctly covered by the said sub-section.

(314) It seems well settled that the statements made by the accused, though not admissible at the trial under S. 27 of the Evidence Act can be taken into consideration. Some of the decisions bearing on this point are :

(315) (1) *Dhanraj Baldeo Kishan v. The State* is authority for the proposition that when the accused himself had admitted that the money represented the sale

proceeds of the stolen bag the whole of that statement, including those parts which might not have been admissible at the trial of the accused whether under S. 25 of the Evidence Act or under S. 162 Criminal Procedure Code. are quite material and can be taken into consideration for the purpose of S. 517 Criminal Procedure Code. (old). Reliance was placed upon Queen Empress v. Tribhovan Manekchand. L. R. 9 Bom 131,.

(316) (2) A Division Bench of the Himachal Pradesh High Court took the same view in Smt. Bal Kaur v. State of Himachal Pradesh following the decision in Dhanraj Baldeo Krishan.

(317) (3) The Gujarat High Court, speaking through P. N. Bhagwati, J. (as he then was) in Gokaldas Kalyanji v. Mohanlal Manjibhai 1963 (1) Cri. L. J. 531, a decision relied upon by Mr. S. P. Minocha, appearing for Sunil, did expressly hold following the decision in L. R. 9 Bom 131 that the statement of an accused, though not admissible for the purpose of the trial, could still be used for the purpose of inquiry or making an order under S. 517 Criminal Procedure Code. ; Mr. Minocha only relied upon the observation of Bhagwati, J. that the statement must be 'proved' in accordance with law before the same could be used.

(318) Mr. Minocha also relied upon the observations of Blacker, J. in Phlu v. Emperor A. I. R 1943 312 to the effect that it would have been better for the Magistrate if he had not put the evidence on the record of the substantive trial but had recorded it separately after the trial was over. This was at best, he pointed out, an irregularity curable under S. 537 Criminal Procedure Code. In the present case also no evidence has been recorded separately on this question ; as far as we know it is not even usual to do so, especially in trial into a grave offence like murder. While making directions under S. 517 Criminal Procedure Code. (old) courts have taken into consideration the entire 'statements made under S. 27 of the Evidence Act despite only such portions as led distinctly to recovery of the fact deposed to are alone taken into consideration.

(319) It may be that an order under S. 452 Criminal Procedure Code. (new) is a quasi-civil proceeding. But it would not seem to be proper, or even desirable, to introduce the strict notion of the said statement having to be strictly proved, in he

sence that there should be evidence aliunde of the facts mentioned in the said disclosure statement. The order that is passed under S. 452 Criminal Procedure Code. (new) is only summary in, nature, subject to The result of a suit. The broad judgment that has to be arrived at, in this situation, is whether there is evidence to show that the accused in question made a statement attributed to him voluntarily and whether he had signed (or thumb-marked) the same; once this conclusion is reached it does not appear that courts should be further detained by the need for more or even much stricter proof concerning the facts that appear in the disclosure statement but were not spoken to by the witnesses during the trial because these portions did not fall within the ambit of S. 27 of the Evidence Act, and hence inadmissible. In other words, once it is proved to the satisfaction, of the court that the accused did make a voluntary disclosure statement which was recorded by the police and to which he appended his signature or thumb impression on order under section 542, Criminal Procedure Code. could be properly made on the basis of his averments in the said disclosure statement. We are happy to note that the view we take receives substantial support not only from the above decision, of the High Courts of Rajasthan, Bombay and Himachal Pradesh but also of Punjab (vide *Mahanta Singh Natha Singh v. Het Ram*) and Kerala (vide *State of Kerala v. Thiraviyam Panicker* 1962 (1) Cri. L.J. 654. We do not feel deterred by some of the cases cited by Mr. Minocha arising out of the civil claims. He has not brought to our attention any other ruling except that of Gujarat High Court which contains the observation that the statement has to be proved in accordance with law before the same could be used. We are of the view that the proof for the said purpose in such a proceeding is adequate when the court is able to find that the accused concerned had made a disclosure statement voluntarily which he also signed that the said disclosure memo contains admissions bearing upon the order passed under S. 452 Criminal Procedure Code ., though the said portions could not be regarded as admissible against the accused for a determination of his guilt. These would constitute admissions by the accused, enabling the court to act on the said basis while making the return of case property subject, however, to the result of any action that any aggrieved party may bring.

(320) The weight of authority being in favor of such statements being used we have only to scrutinise the statements of Sunil to find out whether the further sums

claimed by Mr. Luthra on behalf of U.B.I. over and above what was ordered by him, can also be directed to be handed over to the U.B.I. Concerning the sum of Rs. 10,000 (marked as Ex. P. 25) which was inside Ex. P. 7 and recovered from Sri Krishan Dawar. on the basis of the disclosure statement made by Sunil (vide Ex. Public Witness 82/L), which was proved by Public Witness 142 as well as Public Witness 82 who had attested it ; the same also contains Sunil's signature there is his admission, which was excluded during the trial, that the said sum of Rs. 10,000.00 left by Sunil with Sri Kishan Dawar had been got converted from the 10 rupee currency notes belonging to the U.B.I.

(321) So far as the sum of Rs. 10,000 in respect of which he had purchased a draft in the name of Messrs Nishan Springs Pvt. Ltd. on 11/12/1973 is concerned there is the admission that Sunil had got cancelled at a subsequent date had also been got by him by conversion of 10 rupee currency notes belonging to U.B.I.

(322) Regarding the said sum of Rs. 3,003.25 which had been deposited in the Savings Bank Account No. 3518 also Sunil had admitted in his disclosure statement (Ex. Public Witness 42/A), made on 12/12/1973, to S.I. Babu Ram (P.W. 115), that like the sum of Rs. 10,000 which he had utilised in purchasing the above said Draft in the name of M/s. Nishan Springs Pvt. Ltd. under Draft. No. 7376 dated 11/12/1973 were given to Canara Bank, Bhopal for the purpose of obtaining the said Draft, the above said sum of Rs. 3,003.25 (like the above said sum of Rs. 10,000.00) was stolen money, Sunil's statement (Ex. P.W. 42/A) had been proved not only by S. 1. Babu Ram but also by P.W. 40. All the said three amounts, making in all a total of Rs. 23,003.25 should also be returned to the Ubi, in addition to those ordered to be returned by the trial court.

(323) Regarding the sum of Rs. 37,557, recovered in two or three places from 27 Sunder Nagar, said to belong to Sunil's mother, Sunil himself had no doubt made a statement to the effect as per Ex. Public Witness 82J that he had kept a sum of Rs. 20,000 to Rs. 25,000 in the shape of currency notes of the U.B.I. in the denomination of Rs 10. each. The memo regarding what was recovered from 27 Sunder Nagar is Ex. P.W. 53/A. The search was made by Inspector Inder Raj Chopra on the basis of telephonic information received from Bhopal. Items 1 to

36in Ex. Public Witness 35/A are those with which we are not concerned for this purpose. The said sum of Rs. 35,757.00 has been mentioned as item 37, which was said to be in the form of currency notes.

(324) Mr. K. K. Luthra claims that at least a sum of Rs. 20,000.00 being on the lower side of the amount admitted by him (Rs. 20,000.00 or Rs. 25,000) should be ordered to be returned to the U.B.I. on the basis of what Sunil had stated in Ex. Public Witness 82/J. On the approach adopted by us in this case we have to accept Mr. Luthra's contention, even without an appeal being filed by the Bank against the order of the learned trial Judge returning the entire sum of Rs. 35,757 recovered from 27 Sunder Nagar from Sunil's mother because the powers under S. 454(2) Criminal Procedure Code, 1973, may also be exercised by a Court of Appeal dealing with the case in which the order referred to in sub-sec. (1) was made. The learned trial Judge had overlooked the fact that for the limited purpose (contemplated by S. 451 Criminal Procedure Code) the above statement of Sunil (Ex. Public Witness 82/J) containing the above admission could be taken into account. Mr. Luthra explains that no appeal need be filed by the Bank in view of the fact that S. 454(3) has been worded in such clear terms. On the basis of the above statement it is hereby ordered that out of the said sum of Rs. 35,757.00 recovered from 27, Sundar Nagar, Rs. 20,000.00 only will be ordered to be returned to the U.B.I.

(325) The net result is that while we confirm the directions given by the learned trial Judge concerning the return of the currency notes we direct that, the three additional sums namely of Rs. 10,000.00 (Ex. P. 7) seized from Sri Krishan Dawar, Rs. 10,000.00 (being the amount of the Draft obtained by Sunil on 11/10/1973, as stated above, and subsequently cancelled by him on his application made the next day) Rs. 3003.25 (being the amount deposited by Sunil in the Savings Bank Account No. 3518), Rs. 20,000.00 out of the said sum of Rs. 35,757.00, making in all a total of Rs. 43,003.25, which will be returned to the Union Bank of India, Chandni Chowk, Delhi

(326) Before taking leave of this case we should like to record not only the assistance we have received from the able judgment of the trial court but also the

learned counsel: for the appellants. The arguments spread nearly early there months covering an incredible amount of details. The case for each of the appellants, though extraordinarily difficult for every one of them to any one, was fought determinedly, both factually and legally. If we have found it necessary to burden this judgment with so many details it was to meet with all the contentions put forward by them to the extent which we could not only recall but also make out.

(327) We must also record the great assistance we received from Mr. Kaira, the Special Public Prosecutor, who considerably lightened our labours by supplying, from time to time as the hearing proceeded, at our request, sufficient information and the needed clarifications to meet with the points raised. The hearing of this case, in a case of this kind, might have been probably even longer but for the quality of assistance, we received all round; this has indeed helped us to deliver the judgment without much delay after the hearing - for this we are specially indebted to Mr. Kaira, who had mastered every detail of this case, analysed the evidence with meticulous care and presented them with his characteristic fairness.

(328) We must also place on record our appreciation of the level and quality of investigation but for certain lapses in the matter of safe guarding Exs. P. 12 and 13 (Ambassador car and Fiat car, respectively) ; this happened at Delhi while the main investigating party was at Bhopal.

(329) We are also happy to record that while during the trial a considerable amount of tension appears to have been built up by the defense the learned trial Judge kept his cool; before us, however, the atmosphere maintained by counsel for the accused during the long hearing was so good as to permit an objective, fair and thorough study of the records of this case.

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