



# Zulfikar Ali Bhutto Trial Documents

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# **BHUTTO TRIAL DOCUMENTS**

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## INTRODUCTION

I have reproduced the Judgement of Lahore High Court, and Supreme Court of Pakistan, Criminal Appeal Number 11, 12 & 13 of the Zulfikar Ali Bhutto Case.

As time passed it has become evident that Zia ul Haq, Chief Martial Law Administrator (CMLA) and his coterie had decided to physically eliminate Bhutto. After toppling the Bhutto regime Zia initiated several cases against him. Bhutto was arrested on September 4, 1977 on charges of murder of Nawab Mohammad Ahmad Kasuri father of Ahmed Raza Kasuri a Member of National Assembly and a critic of Bhutto and sent to jail on seven days remand. He was later shifted to Lahore and presented before Justice (retd) Khwaja Muhammad Ahmad Samdani who granted him bail. Three days after his release, however, Bhutto's bail was cancelled. On the night of September 16, a group of army commandos climbed the walls of Al-Murtaza, the Bhuttos' family residence in Larkana, and arrested Bhutto once again under Martial Law Regulation 12. The regulation empowered law enforcement agencies personnel to arrest a person who was working against security, law and order, or the smooth running of martial law. This law could not be challenged in any court of law.

While Zia's political somersaults were being criticized, Begum Nusrat Bhutto filed a constitutional petition in the Supreme Court on September 20, challenging the imposition of Martial Law as well as the authority of the CMLA in arresting Bhutto and other leaders of the party under MLO No 12.

In her petition, Begum Bhutto contended that the Chief of Army Staff had no authority under the 1973 Constitution to impose martial law or to promulgate any supra-constitutional laws. Gen Zia's intervention thus amounted to an act of treason as per Article 6 of the Constitution. Begum Bhutto pleaded that the proclamation of martial law on July 5, 1977, the laws (Continuance in Force) Order, 1977 as well as MLO No 12, under which the political leaders had been arrested and detained, were all without lawful authority.

Gen Zia had anticipated this move, but he had already planned how to face it and get the *coup* legal sanction. While the court fixed September 20 for hearing, Gen Zia moved to replace Chief Justice Yaqoob Ali Khan with Justice Anwar ul Haq. The CMLA knew that Justice Khan – a man known for his idealism – would declare him as a traitor, if the legal case were to take its course. Justice Haq was far more likely to hand a friendly verdict; after all, he was far friendlier with Gen Zia than Justice Khan

ever would be.<sup>1</sup> As Zia planned the Supreme Court Court delivered its verdict on Nov 10, 1977 validating his Martial Law on the basis of doctrine of necessity.

This was not the first time Zulfikar Ali Bhutto was facing fabricated case against him. On November 12, 1968 he was arrested by Ayub Khan's regime along with Dr. Mubashir and Mumtaz Bhutto from Dr. Mubashir's residence in Lahore under Rule 32 of the Defence of Pakistan Rules.

Mr. Bhutto was taken to Mianwali Jail and kept in solitary confinement. After a thorough search of his person and belongings, his papers and books were confiscated although by law he was entitled to keep them. He was confined in an old cell full of rats and mosquitoes, the *charpoy* (cot) was tied to a chain. There was an adjoining little room meant for toilet purposes which was so dirty that it was repulsive to enter it. The food offered to Mr. Bhutto consisted of two *chappaties* (bread) made of red wheat with *dal* which had stones in it or two tiny pieces of meat. A strong light shone for 24 hours throughout his stay there making sleep at night extremely difficult.

After he learnt that the High Court had granted his lawyers permission to meet him, he immediately asked for some paper to enable him to make notes for his meeting with them. Despite his repeated request writing paper was not given to him until the afternoon of the 18th November. His letters and telegrams were not delivered to him. As the High Court ordered that all detenus should be kept in one jail, on the evening of 18th November he was taken to Sahiwal where he arrived in the early hours of 19th November.

Makeshift arrangements were made at Sahiwal for his detention where he continued to be kept in solitary confinement. Here instead of the rats the room was full of bats and, to avoid them, he had to sleep with a towel on his face. The mosquitoes and flies were in legion. The bathroom was separate from the cell and was shared with others. The practice in jail is to provide Class I and II detenus with a convict for personal service. The convict provided to him was told that he would be skinned alive if he spoke to Mr. Bhutto.

Contrary to law, Mr. Bhutto was not permitted the use of a radio or to make private arrangements for my meals. He addressed about five or six applications to the authorities protesting against the illegal conditions of his detention which were neither controverted nor was any action taken on them. He pointed out in these applications that as Class I detenu, by law he was entitled to certain facilities which were being deliberately and maliciously denied to him. In spite of the fact that his cousin and friends were in the same jail, they were not permitted to meet each other. Not only

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<sup>1</sup> To see the bias of Chief Justice Anwar ul Haq who presided over the appeal even after Bhutto sent him a letter from the Jail. Letter is reproduced below: (Pages 7-9).

that, they were not even permitted to exchange reading material. None of the other inmates were permitted to meet or see Mr. Bhutto. Virtually the whole place was vacated when he had to leave his ward to meet his lawyers in the office of Superintendent.

These were the conditions that Mr. Bhutto was kept when he challenged the first dictator of the country. But this time around the things were made more difficult for him. He was not allowed visitors, his lawyers, wife and daughter were allowed very few visits, even his mail was censored.

Bhutto thought the same thing would happen the second time around when he was dealing with Zia-ul-Haq an ungrateful person who toppled him and took over the reigns of the country on July 5th 1977. By this time Bhutto was much stronger than 1968, both inside the country and overseas. He was elected Chairman of Islamic Summit representing all Islamic countries and an elected President and Prime Minister.

Bhutto fought with same zeal and confidence but this time the dictator played his cards well. First he crushed the party by arresting all party workers and leaders and then by giving these people severe punishment including public lashing and even public hanging. Then with the conspiracy of the Generals and courts got Bhutto hanged.

Mr. Bhutto was the victim of a two-layered conspiracy hatched and carried out against him because he refused to compromise on his country's vital interests. Earlier in April 1977, Mr. Bhutto had warned in Parliament that "*the bloodhounds are after my blood*". He became the target of an international conspiracy aimed at destabilizing his elected Government, because Mr. Bhutto refused to cancel or modify the Nuclear Reprocessing Plant Agreement which he had signed with France. In the very same city of Lahore where the death sentence was pronounced against him, Mr. Bhutto had been warned by a Super Power in August 1976, that if he did not change his position on the Nuclear Reprocessing Plant, then "*a horrible example will be made out of you*". This Super Power felt that if Pakistan acquired nuclear technology, it might transfer this technology to the Muslim states with whom Mr. Bhutto had cultivated very close relations. If the Arabs acquired nuclear technology, the oil fields upon which the entire Western civilization depended would be so well fortified that in the event of another Oil embargo, they would be beyond the reach and might of the West. A Super Power felt that the civilization of the "advanced West" could not be placed at the "whim" of the "backward" Muslim Nations. Although the Reprocessing Agreement included cast-iron "safeguards" to ensure that the Plant acquired for peaceful purposes did not lead to proliferation of Nuclear weapons, the Super Power believed that even the minimum risk of Pakistan acquiring nuclear weapons could not be entertained. That is why the decision was made to destabilize the Government

of a man whose services to Pakistan, the Islamic world, and the Third World are internationally acknowledged and respected.

A combination of Foreign Powers and obstructionist internal elements spearheaded by a few Generals overthrew the legitimate, popularly elected Government of Mr. Zulfikar Ali Bhutto in the early hours of July 5, 1977, through a nocturnal coup. The first layer of the conspiracy came to a conclusion with the destabilization and fall of the PPP Government, headed by Mr. Zulfikar Ali Bhutto.

Seeking to consolidate their newly-acquired positions of power resting not on the will and consent of the people, but on brute force, the General embarked on a road of systematic terror and repression, which has found its logical conclusion in the threat of destabilization of not only Pakistan, but of the entire region.

The subcontinent witnessed the ugliest character assassination campaign and the most vicious vendetta against Mr. Zulfikar Ali Bhutto, his family, his cabinet colleagues, and his party. Driven by senseless, primitive passions, the junta has crossed all levels of human decency and civilized conduct to destroy and eliminate Mr. Zulfikar Ali Bhutto.

The junta had hatched a conspiracy to murder its undisputed political rival through the ingenious method of accusing, trying, and sentencing the popular leader to death on, ironically, a charge of murder. The farce that took place in the Lahore High Court called the trial of murder was in fact a murder of trial.

With the exception of Mr. Ahmad Raza Kasuri, whose father's death the Court was theoretically investigating, each and every one of over 40 prosecution witnesses was a Government servant, at the mercy of the junta. All of the top, key witnesses had spent many months in military and police custody before they "testified".

The entire case was fabricated by a special Martial Law Team headed by a Major-General, and assisted by Mr. Saghir Anwar, the Director-General of the Federal Investigating Agency, the late Mr. Anwar, Special Public Prosecutor, and Mr. Justice Maulvi Mushtaq, who later presided over the Full Bench trying Mr. Bhutto. The team reported each stage of its manufactured case to Lt. General Faiz Ahmad Chishti, who heads the "Election Cell" and who, in turn, reported the progress to the Chief Martial Law Administrator.

The fabricated murder case, so specially conceived and manufactured by the full force of the coercive machinery of Martial Law, nonetheless has inherent contradictions which reveal the falsity of the charge. It is perhaps the first case in the annals of criminal law which has two official Approvers and three unofficial Approvers. The three unofficial Approvers are the confessing accused, who say they actually

committed the murder although their recollection of the event is at variance with each other and mutually destructive. For their "confession" extracted after torture at the infamous dungeons of Lahore Fort, the three have been assured that they will not be sent to the gallows. For "confessing" their "crime", they will be given their liberty in about a year and handsomely rewarded financially. Thus, for all purposes, the three "confessing" accused are Approvers in the case along with two other official Approvers. (There are three if one includes Sayed Ahmed).

Mr. Mian Abbas, the fourth confessing accused, who later retracted his statement, and later retracted his retraction, gave a detailed account of how his "confession" was extracted. The biased and prejudiced Bench ensured that this account did not see the light of day by declaring that the proceedings would be held *in camera*, when the accused gave their statements under the Criminal Procedure Code's Section 342.

The hypocrisy of the Lahore High court is obvious when one recalls that, after declaring, for international ears, that the trial would take place "in the full light of day", the Bench transformed it into a closed Court. Mr. Justice Maulvi Mushtaq, promoted to Chief Justice during the trial, twice superseded by Mr. Bhutto, handpicked his favorite colleagues to sit in judgment of the former Prime Minister. He did not include on this Bench the two judges who had granted Mr. Bhutto bail on Raza Kasuri's private complaint. This had been turned into a State base after the two judges on the Divisional bench had dared to ensure justice and set Mr. Bhutto at liberty.

By trying the case immediately at the High Court level and not at the Sessions Court level, the junta and the Lahore High Court deliberately deprived Mr. Bhutto of his first right of Appeal. This was the first in many serious departures from legal procedure.

The whole world was shocked to hear the verdict. Mr. Ramsay Clark former Attorney General of USA who had attended part of proceedings wrote in his article "Even if the entire evidence given against Mr. Bhutto is accepted, the verdict given is not justified."

Mr. Robert Boduete, famous lawyer of France who also witnessed the proceedings wrote at the time, "*Only history will judge these judges.*"

After 31 years one of the judges in Bhutto case Justice Nasim Hassan Shah's while giving an interview to GEO TV said:

Q. Was there any 'advice' from above in the Bhutto case?

A. I am not aware that any 'advice' was given, but I suppose the Chief Justice must have been 'advised' and if he was 'advised' then he must have passed the 'advice' to the other judges on the bench.



Q. Do you think that Bhutto was justly hanged?

*A. I think Bhutto's council Yahya Bukhtiar handled the case badly. When the panel of judges asked him what he thought should be Bhutto's punishment, he retorted that Bhutto should not be punished at all and should be allowed to go free. This annoyed the judges and they hanged him.*

It is never heard that an innocent defendant is punished just because the lawyer of the defendant annoyed the judges!

After the verdict, the entire world appealed for Bhutto including heads of governments of USA, USSR, CHINA, and UK etc. The defence lawyers lodged an appeal for revision in Supreme to General Zia and ordered his family not to do so.

Begum Nusrat Bhutto and Benazir Bhutto, still in custody, were brought for the last meeting but were not allowed to enter his cell. They sat across the door of iron bars on a wooden bench, holding Bhutto's hands through the gaps between the bars. Benazir's request to be allowed to hug and kiss her father for the last time was rejected.

This is how we treated our national hero and his family !!!!!

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California 2021

## CONFIDENTIAL

To,  
Mr. Justice Anwarul Haq,  
Chief Justice of Pakistan and President of Pakistan  
Rawalpindi.

Sir,

*My appeal against the judgment of the Lahore High Court sentencing me to death and imprisonment is pending in the Supreme Court of Pakistan of which you are the Chief Justice. I am writing this application from the death cell of Kot Lakhput Jail, Lahore with a request which, I consider to be pre-eminently legitimate and reasonable. I am writing this application after anxious and careful thought. The request is simple one. Please do not preside over the Supreme Court when my appeal comes up for hearing on 20th May 1978. The following are the reasons for my request:-*

- 1. You resented the Constitution Sixth Amendment made by the Parliament whereby your predecessor got an extension in the term of his office and your promotion to the office of the Chief Justice of Pakistan got consequently delayed. Yes, as leader of the House, I was responsible for that amendment in the Constitution made through Parliament in accordance with the procedure laid down in the Constitution. You have held the Constitution to be still the Supreme Law of the land except, that according to your judgment, a single individual without any mandate from the people, can amend it at will. You have in fact empowered him to change altogether the shape of the Constitution and indeed 'to scrap it'. Thus he has to been allowed by you to rule the Country in the most arbitrary manner for an indefinite period without being accountable to the people. You considered it necessary to give this power to this individual because he nullified the Constitutional Sixth amendment a day after your predecessor while presiding over the Supreme Court admitted for hearing Begum Nusrat Bhutto's petitions challenging the Martial Law of General Ziaul Haq, he Chief of the Army Staff. By the repeal of this Constitutional amendment, he was able to unceremoniously remove your predecessor Mr. Justice Mohammad Yaqoob Ali from the office of the Chief Justice of Pakistan and appoint you to succeed him. How much a Chief Justice can influence a Bench presided over by him becomes apparent when the same Bench presided over by you nullified its order, made four days earlier, when presided over by your predecessor about bringing me and other detained colleagues of mine from different parts of the Country to Rawalpindi for the hearing or the petition.*

2. *Before you assumed office as the chief Justice, the judges of the Supreme Court had, I believe, declined, to take a fresh oath as determined by the 'suspender' of the Constitution, But on your assumption of office as the Chief Justice all the judges of the Supreme Court immediately agreed to take the new oath ordered by General Ziaul Haq.*
3. *At the reference given on your appointment, you considered it appropriate to be critical of my administration for the amendments made in the Constitution during my Government – clearly implying your deep resentment against me. Thus, inferentially you expressed your gratitude to General Ziaul Haq for removing Mr. Justice Yaqoob Ali and appointing you as the Chief Justice. You reciprocated his gesture in full measure by your judgment in Begam Nusrat Bhutto's petition. By virtue of this Judgment, General Ziaul Haq was declared as a national saviour, his Martial Law and coup d'etat justified on "the doctrine of necessity" and his power to act as the one man parliament to amend the Constitution confirmed. You could not possibly withhold the power of amending the Constitution from him on without this power he could not have repealed or nullified the Constitution Sixth Amendment which facilitated your appointment as the Chief Justice of Pakistan and Mr. Justice Yaqoob Ali's removal from that office.*
4. *Again on the occasion of the Fourth Pakistan Jurist Conference which was inaugurated by General Ziaul Haq you thought it fit to criticise my Government in your presidential address.*
5. *While addressing the Bar Association at Karachi on 23rd and 24th of January this year you publicly and bitterly criticized my Government and Party. You went to the extent of advising advocates to 'educate' the people so that persons like me and my colleagues were not returned to power by them in future (for your satisfaction, please check the Radio Pakistan the transcripts of your address at Karachi as the newspapers did not fully report these speeches. The tapes of your Karachi addresses, I understand, are available with some private individuals also).*
6. *That you and Mr. Justice Mushtaq Hussain the Chief Justice of the Lahore High Court have been very close to each other for many years and both of you are zealously collaborating with the Martial Law regime. There could be no two opinions about it.*
7. *That while my appeal is pending before the Supreme Court you did not consider it indiscreet or embarrassing to accept General Ziaul Haq's offer to appoint you as the Acting President of Pakistan. Was this also unavoidable because of the doctrine of necessity? By becoming the Head of State of the country and by actively identifying yourself fully with the Executive at this critical juncture when the dark shadow of the Martial Law is cast over the whole country and more so on my appeal. You have institutionally used the office of the President and that of the Chief Justice into one. By merging, albeit temporarily, the two remaining organs of the State – The*

*Executive and the Judiciary – completely you have done irreparable loss to the Country.*

*General Ziaul Haq has called my trial by the High Court as just and fair trial although I have disputed this in my appeal and the Supreme Court has yet to determine these questions. He called me a "murderer" when my case was subjudice in the High Court. Now belatedly, he tells the world leaders not to make appeals for exercising an executive power of commuting the death sentence awarded to me on the ground that the matter is subjudice before the Supreme Court. Although this executive power has nothing to do with the appeal pending in the Supreme Court, yet it never occurred to him not to prejudice and prejudge the false case against me when it was pending in the High Court.*

*You would, therefore, be doing a service to Pakistan, the Judiciary and yourself by not sitting on the Bench which hears my appeal, by not selecting judges for that purpose but letting the full court, including the ad-hoc Judges to hear the appeal as was done by the Court in hearing Begum Nusrat Bhutto's petition against Martial Law. I had thought that perhaps you would yourself find it unfair and embarrassing to preside over the Bench which hears my appeal in view of the undisputed and well known facts stated above. I have been constrained to address you on the subject as I find no indication thus far, on your part to disassociate yourself from the appeal in my case.*

7th May 1978

Zulfikar Ali Bhutto  
Appellant  
Death Cell, District Jail  
Kot Lakhpat, Lahore

## JUDGMENT

Aftab Hussain, J. – Zulfikar Ali Bhutto, Mian Muhammad Abbas and Ghulam Mustafa, have been challaned by the Federal Investigation Agency for trial for offences under sections 120-B, 302 read with section 109 and 301 and section 307 read with section 109, P.P. C. while Arshad Iqbal and Rana Iftikhar Ahmad have been challaned by the same Agency for offences under sections 120-B, 302 read with section 34 and 301 and section 307 read with section 34, P.P.C. for conspiracy to assassinate Ahmad Raza Kasuri, Member, National Assembly and in pursuance of the aforesaid criminal conspiracy making a murderous assault on him by firing on his car on the night between the 10th and 11th of November, 1974 and as a result of the same causing the murder of his father Nawab Muhammad Ahmad Khan.

2. Zulfikar Ali Bhutto (hereinafter called as "principal accused") was holding the office of the Prime Minister of Pakistan on the fateful day and had been holding that office from the month of August, 1973 till the night intervening 4th and 5th July, 1977. Before 14th August, 1973 he held the high office of the President of Pakistan. The other accused were members of the Federal Security Force. Mian Muhammad Abbas was Director, Operations and Intelligence in that force while Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad accused were employed in that force as Inspector, Sub-Inspector and Assistant Sub-Inspector respectively. Two of the accused persons Masood Mahmud and Ghulam Hussain were granted pardon and have been examined as approvers at the trial. They were holding posts of Director-General and Inspector respectively in the same force.

3. On the night between the 10th and 11th of November, 1974, at about 12-30 a.m. while Ahmad Raza Kasuri, P.W. 1, a Member of the Opposition in the National Assembly of Pakistan, was returning in his' car No. LEJ-9495, from the wedding of one Bashir Hussain Shah of Shadman Colony, Lahore. He was fired at with automatic weapons near Shadman-Shah Jamal Round-about as a result of which his father Nawab Muhammad Ahmad Khan received injuries, which resulted in his dentil in the United Christian Hospital at about 2-55 a.m. the same night. A statement in writing of this occurrence (Exh. P.W. 1/2) was given by Ahmad Raza Kasuri at about 3-00 a.m. and on its basis an F.I.R, copy of which is Exh. P.W. 34/1, was recorded at Police Station Ichhra.

4. According to this statement, a murderous attack by firing was made on the complainant on the 17th of January, 1972, at Kasur and a case about that occurrence was registered in Police Station, City Kasur. Another attack was launched on the complainant on the 24th August, 1974, in Islamabad by automatic weapons. A detailed report of his occurrence was given in the Police Station Islamabad. On the 9th of November, 1974, the complainant received an information from Muhammad Hanif,

Electrician, Tube-well Model Town, Society, that a day earlier 4 to 5 persons were in search of him and were making enquiries about the location of his house. At about 12-30 a.m. on the date of occurrence (night between the 10th and 11th of November, 1974), while the complainant was returning in his Car LEJ- 9495, after attending the marriage ceremony of Bashir Hussain Shah, whose house is in Shadman Colony, and was going towards Shah Jamal, he was again fired at by automatic weapons from the right-hand side. Since the car of the complainant was a right-hand drive car, he was sitting in it on the right side while his father was sitting on the front seat towards his left. The rear seats were occupied by his mother and maternal aunt. The firing which started from Shadan-Shah Jamal Round-about continued till the car reached about a distance of 100 yards. Some bullets hit the car while some hit his father on his head. The father started bleeding. He took him to the United Christian Hospital where he succumbed to his injuries.

5. It was further stated that the complainant was sniped at for political reasons since he was a Member of the Opposition in the National Assembly and held the office of Central Secretary of Tehrik-e-Istaqlal Pakistan. He used to criticize the Government strongly. In June, 1974, the principal accused had said addressing him in the meeting of the National Assembly that he was fed up with him and it was not possible for him (principal accused) to tolerate him (complainant) any more. These words were recorded in the record of the National Assembly and had also been published in the newspapers.

6. The prosecution case is that Ahmad Raza Kasuri who was a founder member of the Pakistan People's Party and had been elected on the ticket of that party as Member of the National Assembly in the elections held in December, 1970, developed after the said elections strained relations with the principal accused, who in order to get him assassinated or liquidated entered into a conspiracy with Masood Mehmood approver through the agency of the Federal Security Force. Mian Muhammad Abbas joined this conspiracy on the direction of Masood Mahmud and directed Ghulam Hussain approver, P.W. 31 to organize the murder of Ahmad Raza Kasuri. Mian Muhammad Abbas also arranged for the supply of arms and ammunition from the armoury of the Federal Security Force for the execution of this design. The other three accused and Ghulam Hussain approver also joined the conspiracy. Ghulam Mustafa obtained the requisite arms and ammunition with the help of Mian Muhammad Abbas to execute the conspiracy. On the night between 10th and 11th of November, 1974 after having received arms and ammunition from Ghulam Mustafa accused, Ghulam Hussain approver, Arshad Iqbal accused and Rana Iftikhar Ahmad accused in furtherance of the common intention fired with automatic weapons at the car of Ahmad Raza Kasuri at the Round-about of Shadman Shah-Jamal Colony, Lahore. The firing resulted in the death of Nawah Muhammad Ahmad Khan while the complainant Ahmad Raza Kasuri escaped unhurt.

7. As will appear from the evidence, as a result of only nominal investigation the case was filed as tin traced in September, 1975.

8. Abdul Khaliq, P.W. 41, Deputy Director, Federal Investigation Agency who investigated the case explained the circumstances leading to the discovery of different links culminating in the said murder. According to him after the promulgation of Martial Law in the country with effect from the 5th of July, 1977 the Central Government directed the Federal Investigation Agency to inquire into the performances of the Federal Security Force and its officers. The inquiries in Lahore Zone were entrusted to the Director, Central Zone, Lahore and the Deputy Director, Lahore Circle. Inquiries were, therefore, conducted into various political murders, kidnapping, and abduction and dispersing of political meetings and processions by the Federal Security Force. In this connection the bomb blast case in the premises of the Lahore Railway Station on the visit of Air Martial (Retired) Asghar Khan in March, 1975 was looked into in which Riaz, a paid agent of the Federal Security Force, was caught red-handed at the Railway Station and was later let off on the intervention of the authorities. Various officials of the Federal Security Force were called and interrogated. It came to light that Ghulam Hussain, Inspector, F.S.F. approver in this case along with his colleagues was seen in Lahore in those days. It was apprehended that the Federal Security Force might be involved in the murder of Nawab Muhammad Ahmad Khan. Arshad Iqbal and Rana Iftikhar Ahmad accused were interrogated on 24-7-1977 and 25-7-1977 and as a result of the inquiry were arrested on 25-7-1977. They confessed their participation in the commission of the above-mentioned offences before a Magistrate P.W. 10 on 26-7-1977. Ghulam Mustafa accused, Ghulam Hussain (approver) P.W. 3, Masood Mahmud (approver) P.W. 2 and Mian Muhammad Abbas accused were also interrogated and arrested. All of them confessed their respective guilt in statements made under section 164, Cr. P.C. before the Magistrates. Masood Mahmud approver directly involved the principal accused in the commission of the offences. This is the background leading to the latter's arrest and this trial.

9. Coming back to the events of the fateful night it may be seen that Ahmad Raza Kasuri sped in his car, which incidentally was also damaged, to the United Christian Hospital. Nawab Muhammad Ahmad Khan was alive at that time. His outpatient card Exh. P.W. 6/1 was prepared by Dr. Zarrin Faiz. He was admitted in the Emergency Room at 1-00 a.m. on the 11th November, 1974 vide entry Exh. 6/2-A in the Emergency Room Register Exh. P.W. 6/2. He was attended to by Dr. Zarrin Faiz. Dr. Bashir Ahmad, Neuro Surgeon of the Mayo Hospital was called. The X-rays of the skull of the injured person Exh. P.W. 6/3 and Exh. P.W. 6/4) were taken. According to the X-ray report Exh. P.W. 6/5 which was prepared by Dr. Mohd. Asif Choudhry P.W. 6 who had also attended the patient, The patient had a "stellate fracture mainly in the left frontal parietal region of skull. A bullet like metallic foreign body was seen in the X-ray in mid frontal parietal region of skull cavity. There was found scattered radio opaque debris in

the left fronto-parietal region, mainly and in right tem pro-mandibular joint area." The medico-legal report relating to this case, Exh. P.W. 6/7, was prepared and signed by Dr. Zarrin Faiz who being somewhere in America could not he produced as a witness.

10. The patient died on the same night at 2-55 a.m. in the hospital. A death certificate P.W. 6/6 was issued by P.W. 6. The cause of death mentioned in this certificate was "bullet injury to brain". In the opinion of the Doctor (P.W. 6)the injury was sufficient in the ordinary course of nature of cause death.

11. Dr. Sabir Ali who was working as Deputy Surgeon, Medico-legal, Lahore at that time, on receipt of order Exh. P.W. 7/1 performed the postmortem examination of the deceased at 6- 15 a.m. the same day. He found the following injuries:

- (1) Lacerated wound with ragged margin,  $2\frac{1}{2}$ " x  $1\frac{1}{4}$ ". The brain matter was visible, placed on the top right side of the head, obliquely transvcised, the lateral end downwards and the medical end upwards, three vertical lacerations on the anterior margin of the wound and two vertical laceration on the posterior margin. The size of the laceration ranged from  $\frac{1}{2}$ " to  $\frac{1}{3}$ ". This wound was situated  $6\frac{1}{2}$ " above the tragus of the right ear at 11 O'clock.
- (2) Lacertaed wound  $\frac{1}{4}$  x  $\frac{1}{3}$ " x scalp deep transversely (slightly oblique) placed on the back of the left side of the head 5" above the tragus of the left car at 2 O'clock. The medial end was slightly downwards than the lateral one.
- (3) An abrasion  $\frac{1}{3}$ " x  $\frac{1}{4}$ " on the right zygomatic arch.
- (4) Abrasion  $\frac{1}{4}$ " x  $\frac{1}{4}$ " on the outer lower half of the left forearm  $2\frac{1}{2}$ " above the wrist-joint.

12. On the dissection of the cranium he found the whole of the underscalp echymosed. There was egg-shell fracture of the parietal hone along with multiple linear and fissured fracture extending in all directions. There was fracture of the base of the skull in its anterior and middle part (cribiform plat, crystagalli etc.). The meninges and the brain (cerebral hemisphere occipital parts) was shattered under injury No. 1. The small pieces of bones were found stuck in. Two thin metallic pieces from the margins of the wound and one bullet from the right cerebral hemisphere in the middle were recovered. The injury No. 2. was only scalp deep.

On opening the chest, both the lungs were found pale. The heart was empty. On opening the abdomen, the stomach was found empty. The small intestine contained chyme and the large one had faces. The liver, spleen and the kidneys were pale. The bladder contained four ounces of urine



13. In the opinion of the Doctor injury No. 1 which was inflicted by some fire-arm was sufficient to cause death in the ordinary course of nature. The cause of death was injury to brain and shock, and only few hours had elapsed between the injury and the death and similarly between the death and the postmortem examination. The post-mortem report is Exh. P. W. 7/2.

14. P.W. 7 handed over to the Police a bullet and two metallic pieces which were sealed in a tube and the clothes of the deceased, bush-shirt, *bunyan*, trousers and underwear, all blood-stained (Exhs. P.1. to P. 4). They were taken into possession by Memo. Exh. P.W. 7/6.

14-A. On receipt of the statement Exh. P.W. 1/2 Abdul Hayee Niazi, Station House Officer, Ichhra Police Station, Lahore (P.W. 34) recorded the formal F.I.R. copy of which is Exh. P.W. 34/1. He directed A.S.L Muhammad Sarwar (P.W. 17) to reach the hospital along with constables. He also sent another A.S.I. Zakaullah by name (not produced) to the spot along with 4/5 constables with a direction to preserve the spot. He himself first went to the spot and from there proceeded to the hospital, where he found Senior Officers like the Deputy Commissioner, Sardar Abdul Wakil D.I.G., Khan Asghar Khan, S.S.P. and Abdul Ahad, D.S.P. He deputed Muhammad Sarwar A.S.L, (P.W. 17) to take care of the car. He prepared the inquest report of the deceased Exh. P.W. 7/5, obtained death certificate of the deceased Exh. P.W. 7/3 and submitted application Exh. P.W. 7/1 for postmortem examination. He took into possession coat P. 6, waist-coat P. 7 and a cap P. 5 hearing bullet marks which belonged to the deceased vide Recovery Memo. Exh. P.W. 1/21. The coat and the waist-coat were bloodstained. He also took into possession Car No. LEJ-9495 of Ahmad Raza Kasuri by Memo. Exh. P. W. 1/3. Since the glass of the rear right-window of the car had been smashed, he took the broken pieces into possession as also some blood from the car vide Recovery Memo. Exh. P.W. 1/6.

15. The S.H.O. (P.W. 34) went to the spot and prepared site plan (Exh. P.W. 34/2). He found some bullet marks on the walls of some bungalows. He also found that one bullet had pierced through the door and also four books in the shelf in one of the rooms of a bungalow. He collected 24 empty cartridges from the spot and lead of a bullet from near the bungalow. It is clear from his evidence and the evidence of Mr. Nadir Hussain Abidi, the then Director, Forensic Science Laboratory, Lahore, (P. W. 36) that these empty cartridges and the bullet so recovered were not sealed. Its Memo, was also not prepared in view of a direction given to the official by the Deputy Superintendent of Police namely Abdul Ahad (now deceased).

16. On an application Exh. P. W. 1/4 submitted by Ahmad Raza Kasuri to the District Magistrate in the hospital and in pursuance of the order passed on it by the District Magistrate, P. W. 34 gave custody of the car on Superdari to Ahmad Raza Kasuri. Recovery Memo, of empty cartridges P.W. 34/4 and other documents were prepared much later but were ante-dated as will be seen from the evidence.

17. The prosecution has produced the evidence to prove the following points: –

- (1) Strained relations and enmity between the principal accused and Ahmad Raza Kasuri resulting in the threat at the floor of the Parliament on 3-6-1974.
- (2) The conspiracy to murder Ahmad Raza Kasuri between the petitioner and Masood Mahmud P.W. 2 and joining of the other accused and Ghulam Hussain approver in that conspiracy.
- (3) Attack on Ahmad Raza Kasuri as a part of the same conspiracy first at Islamabad and later at Lahore, the last occurrence culminating in the death of the deceased.
- (4) The steps taken by the principal accused and his subordinates to channelize the investigation in a manner so as to exclude the possibility detection of the actual culprits; and interference in the investigation of the Provincial Police by Central Agencies.
- (5) Preparation of incorrect record by the Police under the directions of the Officers of the Central Government with the object of making the detection of the actual offenders extremely difficult.

18. The first three points are proved by the evidence of P. Ws. 1 to 4 and 31.

19. Ahmad Raza Kasuri (P. W. 1) stated that he was a founder member of the Pakistan People's Party which was founded on the 1st December 1967. He was elected to the National Assembly of Pakistan in the 1970 elections on the ticket of this party. The relations between him and the principal accused cooled down and became strained after he found that the principal accused was power hungry and keen either to share power with Sh. Mujib-ur-Rehman or to attain power in West Pakistan. In this connection he referred to firstly a statement given by the principal accused in Peshawar in February 1971 making it clear that his party would not be attending the forthcoming session of the National Assembly scheduled to be convened on the 3rd of March 1971 at Dacca because they would be treated as double hostages and would be going to the slaughterhouse; secondly a speech made by him (the principal accused) on the 28th of February 1971, in a public meeting held at Iqbal Park, Lahore threatening that whosoever would go to Dacca, his legs would be broken, and whosoever would going to Dacca, would be going on a single fare; and thirdly the speech made by him (the principal accused) on the 14th of March 1971, in a public meeting held at Nishtar Park, Karachi in which he clarified that since his party was the majority party in West Pakistan, and Sh. Mujib-ur-Rehman's party was majority party in East Pakistan, the

power should be transferred not to the party having an overall majority, but separately in each wing to the majority party of that wing. He referred to the words used by the principal accused to convey this meaning "ادھر تم۔ ادھر ہم". This according to the witness, was the background of the relations between him and the principal accused becoming estranged. He submitted that in fact he developed differences with the said accused on the issue of P. P. L. strike in which he and some other legislators went on hunger strike unto death in order to secure the liberation of the press in Pakistan and liquidation of the National Press Trust. Since the said accused was not interested in the liberation of the Press and knew that he would be using this powerful organ to his own advantage once he comes into power. He stated that the said accused had to face a mini revolt on this issue. He had to lead a procession from Masjid-e-Shohda in connection Mian Mahmood Ali Kasuri's election campaign. When he reached there the processionists shouted "first Camp and then Campaign". The said accused had under compulsion to come to Gol Bagh where he (P. W. 1) was "confined in a Military Camp". He requested the strikers to break their fasts but they refused on the ground that liquidation of National Press Trust was one of the commitments of Pakistan People's Party in its manifesto. On this the said accused took out his pen and in an angry tone threatened to resign from the Chairmanship of the party in his favor.

19-A. He further submitted that he was the only member of the Pakistan Peoples Party who went to Dacca to attend the session of the National Assembly scheduled to be held on the 3rd of March 1971. He had taken this action in the interest of integrity and solidarity of the country. On this, serious differences arose between him and the said accused. Later on he did not sign or vote in favor of the Constitution of Pakistan of 1973 since he considered it an instrument of tyranny which could only perpetuate one-recognition of Bangla Desh which was inter alia a result of the ambition of the principal accused to acquire power. He always expressed an opinion at the floor of the House that 94000 prisoners of war were locked up because of the principal accused's connivance with the Indian Government. He also said the House that 94000 prisoners of war were locked up because of the principal accused's connivance with the Indian Government. He also opposed all black laws which were introduced at the floor of the House in order to throttle any voice of dissent in Pakistan and particularly the Act pertaining to the Federal Security Force. He was an outspoken critic of the policies of the principal accused, internal as well as external, and this was never appreciated by the accused.

20. Elucidating the history of his differences with the principal accused the witness added that on the 2nd of May 1971, the said accused came to Kasur where he addressed the Workers of the Pakistan People's Party in Habib Mahal Cinema, Kasur. The elements pro to the principal accused resorted to an attack on him within the premises of Habib Mahal Cinema and his hand was fractured in that attack. On the same day, after the attack, the principal accused suspended his primary membership of the Pakistan People's Party.

21. On the next day, the witness organized his own group known as Raza Progressive Group in the party. Thereafter, another attack was launched on him on the 17th of January 1972, in which 3 bullets hit his legs. In this incident, his brother Khizar Hayat, also received injuries. Thereafter, he made a temporary peace with the principal accused, as a matter of political strategy since the latter was the Chief Martial Law Administrator and was witch-hunting his political opponents under the Martial Law umbrella by securing quick punishments for them from the Military Courts.

22. Immediately after the lifting of the Martial Law, the witness again showed his teeth to the principal accused and revived his old role of criticizing him, both outside and inside the National Assembly. He was formally expelled by the principal accused from the Pakistan People's Party in October 1972. He joined the Tehrik-e-Istaqlal in June 1973.

23. P. W. 1 made reference to an incident which happened in the Parliament on the 3rd of June 1974 when he contradicted the principal accused who while holding the floor had stated that the Constitution of 1973 was a unanimously passed document. P.W. 1 intervened to put the record straight and pointed out that nine persons had not signed it. On this the said accused lost temper and said pointing his fingers towards the witness "I have had enough of you. Absolute poison. I cannot tolerate you any further". There was an exchange of hot words from both sides at that time. On the 4th of June 1974 the witness filed a privilege motion (P.W. 22/3) alleging that some *Goondas* were looking for him and this had happened because of his altercation with the accused at the floor of the House a day earlier.

24. P.W. 1 then narrated the incident dated 24th of August 1974 at Islamabad in which he was fired at from a blue jeep in broad day-light and in regard to which a case was registered at Police Station Islamabad vide F.I.R. P. W. 1/1. No Police Officer, however, contacted him thereafter in this connection and no investigation or inquiry into the incident was at all made.

25. The witness stated that he took up the matter before the Committee of the Full House which was seized of the Qadiani issue, but that Committee did not entertain the motion since it was not functioning as National Assembly. The witness also agitated this matter on the same day i.e. 24th August 1974 on the floor of the Senate.

26. The witness further stated that he became alert and took all those precautions which a private individual could possibly take. He went to Quetta in September 1974 to attend the meeting of the Working Committee of Tehrik-e-Istaqlal of which he was a member. He stayed there in the hotel Imdad where other members of the Working Committee including Air Marshal (Retired) Asghar Khan were also staying. They had a few guards in addition the local party President, Mr. Khuda Noor, also arranged a

strong contingent of guards. These guards used to search everybody before allowing him to meet the witness and others. A strong contingent of these guards used to stand alert on the staircase of the Hotel and the other set used to watch the rooms where the party of the witness was staying. In spite of this the witness used to slip away at night from the room booked for him since he was aware that he was a marked man.

27. Regarding the incident, P.W. 1 stated that he with his parents and maternal aunt went to attend the wedding ceremony of Syed Bashir Shah in Shadman Colony, Lahore, on the 10th November 1974 at 8-00 p.m. It was a dinner-cum- Qawali function. Shortly after midnight when Qawali was over, he with his parents and aunt started towards his own house in his right-hand driven Toyota Mark-II car which he was himself driving. His father Nawabzada Muhammad Ahmad Khan deceased was sitting on the front seat towards his left while his mother was sitting on the rear seat behind him with his aunt towards her left. He reached in a few minutes of the Shadman- Shah Jamal Round-about which is about 70 yard from the house of Syed Bashir Shah. He had hardly put his car into the second gear when the first burst of weapons hit the body of his car and damaged its dynamo. Immediately the car's light went off. Then there were repeated bursts with automatic fire-arms. He managed to drive on and when he cleared the round-about and turned towards F.C. College bridge in Shah Jamal Colony and reached near the house of Muzaffar Ali Khan Qazalbash he looked into the driving mirror. After seeing that there was no car following him he noticed that his father was resting his head on his shoulder. He moved his hand forward towards his hither whereby his hands were soaked with blood. Realizing that this father had been hit with bullets, he became panicky and was filled with grief. At that stage, his mother consoled him and told him that "son, you have got to know about your father's injuries now but his blood is already in my feet".

28. The witness managed to drive his car to the United Christian Hospital. His father was removed there to the operation theatre. After that he rang up at his home and informed his people about the unfortunate incident. The doctors needed blood which he himself gave. After he had given his blood for being transfused in the body of his father, he saw his brothers along with two immediate neighbors and family friends, Mr. Ayyaz and Mr. Javed Zafar Khan.

29. He went on to state that his brother Maj. Ali Raza rang up the S.S.P., Lahore and informed him about the occurrence. Asghar Khan S.S.P. (P.W. 12) arrived in the Hospital followed by D.L.G. Mr. Abdul Wakil Khan (P.W. 14). The witness described before the Police Officers the entire incident and told them that this attack had been launched on the instructions of the principal accused. He stated that while his father was still in the operation theatre, the police officials were trying to draft an F.I.R. on the basis of the information supplied by him, but he did not agree to the registration of the case on the basis of the draft prepared by them. They had first mentioned in the draft that this attack might have taken place because of political differences to which he

objected that he required precision and the term "political differences" was vague; after which they wrote that this attack might have been arranged by the Government. The witness took objection to this sentence also because in the set up of the Governmental organization, right from the Tehsildar up to the President of Pakistan, everybody performs Governmental functions. He said that he would like the draft to be more precise and to include the name of the principal accused. The Police Officers persuaded him to drop the name of the principal accused. At about 3 O'clock in the night, a doctor came down from the operation theatre and formally announced the death of his father. He lost his temper and told the Police officers with finality that if they had to record an F.I.R. the name of the principal accused must be included in it. Thereupon, they asked him to give his statement in writing promising that the case would be registered on its basis. The witness added that since he was not in a fit state of mind, he dictated his statement Exh. P.W. 1/2 to Javed Zafar Khan and after signing it handed it over to Asghar Khan P.W. 12, who, later handed it over to some policeman on duty.

30. The witness also testified about the post-mortem examination about the taking of possession of the car by the police by Exh. P.W. 1/3, about the bullet marks on the car, about the application Exh. P.W. 1/4, submitted by him in the hospital to the Deputy Commissioner for return of the car and about the Sapurdari Nama of the return of the car, Exh. P.W. 1/5. He went on to state about the taking into possession by the Police (see Memo. Exh. P. W. 7/6), of the clothes of the deceased. Bush-shirt P. 1, vest P. 2, trousers P. 3 and underwear P. 4. He also proved the recovery by the police of cap bearing bullet marks P. 5, blood-stained coat of the deceased P. 6 and his waistcoat P. 7 vide Memo. Exh. P. W. 1/6 by which the police Look into possession the broken glass and the blood of his father from inside the car.

31. The witness referred to the Privilege Motion moved by him on the 29th November, 1974 (Exh. P.W. 1/7) in the National Assembly which was ruled out of order.

32. As regards the investigation, the witness stated that the police did not contact him or his mother or his aunt in connection with the investigation. He stated that once or twice the police officials did come to his house but they came only for condolence purpose. He appeared before the Tribunal headed by Mr. Justice Shafi-ur-Rahman. He kept an Ex-Army Havildar Sherbaz Khan, as his personal guardsman who accompanied him on his visits to and return from the National Assembly.

33. The witness stated that theirs was a happy family and the unity in the family was exemplary. There were no disputes over land. He produced official reports of the National Assembly pertaining to 19th February, 1973, 20th February, 1973, 1st June, 1973 and 3rd June, 1974, Exhs. P.W. 1/8, P.W. 1/9, P.W. 1/10 and P.W. 1/11 to corroborate his statement.

34. The witness recounted the facts leading to his rejoining the People's Party. He stated that in September, 1975, Saeed Ahmad Khan P.W. 3 and Abdul Hamid Bajwa (now deceased) started visiting his house in Lahore and also his room in the Government Hostel, Islamabad. Saeed Ahmad Khan, P.W. 3. persuaded him by reminding him that he was a marked man and the danger had not as yet abated. He also said that the witness was a young parliamentarian having a bright future in the politics of Pakistan and by maintaining the present stance he had not only put his life in jeopardy but had put his entire family at stake. He advised him to patch up with the principal accused. These visits of P.W. 3 and Abdul Hamid Bajwa (now deceased) continued for some time. Mr. Abdul Hafeez Pirzada visited his house in October, 1975 and tried to persuade him to compromise with the said accused and to rejoin the Pakistan People's Party. The witness stated that he patched up with the principal accused on the 6th of April, 1976.

35. In cross-examination by the learned counsel for the principal accused the witness conceded that he continued to be a Member of the Pakistan People's Party up to the 8th of April, 1977, after he had rejoined it on the 6th April, 1976. He explained that he simply maintained a posture of affiliation with the party as a measure of expediency and self-preservation. He admitted that he had applied for the Pakistan People's Party ticket for election to the National Assembly in 1977, but it was not awarded to him. He denied that he had adopted his "present stance against Mr. Bhutto" because the party ticket was not awarded to him. He referred in this connection to his speech in the National Assembly made on the 2nd of December, 1974, (Exh. P.W. 1/14) the relevant part of which is Exh. P. W. 1/14-A, to which reference will be made later. The witness was a Member of the Parliamentary Delegation sent to Mexico in 1976. After his visit to Mexico and several other countries en route Pakistan the witness submitted a report Exh. P.W. 1/20-D. He was confronted in this report with the following portion:-

"We found that your image as a 'Scholar Statesman' is emerging and getting wide acceptance".

He admitted to have written this but explained that he was trying to pamper the accused.

36. Much of the cross-examination by the learned counsel for the principal accused was directed towards showing that the witness had great admiration for the leadership of the principal accused and in this connection he was shown his letter Exh. P.W. 1/18-D and his telegram Exh. P.W. 17-1) which pertain to the period up to 1970. He denied having admiration but stated that he had been prompted to join the Pakistan People's Party, by its Manifesto. He however, admitted his cordial relations with the principal accused up to January, 1971. He described priorities in regard to his loyalties and stated that his first loyalty was to the country and to the nation, second loyalty was to the Party and its Manifesto and the third loyalty was to the leadership. He was cross-

examined at length regarding the incident of Habib Mahal Cinema, Kasur, in May, 1971, the cross-cases registered in that connection against him, the case registered in his support in this connection and a cross-case registered against him and one Muhammad Ashraf, about another attack launched at his house at Kasur on the night between the 4th and 5th of August, 1971 in which his brother Khizar Hayat received as many as 100 injuries, and about an incident of the 8th of April, 1972, of a firing in a public meeting held at Khudian which he addressed, and the cases registered in this respect. He was also questioned about an assault by Ch. Muhammad Yaqoob Maan with his party on him on the 17th January, 1972, in which he sustained bullet injuries on his legs, with the intention of showing that he had inimical relations with Ch. Muhammad Yaqoob Maan. He was examined about his relations with one Akbar Toor who had disturbed the meeting at Khudian. The witness stated that his relations with Ch. Muhammad Yaqoob Maan were very cordial because he was his benefactor. It was when he got instructions from the principal accused that he started resorting to the strong man tactics on him and his family. He attributed indifference of the authorities in such matters to the relations between the principal accused and General Yahya Khan. He stated that after the arrest of Sh. Mujeeb-ur-Rehman General Yahya Khan was entirely banking on the political support particularly of the said accused who was enjoying the position of a private Advisor to General Yahya Khan.

37. Some questions were put to him about an attack made on his house by one Haji Nai in 1952, but he denied this suggestion. He admitted the gifts made by his father to his wife and others but he denied that there was any family dispute on this score.

38. He was questioned whether the strike of P.P.L. had started under the orders of the said accused or the Central Committee the witness replied that it was under the orders of the accused. But he repudiated the suggestion that the strike was started by the strikers including himself without the concurrence of the principal accused.

39. In reply to the questions put by the learned counsel for the other accused the witness admitted that there was no enmity between him, his family and his father on the one hand and Arshad Iqbal, Rana Iftikhar Ahmad and Ghulam Mustafa on the other and that he had no ill-will or enmity against Mian Muhammad Abbas. It is unnecessary to deal with the rest of the cross-examination which dealt only with the question of the witness trying to obtain the Pakistan People's Party ticket or seek interviews with the principal accused in his capacity as Prime Minister.

40. Masood Mahmud approver (P. W. 2) who joined the Police Service of Pakistan in 1948, served as Superintendent of Police, Deputy Inspector General Police, Deputy Secretary in the Provincial as well as Central Government, Deputy Secretary CENTO at Ankara, Joint Secretary in the Defence Ministry and was later promoted as Additional Secretary in the same Ministry, explained the background of his appointment as Director-General of the Federal Security Force. He stated that before his promotion as



Additional Secretary he had been superseded by four juniors and after promotion he was transferred to the post of Managing Director, Board of Trustees of the Group Insurance and Benevolent Funds in the Establishment Division which was a punishment post. He particularly referred to his failure to see Mr. Vaqar Ahmad, Establishment Secretary inspite of his best efforts.

41. He stated that Mr. Vaqar Ahmad asked him one day to call on the Prime Minister (the principal accused) in the morning of 12th of April, 1974 and to see him first before going for the interview. In this meeting Mr. Vaqar Ahmad informed him that the Prime Minister was going to make an offer of appointment to him, which he must accept. He also drew his attantion to his state of health and the state of health of his wife as well as to the fact that he had small children. He further referred to the recent Rules which provide for retirement at any time of Officers of Grade 21 and above. This talk created an impression on the mind of the witness that his job was at the mercy of the Prime Minister and Mr. Vaqar Ahmad.

42. He stated that during the interview with the principal accused the latter said kind words to him and after reminiscing about their past associations praised his capacity of hard work and offered to him the post of Director-General of the Federal Security Force. He also made a mention of the state of health of his wife and of his (P. W. 2) having young children. He asked the witness to be 'on the right side' of Mr. Vaqar Ahmad since Mr. Vaqar Ahmad did not like him (P.W. 2).

43. The witness continued that the principal accused directed him not to seek instructions from Khan Abdul Qayyum Khan, the then Minister of Interior. He asked him to raise the force into a deterrent one because, as spelt out by him, he wanted the people of Pakistan, his Ministers MNAs and MPAs to fear it. He however advised him not to terminate the services of re-employed officers without his prior permission. In this connection he particularly mentioned Mian Muhammad Abbas accused. He also told him that written directive had been issued to the Force for the setting up of an Intelligence Wing.

44. Between the 12th of April, 1974 when the witness had an interview with the principal accused and the 23rd of April, 1974, the witness was visited several times by Mr. Saeed Ahmad Khan, P.W. 3 (who was then the Chief Security Officer to the principal accused), and his Assistant, late Abdul Hamid Bajwa. Abdul Hamid Bajwa did not mince matters in making it plain that if the witness did not accept the job offered to him, his wife and children might not be able to see him again. Similar apprehensions were expressed by Saeed Ahmad Khan P.W. 3, but in mild and persuasive language.

45. The witness stated that he assumed charge of his new office on the 23rd of April, 1974. The charter of duties of this post was contained in the Federal Security Force Act,

1973. The principal accused gave to him an oral charter stating that he wanted the Force to be available to him for political purpose i.e. for —

- (a) breaking-up of political meetings;
- (b) harassment of personages both in his own party and the opposition, and
- (c) induction of plain clothed persons in public meeting addressed by him to swell the crowd.

46. One of the functions to be discharged by the witness was to brief the Prime Minister about the law and order situation in the country, the political situation in the country and information collected through sources about members of his own party including some of his Ministers and those in the opposition.

47. The principal accused directed the witness to be present in the National Assembly when he was attending the session or was in his own chambers in the National Assembly. He also asked the witness to curtail his social life to the barest minimum and to advise his wife to do accordingly.

48. The witness further stated that in June, 1974 when Ahmad Raza Kasuri P.W. 1 was speaking in the National Assembly, the principal accused addressed him directly and not through the Speaker, and asked him to keep quiet. He also stated something to the effect like that he had had enough of him and that he would not tolerate his nuisance any more. A day or two later, the Prime Minister sent for him that he was fed up with the obnoxious behavior of Ahmad Raza Kasuri and Mian Muhammad Abbas accused knew all about his activities. He also told him that Mian Muhammad Abbas had already been given directions through the witness's predecessor to get rid of Ahmad Raza Kasuri. The principal accused went on to instruct the witness that he should ask Mian Muhammad Abbas to get on with the job and to produce the dead body of Ahmad Raza Kasuri or his body bandaged all over. He told him that he would hold him (witness) personally responsible for the execution of this order.

49. The witness protested against his order which according to him was against his conscience and also against the dictates of God, that the principal accused lost his temper and shouted that he would have no nonsense from him or Mian Muhammad Abbas. He further said to him "you don't want Vaqar chasing you again, do you?"

50. The witness called Mian Muhammad Abbas to his office and repeated to him the orders of the principal accused. Mian Muhammad Abbas accused was not the least disturbed and told the witness that he need not worry about it and he would see that the orders were duly executed. He also said that he had been reminded of his operation by the witness's predecessor more than once.

51. The witness continued that he was reminded and goaded again and again about the execution of this order. This was done by the principal accused personally, on the green telephone as well as through Saeed Ahmad Khan P.W. 3.

52. The witness referred to the earlier incident of August, 1974 in which Ahmad Raza Kasuri P.W. 1 was sniped at in Islamabad. He said that before this incident the principal accused had asked him to take care of Ahmad Raza Kasuri who was likely to visit Quetta. He accordingly told Welch P.W. 4, the then Director, Federal Security Force, Quetta that some anti-State elements including Ahmad Raza Kasuri P.W. 1 had to be got rid of. He also told him that Ahmad Raza Kasuri was delivering anti-State speeches and was doing damage to the interest of the country. The witness reminded Welch P.W. 4 personally about this on his visit to Quetta.

53. He added that P.W. 4 submitted an Intelligence report dated 14-9-1974, Exh. P.W. 2/1. It may be stated that the primary object of the report is to intimate that Ahmad Raza Kasuri P.W. 1 arrived in Quetta on 13-9-1974, and though he had his room reserved in the Imdad Hotel he did not reside in the room. It also includes excerpts from the speech of P.W. 1 against the principal accused made at Quetta containing allegations that the latter was splitting up the country, that he had taken thirty lacs of rupees from Ghulam Ahmad on the Qadiani issue, that the Federal Security Force was all over the country and that his favorites Lathi-charged and shot the people. He complained that women had been disgraced and the army has been used against the people.

54. The witness admitted having received another report from Welch P.W. 4, a photostat of which was provisionally marked Exh. P.W. 2/2. A carbon copy was later proved formally as Exh. P.W. 4/1. He also proved documents Exh. P.W. 2/2 and Exh. P.W. 2/3. For the proper appreciation of the facts. It will be worthwhile to mention the contents of these documents.

55. Exh. P.W. 4/1 dated 18th September, 1974 reported the departure of Ahmad Raza Kasuri P.W. 1 from Quetta on the 16th September, 1974 at 11-30 a.m. by PI A. It also reported that throughout their stay at Quetta the party including Ahmad Raza Kasuri were protected by twenty persons and that the party was exceptionally cautious. The persons wishing to see the party were usually searched by the persons who were detailed for their security. It further says that even the times of their (party) movement were not disclosed and they spent little or no time in the hotel room reserved for them. According to the report a source had infiltrated into the ranks of the party claiming to be a relative of Sattar Khan of Mardan, but he was detected when Sattar Khan himself arrived in Quetta. Thereafter he was removed from the inner circle.

56. Exh. P.W. 2/2 is a letter dated 25-9-1974 written by Mian Muhammad Abbas to Welch, P.W. 4 inquiring from him as to where did Ahmad Raza Kasuri, P.W. 1, stay at Quetta if he did not put up at Imdad Hotel where a room was reserved for him. Exh. P.W. 2/3 dated 17th November, 1974 is the reply to the letter Exh. P.W. 2/2 and reports that Ahmad Raza Kasuri seldom stayed in his reserved room during the night, but he occupied some other room reserved for his party in the hotel.

57. The witness stated that he was aware of the inquiry made in Exh. P.W. 2/2. In fact he had been asking Mian Muhammad Abbas accused to inquire from Welch P.W. 4 as to steps taken by him regarding the directions given to him about Ahmad Raza Kasuri, P.W. 1. The reference in the document, Exh. P.W. 2/3 appeared to be an expression of inability by Welch (P.W. 4) to perform the duty.

58. The witness further stated that on the 11th of November, 1974 the principal accused and he himself camped at Multan. Very early in the morning of that date the principal accused rang him up and said: —

"Mian Muhammad Abbas has made complete balls of the situation. Instead of Ahmad Raza he has got his father killed."

On being summoned later to the residence of Sadiq Hussain Qureshi, Multan the witness met the principal accused in the presence of Sadiq Hussain Qureshi. The principal accused most non-chalantly informed him of the news about the death of the deceased in this case as if he had not talked to him before. The witness said in reply that he had also heard about this.

On his return to Headquarters (Islamabad) Mian Muhammad Abbas accused reported to him that his operation has been successful, but instead of the intended victim his father Nawab Muhammad Ahmad Khan had been murdered at Lahore.

59. The witness continued that on this return to Rawalpindi the principal accused summoned him. He found him to be peeved and agitated. He said that the actual task had yet to be accomplished. He, however, declined to carry out such orders any more. Even on subsequent occasions the principal accused directed him to get Ahmad Raza Kasuri, P.W. 1 assassinated, but he refused. Thereafter threats were held out to him and attempts were made on his life as well as to kidnap his children from the Aitchison College, Lahore. Several times his food at Chamba House was poisoned. He discovered that some of his own subordinates seemed to have been bought over or won over since he had seen them lurking at places where they should not have been when he was around.

60. He further stated that he or his family had no grudge or motive against Nawab Muhammad Ahmad Khan, deceased, or Ahmad Raza Kasuri, P.W. 1, and his father and the deceased had been great friends, since the witness himself hailed from Kasur.

61. He explained the circumstances leading to his confessional statement after he was taken into protective custody in the early hours of 5th July, 1977. He was taken initially to some mess in Rawalpindi and was removed from there that very evening to Abbotabad where he stayed till the early days of August. He addressed a letter to the Chief Martial Law Administrator on the 4th of August, 1977 in which he made a clean breast of the misdeeds of the Federal Security Force conducted by him under the orders of the principal accused. He was thereafter contacted by the Federal Investigation Agency. He then made a confessional statement 9P.W. 2/4) before a Magistrate at Islamabad. He also addressed a letter Exh. P.W. 2/5 to the District Magistrate on the 7th of September, 1977 requesting for grant of pardon, in pursuance of which the pardon was granted to him and he made his statement (P.W. 2/6) in consequence thereof under section 164, Cr. P.C.

62. The witness also proved his T.A. Bills Exh. P.W. 2/7 pertaining to the period from 1-11-1974 to 11-11-1974 to establish his visit to Multan and his presence at Multan in the morning of 11th of November, 1974 and his departure therefrom by P.A.F. at 11-30 a.m. He also proved his T.A. Bills Exh. P.W. 2/9 and P.W. 2/10 pertaining to the period 18th of July, 1974 to 4th of August, 1974 to prove particularly his visit to Quetta.

63. In reply to cross-examination questions of the learned counsel for the confessing accused the witness stated that his predecessor and the first Director General of the Federal Security Force was Mr. Haq Nawaz Tiwana. He stated that some of the officers under him had direct contact with the Prime Minister's Secretariat. In some cases those officers had been complying with the orders of the officers of the Prime Minister's Secretariat and orders of the principal accused without reference to him. Such orders used to be about a secret mission, which term was known to all the officials of the Federal Security Force. He conceded that the orders of the principal accused with regard to the instant case were also of 'secret mission'. In reply to a question whether it was impressed upon the subordinate officials of the Federal Security Force during the period of their training that they would have to obey all orders of their superiors whether legal or illegal, the witness stated that this could not be spelt out from the syllabus of training but an order of a superior in a disciplined force has to be carried out.

The witness further conceded that persons from outside the Force had been employed as 'sources' to gather information and to perform 'secret mission' and such persons were paid from the Secret Funds of the Federal Security Force. He admitted that Federal Security Force had been used to disperse meetings at Dera Ghazi Khan and Sheikhpura.

64. The learned counsel for the principal accused cross-examined the witness in detail about his assignments prior to his appointment as Director General, Federal Security Force. He was cross-examined about his alleged role during the language riots of 1952 in Dacca in which there were several casualties in police firing. He was also questioned about his alleged unsavory role in an old case against Mrs. Ibrat. It was suggested to him that Mrs. Ibrat was maltreated and rats were let loose in her Shalwar and its ends were tied. It appears that these questions were put to prove that P.W. 2 was well-qualified from the point of view of the principal accused to be appointed as Director-General of the Federal Security Force. He was also cross-examined about his assertion that he was posted to a punishment post when he was transferred as Managing Director, Board of Trustees, General Benevolent Fund and Group Insurance. He was asked to explain why he was so appointed. He stated: —

"I had knowledge of the fact that Arms and Ammunition had been given to Jam Sadiq Ali and late Mr. Abdul Hamid Bajwa, for operation against the Hurrs, in Sindh. After this information became available to me, I noticed a certain amount of coolness in the dealings with me by the then Secretary and I think in order to ensure that I did not blurt out the secret, the Prime Minister sent Abdul Hamid Bajwa to me to keep my mouth shut. It was after a short while that I was transferred as Managing Director, Board of Trustees, General Benevolent Fund and Group Insurance."

On receipt of this reply the learned counsel cross-examined the witness at length with a view to justify this supply of arms and ammunition in view of the alleged disturbances in Sanghar District. He was later cross-examined with a view to bring on record that he had imparted some information to Abdul Hafeez Peerzada about the burning of records in the Intelligence Bureau. He conceded having given this information in the national interest. He admitted that the appreciation of this was communicated to him by the Military Secretary to the President (the principal accused). He however denied having asked Abdul Hafiz Peerzada to remember him in future since he had done a valuable job. He denied having sent Qamar-ul-Islam to the principal accused or having requested Abdul Hafiz Peerzada or having sent his wife to Mrs. Nusrat Bhutto to recommend his name for the post of Director-General F.S.F.

Several questions were put to him about the disturbances in Baluchistan, occasional bomb blasts there and attacks on the principal accused during his visits there. Suggestions were made to him about threats held out to him by the opposition leaders during the campaign of the election of March, 1977 particularly the threat by Air Marshal (Retd.) Asghar Khan during his speeches in February, 1977 that he (witness) would be hanged upside down. It is unnecessary to give a resume of the answers given to such and similar questions.

65. The witness was confronted with certain omissions in his earlier statements, but he explained that his statement before the Court was in answer to definite questions put by the learned Special Public Prosecutor. However, none of these omissions amount in my opinion to contradiction within the meaning of section 145, Evidence Act. To a question whether the conspiracy to murder P.W 1 had been hatched before he took over as Director General, Federal Security Force, he answered that the principal accused had informed him that direction had been given to Mian Muhammad Abbas through Malik Haq Nawaz Tiwana (former Director-General) to get rid of P.W. 1. He stated that he did not give any plan to Mian Muhammad Abbas for committing the murder of P.W. 1 nor had told him how and from where he could arrange arms and ammunition for the purpose. He stated that Mian Muhammad Abbas accused had assured him about the execution of the orders of the principal accused.

66. Much of the cross-examination was directed towards showing that the post of Director-General, Federal Security Force was a prestigious post and conferred considerable advantages upon the witness. He had to tour extensively and thus had opportunity to earn travelling and daily allowances. While on tours he stayed in renowned Hotels and in Delux suites. He toured abroad and enjoyed travels to foreign countries, e.g. Korea, China, West Germany, Belgium, U.S.A., Japan and U.K. and stayed in good hotels.

The witness however stated that during his tenure as Director-General F.S.F. he suffered misery, torture and agony and in their respective spheres Vaqar Ahmad and the principal accused were his enemies. The learned counsel then put numerous questions to him that he was serving with great pomp and show and that he was allowed to take his wife sometimes to foreign countries as an official attendant and a sum of Rs. \$ 500 was sanctioned for her expenses, that he was allowed to purchase at State expense spectacles with a hearing aid worth about £482.30 and that the expense of the husband and his wife borne by the State amounted to Rs. 50,000.

67. Some questions were put to the witness to elicit from him whether he had first directed Welch P.W. 4 to take care of P.W. 1 on telephone or on his tour to Quetta, the witness answered as follows:-

"The sequence is not clear from my statement quoted in the question. Now that a specific question has been asked of me, about which I state that I communicated orders to Mr. Welch after Mr. Z.A. Bhutto had asked me to take care of Mr. Ahmad Raza Kasuri on the 29th of July, 1974. The telephonic conversation followed this event."

Same sequence was given by P.W. 4 Regarding the events of 3rd June, 1974 he clarified during cross-examination that he did not mean that Ahmad Raza Kasuri P.W. 1 was

making a formal speech or that he was speaking in his own right. He could not recall whether he was speaking in his own right or not.

68. The witness admitted that he submitted application to the Finance Minister, Government of Pakistan for permission to send his two sons abroad for education. He explained that the reasons for this application were that due to his prolonged tour the supervision of the boys' education had suffered, the schools had been closed for three months and one of his wife's brother who was abroad had been insisting that the children should be sent to U.K.

69. Some questions were put about the state of health of the witness and his collapse at Ziarat. These questions were put to suggest to the witness that because of his ailment and hypertension he succumbed to the pressure of the Chief Martial Law Administrator and made this statement. The witness denied this. He replied that he had borne his ailments throughout until his detention on the 5th of July, 1977 and afterwards he added that the doctor who visited him in the hospital was of the view that the blood pressure and heart condition of the witness had never been better. This was the result of the peace of mind despite his detention.

70. Similarly after questioning him at length about his detention, about his relationship with Seth Abid, about his confessions being involuntary and obtained by coercion and undue influence, it was suggested to the witness that he was induced and threatened to make a statement against the principal accused in order to justify the overthrow of the "Prime Minister's Government" by the Chief of Army Staff, that he was promised pardon before he made the confessional statement and that as a reward of the confessional statement, Seth Abid, his relative has been granted the concessions of release of property, immunity from prosecution and permission to establish a bank in the Country. The witness repelled all these suggestions.

71. In reply to cross-examination questions by the learned counsel for Mian Muhammad Abbas accused the witness admitted that this accused was a favorite of Haq Nawaz Tiwana who had allowed him unauthorisedly to sign himself as Director although he was a Deputy Director. He denied that Mian Muhammad Abbas presented to him his resignation in June, 1974 and another resignation in February, 1976 and that he returned the same to him. He denied that the resignations Exh. P.W. 2/12-D and P.W. 2/13-D which were produced by the learned counsel for Mian Muhammad Abbas from his brief were presented to him. He stated that Mian Muhammad Abbas had fallen ill and he had gone to see him in the hospital.

72. He stated that he did not know Ghulam Hussain, Inspector, Federal Security Force (P.W. 3), the other approver. A question was put to him that on 5-6-1974 Ghulam Hussain, Sub-inspector was awarded a first class certificate and cash prize of Rs. 500. The witness stated that he did not remember the details but such orders were passed in



routine by the Director-General on presentation of reward rolls or notes of performance of duty of a nature warranting a reward, without seeing or knowing the person to whom the award is made.

73. Regarding source reports he stated that such reports were sent to him directly by name only in a few exceptional cases and they were kept in his confidential *almirah*. Most of the reports were kept in the custody of Mian Muhammad Abbas and some were kept in the custody of Abdul Haq, Deputy Director. Even those reports which were kept in the confidential *almirah* and in custody of Abdul Haq were by and large seen by Mian Abbas accused, who was Director, Intelligence. He denied that he ever complained about non-cooperation by Mian Muhammad Abbas accused.

74. Saeed Ahmad Khan who was appointed as Chief Security Officer to the President on 11-8-1972 and after the election of the principal accused as Prime Minister became Chief Security Officer to the Prime Minister, appeared as P.W 3. He stated that while holding the post of Additional Inspector- General of Police, West Pakistan, he was dismissed from service under Martial Law Regulation 58 on 23-5-1970. He then set up two business Organizations under the name of Pak. Field Corporation Limited with himself as its Managing Director and Saeed Ahmad Associates, his sole Proprietary concern. He stated that he had met the principal accused for the first time at Larkana when he visited it as a Deputy Inspector-General of Police in December, 1955. The principal accused had called on him as a lawyer on behalf of Sultan Chandeo, his client. Thereafter the witness met him twice or thrice at Karachi and once at Quetta when he was a member of the Central Cabinet.

75. The witness furnished details of his appointment as Chief Security Officer to the President. He stated that he happened to go to Rawalpindi on a business trip in August, 1972 and entered his name in the visitors book on the President's House, he was called by the President and he had an interview with him on the 11th of August, 1972 at 4-00 p.m. In this interview the principal accused persuaded him to work for him and for the country, but the witness pointed out an impregnable difficulty in this connection that being a dismissed civil servant he could not be re-employed to a post in the Government. A device was found by the principal accused for payment of salary and it was settled that the witness would be a Legal and Administrative Consultant to the All Pakistan Research Organization under the aegis of the Cabinet Division from where he would be getting his emoluments and allowances. Although he never worked for this organization even for a single day, he was paid by the above Organization with effect from the 8th of December, 1972 while for services rendered prior to that period he was paid from the "secret fund" of the President through his Additional Secretary Mr. Afzal Saeed Khan. No notification was issued since there was no sanctioned post on which the witness worked.

The witness that he was required to advise the President and subsequently the Prime Minister on political issues in the country and to keep him abreast of the political activities of various political parties. Important and daily intelligence reports from the Intelligence Bureau, Inter Services Intelligence Directorate and of the Provisional Special Branches also began to be supplied to him at the end of 1972. After assessing these reports the witness used to send his own appraisal to the principal accused. When in 1973, the work load increased he asked for assistance from the principal accused on which he was instructed to take late Abdul Hamid Bajwa as Officer on Special Duty with him. The principal accused had suggested the name of Abdul Hamid Bajwa on the ground that being a specialist on Punjab affairs he would prove useful. The witness stated that during his absence on tours Abdul Hamid Bajwa looked after his office and even sat in his room, where the facilities of the Sacrophone were available to him. He found in due course that Abdul Hamid Bajwa had direct access to the principal accused personally as well as on telephone and he was given direct assignments. He would also send reports to- the Prime Minister directly.

The witness continued that he was asked by the principal accused to send reports on a number of persons including Ahmad Raza Kasuri and some other renegades of the People's Party. He, therefore, opened files on such persons. The files in respect of Ahmad Raza Kasuri were also opened in the month of December, 1973. These were Exh. P.W. 3/1, P.W. 3/2 and P.W. 3/3.

76. He said that since Ahmad Raza Kasuri P.W. 1 had become very bitter and critical, in fact virulent, against the principal accused, the latter issued order for keeping him (P.W.) under strict surveillance. This was done by the Provincial Special Branch. The telephone of P.W. 1 was tapped by the Intelligence Bureau.

77. The witness further stated that in the middle of 1974 the principal accused in an interview with him abruptly asked him if he knew Ahmad Raza Kasuri. On his reply that he did not know him personally the principal accused said that he had assigned some work to Masood Mahmud P.W. 2 about Ahmad Raza Kasuri and that he should remind him. On return to his office he passed this message to Masood Mahmud on the green line and the latter replied "all right".

78. He continued that on the 10th/11th November, 1974 as a result of firing by automatic weapons on the car of Ahmad Raza Kasuri, his father was killed. The first Information Report was registered at Ichhra Police Station, Lahore by Ahmad Raza Kasuri in which he blamed the principal accused being responsible for the murder. The witness proved a note by Abdul Ahad, D. S. P., Ichhra, Lahore Exh. P.W. 3/2-A dated 22-1-1974 on file Exh. P.W. 3/2, with which he sent a copy of the First Information Report in the above case. He also proved a note dated 23-11-1974 Exh. P.W. 3/2-A/1 by Abdul Hamid Bajwa and another note dated 24-11-1974 Exh. P.W. 3/2-B written by him. In these notes Abdul Hamid Bajwa had taken exception to the recording of the FIR

at the instance of Ahmad Raza Kasuri, P.W. 1 clearly implying that if the First Information Report which was recorded after 2½ hours had been recorded by the Police, *suo moto* the Prime Minister would not have been named as a suspect in the Information Report and the publicity given to the case would have been avoided. The note by the witness was seen by the principal accused who agreed with it *vide* Exh. P.W.3/2-B/1.

79. The witness stated that Special Inquiry Tribunal was set up under the Special Inquiry Tribunal Act. During the proceedings before the Tribunal the name of the principal accused was mentioned. On this the latter rang up the witness either from Larkana or Karachi and inquired from him as to where he was. He replied that he was at Rawalpindi. On that he lost temper and rebuked him (the witness) and said "what the hell are you doing in Rawalpindi when my name is being taken before a Judicial Inquiry being held at Lahore by Justice Shafi-ur-Rehman in the murder case of late Muhammad Ahmad Khan. What kind of Chief Security Officer and Legal Advisor you are." He directed the witness to proceed to Lahore immediately and meet the Advocate-General, the Chief Secretary, the I-G Police and the investigating Officers and also look into the case himself. The witness stated that on his arrival at Lahore he met with the above-mentioned persons on the 4th and 5th January, 1975. To his dismay he found that there was no worthwhile progress in the investigation, although one and a half month had elapsed since the murder.

80. According to the witness he came to know during the course of his inquiry that the empties of the bullets used at the scene of offence were of 7.62 mm. caliber which indicated the use of Chinese weapons in the official use of the Federal Security Force. He also noticed the helplessness of the local police who were deliberately avoiding to make investigation on this line.

81. The witness further said that on his return to Rawalpindi he informed Masood Mahmud P.W. 2 of his impression about the use of weapons which were in the official use of the F.S.F. but the latter put him off on the plea that these Chinese arms were also issued to other Army Units and besides were smuggled into the country. Not satisfied with this answer the witness met the principal accused and conveyed his impression, but he found that the answer of the principal accused was similar to the answer given by P.W. 2.

82. He stated that the principal accused snubbed him and said that he should keep out the Federal Security Force. He directed the witness to find out from the Joint Army Detection Organization (JADO), which is a part of the Inter Services Intelligence Directorate, and whose main task is to find out and control illicit traffic of arms in the country, whether arms of this caliber were available elsewhere. He also directed him to write to the Defence Secretary in order to find out as to which Army Units the Chinese weapons were issued officially. He also ordered the witness to make inquiries from

Bara, a tribal territory, as to the availability of arms of this caliber. In addition he also talked to the witness about the family disputes of Ahmad Raza Kasuri, P.W. 1, his local political rivalries and the previous litigation in his family and directed him to collect evidence according to the above directions in order to help the investigating Officers in the investigation of the case in the production of material before the Tribunal.

83. P. W. 3 said that when he came to Lahore he found that the investigation had been entrusted recently to Malik Waris, D.S.P., C.I.A. It was decided in the meeting of the Officers mentioned above that the new Investigation Officer would come to Rawalpindi and seek instructions from the witness on the subject. Malik Waris and Sheikh Abdul Ahad, D. S. P. therefore saw him on the 14th of January, 1975. He sent Malik Waris to the Officer Incharge of the JADO in order to find out whether the Chinese weapons of 7.62 mm. were available elsewhere. He informed the Officer Incharge that he was sending Malik Waris for this purpose. The Investigating Officer brought to him a report Exh. P. W. 3/3-B from the JADO to the effect that a number of service arms including 7.62 mm. caliber weapons could be purchased at Darra Adam Khel as well as in settled Districts from underground elements. In view of this report he sent Malik Waris D.S.P. to Bara to find out if such weapons were available there. He also made an inquiry from the Defence Secretary by letter Exh. P. W. 3/3-A dated 17-1-1975. The Secretary pointed out in his reply Exh. P. W. 3/3-C dated 20th of January, 1975 that the Chinese weapons were in official use of the Federal Security Force, Frontier Corps Units and Armoured Corps Tank Crews.

84. The witness added that on receipt of the information (vide Exh. P. W. 3/3-C) that the Chinese weapons were also in official use of the Federal Security Force, he was perplexed since he had positive direction from the principal accused to keep out the Federal Security Force. He met the principal accused and inquired as to whether the letter, Exh. P. W. 3/3-C should be produced before the Tribunal. On this the principal accused was infuriated and asked, "have I sent you to safeguard my interest or to incriminate me. This letter will certainly be not produced before the Tribunal. You are trying to become over-clever and if you don't behave, you will suffer the consequences which your progeny will not forget." He, therefore, kept the original letter on the file and did not produce it either before the police or the Special Tribunal.

85. The witness deposed that he kept visiting Lahore in order to find out the progress of the case before the Tribunal. Meanwhile Malik Waris, D. S. P. had collected some material regarding family disputes, political rivalries of Ahmad Raza Kasuri P. W. I and his family and has even arrested a few suspects.

86. The witness stated that he was instructed to publicize the material produced before the Tribunal which was favorable from the point of view of the principal accused. In support of this statement he referred to letter Exh. P. W. 3/3-D dated 1-2-1975 by which he instructed the Director-General (Information) to arrange publication

of portions of the statements of S.S.P., Lahore and Malik War is D.S.P. before the Tribunal, which were sidelined by him. It may be stated the signature of the principal accused on this document prove that it was seen by him and that it had his approval. The witness continued that in pursuance of that direction wide publication was given by Ministry of Information to the above statements through *Pakistan Times* and *Nawa-e-Waqt* as is evident from Exh. P.W. 3/3.f Which bears the initials of witness Exh P.W 3/3 G and (Exh. P. W. 3/3 -H). The witness also referred to the clippings of the newspaper which appear at pages 99 to 203 in Exh. P. W. 3/3.

87. The witness further deposed that the Tribunal gave its report on the 27th of February, 1975. He put up a note P. W. 3/3-1 to the principal accused on the 28th of February, 1975 pointing out that the Tribunal had criticized the lapses in the investigation at the initial stages, but seemed to have felt satisfied with the investigation carried on later by the 1). S.P., C.I.A. He recommended the publication of relevant portions of the report with a view (as is clear from this document) "to clear the position, emanating as a result of this incident", since "various possibilities and probable causes of this murder have been enumerated" in it. This note (Exh. P. W. 3/3-1) came back to the witness with a note (Exh. P. W. 3/3-J) from the principal accused that he would decide this after seeing the report. The matter was therefore kept pending.

88. The witness stated that the Chief Secretary, Punjab sent the copy of the report of the Tribunal to him with D.O., Letter Exh. P. W. 3/3-K. He asked his office (vide Exh. P. W. 3/3-L) to prepare a brief draft of the report, which could be recommended for publication. On the meeting of the witness with the Prime Minister the latter directed him that the report shall not be published as it was adverse. He further said that he would have nothing to do with this case anymore.

89. The witness elaborated this incident by saying he had been meeting with Hanif Ramay, the Chief Minister of Punjab (given up by the prosecution as having been won over), occasionally in connection with this case. He referred to a D.O. letter (later proved as P. W. 35/3) written by Hanif Ramay which the principal accused marked to the witness. It may be clarified that with this letter was enclosed the Tribunal's report. It is stated in the letter that the report had been discussed with the witness. The Chief Minister sought guidance in it whether the report should be published. The witness stated that this letter was market by the principal accused to him with the query what was the pointed of discussing it with you? It also enjoined upon him to discuss with the principal accused. The witness therefore saw the principal accused who pointed out to him that the report shall not be publicized as it was adverse and that he should have nothing to do with the case anymore. It may be stated that the above remark attributed to the principal accused is proved by the entry of 19th March, 1975 in the Diary/Dispatch Register Exh. P. W. P. W. 27/2.

90. The witness also furnished details of the story how Ahmed Raza Kasuri was made to rejoin the Pakistan People's Party. He stated that in the middle of 1975 there was a rift growing up between Ahmad Raza Kasuri and the Tehrik-e-Istiqlal Chief, Air Marshal (Retired) Asghar Khan. He was instructed by the principal accused to try to win over Ahmad Raza Kasuri and bring him back to the PPP fold. Since the witness did not know Ahmad Raza Kasuri, he told the principal accused that he would ask Abdul Hamid Bajwa to initiate the matter but the said accused informed him that Mr. Bajwa had already been given instructions on the subject.

91. Abdul Hamid Bajwa initiated talks with Ahmad Raza Kasuri and persuaded him to see the witness.

92. The witness stated that in his first meeting with Ahmad Raza Kasuri he asked him to consider rejoining the Pakistan People's Party, of which he claimed to be a founder member since he had parted company with Air Martial (Retired) Asghar Khan. On this Ahmad Raza Kasuri retorted how could he rejoin a party headed by the principal accused who had been responsible for the murder of his father and was also after his blood. The witness told him that it was all the more reason that he should make up with the principal accused and not put his life in jeopardy as he knew that he was a marked man. He also told him that if he rejoined the People's Party, he might even be rehabilitated. Ahmad Raza Kasuri P.W. 1 requested for time to think over. Later on he agreed with the soundness of this suggestion and asked the witness to inform the principal accused that he was prepared to rejoin the Pakistan People's Party, and he would like to meet him.

The witness proved a number of documents to which detailed reference shall be made later. These documents prove the tapping of the telephone of Ahmad Raza Kasuri P.W. 1 within the knowledge of the principal accused, reports submitted by Abdul Hamid Bajwa about the events soon after murder and reaction of P.W. 1, reports about the break of P.W. 1 with Tehrik-e-Istaqlal, the persuasion of P.W 1 by the witness and Abdul Hamid Bajwa to rejoin the People's Party, the fact that Abdul Hamid Bajwa had direct access to the Prime Minister's Secretariat and T.A. Bills of Abdul Hamid Bajwa which prove his numerous visits to Lahore from 9th November, 1974 to the month of February, 1975.

93. The learned counsel for the confessing accused asked the witness whether the principal accused was temperamentally opposed to the criticism about himself. He answered that mostly it was so hut he could not generalize his answer any further. He stated that he knew Mian Muhammad Abbas accused but he had no knowledge whether he visited the Prime Minister's House.

94. Mr. D. M. Awan, appearing for the principal accused cross examined him on his previous service, his association as well as the association of his father and brother with

the family of the principal accused before the authenticity of the story about appearance of the principal accused before him in connection with the case of Sultan Chandeo, appointment of his brother and brother-in-law through the good offices of the father of the principal accused, the business started by him after his dismissal from the post of D.I.G., reports submitted by him on what he called Karachi Affairs, Sindh University Affairs, N.W.F.P. Affairs, the Language Problem in Sindhu Desh, his requests for interview with the principal accused and his meetings with him and the discussion between him and Vaqar Ahmad, Secretary, Establishment Division, for fixing his designation as Chief Security Officer. The suggestion regarding the reports about the affairs of the Provinces was with a view to show that it was in consequence of these reports that the witness was appointed as a Chief Security Officer. In this connection, he was confronted with Exhs. P.W. 3/11-D dated 12-8-1972, P.W. 3/12-D dated 28-8-1972, P.W. 3/13-D dated 30-8-1972 and Exh. P.W. 3/14-D dated 6-9-1972, letter written by the witness to the principal accused although none of these documents establishes that they pertained to the period prior to his appointment. Exh. P.W. 3/11-D on the other hand goes to show that the designation "Chief Security Officer,, was under consideration prior to the 22nd of August, 1972 while other letters pertain to subsequent dates Exh. P.W. 3/13-D and Exh. P.W. 3/14-1) establish that a request for personal interview for conveying vital information was made by the witness. The learned counsel also cross-examined him with a view to establish that Abdul Hamid Bajwa was appointed on his suggestion hut he denied it. He was questioned about his meeting with Ahmad Raza Kasuri. He stated that he must have met him first either in the end of June or beginning of July, 1975 after Abdul Hamid Bajwa had a talk with him in connection with the proposal for his re-joining the Pakistan People's Party. In order to prove that Ahmad Raza Kasuri was keen to meet the principal accused and the latter was putting him off, document Exh. P.W. 3/16-1) was put to the witness. This was a photostat and was allowed to be exhibited subject to objection by the learned counsel for the prosecution, as the original was stated not to be traceable. The witness proved his own signature on the note as well as the signature of the said accused on the other notes, but when he was questioned about the authenticity of the note of the said accused, he stated that the original of this document was not sent to him but was sent to the Private Secretary to the Prime Minister whose signature the witness also identified. The witness also stated that the two endorsements were in the hand of the principal accused.

95. It may be stated that the note Exh. P.W. 3/16-D is a note reporting to the principal accused the meetings of the witness with Ahmad Raza Kasuri and that he had realized that his future lay with the People's Party. It also conveyed his request, for "an audience with the Prime Minister at his convenience." It also proves that it travelled to the principal accused through his Secretary. The two endorsements are as follows:-

1. "He must be kept on the rails, he must repent and he must crawl before he meets me. He has been a dirty dog. He has called me a mad man. He has

gone to the extent of accusing me of killing his father. He is a lick. He is ungrateful. Let him stew in his juice for some time.

(Sd.) Z.A. Bhutto  
29-7

2. Please file.

(Sd.) Z.A. Bhutto  
29-7

P.s.

The question of the admissibility and authenticity of these note shall be considered later.

96. It was suggested to the witness that Ahmad Raza Kasuri himself was keen to see the Prime Minister. The witness denied this and reiterated that he was first reluctant to join the Pakistan People's Party on the plea that it was headed by the principal accused who was responsible for the murder of his father. He was confronted with the portion 'A' to 'A' in his note Exh. P.W. 3/16-D in which, as stated above, he had reported that Ahmad Raza Kasuri (P.W. 1) had realized that his future lay with the Pakistan People's Party and he had requested for interview with the Prime Minister. He explained that this document related to the period when ice was broken and P.W. 1 had informed him that the advice given to him by him (witness) was sound.

97. The witness also proved another note submitted by him to the Secretary to the Prime Minister dated 13-11-1975 (Exh. P.W. 3/17-D). He identified the signature of the principal accused as well as the signature of his Secretary, Mr. Afzal Saeed on this document.

98. This document was also put to the witness since it consists of a request to the principal accused for grant of an audience to Ahmad Raza Kasuri. The witness volunteered that in his personal interview with the principal accused regarding the question of grant of interview to Ahmad Raza Kasuri who had been asking for the same after he had been won over, the principal accused had told him that this question should be left to him since he was the master of timings and would call him when he would think best.

99. The witness further proved at the instance of the learned counsel for defence, another note sent by him on the 5th of December 1975, to the Secretary to the Prime Minister (Exh. P.W. 3/18-D) reporting the request of Ahmad Raza Kasuri for an interview and the willingness of Sardar Izzat Hayyat of the Tehrik-e-Istaqlal also to join the party. He also proved on it the endorsement of the principal accused: —



"I will see Ahmad Raza Kasuri in Pindi. Please return the file after you have noted."

Marked to the Military Secretary. The witness was confronted with this document to enable him to explain why did he have to write this note again when the principal accused had already consented to grant an interview to Ahmad Raza Kasuri when he considered necessary. He explained that Izzat Hayat also wanted to join the party and certain other developments had taken place as Ahmad Raza Kasuri was being pressurized by the Opposition Parties and the old guard of the Tehrik-e-Istaqlal. He further stated that the principal accused granted an interview to Ahmad Raza Kasuri probably in the first half of 1976.

100. He was questioned about certain omissions in his earlier statement regarding his first, talk with Ahmad Raza Kasuri and his later consent to rejoin the Party. Some of these omissions were in both the statements made under sections 161 and 164, Cr. P.C. and some in one of either statements. The witness explained these omissions by stating 'the question did not come up' meaning thereby that no question was put to him. At another place he stated that he had so far as he remembered stated the salient features before the Magistrate which he remembered at that time. He recollected the details when specific questions were put to him before the Court.

101. He was questioned at length about the statement made by him regarding association with the investigation and his meeting with different Officers. A question was also put to him about the origin of the information that 7.62 mm Caliber ammunition was in the official use of the Federal Security Force. He stated that this information was given to him by Abdul Wakil Khan, D.I.G. of Police Lahore P.W. 14, Asghar Khan S.S.P. Lahore, P.W. 12 and Abdul Ahad, D.S.P., Supervising Officer in this case. Further questions on this point did not elicit any answer favorable to the defence.

102. He was questioned about the files and whether such files were already opened much earlier by the D.I.G. and the Special Branch even before the principal accused took over as President of Pakistan. He denied any knowledge of the matter. He also denied any knowledge whether the files relating to M.N.A.'s were opened by the Intelligence Agency. When questioned as to why he wrote to the D.I.G. for the file of Ahmad Raza Kasuri, he stated that he had obtained the personality sheet of Ahmad Raza Kasuri from the D.I.G. under the directions of the principal accused.

103. The witness stated that he acted as Chief Security Officer up to the 15th June, 1976, when he took over as Special Officer, Hyderabad Conspiracy Case, under the orders of the Cabinet Secretary. He gave reasons for his appointment as such. He refuted that an inquiry was instituted against him on the request of Khan Abdul Qayyum Khan to the principal accused but stated that he had written a note to the said

accused against the directive of Khan Abdul Qayyum Khan but the accused had sent that file to Khan Abdul Qayyum Khan and thus compromised his position.

104. The witness was confronted with his letter of apology to the principal accused (Exh. P.W. 3/15-D) in which he admitted having used his name at times to felicit the required information to which of course the accused had taken exception in the presence of the two Intelligence Chiefs. He owned the contents of the documents dated the 6th October, 1972.

104-A. The learned counsel cross-examined the witness at length about the facts leading to the statements made by him before the F.L.A. and the Magistrate in connection with this case, in order to establish that he was under pressure from the Authorities. He denied this. He also denied that he was ever kept in the Lahore Fort. It was suggested to him that he was threatened with the registration of a number of cases against him and that he had been and was still under detention. For this reason he had made a false statement. In answer, he stated that he had been detained because of the sins of commission and omission of the principal accused. In fact, it was a blessing in disguise for him because he had time to seek mercy of Allah. He himself volunteered to the Chief Martial Law Administrator to make clean breast of what he knew of his association with the said accused. He forcefully denied that he was under any threat or undue influence and stated that the files maintained in his office were sufficient proof of this.

105. In cross-examination by the learned counsel for Mian Muhammad Abbas, he stated that he did not remember having recommended the case of this accused for his promotion to the rank of Director F.S.F., nor he had any idea of any detention camp at Dulai in Azad Kashmir. In answer to the question whether it was not a fact that the Government servants were living in constant danger of life and threat to their family honor in 1974 and onwards, he stated that this question should be put to the Secretary Establishment. So far as he knew, there was insecurity in service after the retirement of 1400 Government servants without any show cause notice under Martial Law Regulation No. 114.

106. Mervyn Ruper Welch, Director, Federal Security Force, Quetta appeared as P.W. 4. He stated that his duties comprised of maintaining the force under his command, keeping an eye on the political leaders and their activities as well as keeping watch on anti-Government elements. He was also required to submit intelligence reports on the activities of the aforementioned persons which he typed himself and of which he maintained copies. According to him, the reports were generally sent to the Director-General, F.S.F. Rawalpindi by designation but if they related to very confidential matters, they were sent to the Director-General by name.

107. He stated that Masood Mahmud P.W. 2 visited Quetta in the month of July, 1974, in connection with the tour of the principal accused. P.W. 2 was staying at Lourdes

Hotel. He sent for him one day and said that the enemies of Pakistan must be eliminated and this was expected from every loyal citizen. He mentioned the name of Ahmad Raza Kasuri P.W.1 and said that he had been obnoxious in his speeches against the Prime Minister and he should therefore be eliminated.

108. The witness deposed that Ahmad Raza Kasuri P.W. 1 arrived in Quetta on the 13th September 1974, but a day or two prior to his arrival he received a telephone call late in the evening from P.W. 2 informing him of the impending visit of P.W. 1 to Quetta and also telling him that he (P.W. 1) should be taken care of. The witness explained that in the context the words 'take care of' and 'eliminate' were used by P.W. 2 in the sense that P.W. 1 should be assassinated.

109. The witness further stated that although P.W. 1 had a room reserved in Imdad Hotel, he did not actually reside there. The Party Workers of Tehrik-e-Istaqlal had watched the rooms in Imdad Hotel occupied by the members of the party. They were cautious regarding the movements of their leaders and did not disclose their movements. They searched the person of any one desirous of meeting the political leaders.

110. The witness further corroborated the statement of P.W. 2 in regard to documents Exh. P.W. 2/1, Exh. P.W. 4/1, Exh. P.W. 2/2 and Exh. P.W. 2/3. He proved the entries of the dispatch of Exh. P.W. 2/1 and Exh. P.W. 4/1 in the Dispatch Register Exh. P.W. 4/2, and the entry of dispatch of letter Exh. P.W. 2/3 in Register P.W. 4/3. He stated that he had no intention of committing this heinous murder and for this reason found a plausible excuse that Ahmad Raza Kasuri was well protected. He stated that after promulgation of Martial Law he appeared in the middle of July 1977, before the Enquiry Team which was inquiring into the Federal Security Force affairs.

111. The learned counsel for the confessing accused asked the witness whether he had to comply with orders which were not covered by the charter or duties. He admitted this but stated that he did not carry out orders which were criminal.

112. In cross-examination by the learned counsel for the principal accused the witness stated that it was a part of this duty to keep round the clock watch on politicians and to find out where they resided and when they were scheduled to move from one place to another. Similarly it was a routine to send reports like Exh. P.W. 2/1, Exh. P.W. 4/1 and Exh. P.W. 2/3 to the higher officers. He conceded that a 'source' infiltrated in the meeting of the party of which P.W. 1 was a member but was later discovered. He was asked about certain omissions in his earlier statement, but he explained that those were brief statements and moreover no question was put to him by the Magistrate or by the F.I.A. implying thereby that the portion of the statement made in Court, missing from the earlier statements, was made on questions of the learned Special Public Prosecutor and was more elaborate.

113. He was also questioned about the oral and telephone direction given to him by P.W. 2 but the answers elicited do not differ from the statement in examination-in-chief.

114. A number of questions were put to the witness about his visit to Lahore in connection with the investigation of this case by the Federal Investigation Agency. The witness stated that he had made a voluntary statement. He denied that it was false or was made under pressure.

115. In reply to question by the learned counsel for Mian Muhammad Abbas the witness stated that he did not contradict P.W. 2 but kept quiet on his direction to kill P.W. 1 because if he had acted otherwise he would have dubbed him as an officer disloyal to Pakistan and would have initiated action against him for that reason. He denied the suggestion that while serving under P.W. 2 he was under 'a constant danger' to his life and threat to his family honor. He also denied that P.W. 2 was considered in the Federal Security Force as a terror; he was, however a very efficient officer. He denied that Mian Muhammad Abbas ever reported against him for lack of control in an inquiry against Mustafa Jan, Deputy Director, Federal Security Force for his alleged involvement in smuggling.

116. The witness had stated in his examination-in-chief that the photostat copy Exh. P.W. 2/2 of the original report Exh. P.W. 4/1 was collected by him from Mian Abbas while he was still working in his office as Director after his appearance before the inquiry team. It was suggested to him that it was given to him not by Mian Muhammad Abbas but by Nazir Ahmad, Deputy Director. The witness denied the suggestion. A different suggestion was put to him that Mr. Shikri a member of the enquiry team had directed Mian Muhammad Abbas accused on telephone to arrange for the copy. The witness denied this.

117. Ghulam Hussain P.W. 31 stated that after his retirement as Naib Subedar from the Army where he served for 14 years as a Commando, he joined the F.S.F. on the 3rd of December, 1973, after an interview with the then Director-General of the Force, namely, Malik Haq Nawaz Tiwana. He was questioned in this interview about his education, service as Commando and Commando Courses. His paper posting was in Battalion No. 5 but an oral order was given by Mian Muhammad Abbas accused that he would work under him at the Headquarters. One or two days after he joined F.S.F. he was assigned a special duty at Larkana by Mian Muhammad Abbas and after having performed his duty, he was posted back in March, 1974, to Battalion No. 5 which was stationed at Rawalpindi.

118. He continued that Mian Muhammad Abbas summoned him in April, 1974 and handed over to him the syllabus of the Commando course and directed him to make necessary preparation for running the course. The witness selected personnel from the

4th and 5th Battalions of F.S.F. for starting the Commando Course and set up his camp near the place where the 4th Battalion had its barracks at Islamabad. He himself was instructor-in-charge of the Force but his camp was run under the supervision of Mian Muhammad Abbas accused. The trainees used to bring their own weapons from their respective Battalion but the ammunition was drawn from the Armoury at the Headquarters of F.S.F., which was in the charge of Sub-inspector Fazal Ali P.W. 24. He therefore drew the ammunition from the camp. The ammunition thereafter remained in his custody. It may be stated at this stage that the Road Certificate Exh. P.W. 24/7 proves the issue of 1500 cartridges of light machine-guns (L. M. G.) sub-machine guns (S. M. G.), beside other ammunition.

119. In the end of May, 1974, Mian Muhammad Abbas accused summoned the witness to his office and enquired from him about the methods that he would adopt for kidnapping or murdering a person. The witness was asked to reduce his answer into writing. He complied with the orders but Mian Muhammad Abbas accused kept the paper with him.

120. Mian Muhammad Abbas again sent for the witness two or three weeks later and enquired from him whether he knew Ahmad Raza Kasuri on his answer in the negative, Mian Abbas ordered him to find out and for this purpose gave him several addresses where he could possibly contact him (Ahmad Raza Kasuri). Since he made it clear that he would not be able to identify him, Mian Muhammad Abbas deputed Head Constable Zaheer, one of the trainees at the Commando Camp to accompany him on the quest. Mian Muhammad Abbas placed a jeep and a driver at the disposal of the witness and asked him to use the jeep after changing the number-plate.

121. The witness continued the search for P.W. 1 and ultimately not only located and identified him but also found out his residence which was situated behind the house of Field Martial Muhammad Ayub Khan in Islamabad.

122. Mian Muhammad Abbas again summoned the witness in the beginning of August, 1974, and asked him about the result of his efforts in connection with the search for Ahmad Raza Kasuri P.W. 1. On his informing him that he had located and identified P.W. 1 and found his residence also, he also said that it would be his duty to remove P.W. 1 from the path of the principal accused and that it was an order given by Masood Mahmud P.W. 2. The witness stated that by the expression "Removal of Mr. Kasuri" Mian Muhammad Abbas accused meant that he should kill Mr. Kasuri. The witness resisted this order but Mian Muhammad Abbas told him that this murder had to be committed since "Mr. Kasuri was an enemy of Mr. Z.A. Bhutto". He promised full protection to the witness. He emphasized upon him that it was a secret mission and since he had been taken into confidence, he would have to perform it otherwise his service as well as his life would be in danger. It was under this promise of protection,

threat of loss of service and life and the pressure brought to bear upon him, that the witness agreed to implement the orders.

123. Mian Muhammad Abbas gave to the witness a chit and directed him to obtain a sten-gun, a pistol, two magazines and ammunition from Fazal Ali P.W. 24. The witness took the chit to Fazal Ali and in accordance with the order of Mian Muhammad Abbas, accused, asked him not to make an entry of the issue of these arms and ammunition in the register but to issue them on his bare receipt. Since Fazal Ali declined to oblige the witness took the chit back and reported to Mian Muhammad Abbas that Fazal Ali was not prepared to issue any material without first entering it in the register. Mian Muhammad Abbas directed the witness to fetch Fazal Ali. When the latter went to him, Mian Muhammad Abbas repeated the orders to him and threatened that disobedience of the order would lend him in trouble with him and that he would also lose his job. On Fazal Ali's expressing his willingness to comply with the order the witness accompanied him to the Armoury where he (Fazal Ali) handed over to him a sten-gun with two magazines, a pistol with two magazines and ammunition for both. The witness handed over a receipt to him and took these things to the Commando Camp. Fazal Ali did not make any entry in his register.

124. The witness started following Ahmad Raza Kasuri and also detailed H.C. Allah Bakhsh usually known as Bakhshoo and Constable Mulazim Hussain who were both trainees at the Camp, to assist him in this campaign.

125. Mian Muhammad Abbas called the witness to his office again on the 20th of August, 1974, and complained to him that he had not performed the task assigned to him although he was getting him promoted as Inspector. He exhorted him to pay attention to the task because Masood Mahmud P.W. 2 was unhappy as the principal accused had started abusing him (P.W. 2) because of this procrastination. He further threatened him that any further inaction on his part might endanger his own life. According to the witness, it came to his notice during those days that Mian Muhammad Abbas accused had also detailed another team who had instructions to do away with the witness in case he failed to perform the task assigned to him and then proceed to perform it.

126. In the morning of 24-8-1974 the witness established telephonic contact with Ahmad Raza Kasuri P.W. 1 at his residence, the telephone number having been supplied to him by Mian Muhammad Abbas accused. He told him that he was a Clerk in the Cantonment Board and wanted to see him so that his grievance might be redressed. P.W. 1 advised him to meet him at 1 O'clock at the gate of M.N.A. Hostel in Islamabad. He promised to be at the gate because otherwise the police posted there would not let him know of his whereabouts.

127. The witness stated that he left Rawalpindi for Islamabad at 12:30 p.m. in his blue jeep with H.C. Allah Bakhsh and F.C. Mulazim Hussain. Mian Khan driver drove the jeep, the genuine number plate of which had been removed in compliance with the orders of Mian Muhammad Abbas.

128. When the witness reached the M.N.A. Hostel, he found the car of Ahmad Raza Kasuri. P.W. 1 parked at a place between the said Hostel and the National Assembly Building, he saw Ahmad Raza Kasuri P.W. 1 sitting in his car and talking to another person who stood outside. The witness proceeded towards the Assembly Building after instructing his companions with the order not to open fire on the car of Ahmad Raza Kasuri P.W. 1 since a stranger was standing near him. He parked the jeep under a tree and kept watch on Kasuri. After some time Kasuri, proceeded to the M.N.A. Hostel. The witness stated that he was in a fix because on the one hand he found that Ahmad Raza Kasuri had given him so much encouragement on the telephone and had even come to the rendezvous to meet him, while on the other he was supposed to put him to death. He remained absorbed in these thoughts till 3-00 p.m. when he came to a decision not to commit the offence but to save the life of P.W. 1.

129. He then saw the car of Ahmad Raza Kasuri emerging from the M.N.A. Hostel. Allah Bakhsh, Head Constable had gone at that time to take tea. He directed the Driver to drive the jeep. He ordered Mulazim Hussain who was armed with sten-giin and two fully loaded magazines to fire in the air when directed. The witness was himself armed with a pistol.

130. P.W. 1 was heading towards his residence. When he reached near an intersection he switched on the right indicator of his car. When the jeep was about to reach the intersection the witness directed the Driver to take the jeep to the left and ordered Mulazim Hussain to open fire through the rear window of the jeep, the blind of which had already been rolled up, the moment the car reached the intersection.

131. Mulazim Hussain complied with the orders and when he fired the first burst, Ahmed Raza Kasuri P.W. 1 glanced towards the left and sped on. The jeep of the witness was then driven through a circuitous route to the F.S.F. Headquarters.

132. When the witness reached the Headquarters Office, he found that the news of this incident had already reached the F.S.F Headquarters. He was met by Ch. Nazir Ahmad. Assistant Director (Headquarters) outside the office of Mian Muhammad Abbas accused and was taunted by him how he was justified in calling himself a Commando when he had let the target escape in broad daylight from a distance of thirty yards, despite his having automatic weapons and a jeep He informed him that neither Ahmad Raza Kasuri nor his car was hit by any bullet. This convinced the witness that another party had been detailed to watch his movements and that this party had given advance information of what had happened.

133. After his return to the office Mian Muhammad Abbas questioned the witness about the details and after hearing him he reprimanded him and showed his surprise that a Commando who had been given automatic weapons and a jeep had allowed the quarry to escape in broad daylight. He said that his failure to complete the mission had exposed the whole thing and this had made the Prime Minister very angry. He then directed him to remain on the job but to be cautious. He ordered him to carry out the task but not to fire in the air. He also admonished him that he was not supposed to give Ahmad Raza Kasuri time to collect his wits and that he should finish him off quickly.

134. The witness rang up the number of P.W. 1 again after a day or two but was informed that the latter was not available. On his further quarry he was informed that he had gone out of Rawalpindi and it was not known when he would return.

135. The witness informed Mian Muhammad Abbas about this on which the latter ordered him to return the weapons to the armoury and to carry out a reconnaissance in order to trace the whereabouts of P.W. 1. He also advised him to obtain arms from the nearest Battalion after he was able to locate him.

136. The witness replaced the empties of 7 rounds which had been fired, with live cartridges, from the Commando Camp and returned the sten-gun and the ammunition to Fazal Ali P.W. 24, who returned to him the receipt.

137. Mian Muhammad Abbas accused ordered the witness to depute Head Constables Zaheer and Liaquat from the Commando Camp to go to Lahore and search Ahmad Raza Kasuri. The witness complied with the order. After some time in October, 1974 but before Eid, Mian Muhammad Abbas sent for the witness and informed him that his men had been enjoying holidays at Lahore, and had done nothing and that the Prime Minister was abusing him since no progress had been made. The witness replied that he would himself leave immediately after Eid for Lahore. Mian Muhammad Abbas however directed him to leave for Lahore immediately and to inform him about his arrival there on telephone. He said that the Eid was the best occasion to deal with Ahmad Raza Kasuri since on this occasion he would be meeting his friends and relations. The witness consequently made an entry of his departure (vide entry P.W. 31/1 dated 16-10-1974) in the daily diary of Battalion No. 4 and left for Lahore from where he rang up Mian Muhammad Abbas to inform him about his arrival. Mian Muhammad Abbas rang him back at the F.S.F. Headquarters in Shah Jamal with a view to confirm whether the witness had really given him a ring from Lahore.

138. The witness stayed at Lahore for about ten days and after finding out the whereabouts of Ahmad Raza Kasuri he proceeded back to Rawalpindi where he noted his arrival in the Roznamcha of Battalion No. 4 vide entry Exh. P.W. 3/2 dated 26-10-1974.



139. The witness reported to Mian Muhammad Abbas that he had found the whereabouts of P.W. 1 and that his men were watching him (P.W. 1). He asked for further orders. Mian Muhammad Abbas accused directed him to take the ammunition from the Commando Camp and proceed to Lahore with Rana Iftikhar Ahmad accused who was one of the Commandos. He informed him that Soofi Ghulam Mustafa accused would provide him arms and a jeep. He further directed him to try to exchange the ammunition of the Commando Camp with similar ammunition from some other source so that it could not be discovered that the ammunition had been supplied by the F.S.F.

140. The witness took the ammunition from the Commando Camp. He also took Rana Iftikhar with him and as instructed by Mian Muhammad Abbas both of them got their departure recorded in the daily diary of Battalion No. 5 (Exh. P.W. 31/3) without showing their destination. They proceeded to Lahore the same day.

141. On reaching Lahore the witness contacted Soofi Ghulam Mustafa at the F.S.F. Headquarters in Shah Jamal and apprised him that he had been sent by Mian Muhammad Abbas for killing Ahmad Raza Kasuri P.W. 1. Soofi Ghulam Mustafa stated that he had already been informed of his arrival on telephone by Mian Muhammad Abbas accused and that the latter had asked him to help the witness. He further said that he had already been told that the mission was to be accomplished by Iftikhar and Arshad Iqbal and the witness with his help. The witness informed Soofi Ghulam Mustafa about the ammunition and that he was supposed to provide him arms and the jeep.

142. After three or four days, Soofi Ghulam Mustafa apprised the witness of a telephone call received by him from Mian Muhammad Abbas who was annoyed that no positive steps had by that time been taken to accomplish the mission. He further told him that Mian Muhammad Abbas had asked him to push him (witness) out of the place and ask him to go and live with Ahmad Raza Kasuri if he could not comply with the orders because the principal accused had been grossly insulting him on that account. He also informed him that Mian Muhammad Abbas had threatened to have the witness murdered along with Ahmad Raza Kasuri P.W. 1 if he did not accomplish the mission. Soofi Ghulam Mustafa told the witness that he had informed Mian Abbas that the witness was putting in a lot of efforts and that he would be able to report compliance of the order very shortly.

143. Soofi Ghulam Mustafa informed the witness that he had already obtained a sten-gun and that another one would be procured shortly. The following day, he informed him that he had brought another sten-gun from the Battalion of Amir Badshah Khan, P.W. 20, which was stationed at Walton.

144. At about 7 or 8 p.m., on the 10th of November, 1974, Soofi Ghulam Mustafa, Iftikhar Ahmad and Arshad Iqbal accused accompanied by the witness left in a jeep for Model Town. The jeep was driven by Soofi Ghulam Mustafa. They spotted the car of Ahmad Raza Kasuri at the place where the main road for Model Town branches off from Ferozepur Road. The car was heading towards Ferozepur Road. By the time they brought their jeep to the Ferozepur Road they had lost track of Ahmad Raza Kasuri. They, therefore, returned to the F.S.F. Headquarters where from Soofi Ghulam Mustafa rang up number 353535 which is installed at the residence of Ahmad Raza Kasuri. This was done with a view to finding out the place where Ahmad Raza Kasuri had gone. He was informed from the other end that Ahmad Raza Kasuri had gone to attend some wedding dinner in Shadman. The three above-named accused persons and the witness took the jeep and drove towards Shadman to find out the place where the wedding dinner was held. At that time Ameer Driver (P.W. 19) was at the wheel of the jeep. They saw illuminations in a house situated at about 80 to 90 yards from the round-about at the place where Shah Jamal ends and Shadman begins. They also found a number of cars parked there by the side of the road. They saw a car of a color similar to that of Ahmad Raza Kasuri's car. Suspecting that it was his car the party proceeded about 100 yards ahead of the house and parked their jeep there. The witness asked Soofi Ghulam Mustafa and Arshad Iqbal to go and see the car. They returned in a few minutes and confirmed that it was Ahmad Raza Kasuri's car.

145. They then returned to their Office in Shah Jamal after taking tea in Ichhra. They held a conference, settled a plan and the site for firing, and took the weapons. The witness took a pistol with two magazines containing 16 rounds while Arshad Iqbal and Iftikhar Ahmad were given a sten-gun each fully loaded with two magazines containing 16 rounds.

146. Arshad Iqbal and Iftikhar Ahmad donned over-coats to keep the sten-gun hidden. They moved towards the chosen post, that is the round-about of Shah Jamal-Shadman intersection which had a shoulder high hedge around it. The witness posted Arshad Iqbal on the round-about at a place from which Ahmad Raza Kasuri's car was visible and at a distance of about 7-10 feet further posted Rana Iftikhar Ahmad at a place facing the road which branched towards the left of a person coming from the house where the wedding was taking place.

147. The witness directed Arshad Iqbal to open fire in the air the moment he saw that Ahmad Raza Kasuri's car was about to pass by him. He ordered Iftikhar Ahmad to open fire at the first car which came before him after Arshad Iqbal fired in the air. The witness explained the reason for directing Arshad Iqbal accused to fire in the air. He stated that Arshad Iqbal was facing the Shamianas and if he had fired at the car, people in the Shamianas might be hit. Similarly, there was danger of injuries being caused to other persons going in cars or walking on the road. The final reason was that the fire in

the air would be a caution to Iftikhar Ahmad accused since he could not see the car arriving from the side where the wedding was taking place.

148. The witness himself started pacing the road which branches off from the road in front of Iftikhar Ahmad. This road was not lit. The witness, however, came to the intersection a number of times to keep Arshad Iqbal and Iftikhar on guard and also to find out whether participants had started leaving the place of wedding.

149. The witness heard the sound of firing at about midnight. The second and third burst followed after short intervals. He hurriedly reached the intersection from the branch road which he was pacing. He saw shortly thereafter a car without head-light emerging from the road which links the road that he was pacing with the road that came from the house where the wedding was held. The car proceeded on the way which leads to the Canal. The witness realized that this must be the car of P.W. 1 because it was the first car which passed by him after the first burst was fired. He presumed that the car had not been hit and that Ahmad Raza Kasuri had switched off his lights in order to save his life. The witness proceeded towards the Tomb of Shah Jamal Sahib and was soon overtaken by Arshad Iqbal and Rana Iftikhar Ahmad accused. He expressed his apprehension to them that the person driving the car was alright and had not been injured. Arshad Iqbal, however, told him that he had fired in the air after identifying the correct car, while Rana Iftikhar Ahmad informed him that he had fired at the first car which came before him after Arshad Iqbal fired in the air, and that he had correctly aimed at the car before firing.

150. The party reached the F.S.F. Headquarters. They found the gate closed. The witness did not want to be seen by the sentries soon after the firing. All the three scaled the wall one by one. On reaching the place where they were staying they met Soofi Ghulam Mustafa and informed him of the occurrence. They returned the arms to Soofi Ghulam Mustafa. On checking the ammunition it was found that 30 rounds had been fired that day. The witness put the ammunition in his cupboard, and handed over the arms to him with instructions to clean them and return them.

151. Next morning Ghulam Mustafa rang up the Ichhra Police Station and on his inquiry about the firing incident he was informed that it was not a case of dacoity; Ahmad Raza Kasuri had been fired at but his father was hit and as result of injuries had died. Ghulam Mustafa tried to contact Mian Muhammad Abbas accused on telephone at Rawalpindi, but he was not available there. He rang up at his house and received information from there that Mian Muhammad Abbas had left for Peshawar. Ghulam Mustafa then inquired from the Control room at Rawalpindi about the whereabouts of Mian Muhammad Abbas and contacted the latter on the telephone number given to him. He was also informed that Mian Muhammad Abbas would be coming to his office at 9-00 a.m. Ghulam Mustafa was ultimately able to contact Mian Muhammad Abbas at 9-00 a.m. in the presence of the witness and gave him the news of the death of the

deceased. Mian Muhammad Abbas directed him to ask the witness to return to Rawalpindi.

152. The witness allowed the other accused to go to their homes with an instruction that they should return after 8 to 10 days. On the following day i.e. the 12th of November, 1974, Masood Mahmud's (P.W. 2) car arrived at the Headquarters, just as the witness was preparing to leave. He asked Manzoor Hussain, Driver of the car (P.W. 21), for lift to Rawalpindi. He travelled in that car and on reaching Rawalpindi he contacted Mian Muhammad Abbas.

153. Mian Muhammad Abbas accused called the witness to his house. The witness went there and narrated to Mian Muhammad Abbas all that had happened. The latter consoled him by saying that if God was saving Ahmad Raza Kasuri they could not kill him. The witness made it clear to him that what he and his companions had done was the result of coercion and undue influence and he was not prepared to repeat it again.

154. On a query from Mian Muhammad Abbas accused if he had left anything incriminating at the spot which might disclose that it was an F.S.F. exploit, he told him that the spent ammunition had been left there since it could not be found because of darkness and the grass. He (Mian Muhammad Abbas) asked him not to bother about the empties and that he would take care of them. The said accused then directed him to go back to the Camp to complete the training and disband the Camp.

155. After the winding up of the Camp, the witness returned to Fazal Ali P.W. 24, the remaining ammunition live as well as spent, on the basis of a road certificate Exh. P.W. 24/9. Fazal Ali refused to accept the same since the ammunition was short by 51 empties, including the 30 cartridges fired at Lahore and 7 at Islamabad. The rest had been lost during the practice firing by the trainees. Fazal Ali P.W. 24 detected the shortage after physical checking and declined to accept the consignment without 51 spent cartridges being supplied to him. The witness reported the matter to Mian Muhammad Abbas who asked him to report -back to him after 3 or 4 days during which period he would be able to make some arrangement. The witness went to Mian Muhammad Abbas after 3 or 4 days. He gave him a Khaki Envelop containing 51 empty cases of sten-gun ammunition, with which he returned all the ammunition to Fazal Ali on the basis of road certificate referred to above.

156. The witness did not get the entry of his return incorporated in the Daily Diary for 8 or 10 days since he had been so ordered by Mian Mahaminad Abbas.

157. Again under instruction from the latter he had an entry of his departure recorded on 22-11-1974 for Peshawar (Exh. P.W. 31/4). The entry of return from Peshawar was made on 29-11-1974 (Exh. P.W. 31/5). He did not however, go to Peshawar and remained throughout in Rawalpindi.

158. The witness on instruction from Mian Muhammad Abbas claimed his travelling and daily allowance for Karachi for the months of October and November 1974 and submitted T.A./D.A. Bill (Exh. P.W. 31/6). This bill was scrutinized by Mian Muhammad Abbas to ensure that the witness had not indicated his presence at Lahore during the days of occurrence, and was after approval passed on to the Accountant to deal.

159. The witness applied by application Exh. D.W. 9/1 to the District Magistrate for pardon, on the 13th August 1977. He was produced before P.W. 9 on the 13th August 1977 and after grant of pardon was sent to another Magistrate. At that time, the witness was accompanied by the Assistant Superintendent, Camp Jail, Lahore. Thereafter his statement Exh. P.W. /10/11-1 was recorded by the Magistrate (P.W. 10) the witness concluded his statement by saying that the firing at Islamabad and at Lahore on Ahmad Raza Kasuri had been made due to pressure and coercion. He himself had no animosity with Ahmad Raza P.W. 1, nor did he know him.

160. In reply to a question by the learned counsel for the confessing accused, he admitted having been awarded a reward of Rs. 500; but he explained that it was not on account of imparting good training in the Commando Camp but had been given to him for detection of illicit liquor in the Cafeteria of the National Assembly by Mian Muhammad Abbas accused. He further stated that though his paper-posting was with Battalion No. 5 but Mian Muhammad Abbas had him attached with himself. He denied any knowledge of the relations of Mian Muhammad Abbas and the principal accused since he had never "accompanied him to the Prime Minister". However, he conceded that he received orders only from Mian Muhammad Abbas.

161. Questions were put to him whether it was possible for the empties in the Islamabad incident to fall outside the jeep on the road. He stated that an empty is always ejected from a sten-gun in such a way that it is thrown outside towards the right and in front of the muzzle. He stated that in case a sten-gun is fired from the jeep, the empty would fall within the jeep only if in the course of being ejected it hits some other object and its progress is altered.

162. The witness further stated that two or three days before the occurrence, while they were going towards Model Town in a jeep without number-plate, they were checked between the Canal Bridge on the Ferozepur Road and near the Atomic Energy Centre, by Sardar Abdul Wakil Khan, D.I.G. Lahore, P.W. 14, at about 10-00 p.m. He objected to their travelling in the jeep without number-plate and on inquiry from him the witness told him that he was an inspector in the Federal Security Force and was proceeding towards Walton to one of its Units. He explained that the jeep was without number-plate since it had been brought from the workshop that very day. P.W. 14

spoke to somebody on the wireless and then informed him that he had spoken to Mr. Mallhi (Irfan Ahmad Mallhi, Director, Federal Security Force).

163. He stated that M. Mallhi summoned him and Ghulam Mustafa to his house and informed them about what had transpired between him and P.W. 14 who had ordered him not to permit his men to roam about in a jeep without number-plate.

164. He stated that Arshad Iqbal was later attacked at Lahore outside his house in Ichhra but in that attack his brother Amjad was murdered. He admitted that Arshad Iqbal told him after the occurrence that he had submitted his resignation more than once but it was not accepted. According to the witness undue influence and coercion for attempt on Ahmad Raza Kasuri's life was exercised by Mian Muhammad Abbas.

165. In cross-examination by the learned counsel for the principal accused, the witness stated that his statement before the Magistrate made on the 11th August 1977, was not a detailed statement. At that time he had only given an outline. He was confronted with that statement in which he had stated that he had been directed by Mian Muhammad Abbas to start the Commando Course in the second or third week of May 1974, but the witness stated that he did not remember if he said that but the fact was that he started the course in April 1974.

166. In his statement Exh. P.W. 10/11, the witness stated that the day Mian Muhammad Abbas enquired from him about the methods of kidnapping and murdering person, he was directed by him to chase and identify Ahmad Raza Kasuri and when he was confronted with that statement the witness stated that between 18th and 19th August 1977 when he had already applied for being made an approver, Mian Muhammad Abbas who had come to know about it, sent a message through a convict begging him to save him also in case he was granted pardon. He had made that statement for the reason that Mian Muhammad Abbas may not be implicated to a very large extent. He stated that a similar statement had been made by him on the 11th August 1977. When confronted with that statement, the witness gave the same explanation that in that statement also he had given an outline.

167. When asked about the delay in locating P.W. I, he stated that after the jeep had been delivered to him he had been charged with so many duties that it was difficult for him to separate the performance of one from the other, for example, he had to identify the Joint Secretary and pull him up and there were two Labour Leaders who were also to be similarly pulled up and asked to behave. In relation to certain question put to the witness about his statement dated the 11th August 1977, the witness pleaded lack of memory. It is not necessary to reproduce those portions from the cross-examination since despite the recall of P.W. 10 for the proof of such statements, the said statement was not proved.

168. On being confronted with the statement that Mian Muhammad Abbas had directed him to obtain two sten-gun and 400 rounds from Fazal Ali Inspector, P.W. 24, he stated that in spite of this he asked for only one sten-gun with two fully loaded magazines containing 20 rounds each with 60 rounds spare and pistol with its magazines and ammunition since he thought that it was enough for the completion of the mission.

169. He was questioned about the presence of Zaheer in the incident at Islamabad but he stated that he did not remember whether he was there or not at that time. He stated that the other party who had been detailed for killing Ahmad Raza Kasuri as well as the witness in case he failed to execute his mission comprised of A. D. Murtaza, Bahadur Khan, a Sub-Inspector and probably Iqbal, an A.S.I.

170. Mian Qurban Sadiq Ikram, in the cross-examination on behalf of Mian Muhammad Abbas accused, suggested to the witness that an inquiry was held against him by Rab Nawaz Niazi, Deputy Director, and by Muhammad Nawaz Deputy Director, regarding misappropriation of the funds from the Unit in the end of 1975, but the witness denied this suggestion. He repelled the suggestion that any inquiry was at all held or was initiated by Mian Muhammad Abbas. Similarly, he repelled the suggestion that an inquiry was held against him by Mr. Najmi, Assistant Director, on the written order of Mian Muhammad Abbas. It was suggested to him that he was making the statement because of personal animosity with Mian Muhammad Abbas accused under the instructions from Masood Mahmud P.W. 2 and Ch. Muhammad Abdullah, Deputy Director. He stated that the suggestion was totally false. He reiterated that it was Mian Muhammad Abbas only who was instrumental in all his promotions up to the rank of Inspector.

171. He was questioned with a view to show that during his stay in the Camp jail he was in a position to contact Masood Mahmud or that the Officers of the Federal Security Force had been meeting him, but he denied the suggestion. He repudiated the suggestion that his statement was made under pressure from the F.I.A. or that any portion of his statement was false. Certain omissions in his previous statement were pointed out to him but he generally answered that he had made the statement in Court on questions being put to him.

172. He conceded that every Battalion had its own Armoury, but stated that ammunition had not been supplied to the Battalions when he drew the arms from the Headquarters. He explained that it was necessary for Mian Muhammad Abbas to give a chit to him to obtain the arms from the Headquarters because the arms could be drawn only in the name of an Officer and consequently had to be obtained in the name of Ghulam Hussain Butt, Deputy Director.

173. According to him, the Commando Course was meant for the personnel attached to the 4th and 5th Battalions. He repelled the suggestion that Road Certificates Exh. P.W. 24/7 and Exh. P.W. 24/9 were forged. He stated that they could be corroborated by the ledgers of the Armoury. It was suggested to him that there was not Commando Camp and the Commando Courses were being held in the respective Battalions, but he denied it. He stated that he did not make any entry of 1500 rounds and ammunition in any register. He explained further that he drew the arms and ammunition from the 5th Battalion when he proceeded in uniform to perform the duty, but whenever he proceeded in Mufti on the instructions of Mian Muhammad Abbas to perform any duty he drew arms and ammunition from the Armoury at the Headquarters.

174. Various questions were put to him to suggest that he must have previously known Ahmad Raza Kasuri who was a prominent man but he repelled this suggestion. Regarding fake numbering of the jeep, he stated that whenever an assigned task was accomplished a new fake number was allocated and painted on the bumper of the jeep.

175. He admitted that he was interviewed on the 20th August 1974, in connection with his promotion as Inspector. He, however, stated that he was interviewed along with other candidates by the Director-General (P.W. 2) and was summoned for the interview by wireless by Mian Muhammad Abbas. He denied having any meeting with the Director-General during the month of July or August 1974 except on the occasion of interview. He stated that he had never met the Director-General except at the interview.

176. He was questioned about the Islamabad incident particularly about the location where his jeep was parked. He, however, repelled the suggestion that Ahmad Raza Kasuri did not visit the M. N. A. Hostel that day at all. He denied that Zaheer, Liaquat or himself had ever visited Lahore in connection with Ahmedia Agitation which was on in the months of September and October 1974. Reference was made by the witness in answers to cross-examination questions to other missions for example, the missions for the murder of Muhammad Ali, a Film actor, and Retired Justice Jamil Hussain Rizvi, but it will be unnecessary to refer to them.

177. In reply to the questions about the incident at Lahore, he stated that he could not exchange his ammunition since he did not, at that time, have any source in mind and in any case he knew that even if somebody had similar ammunition, it would not be possible to make the exchange, since he would not be in a position to explain to him the reasons for the exchange and thus gratify his inquisitiveness.

178. He did not know whether the ammunition of 7.62 caliber was available elsewhere. He stated that the number of the lot to which certain rounds belongs and the year of its manufacture are engraved on the base of the cartridge and since a lot of similar number cannot be issued to anyone else, there are no other markings on the rounds. Regarding message from Mian Muhammad Abbas received through Ghulam



Mustafa in which it was said that if the witness was not prepared to perform his duty, he should be turned out and be dealt with along with Ahmad Raza Kasuri, it was suggested to him that in fact Ghulam Mustafa had gone to Rawalpindi and brought this message from there. The witness stated that it might be so but it was his impression that the message was communicated to Ghulam Mustafa on telephone.

179. It is in the confessional statement Exhs. P.W. 10/21-1 and P.W. 10/3-1 of Rana Iftikhar Ahmad and Arshad Iqbal that the witness had also fired with his pistol. In a answer to a question whether he had fired the pistol, he stated that he did not remember if he had so fired.

180. It was suggested to him that he had made a false statement at the instance of F.I.A. but the witness repelled this and stated that he had made a true statement voluntarily and without anybody's influence. He repelled the suggestion that he was not in Lahore from 31-10-1974 to 12-11-1974.

181. The witness was confronted with his earlier statements in order to bring out a contradiction that while the earlier statement implied that he had himself reported to Mian Muhammad Abbas about his having indentified Ahmad Raza Kasuri, in the statement before the Court he had stated that this information was given by him on any inquiry by Mian Muhammad Abbas. There is in fact no contradiction as the earlier statement cannot be interpreted as meaning that the said information was given by the witness without being asked about it. There are no material contradictions in the statement.

182. P.W. 24 and P.W. 19 corroborate the statement of Ghulam Hussain approver about supply of arms for Islamabad and Lahore incidents under the orders of Mian Muhamma Abbas accused. P.W. 24 relates a circumstance leading to substitution of crime empties by Mian Muhammad Abbas.

Fazal Ali, P. W. 24, Incharge of the Armoury at F. S. F. Headquarters, Rawalpindi, proved the receipt of ammunition in the Armoury under his charge from tKe 9th June 1973 (Exh. P.W. 24/1), Ammunition Voucher No. P-29 dated the 12th February 1974 (Exh. P.W. 24/3), and Voucher No. P-52 dated 29th May 1974 (Exh. P.W. 24/5). Entries of this ammunition in the Stock Register are Exhs. P.W. 24/2, P.W. 24/4 and P.W.24/6 dated 13-6-1973, 9-3-1974 and 8-8-1974 respectively. Fazal Ali stated that the details of the ammunition supplied by C.A.D. have been given on the back of each Voucher.

183. Fazal Ali explained in his evidence that the numbers on the reverse of the Ammunition Voucher are marked on outer side of the package itself. The last figures against each such number show the number of boxes and the number of rounds contained in each box. The numbers shown on the reverse of this document, after the first set are inscribed on the base of the cartridges cases.

184. He further stated that the ammunitions were issued to the Battalions of F.S.F. according to the scale and the unissued arms and ammunitions were kept in the Armoury in his charge.

185. He deposed that ammunition was issued to Ghulam Hussain P.W. 31 on Road Certificate Exh. P.W. 24/7 and its entry was made in the stock register, at Exh. P.W. 24/8 on the 9th May, 1974. This entry is in respect of S.M.G. and L.M.G. ammunition only.

186. The witness further stated that in August, 1974. Ghulam Hussain brought a chit from the Director, Mian Muhammad Abbas accused, ordering him to issue one sten-gun, two magazines, sixty rounds and one pistol to him (approver Ghulam Hussain). The witness wanted to make necessary entry in the temporary issue ammunition register but Ghulam Hussain P.W. 31 restrained him from doing so on the plea that such was the order of Mian Muhammad Abbas accused and that the weapon and ammunition should be issued on a *kachcha* receipt of Ghulam Hussain which shall be returned to him after the weapons and ammunition were returned. The witness declined to issue these weapons and ammunition in the above manner. Ghulam Hussain later came to him and told him that Mian Muhammad Abbas accused had called him. When the witness entered the office room of Mian Muhammad Abbas accused, he asked him why he did not obey his orders. The witness pleaded that the orders were not according to the standing order. The said accused shouted at him saying that if he did not want to serve any more he would be discharged from service and he would not even reach home. He directed him to issue weapons and ammunition on the basis of a receipt from Ghulam Hussain without making a corresponding entry in the register. The witness complied with the direction.

187. Two days before the end of the same month Ghulam Hussain returned the entire weapons and ammunition and took back the receipt.

188. Two or three days prior to the 25th of November, 1974, Ghulam Hussain came to return the ammunition which had been issued to him on the 9th May, 1974, by road certificate Exh. P.W. 24/7. He found that 50 to 51 S.M.G. empties were short. He consequently refused to accept the ammunition unless the missing empty cases were accounted for. Ghulam Hussain took back the ammunition but he returned the entire ammunition in the form of empty cases on the morning of the 25th November, 1974, by road certificate No. 2, Exh. P.W. 24/9 and an entry Exh. P.W. 24/10 to this effect was made in the stock register.

189. He stated that eight or ten days before the empty cases of 1500 rounds were deposited he was summoned by Mian Muhammad Abbas accused in his office. He enquired from him if he had with him any fired cartridges in the Armoury. On the

witness giving a reply in the affirmative Mian Muhammad Abbas ordered him to bring 25/30 fired cartridges of S.M.G./L.M.G. The witness returned with 30 such empties. The said accused ordered him to place these empties on the table on the pretext that he was busy in the work. He further told him that he would let him know as to when he should collect these cartridges. The witness was summoned again after 2 or 1 1/2 hours by the said accused and asked to take away the empties which on physical counting were found to be 30. They were deposited again in the Armoury.

It may be stated at this stage that the photostate copy of Voucher No. 1451 proved by the witness was exhibited in his statement as P.W. 24/1 but by mistake the office marked this exhibit Number on the copy of Voucher No. 29 original of which is already marked as Exh. P.W. 24/3. This mistake was noticed during arguments of the learned counsel for Mian Muhammad Abbas. It was corrected after resummoning the original Voucher No. 1451, which is now marked as Exh. P.W. 24/1.

190. It may further be stated that Exh. P.W. 24/1 read with Exh. P.W. 39/2 proves the receipt in the Armoury of 7.62 mm. Ball for Chinese S. M. G/L. M. G. numbering 1247760 rounds most of which bear No. 71-661. Exh. P.W. 24/5 establishes the receipt of similar ammunition of S. M. G/L. M. G. Numbering 60000 marked as 71-661 and cartridges S. A. 7.62 mm. Ball for Chinless Rifles bearing 71-31. Exh. P.W. 24/3 similarly proves the receipt of 7.62 mm. Ball for Chinese rifles bearing the Marking 71-31.

191. In cross-examination the learned counsel for Mian Muhammad Abbas accused confronted the witness with the omission in his statement under section 161 (Exh. P.W. 39/9-D) of the story relating to Mian Muhammad Abbas but the witness stated that he had made no improvement in the story and had related the entire story to the Investigation Officer. In reply to a question that he had made a false statement he stated that he had taken an oath before making the statement and had stated what had actually happened. He stated in the cross- examination of the learned counsel for Mian Muhammad Abbas that the Armoury was not attached to any Battalion and ammunition could be drawn from it by any Battalion. He stated that the Commando Camp had been established at Islamabad.

192. Amir Badshah Khah, P.W. 20, who was Deputy -Director, F. S. F. Battalion No. 3, in October and November, 1974, stated that he received order from Mian Muhammad Abbas accused on telephone a few days after his transfer from Battalion No. 1 to Battalion No. 3 that Ghulam Mustafa S. I. P. would visit him and he should be supplied whatever weapons he required on a simple receipt without making any entry in the register. Ghulam Mustafa visited him thereafter and asked for two pistols and 16 cartridges. The witness called Muhammad Yousaf Head Constable of the Armoury and directed him to hand over the requisitioned weapons and rounds, on a receipt. He was directed not to make this entry in the register. He was informed that Ghulam Mustafa accused would return after a few days by Ghulam Mustafa who took away his receipt.

193. The witness stated that again he received a telephonic call from Mian Muhammad Abbas accused a week later from Rawalpindi ordering him to hand over one sten-gun, 30 cartridges, two pistols and 16 cartridges to Ghulam Mustafa S.I., Ghulam Mustafa S.I. came to the witness that very day. the witness informed him that he had received a telephonic message in this regard from Mian Muhammad Abbas accused. Muhammad Yousaf Head Constable then handed over the requisitioned weapons and ammunition to Ghulam Mustafa and obtained a receipt from him, but he did not make any entry in the register.

194. Ghulam Mustafa came to the witness after some days. He asked him to deliver to him another sten-gun and 30 cartridges. The witness sought instructions on telephone from Mian Muhammad Abbas accused who directed him to deliver the weapon and ammunition to Ghulam Mustafa on his receipt. On instructions from the witness, Muhammad Yousaf Head Constable handed over a sten-gun and 30 cartridges to Ghulam Mustafa, in the presence of the witness.

195. The witness further added that after the murder of the father of Ahmad Raza Kasuri, Ghulam Mustafa returned the two sten-guns and 60 cartridges. He retained two pistols and 16 cartridges. These were collected by Muhammad Yousaf H.C. from Shah Jamal on the direction of the witness. The witness could not state the caliber of the weapon but stated that it was made in China.

196. Some insignificant omissions were put to the witness in his earlier statement. It is unnecessary to refer to them. He was cross-examined at length, about the procedure of issue of weapons and inspection of Armoury as well as about the time when arms were given to Ghulam Mustafa.

197. The learned counsel for Mian Muhammad Abbas put to the witness that Mian Muhammad Abbas was responsible for his removal from the post of Deputy Director and had made an inquiry against him. He denied all this. He, however indentified the signatures of Mian Muhamad Abbas at the end of Report Exh. P.W. 20/I-D, but he stated that he received no notice. He admitted that he resigned his post.

198. Muhammad Amir P.W. 19 corroborated Ghulam Hussain approver on supply of arms by Amir Badshah, the presence of the said approver in Lahore in early November, 1974 and reconnoitering by him and the confessing accused at the site of wedding for the car of Ahmad Raza Kasuri P.W. 1. He stated that he worked as a Driver and was given Jeep No. LEG-7084. He was attached with Inspector Soofi Ghulam Mustafa accused. He drove the jeep whenever he was asked to do so by the said accused. There were several number- plates and the number of the jeeps used to be changed by Soofi Ghulam Mustafa accused by replacing the fake number-plates. A log book was

maintained in the jeep. Its entries were made by Soofi Ghulam Mustafa accused and in his absence by the M.T.O.

199. The witness stated that once the above-named accused took the jeep and parked it at a distance of 50 yards from Walton and he himself went to Amir Badshah, Deputy Director. He brought with him from there something wrapped in a piece of cloth which appeared to be a weapon and placed it in the jeep.

200. After some days Soofi Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar, accused and Ghulam Hussain, P.W. 31 went to Shadman Colony to a place where some marriage Ceremony was being held. Several cars were parked there. Soofi Ghulam Mustafa and Arshad Iqbal accused got down from the jeep and went towards the place where cars were parked. On their return to the jeep they informed Ghulam Hussain, on his query, that the car of Ahmad Raza Kasuri was parked there. Thereafter the party went to Ichhra for taking tea. On the following day, he learnt about the murder of the father of Ahmad Raza Kasuri P.W. I. He was ordered by Soofi Ghulam Mustafa not to take out the jeep for about 3/4 days. The jeep was taken into custody by F.I.A. in August, 1977. According to the witness, Ghulam Mustafa accused also used to drive the jeep and used to take it at different places. On cross-examination by the learned counsel for the confessing accused he stated that whenever they visited Model Town, Ghulam Hussain (P.W. 31) accompanied them.

201. In answer to the questions of the learned counsel for the principal accused he stated that the Jeep was placed at the disposal of Ghulam Mustafa accused three to six months before the murder on orders received from Rawalpindi. He further stated that Ghulam Hussain Inspector did use the jeep sometimes. He also used to drive it away unaccompanied but he did not make the entries in the log-book. They were made by Ghulam Mustafa accused. He also stated that about five or six days but less than a week before the occurrence he drove Ghulam Mustafa accused to Walton. He had taken the jeep to Shadman Colony at 8-00 p. m. on 10-11-1974.

202. He further stated that he was not coerced by anybody and was making the statement voluntarily and "*Iman Se*". He stated that after leaving the jeep on return from Shadman, in the office he was relieved of his duty. He denied that he had stated in his statement under section 161, Cr. P.C. (Exh. P.W. 39/6-D) that he "then returned on foot".

203. In answer to the question by the learned counsel for Mian Muhammad Abbas accused he stated that the Investigating Officer did not take into possession any fake number-plate in his presence.

204. Manzoor Hussain Driver, P.W. 21 used to drive the staff car of the Director-General, F. S. F. He supported the statement of Ghulam Hussain approver about his journey from Lahore to Rawalpindi in that staff car. He proved entries in the log-book

of the car (Exh. P.W. 21/1) from 1st November to 13th November. He stated that he drove the car from Rawalpindi to Multan on the 3rd November. He performed duty at Bahawalpur, and Rahimyar Khan on the 10th and 11th November 1974. He performed his duty with the Director-General in Multan, but after the Director-General left Multan for Rawalpindi by Air at 11-30 a.m., he returned to the Canal Rest House and after collecting his luggage, left for Lahore the same day at 2-00 p.m. along with the gunman of the Director-General. He reached Lahore the same night at 11-30 p.m. spent the night in a hotel in Bakhsi Market and went to the Headquarters of the F.S.F. in Shah Jamal Colony the next morning to get petrol for his car but he could not get it from there. He stated that Inspector Ghulam Hussain Approver, P.W. 31, was present there. On his query, he told him that he was going back to Rawalpindi. Ghulam Hussain P.W. 31 asked him to take him along. Leaving Lahore on 12-11-1974 at about 8-00 a.m. the witness arrived at Rawalpindi with Ghulam Hussain at about 2-00 p.m. The entries in the log-book were checked by the Private Secretary to the Director-General, namely Ahmad Nawaz Qureshi, P.W. 5.

205. He stated in cross-examination of Mr. D. M. Awan that the F. S. F. Office at Lahore had a contract with a petrol pump situated at Ferozepur road. He did not go to the petrol pump since he was informed at the F.S.F. Headquarters at Shah Jamal that aviation was not available at the Petrol Pump. He therefore obtained the petrol from a Petrol Pump at Mc Leod road. He stated that while at Multan the keys of the car remained with him. He drove the car whenever P.W. 2 wanted to go anywhere, so far as he knew, P.W. 2 did not visit any place in Multan in the morning of 11th November 1974.

206. The learned counsel for Mian Muhammad Abbas cross-examined him in regard to the entries in the log-book pertaining to the first three days of November 1974, which are not material and some alleged contradiction with the statement under section 161, Cr. P. C. It is unnecessary to refer to the latter since the statement made before the Investigating Officer was not proved. As regards entries in the log-book the witness stated that he was at Rawalpindi and had driven from there on the 3rd November 1974.

207. The circumstances in which the F.I.R., was recorded and the evidence and investigation was tampered with is proved by P.W. 11, P.W. 12, P.W. 14, P.W. 15, P.W. 34, P.W. 16, P.W. 17 and P.W. 18 who corroborate Ahmad Raza Kasuri P.W. 1 and Seed Ahmad Khan P.W. 3. P.W. 14, 34, 16, 17 and P.W. 18 relate the circumstances leading to the substitution of crime empties, Abdul Aziz P.W. 11 was posted as Additional S.H.O., Police Station Gulberg in November, 1974. He stated that while on patrol duty with Muhammad Bashir A.S.L, P.W. 8 in the area of Liberty Market, on the night between 10th and 11th November 1974, He received information at 12-30 or 1.00 a.m. that Ahmad Raza Kasuri P.W. 1 and his father were fired at and they were in the United Christian Hospital. He reached the Hospital. Ahmad Raza Kasuri gave him the version of the incident and also that they were fired at the behest of the principal accused. He

asked P.W. 1 to make a statement but he said that his father was being operated upon and he could make a statement after the result of the operation, he came downstairs and rang up the Control Room of Police Station, Civil Lines, and Sh. Abdul Ahad D.S.P., Ichhra. He passed on the information to the D.S.P. about the occurrence. After some time the D.S.P. reached the Hospital followed by Khan Muhammad Asghar Khan and some officers including Sardar Abdul Wakil Khan (P.W. 14). The witness narrated the occurrence to Abdul Ahad who contacted Ahmad Raza Kasuri, P.W. 1 and asked him to write the report. Khan Muhammad Asghar Khan S.S.P. (P.W. 12) also reached there. Ahmad Raza Kasuri said that he would name the principal accused in the F.I.R. and stated that since the police would not mention his name he would make a statement only in the presence of some higher police Officers. Thereafter, Sardar Abdul Akil Khan arrived there. He told Ahmad Raza Kasuri to give a statement in writing and stated that a case would be registered accordingly. In the meantime, the father of P.W. 1 succumbed to his injuries. P.W. 1 gave his statement in writing (Exh. P.W. 1/2) to Khan Muhammad Asghar Khan, who, handed it over to him. The witness stated that he handed over the same to Muhammad Bashir A.S.L P.W. 8, after putting down his signature underneath the narration of proceedings by the police.

208. Muhammad Bashir P.W. 8, supported this version and stated that he took the statement to Police Station, Ichhra and handed it over to Abdul Hayee Niazi.

209. Muhammad Asghar Khan P.W. 12 who was posted as S.S.P., Lahore in November 1974, stated that on receiving information about the attack on Ahmad Raza Kasuri and the injury received by his father, he ordered the Police Headquarters to send a reserve on the spot in order to preserve the scene of occurrence. He himself reached the hospital. On his inquiry Ahmad Raza Kasuri related the incident to him and reported that the attack was a result of his political differences with the principal accused and that the latter had declared at the floor of the house that he was fed up with him. The witness instructed the police officers, to record the statement of Ahmad Raza Kasuri and register the case accordingly. He thereafter left for the spot. The father of Ahmad Raza Kasuri was still in the operation theatre at that time.

210. After satisfying himself at the spot that the scene of occurrence was being preserved, he went back to the hospital. By that time the injured person had breathed his last. He found Ahmad Raza Kasuri a little excited and on his inquiry whether his statement had been recorded and the case had been registered, he stated that unless the name of the principal accused was mentioned in the F.I.R. He would not get the case registered. The witness asked him to give statement in writing promising that the same would be reproduced in the F.I.R. Sardar Abdul Wakil, D.I.G. who had arrived at the hospital agreed with the witness that the case be registered on the statement of Ahmad Raza Kasuri.

211. The witness further stated that Ahmad Raza Kasuri brought the statement Exh. P.W. 1/2 to him in writing which he handed over to Abdul Aziz, S.I. for registration of the case. The witness, remained in the hospital till the dead body of the deceased was removed by his sons and relations. He also stated having seen the car of P.W. 1 and described the bullet marks on it. He also stated that the glass of the right rear door was broken.

212. Continuing his statement he said that a meeting was held in the house of the Inspector-General of Police on the evening of 11th of November, 1974. It was attended besides the witness by the Inspector-General of Police the Deputy Commissioner. The Inspector-General ordered the witness to remove the dead body of the deceased from his house and bury it somewhere during the night. The witness refused to carry out this order on which the Inspector-General of Police threatened him that if anything happened the next day he would be taken to task. He referred to another meeting with Abdul Hamid Bajwa in connection with this case. He stated that the latter questioned him as to why the name of the Prime Minister was mentioned in the F.I.R. He suggested that the case could be registered on the statement of any other person. In that case the name of the Prime Minister would have been avoided. He referred to another meeting two or three days later with Abdul Hamid Bajwa in connection with this case. He stated that the latter questioned him as to why the name of the Prime Minister was mentioned in the F.I.R. He suggested that the case could be registered on the statement of any other person. In that case the name of the Prime Minister was mentioned in the F.I.R. would have been avoided. He referred to another meeting two or three days later with Abdul Hamid Bajwa in the presence of Sardar Abdul Vakil, D.I.G., P.W. 14. Abdul Hamid Bajwa asked the D.I.G. about the empties, but the D.I.G. told him that those were properly sealed. Abdul Hamid Bajwa remarked against the hurry exhibited in sealing them. The witness could not explain why Abdul Hamid Bajwa had asked about the empties.

213. The witness further stated that besides Abdul Hamid Bajwa, Saeed Ahmad Khan P.W. 3 also contacted him in connection with the case. He too questioned him about the reason for allowing the name of principal accused to be mentioned in the F.I.R. and further told him that "Sahib" was annoyed with him (with witness) on this account. A meeting was then held in the office of the Home Secretary which was attended by the I.G. Police, D.I.G. (P.W. 14), Saeed Ahmad Khan P.W. 3, the Home Secretary and the witness Saeed Ahmad Khan ordered in that meeting that the investigation of the case should be entrusted to Malik Muhammad Waris, D.S.P., P.W. 15 and Mr. Abdul Ahad, D.S.P. and both of them should see him at Rawalpindi for further briefing. Both the D.S.Ps were accordingly informed and they did go to Rawalpindi in pursuance of the directions given to them.

214. The witness stated that he did not have a free hand in the investigation of the case because instructions relating to the investigation were being issued by Abdul



Hamid Bajwa and Saeed Ahmad Khan P.W. 3, which he had to obey. These two persons visited Lahore frequently. In fact in the meeting held in the office of the Home Secretary Mr. Saeed Ahmad Khan P.W. 3 had informed the witness that he had been specially sent by the Prime Minister to supervise the investigation of this case and to put the investigation on the "right" lines.

215. Reference has already been made to P.W. 3/2-A with which Abdul Ahad, D.S.P. had sent a copy of the First Information Report to Abdul Hamid Bajwa. The witness stated that he had seen this document for the first time. He stated that the only channel of communication with outside agencies was through him in his capacity as S.S.P. implying thereby that the copy of the F.I.R. could not have been sent directly to Abdul Hamid Bajwa. He further stated that Abdul Hamid Bajwa had never asked him or any of his subordinates through him to supply to him a copy of the First Information Report.

216. In cross-examination by the learned counsel for the principal accused whether he was satisfied with the investigation carried out by Abdul Hayee Niazi and Abdul Ahad, he stated that there was no progress in the investigation, hence the question of his satisfaction or otherwise did not arise. He gave a very significant answer to the question whether the statements of the witnesses had not been recorded. He stated that the investigation of blind murder cases is started on the basis of motive. In the present case the motive was clearly mentioned by Ahmad Raza Kasuri in the First Information Report. The case could consequently be investigated only by interrogating the principal accused who had been named in the F.I.R. but neither he nor his subordinates were in a position to interrogate the then Prime Minister. The question of satisfaction or dissatisfaction, was, therefore, irrelevant.

217. Muhammad Abdul Vakil Khan, P.W. 14, was D.I.G., Lahore in the month of November 1974. He also visited the spot as well as the hospital. He corroborated the statement of Asghar Khan, P.W. 12 about the manner in which the case was registered at the statement of Ahmad Raza Kasuri, about what transpired in the meeting in the police station, civil lines, Lahore, between P.W 12 and himself on the one hand and Abdul Hamid Bajwa on the other, about the meeting held in the office of the Home Secretary in the full week of January 1974, in which Saeed Ahmad Khan directed that Malik Waris P.W. 15 would investigate the case and that the latter and Abdul Ahad D.S.P. should see him at Rawalpindi for being briefed. He stated that though the empties had not been sealed, he informed Abdul Hamid Bajwa that they had been sealed. He had already received information on the 11th November 1974, that the empties of 7.62 mm. caliber had been recovered from the spot. He knew that weapons of this caliber were used by the F.S.F. He put off Abdul Hamid Bajwa by telling him that the empties had been sealed since he knew that Abdul Hamid Bajwa was associated with the F.S.F. very closely and he wanted to avoid any suggestion from him to tamper

with the empties in order to exonerate the F.S.F. He corroborated P.W. 12 about the reaction of Abdul Hamid Bajwa on the report that the empties had been sealed.

218. The witness further stated that about a fortnight later Mr. Abdul Ahad met him. He enquired from him if any result had been received from the Ballistic Expert to whom the empties were sent. The witness was surprised to hear from him that he (Abdul Ahad) had delayed the sending of the empties because they were taken away by, Abdul Hamid Bajwa and then returned to him after 2/3 days and that the empties were sent only then for examination. On further questioning why he had handed over the empties to Abdul Hamid Bajwa, Abdul Ahad answered that the empties had to be handed over to Abdul Hamid Bajwa on the latter's threat that the empties were required to be taken to the Prime Minister's House to be shown to the high officers.

219. The document Exh. P.W. 3/2-A was shown to P.W. 14 also. He denied having seen it ever before. He also denied that Abdul Hamid Bajwa ever approached him for the copy of the F.I.R. which an outside agency could get either through him or the S.S.P. or from the Court but certainly not from the D.S.P.

220. The witness stated that Saeed Ahmad Khan P.W. 3 met him in the last week of December 1974, or 1st week of January 1975, and enquired from him about the empties recovered from the spot. The witness told him that the empties were of 7.62 mm. caliber. He discussed the case with him early in relation to the empties.

221. He also stated that a few days before the occurrence, while on patrol duty, he came across a jeep without number-plate going ahead of him on the Canal Road. He chased, overtook that jeep and stopped it. He questioned the person who came out of the jeep, about his identity and he told him that he was an Inspector in the F.S.F. He could not give a satisfactory answer to the question as to why he was driving the jeep without number-plate. He then contacted Mr. Mallhi (Muhammad Irfan Malhi), Director F.S.F. at Lahore, through Wireless Control who confirmed that the Inspector as well as the jeep belonged to the Federal Security Force. The witness could not give the name of the Inspector. It was suggested to him in cross-examination on behalf of the principal accused that the Martial Law Authorities had prepared a list of screening out certain officers and that his name was included in it. He denied he was at all aware of it. He stated that he did not attend the meeting held at the residence of the Inspector-General of Police on 11th November 1974, in spite of being contacted for attending the same. He however, agreed with Asghar Khan, P.W. 12 when he informed him about his refusal to remove forcibly and himself supervise the burial of the dead body of the deceased. Certain portions of his earlier statements were put to him but he emphasized and explained that they were not contradictory to what he stated in Court. He stated that Asghar Khan met him daily and complained that he did not have a free hand in the investigation.

222. Malik Muhammad Waris, P.W. 15 stated that he was posted in the C.I.A. on 2nd of January 1975, at Lahore and took charge on the 10th of January 1975. A month before he took charge of investigation of this case had been transferred to the C.I.A. He took the file of this case to Muhammad Asghar Khan who directed him to take it to Saeed Ahmad Khan P.W. 3 to Rawalpindi and to seek instructions from him with regard to investigation as the investigation had to be carried out in accordance with his instructions.

223. On 12th January 1975, Abdul Vakil Khan, P.W. 14 also ordered him to go the next day to Rawalpindi and meet Saeed Ahmad Khan for the same purpose. He could not, however, leave for Rawalpindi that day due to preoccupations. The D.I.G. and the S.S.P. (P.W. 14 and P.W. 12) got annoyed with him on this account and the D.I.G. wrote D.O. 113 dated 13th January 1975, to the LG. Police against him. His explanation was called for non-compliance with the order of the D.I.G.

224. He stated that he proceeded to Rawalpindi on 13-1-1975. Sh. Abdul Ahad D.S.P. also reached there. Both of them went to the Prime Minister's Secretariat and appeared before Saeed Ahmad Khan P.W. 3 and Abdul Hamid Bajwa who were together. They instructed him to proceed with wisdom and caution since the name of the Prime Minister had appeared in the First Information Report. They further told him that Ahmad Raza Kasuri had named the Prime Minister dishonestly.

235. P.W. 3 directed the witness and Sh. Abdul Ahad to go to Bara in order to find out if the weapons and ammunition of the caliber used in the occurrence were available there. He further directed them to contact JADO at the G.H.Q. and find out if weapons and ammunition of this caliber were available in the region of Lahore or near about illegally. P.W. 3 further ordered that neither his name nor the fact that he had contacted him in the Prime Minister's Secretariat should appear in the Police diary or the correspondence.

236. The witness and Abdul Ahad visited J.A.D.O. as per instructions of P.W. 3 and met the Col. Incharge whose name had been given to them by P.W. 3. The Colonel gave a report Exh. P.W. 15/1 to them. It may be stated that the report confirmed the availability of the arms in Darra Adam Khel and with the underground elements in settled Districts. The witness added that they then visited Bara. Since the market was closed that day, they came back but left Muhammad Sharif, Sub-Inspector to seek necessary information. Two/three days later Muhammad Sharif met them and informed them that the weapons and the ammunition of the caliber used in this case were available at Bara.

237. He stated that Saeed Ahmad Khan P.W. 3 and Abdul Hamid Bajwa also ordered the witness to find out disputes over the division of land in Kasuri family and also the disputes of the deceased with the local persons, but these investigations conducted by

him regarding these matters led to no worthwhile results. Only minor differences were discovered which in his opinion could not form the motive for the offence.

238. The witness deposed that Saeed Ahmad Khan, P.W.3 held meetings in the office of the Advocate-General, Punjab, Office of the Home Secretary, Punjab and once in the Chief Minister's House and in these meetings the investigation of the case was brought under discussion and P.W. 3 used to give him instructions. He complained that his officers namely S.S.P., D.I.G. and I.G. had left him at the mercy of P.W. 3 who controlled the entire investigation and did not allow a free hand to the witness to conduct the same. He had to concentrate all his efforts in conducting the investigation on the lines on which Saeed Ahmad Khan, P.W. 3, gave directions.

239. In cross-examination by Mr. Irshad Ahmad Qureshi the witness stated that he was not satisfied with the investigation since every Investigation Officer has his own angle of vision about it. He found that the efforts which should have gone into tracing the culprits had not been used in this particular case despite its importance. He admitted that he did not join any employee of the Federal Security Force in the investigation since he was directed to carry on the investigation on wrong lines.

240. In reply to a question by the learned counsel for the principal accused, the witness stated that as a result of his investigation he had found that the disputes amongst Yaqub Maan's party and Ahmad Raza Kasuri had come to an end and the cases had, therefore, been closed. It was suggested to him that consequent upon the gift of land made by the deceased, his children were split into two factions; one comprising of Major Ali Raza, Sikandar Hayat and Khizar Hayat, and the other comprising of the three brothers, the deceased and his wife. He replied that this information was proved incorrect during investigation. It was also suggested to him that the inheriting of her legal share in her paternal estate by the wife of Major Ali Raza sparked dispute between her paternal family and that of Ahmad Raza Kasuri. The witness admitted that he had received this information, but it was found to be incorrect on investigation.

241. Abdul Hayee Niazi P.W. 34 stated that he reached the spot, after recording the formal F.I.R. a copy of which is Exh. P.W. 34/1. He then proceeded to the hospital where he found the D.I.G., the S.S.P., his D.S.P. and Ahmad Raza Kasuri and his relatives. After He was free from the hospital, he left for the spot. Adbul Ahad told him at that time that he would also reach there after visiting Model Town and directed him not to prepare any recovery memo at the spot as the name of the Prime Minister had been mentioned in the F.I.R.

242. He stated that he recovered 24 empty cartridges and lead of a bullet but he did not prepare the recovery memo. On his examination he found that at the base of each of the 24 cartridges were inscribed figures 661/71. Adbul Ahad D.S P. directed him to show the empty cartridges and the car to the Ballistic Expert so that it could be

ascertained what type of arms had been used. He accordingly went to the Civil Secretariat and he took Nadir Hussain Abidi P.W. 36 with him to the hospital. He was accompanied by Officers of his Staff. P.W. 36 inspected the car and took its photographs (later proved by P.W. 36 as Exh. P.W. 36/2, P.W. 36/3 and P.W. 36/4). He showed the empty cartridges and lead -bullet to P.W. 36, at the Police Station, but he was unable to give any opinion unless the cartridges were sent to him and they were minutely examined in the laboratory.

243. At 9/10 p.m. on the 11th November 1974, Abdul Ahad D.S P., asked the witness to accompany him to Rao Abdul Rashid, I.G. of police. He also informed him that the I.G. of Police had ordered the production before him of the 24 empty cartridges, lead bullet and cap of the deceased. The cartridges and lead-bullet were put by the D.S.P. into a service-envelope. Both of them went to the residence of the Inspector-General of Police. Abdul Ahad went in while the witness kept sitting in the jeep. The D.SP. returned after about half an hour and informed the witness that the Inspector - General had kept the 24 empties and lead bullet with him and had returned the cap. He further informed him that the Inspector-General had told him that he would pass further orders later and that the investigation should be conducted according to his orders.

244. He added that on the 12th Nov 1974, Abdul Ahad folded and sealed the original F. I. R. (Exh. P.W. 34/3) in his presence and in the presence of Abdul Ikram. He showed the original F.I.R. and stated that it bears marks of stitching and seal. He added that Abdul Ahad left for Rawalpindi on 13-11-74 and took along with him the site plan Exh. P.W. 34/2. He returned after two or three days and asked the witness to prepare the recovery memo. Exh. P.W. 34/4, as per draft which according to the D.S P. had been given to him from the Prime Minister's House. He copied P.W. 34/4 from the said draft and returned the same to the D.SP. He asked the D.SP. for the empty cartridges, but he informed him that they would not be returned. He advised him that the order should be complied with, otherwise both of them would find themselves in trouble and not only their services would be terminated but they would also be involved in some case.

245. He stated that on looking at the draft, he found that the number of the empty cartridges recorded there were different 22 empty cartridges were stated to contain No. BBI/71 while two were stated to contain No. 31/71.

246. He continued that Muhammad Bashir A.S.I., P.W. 16, who was posted as Moharrir Malkhana, was on leave at that time. He returned on the 17th November 1974. The witness gave the recovery memo, to him with a direction that he should enter the articles mentioned in the recovery memo, in the relevant register against the date 11-11-1974, He (the witness) directed him to have these entries made by Abdul Ikram. It was in these circumstances that the entry about the recovery of the empties and the lead-bullet extracted from the head of the deceased were made although none of the former were available at that time.

247. The witness deposed further that the D.S P. gave 24 empty cartridges to the witness on the 23rd November 1974, and ordered him to seal them and send the same to the Inspectorate of Armaments G.H.Q., Rawalpindi. He complied with the order, prepared a sealed parcel of those empty cartridges, and deputed Muhammad Sarwar A.S.I., P.W. 16, to prepare the docket in order to take the parcel to its destination. The result of the inspection was communicated by the Inspectorate of armaments on the 27th December 1974, vide Exh. P.W. 32/1. It may be noted at this stage that this report confirms the use of 7.62 x 38 m.m. service bore weapons (Rifle, L.M.G. and S.M.G.) of Chinese origin.

248. The witness added that the lead bullet and two metallic pieces were later sent to the Inspectorate of Armaments through Muhammad Sarwar, P.W. 17, on the 24th December 1974, under the direction of the D.S P.

249 In cross-examination by Mr. Qurban Sadiq Ikram the witness stated that he had been transferred six or seven months ago to the police liner but he had not been assigned any duty. He was confronted with the statements made by him on 16-12-1974, 17-12-1974 and 23-12-1974 before the Tribunal. He stated that he could not make the present statement at the time because of circumstances then prevailing. He stated that he did not record in the diary about the visit of P.W. 36 or that he was shown empties having recovered from the spot. He however admitted stated before the tribunal when confronted with the statement of P.W. 36. It is also incorrect in the statement of the Director that the empties were shown to him there and they had not been sealed at the spot. He admitted that the draftsman had prepared site plan Exh. P.W. 34/5-D but the spot from which the empties was wrongly indicated. He stated that 11 empties were recovered from two places from the round-about, five from one place and six from other at a distance of ten paces from one another, while thirteen cartridges were outside the round-about, seven at one place and six at other, there being a distance of 35 Karams between the two places by that outer circumference of the round-about.

249 (A.) Muhammad Bashir P.W. 16, Abdul Ikram P.W. 18 and Muhammad Sarwar P.W. 17 supported this version in so far as the part attributed to them was concerned. Muhammad Bashir P.W. 16 proved the entry Exh. P.W. 16/1-1 in register No. 19, Exh. P.W. 16/1 about the recovery of empties and the bullet made by Abdul Ikram. P.W. 18 under instructions from P.W. 34.

249- (B.) Muhammad Sarwar A.S.I. P.W. 17 stated about taking away sealed parcels to the Inspectorate of Armaments on 23-11-1974 and 24-12-1974. He stated that all the seals were intact. The first parcel contained empty cartridges and the second contained lead bullet and two metallic pieces.

250. Abdul Ikram P.W. 18 corroborated the statements of P.W. 16 and P.W. 17. He also stated that Sh. Abdul Ahad D.S P. and S. H. O. Abdul Hayee Niazi had taken at about 9-00 or 10-00 p.m. on the 11th November, 1974, the empty cartridges to the Inspector-General, Police, at his residence, in an open service envelope.

251. P.W. 32, P.W. 33, P.W. 36 prove the caliber of empties. P.W. 36 is also a witness of a circumstance proving substitution of empties. These three witnesses and P.W. 40, P.W. 36 establish that empties P. 8 to P. 31 have been kept intact since they were first sealed by P.W. 34.

Lt. Col. Zawar Hussain, Chief Inspector of Armament in the Inspectorate of Armaments at Rawalpindi appeared as P.W. 32 and stated that the Inspectorate had received 24 empty cartridges by S.S.P. Letter No. 57941-C dated 23rd November, 1974. These cartridges were examined and report was sent by Letter Exh. P.W. 32/1 dated the 27th November, 1974. Another letter from the S.S.P., Memo No. 71752/C dated the 24th December, 1974, accompanying a parcel containing the core of bullet and two small metallic pieces was received in the office and its detailed report was sent vide letter Exh. P.W. 32/2 dated the 7th January, 1975. He stated that the 24 empties were kept in the ammunition store and were returned to the representative of F.I.A. on the 25th August, 1977.

252. Major Muhammad Sarfraz Naeem P.W. 33 stated that Mr. Aslam Sahi, Inspector F.I.A. approached him in order to collect the 24 empty cartridges and the core of the bullet and two small metallic pieces which he collected from him. He wrote a letter Exh. P.W. 33/1 dated 25-8-1977 to the Deputy Director F.I.A., Lahore Camp. It may be stated at this stage that according to this letter 24 fired cases were empties of 7.62 mm. Round of Chinese origin fired from Rifles, S.M.G. and L.M.G. This letter also referred to the return of the empties and the blood-stained bullet core with the two pieces of metallic pieces alleged to have been recovered from the body of the deceased. Similarly report Exh. P.W. 32/1 proves the bore (7.62 mm. x 38 mm.) of the 24 empties while para 2 of letter Exh. P.W. 32/2 proves the core of these bullet to be from a round of the same caliber and its shape was similar\* to that of bullets from Russian, Chinese and other Communist countries.

The witness proved the recovery memo, of these articles prepared by Mr. Aslam Sahi (Exh. P.W. 33/2)

253. Aslam Sahi P.W. 40 stated that after taking the two sealed parcels into possession, he handed them over intact to Muhammad Boota Inspector F.I.A., P.W. 39 for delivering the same to the Director, Technical F.I.A., Islamabad. He further stated that he received two parcels from the said Director on the 22nd October, 1977. These parcels were sealed and he deposited them in the High Court Malkhana intact.

254. Muhammad Boota Inspector F.I.A., P.W. 39 said that he deposited two parcels received by him from Mr. Aslam Sahi, with Abdul Rauf Moharrir, Police Station Islamabad, as the docket could not be issued due to the closure of the office. He obtained the said sealed parcels on the 27th August, 1977, got their docket prepared after which he delivered them in the office of the Director, Technical F.I.A, Islamabad. He explained that he could not deliver the parcels on the 26th August, 1977, since it was Friday, The parcels were not tampered with and were delivered intact.

255. Abdul Rauf P.W. 37 supported the above statement and proved the reports of receipt and return of the parcels Exh. P.W. 37/1 and Exh. P.W. 37/2.

256. Nadir Hussain Abidi, P.W. 36, now Deputy Director, F.I.A. (Technical Wing), Rawalpindi stated that he was posted as Director, Forensic Science Laboratory, Lahore, in November, 1974. On the 11th November, 1974, Abdul Hayee Niazi, S.H.O. Ichhra, P.W. 34 visited him in connection with a firing case and sought his assistance. He also desired that the witness should inspect a car which had been fired at and get it photographed. He, therefore, visited the United Christian hospital, along with Abdul Hayee Niazi, Ghulam Muhammad photographer and one Qurban Raza, Fire-Arms Expert. The Photographer photographed the car vide photographs Exh. P.W. 36/1 P.W. 36/2 P.W. 36/3 and P.W. 36/4. The witness found that the right rear window of the car was damaged. He also saw that there were broken glass pieces inside the car and there was blood on its front seat. The metallic portion of the window had one or two holes and there was also a mark on the bonnet. He field the photo before the Tribunal when, he was summoned in December, 1974 since no police officer collected them.

257. He further stated that he was taken to the roundabout near Shah Jamal which was the scene of occurrence. Abdul Hayee Niazi P.W. 34 showed him three or four places there from where he had recovered the fired shells. He also showed the portion on the wall facing the round-about which bore a mark of having been hit by some object. Abdul Hayee Niazi P.W. 24 told him that he had recovered a piece of bullet from there.

258. The witness said that he was then taken by Abdul Hayee Niazi P.W. 34 to the Police Station, Ichhra saying that he wanted to show to him the fired shells recovered by him from the scene of crime and to get some technical advice. He showed 24 shells and a mutilated metal which he said was a bullet recovered by him from near the wall at the scene of crime. These articles were not sealed and they were shown to him in an open condition. He examined each one of the articles and advised P.W. 34 that they were not fired from G-3 Rifles. He told him that he could not give any opinion about any other type of automatic weapons without a detailed examination of the empties with reference to the concerned literature at the Laboratory. He stated that the caliber of G-3 Rifle is also 7.62 mm. He further stated that he could not give any opinion about the



metallic piece also. He left the police station but by that time the empties and the metallic pieces had not been sealed.

259. The witness further stated that he appeared before the Tribunal to make his statement. He was recalled on the 6th January, 1975, when he was confronted with the statement of Mr. Niazi.

260. The witness further deposed that on the 27th August, 1977, Muhammad Boota, Inspector F.I.A, delivered two sealed parcels, one containing 24 crime empties and the other containing a core of a bullet and two metallic pieces, in the Technical branch at Islamabad. These parcels were sealed with the seal of the Chief Inspector of Armament and related to the present case. They were opened and then were resealed for return to Mr. Aslam Sahi, Inspector F.I.A., Lahore Circle to whom they were delivered on the 22nd October, 1977.

261. The seals on these parcels were found intact and were opened by the witness in the Court. He stated that on the bases of 22 empties is engraved 661/71 though this number can also be read as BBI/71. The other two bore different batch marks. The empty cartridges were marked P. 8 to P. 31. The sealed tube containing core of the bullet and two metallic pieces was marked as Exh. P. 32

It was suggested to him in cross-examination that he never visited the place of occurrence or the police station and did not see the empty shells and the metallic bullet but he denied it.

262. Nasir Nawaz, Inspector Police P.W. 23 who was posted as S.H.O. Police Station, Islamabad, on the 24th August, 1974, corroborates Ghulam Hussain approver and Ahmad Raza Kasuri about the Islamabad incident. He proved the statement of Ahmad Raza Kasuri Exh. P.W. 23/1 on the basis of which F.I.R. Exh. P.W. 1/1 was registered in respect of the incident of 24th August, 1974, at Islamabad. He stated that a case under section 307. P.P.C. was registered on the basis of. this statement and investigated by him. He prepared site plan Exh. P.W. 23/2 and a recovery memo, of the empties recovered from the spot, Exh. P.W. 23/3. He stated that he sent the sealed parcel of the empties to the Expert Armament, G. H. O., Rawalpindi from where he received report, Exh. P.W. 23/4. On 5-10-1974 the witness sent a report that the case be filed as untraced.

263. It may be stated by Exh. P. W 23/3 the witness recovered from the spot five shells, each bearing No. 661/71 which are proved by report. Exh. P. W, 23/4, to have been fired by S. M. G/L. M. G. of 7.62 bore.

264. There is oral and documentary evidence that Abdul Hamid Bajwa continued to probe into the security measures of Ahmad Raza Kasuri. The oral evidence is furnished by Ashiq Muhammad Lodhi, P.W. 28 who was acting as Assistant Director in Headquarters. F.S.F. in January, 1973. He stated that in the year 1975, his duty was to

give reports of the proceedings of the National Assembly and the senate besides this he used to compile the incoming reports and place the same before the officers. He used to incorporate the utterances in the National Assembly. In January 1975. Abdul Hamid Bajwa asked him to meet him in the Prime Minister's Secretariat. He met him with the permission of Mian Muhammad Abbas. Abdul Hamid Bajwa directed him to secure the description of the gunman of Ahmad Raza Kasuri who accompanied him to the National Assembly Cafeteria and the Gallery. The witness complied with the order and sent a report, Exh. P.W. 28/1 to that effect along with covering letter Exh. P.W. 3/2-T. He sent this report directly to Abdul Hamid Bajwa since such a practice of sending reports directly to him, had developed under orders of Mian Muhammad Abbas accused.

265. It is unnecessary to refer to the cross-examination of any of the learned counsel except Mian Qurban Sadiq Ikram who appeared on behalf of Mian Muhammad Abbas. In cross-examination by him, the witness first tried to prove that Mian Muhammad Abbas was opposed to him. He stated that he was promoted as Assistant Director in the Federal Security Force on the 1st April, 1974, on the recommendation of Haq Nawaz Tewana, the then Director-General, and that Mian Muhammad Abbas had opposed his posting at that time. He however, later made certain concessions to favor him. He stated that Ghulam Hussain approver P.W. 31 was given a special award of Rs. 500 for good work in the National Assembly in June, 1974, where he was posted during Ahmadia Agitation. He further stated that Mian Muhammad Abbas told him in June, 1975, and again in February, 1976, that he had tendered his resignation which was not accepted, that P.W. 2 would give instructions to him (witness) directly when he visited the National Assembly, that he sent for Ghulam Hussain P.W. 31 through him once or twice during those days, and that in the end of July, 1974, he sent for Ghulam Hussain through him and remained closeted with him in the room while the red light on the door continued glowing throughout that period. He further said that Rana Iftikhar Ahmad was one of the gunmen attached to the Director-General in those days.

266. Zawar Hussain P.W. 13 who was posted as Incharge (Records), F.S.F. Headquarters has proved the service record of Ghulam Hussain and the three confessing accused. He stated that Ghulam Hussain joined as A.S.I. on 3rd of December, 1973, and he was promoted as Sub-Inspector on 15th January, 1974, and as Inspector on 20th of August, 1974. Ghulam Mustafa accused was appointed as A.S.I., F.S.F. on 1-6-1973. He was promoted as Sub-inspector on 15th of December, 1973 and as Inspector on 1st of December, 1974 Arshad Iqbal joined as Foot Constable on 19-3-1973. He was promoted as Head Constable on 19-9-1973. as A.S.I. on 10-10- 1974. and as Sub-Inspector on 2-8-1976. Rana Iftikhar Ahmad accused joined F.S.F., as Foot Constable on 21st of May, 1974, was promoted as Head Constable on 1st February, 1975, and as A.S.I. on 2-8-1976. He further stated that in November, 1974, Ghulam Hussain, approver and Rana Iftikhar Ahmad accused were posted in Rawalpindi/Islamabad area while Ghulam Mustafa and Arshad Iqbal were posted in Lahore area.

267. It is necessary to refer to some formal evidence in order to point out the manner in which some documentary evidence is admitted. P.W. 5 Ahmad Nawaz Qureshi proved the itinerary of the Director Generals tour to Multan, in early November, 1974 (Exh. P.W. 2/8) and the details of his Quetta tour in the end of July and beginning of August 1974 (Exh. P.W. 5/1). He also stated that Mian Muhammad Abbas had served as Director Operation and Intelligence till the time of his detention in August, 1977. He threw some light on the office procedure and said that letters addressed to the Director-General by name were forwarded to him unopened while other letters were opened by him and presented to the Director-General. Some of the letters were returned by the Director-General while others were not. He was asked by the F.I.A. to search the Intelligence Report dated the 18th November, 1974, presumably to prove the Director-General's endorsement dated the 21st September, 1974, on the original of the document marked P.W. 2/Z. He was also directed to search some other documents from Quetta office. He could not trace out any of them.

268. P.W. 25, Ijazul Hassan , another Assistant Director, Federal Security Force was also asked to trace these documents. He stated that he could not trace them in spite of search with the help of Sana Ullah, Reader to Mian Muhammad Abbas. It may be recalled that the office copy of the report Exh. p. W 2/Z which was sent to P.W. 2 by him was proved by P.W. 4f In view of the original copy being untraceable P.W. 4 further proved the endorsement of Exh. P.W. 2/Z which according to him was a photostat copy of the original report which he had obtained from Mian Muhammad Abbas for production before the team appointed to enquire into the affairs of F.S.F. in July, 1977. It appears from the cross-examination of the learned counsel for Mian Muhammad Abbas that he did not attack its gaminess since he suggested to the witness that the copy was not handed over to him by Mian Muhammad Abbas but was given to him by Nazir Ahmad, Deputy Director.

269. P.W. 35 Private Secretary to the Home Secretary, Punjab proved:-

- (1) Exh. P.W. 35/1, covering letter of the report by the Tribunal to the Chief Secretary, Punjab;
- (2) Exh. P.W. 35/I-A an endorsement on it bearing a direction of the Chief Secretary to the Secretary to the Chief Minister to bring the matter to the notice of the Chief Minister;
- (3) Note Exh. P.W. 35/2 by the Chief Secretary and Note Exh. P.W. 35/2-A by the Secretary to the Chief Minister with noting part of the file relating to the Tribunal's inquiry;

- (4) Exh. P. 35/3, office carbon copy of D. O. No. 178/CM (PM) 75 dated the 7th March, 1975 by the Chief Minister, Punjab to the Prime Minister (the principal accused) enclosing the report of the Tribunal, and informing the addressee that the report had already been discussed with his Chief Security Officer and that he had asked the Chief Secretary to send to him (Chief Security Officer, P.W. 3) a copy and seeking guidance from the addressee whether the report should be made public; and
- (5) Exh. P.W. 35/4, a letter by the Inspector-General of Police to the Home Secretary, Punjab, dated the 27th September, 1975 soliciting order from him that this case should be filed as untraced in view of the report of the Deputy Inspector-General of Police about the impossibility of tracing any culprit.

270. The witness also identified signature of the Chief Secretary on document Exh. P.W. 3/3-K, a letter sent by the Chief Secretary to the Chief Security Officer to the Prime Minister enclosing for his perusal the report of the Tribunal to him as desired by the Chief Minister.

271. Muhammad Yousaf P.W. 27, Superintendent in the Prime Minister's Secretariat (Punjab), Special Cell, proved Exh. P.W. 27/2 i.e. entry No. 803 dated the 19th March, 1975, in the Diary maintained in the Secret Section of the Prime Minister's Secretariat. This entry pertains to the receipt of D.O. letter No. 178/CM/(PM)/75 Exh. P.W. 35/3 which was sent along with the report of the Tribunal by the Chief Minister Punjab to the Prime Minister and also the remarks of the latter on it after it was seen by him. The entry is reproduced as under: –

S. No.	Date of document	From whom received	Brief Subject	Record of movement
1	2	3	4	4
803	D.O. No. 7-4-74 178-CM (PM)- 75 (2654)	Chief Minister A report Punjab Tribunal set up to enquire into the incident which took place on the night between 10th & 11th November, 1974 at Shah Jamal Round about, Lahore leading to the death of Nawabzada Muhammad Ahmad Khan	Endorsed	What was the point of discussing with you? Please discuss (Sd.) P.M. 18-3. Mr. Saeed Ahmad Khan C.S.O P.M. 1 folder of 3 pages with a report

The witness while proving the document made a reference to all the above columns and their entries and stated with reference to the remarks of the principal accused in the last column that it was marked to Saeed Ahmad Khan C.S.O., PM, (P.W. 3). He also explained that the last column mentioned number of pages of the letter dispatched. He explained that this was done in order to obviate the possibility of the recipient denying the receipt of the article dispatched. He further stated that what was mentioned in the last column was duly dispatched.

272. This document has been proved to corroborate the testimony of Saeed Ahmad Khan that it was in view of this order of the Prime Minister (as given in the last column of Exh. P.W. 27/2 referred to above) that he had a meeting with the principal accused and that the latter told him in that meeting that the report should not be published as it was adverse. This entry was proved since the original document bearing this note could not be traced.

The witness further explained reference to No. 803/75 in entry Exh. P.W. 3/4-A in Peon Book Exh. P.W. 3/4. He stated that the number indicates the serial number of the letter in the dispatch register of the Prime Minister's Secretariat. He stated that Peon Book was taken into possession vide Memo. Exh. P.W. 26/1.

273. The witness also proved challan sheet Exh. P.W. 27/1. He stated that this challan sheet was prepared in duplicate in the Prime Minister's Secretariat and contained a list of documents received from the Secretary to the Prime Minister and marked to the latter. Serial No. 9 of this document is the entry about sending Letter No. 788/28/CSO(PM) dated the 24th November, 1974 (Exh. P.W. 3/2-B) on which appears the endorsement Exh. P.W. 3/2-B/1 to the following effect: —

"I agree with you.  
(Sd.)  
P.M."

274. The witness stated that this letter never came to him though he tried to trace it out in the entries of diaries of the dispatch register.

275. This evidence was produced since the document in question could not be traced. The challan sheet Exh. P.W. 27/1 was proved to establish that the letter Exh. P.W. 3/2-B must have reached the Prime Minister and seen by him.

276. Muhammad Younis Qazi, P.W. 26 also made a similar statement in regard to the entry Exh. P.W. 3/4-A in the Peon Book Exh. P.W. 3/4. He identified the signature of Abdul Hamid Bajwa on this entry. He stated that he searched the letter from the diary and the dispatch register but he could not find it.

277. P.W. 29, Khizar Hayat proved the recovery by the F.I.A. of the files Exhs. P.W. 3/1, P.W. 3/2 and P.W. 3/3. He stated that he handed over these files to the Deputy Director, Agha Habib, for sending the same to F.I.A., Lahore.

278. Haroon Ahmad P.W. 30, Section Officer in the Establishment Division, Rawalpindi, proved the T.A. Bills of Abdul Hamid Bajwa Exh.s P.W. 3/5 to Exh. P.W.

3/10 which were taken into possession vide recovery Memo Exh. W. 30/1. He stated that these bills were passed and their payments made.

279. Two witnesses, P.W. 9 and P.W. 10 have been produced to prove pardon to accomplices, their statements, and the confessions of four accused. Statements of P.W. 38 and P.W. 40 also throw light on this matter. Iqbal Nadeem, P.W. 9 made a statement only about grant of pardon to the two approvers P.W. 2 and P.W. 31. After grant of pardon he sent each approver to Mr. Zulifqar Ali Toor P.W. 10 for the recording of his statement under section 164, Cr. P. C. as a witness.

280. Mr. Zulifqar Ali Toor, Magistrate 1st Class, Lahore P.W. 10 stated that he recorded the confessional statements of Iftikhar Ahmad, Arshad Iqbal and Ghulam Mustafa Exh. P.W. 10/2-1, P.W. 10/3-1 and P.W. 10/6-1 respectively. Each of the accused was sent to the judicial lockup soon after the statement. He also recorded the statements of Masood Mahmud P.W. 2 (P.W. 2/6) and Ghulam Hussain P.W. 31 (P.W. 10/11-1). The statements according to him were voluntary and he had taken all precautions to ensure that they were voluntarily made.

281. This witness recorded the statement of Mian Muhammad Abbas accused on the 18th of August, 1977. On application Exh. P.W. 10/8 submitted by Ahmad Saeed Khan, Assistant Director, F.L.A. P.W. 38 the Magistrate passed order Exh. P.W. 10/8-1 on it. He stated that he, observed all the formalities enumerated in the form Exh. P.W. 10/9 prescribed under section 164 Cr. P.C. He gave time to Mian Muhammad Abbas, accused to think over and informed him that he was not obliged to make a confessional statement. He also warned him that in case he made a confessional statement, it might be used against him.

282. He stated that after he was satisfied that the accused was making a voluntary statement, he proceeded to record his statement Exh. P.W. 10/9-1. The statement was read out to him and he admitted it to be correct and put down his signature on it. The witness then filed in and signed the certificate Exh. P.W. 10/9-2. The witness stated in cross-examination that he had not asked any confessing accused whether any pressure or threat or inducement was given to them because he was of the view that there was an implied reference to these matters in the first question on the prescribed form. He also did not ask any question whether the confessing accused had been promised pardon in case they made a confession nor did he ask them where they were kept. Although he had not given any note in Exh. P.W. 10/9 about sending the Police Officers out of the Court room, he stated that they were so sent. The time given to Mian Muhammad Abbas accused to think over the matter before the statement was recorded, is not given in the note. The witness, however, stated that it was 30 minutes. He further stated that the custody of Mian Muhammad Abbas was given back to Ahmad Saeed, Assistant Director P.W. 38 for being taken to the judicial lock-up vide order Exh. P.W. 10/14.

283. Ahmad Saeed P.W. 38, Assistant Director F.I.A. who had produced Mian Muhammad Abbas before P.W. 10 stated that Mian Muhammad Abbas was sent to Camp Jail from the Court through Muhammad Aslam Sahi (P.W. 40) under order of the Magistrate. The witness also stated that he brought a report Exh. P.W. 38/1 from Central Ammunition Depot, Havelian along with two vouchers Exh's P.W. 38/2 and P.W. 38/3. It may be stated that letter Exh. 38/1 signed by Colonel Commandant of the Central Ammunition Depot, Havelian confirms that quantity 75000 and 60000 of 7.62 mm ball ammunition were issued by the Depot to Director-General, F.S.F. vide Voucher No. A.M. M.O./P.29 dated 7-2-1974 (Exh. P.W. 38/2) and A.M. M.O./P.-52 dated 25th May, 1974 (Exh. P.W. 38/3). Same two vouchers had been proved by Fazal Ali P.W. 24 as Exhs. P.W. 24/3 and P.W. 24/5 respectively.

284. Muhammad Aslam Sahi, Inspector, F.I.A. P.W. 40 stated that on 18-8-1977 Ahmad Saeed P.W. 38 handed over the accused Mian Muhammad Abbas to him and he took him to the Camp Jail, the same day. This witness had partly investigated the case and questioned Arshad Iqbal accused on 24-7-1977. The said accused was arrested formally by the Deputy Director, F.I.A. on 25-7-1977. He also produced Rana Iftikhar Ahmad and Arshad Iqbal accused on 26-7-1977 in the Court of P.W. 10.

285. He stated that he went to the Inspectorate of Armaments G.H.Q., Rawalpindi where Major Sarfraz Naeem, P.W. 33 gave him a letter Exh. P.W. 33/1 addressed to the Deputy Director, F.I.A. Reference to his statement about delivery to him of parcels containing empties etc. has already been made.

286. In cross-examination by the learned counsel for Mian Muhammad Abbas he stated that he had not interrogated Mian Muhammad Abbas. He stated that He had taken Mian Muhammad Abbas from the Court of P.W. 10 to Naz-Nageena Cinema since Mian Muhammad Abbas accused had to get some clothes from there from his relatives. He took these clothes from the relatives, took his meals and offered his prayer and there after he was taken straight from the Cinema to the Camp Jail. He denied having taken to him to the Police Station F.I.A.

287. Muhammad Boota P.W. 39, Investigating Officer interrogated Ghulam Hussain, approver as well as Ghulam Mustafa and got their statements recorded by a Magistrate. He submitted application Exh. P.W. 39/1 dated 11-8-1977 before P.W. 10 for remand of Ghulam Hussain to judicial custody. He stated that he visited Central Ammunition Depot, Havelian and secured from there, report Exh. P.W. 39/2 dated 28-8-1977 addressed to the Deputy Director F.I.A. He formally proved the documents. It may be noticed that Exh. P.W. 39/2 is confirmation of the fact that by issue voucher No. A.M. M.O./1451 dated 9th of June, 1973, ammunition of 7.62 mm. ball for S.M.G./L.C.G. numbering 1274760 rounds was issued to Director-General, Federal Security Force. It also proves that lot Nos. 71-661 were sent, but no lot of ammunition in question bore marking B.B.1/71. According to the letter the marking presumably is 661/71. It further

clarifies that out of the digits 71-661 stamped on the base of each case, 71 indicates the year of manufacture while 661 indicates the factory code.

288. The witness further said that he also took into possession Jeep L.E.J. 7084 by recovery Memo. Exh. P.W. 39/3 and gave it on Sapudari to Muhammad Yaqoob, Inspector vide Superdarinama Exh. P.W. 39/4 dated 31-8-1977. In cross-examination he proved the statement of Ahmad Raza Kasuri, P.W. 1 (Exh. P.W. 39/7-D), Mahammad Amir P.W. 19 (Exh. P.W. 39/6-D), Abdu) Ikram P.W. 18 (Exh. P.W. 39/7-D), Ahmad Nawaz Qureshi, P.W. 5 (Exh. P.W. 39/8-D), Fazal Ali P.W. 24 (Exh. P.W. 39/9-D) under section 161, Cr. P.C. He stated that he had taken 25 S.M. G. from the Headquarter of the F.S.F., Rawalpindi.

289. Abdul KHaliq P.W. 41, Investigating Officer is the Deputy Director, F.L.A. who had mainly investigated the case. His statement about how he found a clue of this offence and arrested all the accused, has already been reproduced.

290. In cross-examination he proved the statements of Saeed Ahmad P.W. 3 (Exh. P.W. 41/3-D), Marvyn Rupert Welch P.W. 4 (Exh. P.W. 4/41-D, Muhammad Asghar Khan P.W. 12 (Exh. P.W. 41/5-D), Sardar Abdul Vakil P.W. 14 (Exh. P.W. 41/6-D) and Malik Muhammad Wari\$ P.W. 15 (Exh. P.W. 41/7-D).

291. Before the start of trial the principal accused had challenged the constitution of the Court on the ground inter alia that by his appointment as Chief Election Commissioner the Acting Chief Justice had ceased to hold the later office. He had also raised some allegations of bias against the Acting Chief Justice. The Supreme Court directed him to raise all these before this Court. In view of this direction the principal accused submitted two petitions Criminal Misc. No. 932/M and 933/M of 1977; one challenging the constitution of the High Court and the other showing apprehension that he would not get a fair trial in view of the allegations of bias against the Acting Chief Justice (as his Lordship the Chief Justice then was). These petitions were dismissed in limine by this Bench on 9-10-1977. Besides strongly refuting the allegations of bias it was pointed out in the order that the matter was being herd not by the Acting Chief Justice alone but by a large Bench of five Judges each of whom had to act independently and was under oath to act justly without fear or favor. The accused submitted two petitions for Special Leave to Appeal against the order before the Supreme Court. He however, withdrew the petition filed by him to challenge the order passed on the petition raising question of bias against the Chief Justice. Thereafter he submitted several incompetent petitions and information repeating the same allegations, despite the fact that the matter had attained finality. In some petitions there was a prayer for transfer of the case to some other Bench or to the Sessions Court. All these petitions were dismissed. It was repeated that the apprehension of the principal accused was altogether unreasonable.



292. In his last petition for transfer which was submitted on 18-1-1978 the accused repeated all the earlier allegations of bias and supplemented them with a number of scandalous, scurrilous and baseless allegations. He also took such objections to the Court's rulings or procedure adopted by it, which can be taken only before a Court of Appeal. Since the practice of this Court is to hear motion cases in Chambers and the Bench trying the case was of the view that the petition was submitted only to scandalize the Court and to give publicity to these baseless allegations with a view to shake public confidence in the Court, it was considered proper to hear this transfer case in motion in chambers. The accused was called to the Chambers alone to argue the matter since he had submitted the petition in person and not through counsel. On entering the Chamber the principal accused showed surprise that the matter was not being heard in Court and requested that it should be heard there. This made it obvious that he was more interested in publicizing his baseless and scandalous allegations in the petition and not his arguments on it. He was informed that motion cases are generally heard by the Court in Chambers. The principal accused then submitted that his counsel would argue the case. He named Mr. D. M. Awan and Mr. Ehsan Qadir as his counsel. Both the counsel were therefore, called.

293. Mr. D. M. Awan addressed arguments on the question of maintainability of the petition. He did not argue the points which had already been decided. He also did not address on matters on which rulings had been given after giving full hearing and which could only be urged in appeals. The other new points were sheer calumnies which he made no effort to justify. During the course of hearing the principal accused tried to interrupt and interfere in the proceedings, but he was informed that he would be given an opportunity to supplement the arguments of his counsel on merits. After finishing his arguments Mr. D. M. Awan requested to be allowed to withdraw from the case. This request was not granted since there appeared to be no ground for allowing him to withdraw from the prosecution of the defence. He then prayed that the accused might also be given a chance to make some submissions on merits. The accused was allowed to argue on merits although he had no right to address the Court in person when he was represented and his counsel had already been given full hearing. Instead of making any contribution towards the merits of his petition he started a political speech which was absolutely irrelevant. He was warned several times and asked to be relevant in his submissions but He finished his submissions by saying that if He was not allowed to say what he wanted to say he would not address the Court any further. The petition for transfer was then dismissed.

294. When the Bench assembled in the Court room for recording the evidence of Ghulam Hussain, approver (P.W 31) who had already been cross-examined at length by Mr. Ehsan Qadir on behalf of the principal accused, the learned counsel stated that he had no more question to ask since his client had instructed him to do so.

295. Later Mr. D. M. Awan stated at the Bar that his client had withdrawn the powers of attorney of all his counsel. He also placed on record a writing by the principal accused that he did not want to defend in view of what had happened that day. The reference was obviously to the hearing of his petition for transfer in Chamber, its dismissal and the fact that the said accused had to be ordered to take a seat since the Court was not inclined to hear irrelevant arguments or a political speech in a trial which is to be conducted under the provisions of the Evidence Act.

296. Mr. Ehsan Qadir and Mr. D. M. Awan were directed to conduct the defence at State expenses. Mr. Ehsan Qadir appeared before the Bench after the Court rose for the day and requested to be relieved since he had other professional business to attend at Sargodha where He usually practices. Next day Mr. D. M. Awan also requested to be relieved on the ground that the above-mentioned accused refused to give him any instructions.

297. The High Court Rules make provisions for arranging a counsel in a Sessions Court for an unrepresented person accused of an offence punishable with capital sentence in case he is indigent. Where the case is tried by the High Court on its original side Rule 2, Chapter 4-E of Volume V the High Court Rules and Orders vests the Court with a discretion to arrange representation even for the defence of an accused who is not a pauper and can afford to engage a counsel. It was in exercise of this discretion in favor of the accused that the court had asked the counsel who had defended him so long, to continue defending him at State expenses. Since the accused appeared bent upon thwarting this attempt to arrange for his defence at State expense and refused to co-operate with the counsel, the Court relieved Mr. D. M. Awan and directed the accused to conduct the case himself.

298. This was the only course open to the Court since it has not authority under the above Rule to force upon the accused the services of a counsel if he is unwilling to accept upon him. As observed by a Division Bench of the Lahore High Court in *Iftikhar-ud-Din v. Sate*<sup>2</sup> if the accused contumaciously refuses to accept the offer of legal advice made to him and is not willing to accept the representation arranged by the Court he must be left to conduct his case himself.

299. The accused refused to cross-examine other witnesses who were formal. Mr. Qurban Sadiq Ikram, learned counsel for Mian Muhammad Abbas, accused, however, cross-examined them in detail on all relevant points. He brought on record and proved through the prosecution witness most of these statements under sections 161 and 164, Cr. P.C. made by witnesses for the prosecution with which the counsel for the principal accused had tried to confront them. This was done presumably because the defence of the two accused appears to be identical.

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<sup>2</sup> PLD 1954 LAH 547

300. When the first question was put to the said accused in his examination under section 342, Cr. P.C. he stated that since he was boycotting the proceedings he would not be offering any defence. He would, however, make a statement only about the reasons why the present case was fabricated against him and why he apprehended that he would not get fair trial and justice in this Court.

301. A reference to the last point was entirely uncalled for since the accused had already submitted a number of petitions making false, baseless and scandalous allegations against the Court which had been disposed of. These allegations were not at all relevant to the statement under section 342, Cr. P.C. Yet if the accused considered it necessary to harp on the same tune it must be only with the intention that his calumnious and slanderous statement may receive publicity in open Court as well as in press. This was the object with which he wanted the last petition for transfer to be heard in Court.

Now no Court much less a superior court can allow litigant to challenge before it its fairness, integrity and impartiality, or to scandalize it, and to go on repeating with impunity, scandalous and libelous attacks on Judges which are calculated to lower the authority of the Judges and to malign them. If this is allowed it would shake the public confidence in the administration of justice. In exercise of the discretion vested in the Court by the provision to section 352, Cr. P.C. the proceedings were therefore directed to be held *in camera*.

302. Next day when the Court assembled the principal accused showed surprise that the press and the public had been excluded from the Court. He emphasized that it should be an open trial. His attention was drawn to section 352 of the Criminal Procedure Code which confers a discretion upon the Court to order at any stage of any particular case if it thinks fit that the public generally or any particular person shall not have access to or be of remain in the room or building used by it. The accused stated that he would consult his lawyers on the question whether the proceedings can be held *in camera*. It was pointed out to him that he had already given up his lawyers. The next question under section 242, Cr. P.C. (Question No. 54) was then put to him, instead of answering the question he dictated a statement covering more than 9 pages in which he amongst other things attacked the Court's impartiality and the legality of the order holding the trial *in camera*.

303. At the end of this irrelevant address the Chief Justice advised him to answer the questions since it was in his own interest to do so and assured him that in case he agreed to make a statement all questions would be put to him again. He requested for time to consult Mr. Yahya Bakhtiar and Mr. D.M. A wan. The case was, therefore, adjourned to the 28h of January, 1978 to enable the accused to seek legal advice.

304. The accused met his counsel Mr. Yahya Bakhtiar for 3 hours on 25th January, 1978. He again met his counsel in Jail on the next two days, however he submitted application for copy of the order for holding the proceedings *in camera* and copies of his statements recorded on 24th and 25th of January, 1978. The copies of the order as well as his statements made on 24th January, 1978 were supplied to him on the 28th January, 1978. The copy of the statement made on 25th January, 1978 could not, however,, be supplied to him since it contained scandalous and scurrilous remarks against the Court. On 28th January, 1978 the accused again requested for further time to consult his counsel on the question whether the proceedings could be held *in camera*.

305. It was pointed out to him that he was given an opportunity to see his counsel only on the question whether He would like to make statement under section 342, Cr. P.C. The Court, however, agreed to give him five minutes for this purpose.

306. The Court re-assembled after about half an hour. The accused stated that his counsel had by then hardly read a few questions out of the statement made on the 24th January, 1978, and the time given to him was insufficient for advice. The Court did not agree to any further adjournment since the reading of his earlier statement under section 342, Cr. P.C. was not material for tendering advice on the question whether he should answer questions particularly when my Lord the Chief Justice had assured him that all the questions will be put to him again in case he agreed to answer them. When the next question was put to the witness he again dictated a statement almost repeating what he had already stated on the 25th January, 1978. This statement covers more than eleven pages. Thereafter he did not answer any question put to him.

307. After his statement was recorded, the said accused was asked to sign it, but he refused to do so. He was asked to read the statement. On his inquiry whether he could correct the typographical or grammatical errors, he was told to make any correction for so long as the substance of the statement was not changed. He wrote certain uncalled for and incorrect remarks that the statement might not have been complete.

308. Thereafter the accused sent an application through the Superintendent Jail, in which he alleged that his statement was not correctly and completely recorded. This application was dismissed since the statement had been typed on the dictation of the accused himself and the allegations leveled in the petition were absolutely false.

309. On the 25th of January, 1978, a few supporters of the principal accused demonstrated against the holding of the Court *in camera* and created disturbance outside the Chambers of my lord the Chief Justice. In view of the possibility of such disturbances occurring in future, it was ordered that the proceedings of the trial shall continue *in camera*.

310. On 7-2-1978 after the defence evidence had been recorded, the accused was asked whether he would like to cross-examine D.W. 4 who had been produced on behalf of the three confessing accused. The accused stated that he would not cross-examine him but make a statement on his statement. He was allowed to do so although he had no right to make such statement after the close of his statement under section 342, Cr. P.C. He dictated more than eleven pages to the typist and repeated all that had been said by him on the 25th and 28th of January, 1978 and also attacking the order to continue all further proceedings *in camera*. Thereafter he refused to even read or sign the statement.

311. The statement of the principal accused under section 342, Cr. P.C. was recorded on three dates i.e. 24-1-1978, 25-1-78 and 28-1-78. The accused did not answer the first question whether Ahmad Raza Kasuri, P.W. 1 was a founder, member of the Pakistan People's Party and was elected to the National Assembly in the elections of 1970 on the ticket of that party. He stated that he would not be offering any defence since he was boycotting the proceedings of the trial and had already withdrawn the *wakaltanamas* of his counsel after his applications dated the 18th December, 1977 (for transfer of the case) and 22nd December, 1977 (requesting for hearing of the application dated the 18th December, 1978) were dismissed by this Bench in Chambers. He further stated that he would confine his statement mainly to two issues i.e. the reason for his lack of confidence in the fairness of the trial and the reason why this case had been fabricated against him. He answered the question whether Ahmad Raza Kasuri had advocated on the floor of the House that 94000 P.O.Ws. were locked up because of his (accused's) connivance with the Indian Government. He stated that it was preposterous for any Pakistani to think that he would connive with India, a country against which he had mobilized the people of Pakistan to wage a thousand years' war. Similarly when he was asked about what had happened on the 3rd June, 1974, on the floor of the National Assembly, the accused stated that by his assertion about the unanimous approval of the Constitution by a democratically elected Parliament he did not mean that all the members must have voted for it. It only meant that all the parties and their leaders had not only approved it but had also signed it. It was in this sense that the 1973 Constitution was a unanimous and a democratic Constitution. He cited examples of some Prime Ministers of England losing temper and said that even Abdul Wali Khan had shouted in the Parliament at Abdul Hafeez Pirzada that he would wring his neck and would shoot the Prime Minister or the President, but the Speaker expunged the words 'I will shoot you' from the Assembly proceedings. He denied that he did not appreciate criticism and stated that he would not have risen to political Heights if he had not been tolerant. He added that he had heard disagreements in the Central Committee of his Cabinets which sometimes went on non-stop for 24 hours. Regarding the statement of Saeed Ahmad Khan P.W. 3 that he was paid from the secret fund or that a device was found out to pay him from the funds of the All Pakistan Research Organization in his capacity as their Legal and Administrative Consultant, the accused replied that the said Organization was basically an Intelligence Agency.

312. He further stated that he did not take political advice from bureaucrats and that the dismissed Officers were being re-instated even by the present Government. He stated that he did not know Abdul Hamid Bajwa nor needed the services of any unknown individual to guide him on Punjab affairs. He did not deny that he did call Officers over the heads of officers superior to them. He stated that a Prime Minister or a President has every right to call any Officer in the Establishment of the Government or in the Administration of the Government.

313. In regard to the preparation of Exh. P.W. 3/1, P.W. 3/2 and P.W. 3/3 he stated that so far as he remembered the D.I.B. and the D.G. I.S.I special branches of the Provincial Government and the District Magistrates kept copious files of prominent individuals during the British rule, and "this practice has continued from those days to our times".

314. Regarding Mian Muhammad Abbas he stated that he did not know him till 1976 and never spoke to him either directly or on telephone. He came to know him only in the late 1976 when Masood Mahmud (P.W. 2) told him that a very competent officer of his force had suffered heart attack and was hospitalized and as such the burden of his own work had increased.

315. He stated that the objectives of the Federal Security Force, as brought on record were completely false and concocted. His impression was that this Force was established in almost all Federations in the world.

316. He denied that Masood Mahmud P.W 2 used to be present in the Assembly when he attended the Session because he did not need "such Rustam-i-Zaman", for his defence. He stated in answer to Question No. 34, that he had seen the other accused and approver Ghulam Hussain for the first time during the trial. To the question whether after Masood Mahmud (P.W. 2) refused to comply with his orders regarding the murder of Ahmad Raza Kasuri (P.W. 1), attempts were made on his life and threats were held out and attempts were made to kidnap his children, the accused stated that the contradiction was self-evident.

317. As already stated the accused did not answer any question on the 25th and 28th January but proceeded to make either irrelevant or scandalous statements.

318. Mian Muhammad Abbas accused had already retracted his confession before the opening of the trial. He stated that his statement under section 164, Cr. P.C. was obtained under duress as well as promises. He denied the charge in every respect. He stated that he did not have good relations with Masood Mahmud P.W. 2. In fact Masood Mahmud did not have good relations even with his predecessor since the latter

had been given an ad hoc promotion to the rank of D.I.G. of Police whereas Masood Mahmud was ignored.

319. He stated that he himself was recommended by Malik Haq Nawaz Tiwana. In fact Masood Mahmud cherished ill-will against him since 1961 for the reason that he wanted him to involve Mr. Moghis A. Sheikh of the Colony Textile Mills, in a false case under the Foodstuffs Control Order but he refused to be a party to it. Masood Mahmud P.W. 2 later had a talk with the then Deputy Commissioner, Malik Karam Dad, who got the matter checked up from his own sources and upheld the view-point of the accused. He said that another reason for this ill-will was that Nawab Iftikhar Hussain, one of the leading landlords of Multan was accused of the offence of murder. The Police was after him. P.W. 2 who had a soft corner for him and wanted to help him, but he (the accused) repulsed his attempt. The third reason was that some *Ulemas* led a deputation to the Nawab of Kalabagh, Governor of the Punjab and represented that they had not been given proper protection by P.W. 2 (as D.I.G.) whom they had met. The Governor of the Punjab (it should be West Pakistan) asked the accused regarding the truthfulness or otherwise of the allegation made. The matter was fully verified and was known to the gentry of Multan. He referred to the callous attitude of P.W. 2 and stated that the papers relating to the complaint lodged by Azmat Ullah Khan, Deputy Commissioner, Multan, might be brought on the file.

320. The accused admitted the writing of Exh. P.W. 2/2 and receipt of reply Exh. P.W. 2/3 from Mervyn Rupert Welch P.W. 4 but stated that this correspondence was exchanged in routine. He denied having assigned to Ghulam Hussain the task of organization of and running of a Commando Course on the ground that during the time of P.W. 2, even a constable could not be transferred without his oral orders. Regarding the supply of arms, he stated that it was under the charge of the Deputy Director (Equipment and Stores). Accordingly if any arms and ammunition were issued, they must have been issued under the orders of the Deputy Director Incharge or the Deputy Director-General.

321. He denied having sent for Ghulam Hussain and having asked him about Ahmad Raza Kasuri or having placed a jeep at his disposal or having supplied to him the addresses of Ahmad Raza Kasuri. He said that he was sick during those days and had himself examined by a heart specialist. He stated that he submitted his resignation Exh. P.W. 2/13-D and then another resignation Exhs. P.W. 2/12-D but they were returned to him because Masood Mahmud P.W. 2 did not agree to his quitting the Force and Saeed Ahmad Khan P.W. 3 also tried to persuade him to continue service.

322. Regarding the transport he stated that it was in the charge of the Deputy Director (E. & S.). He stated that Inspector Ghulam Hussain had direct contact with Masood Mahmud P.W.2 who had not only rewarded him but also promoted him as Inspector. He denied having given any threat to Ghulam Hussain or detailed another team to do

away with Ghulam Hussain if he failed to perform the task and then itself to proceed to perform the task. He denied having talked with Masood Mahmud about this mission or being reminded by him., Regarding Amir Badshah he stated that he had ill-will against him, because he gave adverse views against him in an inquiry. He denied that Amir Badshah ever telephoned to him. He denied any knowledge of the caliber and nature of the weapons with F.S.F. Regarding issue of arms, he stated that they were entered in the daily diary including the diary taken over in possession by the F.I.A. He denied that Ghulam Hussain Inspector met him at 3-00 p.m. on the 12th November, 1974, at Rawalpindi since he was Peshawar at that time and had left for Rawalpindi by P.L.A. at 5-15 p.m. Regarding Inspector Fazal Ali He stated that he had made statement under some influence. Regarding the T.A. Bill Exh. P.W. 31/6 of Ghulam Hussain he stated that it is the personal responsibility of the individual performing certain journey to bill out the same. It was not his duty to scrutinize or vet the bill. His job was only to mark it to the Accounts Branch. To a question whether he had resiled from the statement as he had made unsuccessful efforts to be made an approver, He stated that he was asked to become approver but He did not opt to become one since he did not agree to act according to the dictates of the prosecution. In reply to question No. 4, regarding the statements of Ghulam Hussain and Masood Mahmud he made several other allegations against Masood Mahmud to the following effect.

(a) He pointed out once that the wireless equipments which were worth crores of rupees were not being properly surveyed or inspected and it was imperative for the Command to go to the highest in order to get an inspection team through the good offices of the G.H.Q. but the fact remains that very poor staff had been taken for this purpose.

(b) Some cloth was being purchased for the preparation of uniforms. He suggested that the matter may be brought to the notice of the Directorate General I.P. & S., Karachi but P.W. 2 asked him to keep off and the cloth was accepted piecemeal by another Director, Ch. Muhammad Ramzan;

(c) P.W. 2 did not express good views in regard to Mr. Asghar Khan to which he (the accused) objected and this led to an exchange of hot words.

323. Regarding Ghulam Hussain he stated that he had deputed A. D. Najmi to conduct the inquiry against him into some alleged malpractices and corruption prevailing in the Line at Recruits Training Centre, Pehur. Ghulam Hussain was Inspector and Ch. Abdullah Khan was Deputy Director.

324. The accused filed a written statement in which he added that during the period of Anti Qadiani Movement in the year 1974. P.W. 2 had verbally ordered plain clothes men to stand guard at the house of Mr. N. A. Farooqi, his relative, and this guard remained posted at his house for a period of one year. P.W. 2 got annoyed because of



the objection taken by the accused to this illegality. He further felt annoyed after the promulgation of Martial Law, on seeing a statement of the accused alleging that he had taken more than Rs. 95,000 out of the F.S.F. Secret Fund. The accused also made a statement before the inquiry implicating P.W.2 he further stated that he had held an inquiry against Amir Badshah P.W. 20 also and submitted his report Exh. P.W. 20/1-D. In paragraph No. 8 of the written statement he stated that the Armoury at the Headquarters was meant only for the supply of Arms and ammunition in bulk to various battalions and not for individuals. He added that he had made adverse observations against P.W. 4 also during an inquiry against one Mustafa Khan of Quetta.

325. All the confessing accused, namely, Ghulam Mustafa Arshad Iqbal and Rana Iftikhar Ahmad admitted having made voluntary statements under section 164, Cr. P.C. and confessed the role played by them in the incident of the night between the 10th and 11th November, 1974. Ghulam Mustafa admitted that he had been given a jeep under the orders of Mian Muhammad Abbas and the latter had supplied to him fake number plates with instructions that none of the number plates should be displayed on the jeep for a long time. He admitted having obtained, at different times, pistols, sten-guns and their ammunition from Amir Badshah Khan as stated by the prosecution witnesses. According to him, the first sten-gun with 30 cartridges and two pistols with 16 cartridges were obtained by him for the mission to assassinate the retired Justice Jamil Hussain Rizvi under the orders of Mian Muhammad Abbas who informed him that such were the orders of P.W. 2 and the principal accused. He was, however, deterred from carrying out the mission in view of the old age of Syed Jamil Hussain Rizvi despite threat of his extermination and annihilation of his family and children given by Mian Muhammad Abbas. He referred to similar threats given at different stages (as stated by Ghulam Hussain) by Mian Muhammad Abbas to him and the other two confessing accused as well as approver Ghulam Hussain. He supported the statement of Amir Badshah Khan also in every respect in so far as it concerned the supply of arms and ammunition to him under the orders of Mian Muhammad Abbas. He also stated that on his visit to the spot on the 11th November, 1974 he had seen the marks of bullet on the wall and had also passed on the information to the Control Room as well as to Mian Muhammad Abbas as instructed by him.

326. He stated that he was an ex-serviceman and was promoted after 30 years service as Naib Subedar with exemplary character. His lather had also been an ex-serviceman and a member of Quaid-e-Azam's body guards. According to him, he was administered an oath in 1973 when he was inducted into the F.S.F. and in this oath he under took to abide by the orders of his superior to be loyal to Pakistan and to the principal accused personally and obey all the orders even if they entailed any danger to his life.

327. He produced his pass bearing No. 5807 for the National Assembly to show that he had been on duty in the National Assembly where he used to gather intelligence report from the Cafeteria and then pass it on to Mian Muhammad Abbas. Twenty to

Twenty-five jeeps of the F.S.F. according to him, used to patrol around the building with weapons like sten-guns and rifles with the object of preventing any demonstration against the Government and also to overawe the Members of the Opposition. He stated that he had seen Masood Mahmud P.W. 2 for the first time in the High Court and his contact was directly with Mian Muhammad Abbas. The F.S.F. according to his statement, had been set up for terrorizing people, for dispersing public meetings and processions of the Opposition Leaders and for suppressing any sort of opposition to the Government and also for making the People's Party meetings successful. He referred to certain other secret missions which had to be performed by the F.S.F. including an attack on Muhammad Ali Actor under order by Mian Muhammad Abbas.

328. At the end he stated that he had acted in accordance with law and had made true statement regarding all the facts of the case before the Court. He had not committed any offence and instead of being arrested as an accused in the case he should have been produced as a witness. He summed up by saying that this offence had been committed under the orders, pressure and intimidation of Mian Muhammad Abbas and on Being told that it was a duty provided by the F.S.F. Act and Rules, and also the oath administered to him, which he should perform.

329. He filed a written statement in which he repeated what had already been said. He added in this statement that once he received a telephonic call from Mian Muhammad Abbas to ask Ghulam Hussain to finish as soon as possible a traitor to the nation. He also said that the principal accused and P.W. 2 had disgraced him on account of the delay and if Ghulam Hussain did not execute the mission he should be thrown out of the office. He threatened that another party was being detailed which will carry out the secret mission and will deal with the confessing accused as well as Ghulam Hussain. The accused referred to a murderous attack in which Amjad Iqbal brother of Arshad Iqbal received fatal injuries.

330. Arshad Iqbal, as stated above, confessed the role said to have been played by him. He referred to the telephone call by Ghulam Mustafa then informed him of threatening words used by Mian Muhammad Abbas on the telephone. He received a telephonic call after one hour from Ch. Nazir Ahmad, Deputy Director (Intelligence and Operations), Rawalpindi, who threatened him with murder if he failed to perform the duty assigned to him. He stated that he had to abide by the orders because he and his other co-accused were afraid of their lives. Soon after the occurrence he tendered his resignation to Ghulam Mustafa who forwarded it to Mian Muhammad Abbas but the latter rejected it and held out threats to him. He submitted other resignations also which were similarly turned down. He stated that when P.W. 2, Mian Muhammad Abbas and Ch. Nazir Ahmad were fed up with his resignations, they planned his murder but in the murderous assault carried on him in 1975, his elder brother Amjad Iqbal received grievous injuries as a result of which he died. He gave instances where direct instructions were given to him by Mian Muhammad Abbas. He referred to various

misdeeds of the F.S.F. and the secret missions which he was asked to perform, but it is unnecessary to describe the same in detail.

331. He filed a written statement in which he reiterated what he had already stated under section 342, Cr. P.C.

332. Rana Iftikhar Ahmad, the last confessing accused also gave the details of the occurrence. He also relied upon the form of oath, which according to him, bound him to remain loyal even to the principal accused. He stated that the persons enrolled in the F.S.F., were brain-washed so as to abide by their oath and obey all orders issued by the Headquarters. He also referred to several other missions in which he participated as a member of the F.S.F. under order of Mian Muhammad Abbas and said that Mian Muhammad Abbas used to be the incharge of all such missions. He reiterated almost all these points in his written statement.

333. No evidence was led by the principal accused in his defence.

334. Mian Muhammad Abbas accused summoned three defence witnesses namely Safdar Shah, Bahadur Ali and Azmat Ullah but gave them up on the 7th February 1978. He examined three formal witnesses, Muhammad Amin D.W. 1, Abdul Majid, D.W. 2 and Abdul Khaliq, Deputy Director FIA D.W. 3 who were summoned for the production of some record. D.W. 1 Muhammad Amin produced a copy of the statement of Mian Muhammad Abbas dated the 21st July 1977, pertaining to the affairs of F.S.F. (Exh. D.W.1/1). Abdul Majid D.S.P. Special Cell, Ministry of Interior, Government of Pakistan, D.W.2 was produced to prove an order alleged to have been passed by Mian Muhammad Abbas directing an inquiry to be held against Ghulam Hussain P.W. 31, and Anwar Anjum Accountant. The witness, however, denied the existence of such an order on the record. He stated that the document on the record only showed that an inquiry was ordered by Sardar Tahir Ali Kheli, Director Training, F.S.F. who had sent the papers to Mian Muhammad Abbas for appointment of a particular person as an inquiry Officer from his Cell but Mian Muhammad Abbas regretted his inability to do so and suggested that one Mr. Najmi along with an Inspector of the Accountant Branch may be asked to do so.

335. D.W. 3, Abdul Khaliq, who had also appeared as P.W. 41, produced attested copies of Report No. 2 dated the 26th October 1974, and report No. 5 dated the 7th November 1974 from the Daily Diary of Battalion No. 3, F.S.F. Walton Camp, Lahore, which were taken into possession by Recovery Memo. Exh. D.W. 3 by Inspector Muhammad Boota P.W. 39. He also produced the office copy of the T.A. Bill of Mian Muhammad Abbas in Peshawar till the afternoon of the 12th of November 1974. He produced letter dated the 10th January 1973, purporting to have been initiated by late Haq Nawaz Tawana, former Director General of the Federal Security Force.

336. The three confessing accused produced Abdul Majid who had already appeared on behalf of Mian Muhammad Abbas, as D.W. 4. He produced Annual Confidential Reports of Mian Muhammad Abbas, Exh. D.W. 4/1 pertaining to the period from 1-1-1974 to 31-12-1974 Exh. D.W. 4/2 for the calendar year 1975 and Exh. D. W. 4/3 for the calendar year 1976. He produced the order Exh. D.W. 4/4/ dated the 15th January 1974, passed by Mian Muhammad Abbas, Acting Director, F.S.F. promoting Ghulam Hussain P.W. 31, as Sub-Inspector and another order Exh. D.W. 4/5 dated the 16th July 1974, passed by Mian Muhammad Abbas awarding Ghulam Hussain, Inspector Rs. 75 with a recommendation certificate for running a Commando Course painstakingly and efficiently. He also proved documents Exh. D.W. 4/6, a recommendation by P.W. 2 to process the case of promotion of Mian Muhammad Abbas to the post of Director, F.S.F. in Grade 19; D.W. 4/9, an order of P.W. 2 dated 15th June 1976 according sanction of honoraria to Officers of the F.S.F. including Mian Muhammad Abbas for the performance of works of special merit; Exh. D.W. 4/7 notifying grant of two months, leave by P.W. 2 to Mian Muhammad Abbas from 15th March 1975, and Exh. D.W. 4/8, a certificate of no objection to the grant of loan to the said accused. This witness was directed to bring the oath taken at the time of their induction in the F.S.F. by Ghulam Mustafa and Arshad Iqbal, but he could not find such oath on the record. The only oath of Ghulam Mustafa discovered on the file is dated 5-12-1974 although Ghulam Mustafa was recruited on 1-7-1973. Similarly, Arshad Iqbal's oath is dated 9-11-1973 although he was recruited on 1-6-1973. In cross- examination he proved Exh. P.W. 4/10, T.A. Bill of Mian Muhammad Abbas which as stated above was produced by the same witness as P.W. 2 to prove the stay of Mian Muhammad Abbas in Peshawar till the afternoon of 12th November 1974.

337. After the production of this evidence Mian Muhammad Abbas filed a supplementary written statement making reference to his statement Exh. D.W. 1/1 made before the F.S.F. Inquiry Committee, identifying the original entries in the Roznamcha Register taken into possession by Memo. Exh. D. W. 3/1 to be in the handwriting of Muhammad Yousaf, Head Constable. He stated in the statement that the Annual Confidential Reports were given by the Deputy Director General (O) who was the reporting officer and P.W. 2 had given his remarks on those reports in routine which in fact indicated that he was not prepared to say anything in this favor. He admitted that he had obtained loan from the Agricultural Development Bank on a No-Objection Certificate, but he stated that P.W. 2 had no hand in the matter. He admitted that he was given an honorarium of Rs. 700 but he added that this was given to him by the Director. Regarding the award of Rs. 75 to Ghulam Hussain, he stated that it was given on the recommendation of the Director-General. He stressed, however, that there was no separate Commando Camp at Islamabad.

338. After the defence evidence was closed Mian Qurban Sadiq Ikram argued that the Public Prosecutor should be called upon to sum up his case and the accused should be

allowed to sum up his reply later. This submission ignored section 265-G, Cr. P.C. which provides in its subsection (2) that:

"In cases where the accused, or any one of the several accused examines evidence in his defence, the Court shall, on the close of the defence case, call upon the accused to sum up the case where after the prosecutor shall make a reply".

This is a mandatory provision which clearly envisages the summing up of their case first by the accused persons where even one accused examines evidence in his defence. If no defence evidence had been led the matter would have been governed by subsection (1) of this section and in that case the defence would have had the opportunity to sum up its case after the arguments by the prosecution. The contention was consequently repelled. The principal accused also raised the same contention when he was asked on 22-2-1978 to be ready to argue his case after the arguments of Mian Muhammad Abbas but the Court did not find it possible to agree to this. He then refused to argue his case.

339. Before dealing with the evidence it would be necessary to dispose of certain objections by the learned counsel.

Before the charges were read out to the accused, Mr. D. M. Awan, appearing for accused No. 1 raised some preliminary objections against the competence of the trial. He argued that the Federal Investigation Agency Act, 1974 (Act VTTT of 1975) allowed the Federal Investigation Agency constituted under the Act to enquire into and investigate offences specified in the Schedule and no other offence. He argued that sections 302 and 307, P.P.C. were not included in the schedule to the Act and consequently could not be investigated by the Agency. He further urged that though the Federal Government has the power under section 6 of the Act to amend the Schedule by notification in the official Gazette so as to add any entry thereto or modify or omit any of its entry, yet it did not make any amendment in the Schedule incorporating either of these sections.

340. This argument is without merit since section 302, P.P.C., is one of the sections added to the Schedule by Notification No. SRO-405(I)/75 published in the Gazette of Pakistan, Extraordinary, Part II, dated the 9th April 1975. Section 307 deals with offence of attempt to murder which can be investigated by the Agency under section 3 of the Act which empowers the Agency not only to investigate offences specified in the Schedule but also "an attempt or conspiracy to commit, and abetment of any such offence."

341. The second objection of Mr. D. M. Awan is that the final report was not submitted by a Police Officer Incharge of any Police Station as required by section 173, Cr. P.C. but was submitted by Mr. Abdul Khaliq, Deputy Director, F.I.A. The

cognizance of the case could not, therefore be taken by the Magistrate and the trial of the accused on such challan would be illegal. He argued that section 190, Cr. P.C. allows a Magistrate to take cognizance of the offence either upon a report in writing of facts constituting the offence made by any police officer, or upon receiving a complaint or upon information from any person other than a police officer or upon his own knowledge or suspicion that such offence has been committed, where the cognizance is taken upon a report it must be on the report of a Police Officer described in section 173, Cr. P.C. i.e. an Officer-in-Charge of a police station. Since in the instant case there is no report of an officer-in-charge of the police station, the Magistrate had no jurisdiction to take cognizance of this case or to send it to the Court of Session.

342. In reply Mr. M. Anwar produced Notification No. 10/1/75- FIA-II dated the 12th of January 1976, by which the Government, in exercise of the powers conferred by subsection (4) of section 5 of the Federal Investigation Agency Act, 1974, declared inter alia offices of the Deputy Director and the Assistant Director, Federal Investigation Agency, Lahore as Police station for the purpose of the Code of Criminal Procedure on and from the 13th of January 1975. Subsection (2) of section 5 of the Act provides that any member of the Agency not below the rank of a Sub-Inspector may, for the purposes of any inquiry or investigation under the Act, exercise any of the powers of an officer-in-charge of a police station in an area in which he is for the time being and, when so exercising such powers, shall be deemed to be an officer-in-charge of a police station discharging his functions as such within the limits of a station. The Deputy Director or the Assistant Director, as the case may be, whose offices were notified as police station must therefore be held to be the offices were notified as police stations must therefore be held to be the officer-in-charge of the police stations. This objection also is without force.

343. The third objection is that on 11th of September 1977, when the Magistrate took cognizance of this case and sent it under section 193, Cr. P.C. to the Court of Session, only an incomplete challan had been presented. It was urged that the Magistrate had no authority to take cognizance of the matter unless a complete challan was presented to him. He urged that only such a challan could be said to be a final report as required by section 173, Cr. P.C.

344. This objection is equally without merit since the law does not recognize the distinction between an incomplete challan and a complete challan. As observed in *Wazir v. The State*<sup>3</sup>, trial can be started on an incomplete challan. In *Zafar Sarwar v. The State*<sup>4</sup> it was held that there is no provision for submission of any interim or incomplete report under section 173, Cr. P.C. In that case the investigation was complete in all other respects except that the report of the Ballistic Expert had not been received by the 27th of December 1967. It was held that it could not, therefore, be said that the report dated

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<sup>3</sup> PLD 1962 LAH 405

<sup>4</sup> 1969 SCMR 59

the 27th December 1967 did not satisfy the requirement of section 173 or that the Magistrate was precluded from taking cognizance until the final challan was submitted. In *Ata Muhammad v. Inspector-General of Police, West Pakistan*<sup>5</sup> and *Muhammad Akbar v. State*<sup>6</sup> it was held that there is no statutory prohibition for the police not to embark on a fresh investigation of the case even after the submission of final report and to remove defects in the first investigation in the detected subsequently.

345. Mr. D. M. Awan conceded that this was the law but he submitted that it became inapplicable after the amendment of the Code of Criminal Procedure by the Law Reforms Ordinance and addition of section 265-C which makes it incumbent upon the Court to supply to the accused copies of the statements of witnesses under sections 161 and 164, Cr. P.C. 7 days before the start of trial. He submitted that an investigation continued after the start of trial may render nugatory the provisions of the above section.

346. This argument is misconceived. There is no justification for reading into the language of section 265-C such an interpretation of sections 173 or 190, Cr. P.C. Section 265-C only means that after the submission of Challan and before the start of trial the statements of those witnesses who have been named in the calendar must be supplied to the accused persons. It does not take away the power of the Investigating Officer to make a fresh investigation or to correct errors in the earlier investigation by submission of a fresh report. If new witnesses are added, the Court can substantially comply with the provisions of section 265-C by affording opportunity to the defence to meet the additional evidence by adjourning the trial for a reasonable time not exceeding a week.

347. What is requisite, before a Magistrate takes cognizance, is that the report submitted to him, even though incomplete, should make out an offence. In the present case the incomplete challan dated the 11th of September, 1977, included the names of all the accused, the evidence collected by that time, as also the facts prima facie connecting the accused with the offence. In these circumstances, nothing more was required for the learned Magistrate to enable him to take cognizance or for the trial Court for start of trial.

Moreover the mere fact that a Police Officer not competent to investigate has carried out the investigation is not a defect which may vitiate the trial, *Walizar v. State*<sup>7</sup> and *Manzoor Elahi v. State*<sup>8</sup> nor is a complete challan a sine qua non of the trial.

348. It was also argued that the High Court could have transferred the case to its own file after the same was taken cognizance of by the Magistrate and was sent by him to the

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<sup>5</sup> PLD 1969 SC 136

<sup>6</sup> PLD 1936 SC 157

<sup>7</sup> PLD 1960 KAR 204

<sup>8</sup> PLD 1960 KAR 607

Court of Session. This argument would be without force if once it is Held that the Magistrate can take cognizance of an incomplete challan and transmit the case on its basis to the Court of Session under section 193, Cr. P.C.

349. After the start of trial, both the prosecution and the defence wished the report of Mr. Justice Shafi-ur-Rahman to be admitted in evidence Mr. Justice Shafi-ur-Rehman was appointed as a Tribunal under the provisions of the West Pakistan Tribunals of Inquiry Ordinance (H of 1969,) to inquire into the causes of the death of the deceased.

350. The object of the prosecution was to prove from this report that the Tribunal had specified certain guiding principles for investigation, but the investigating Officer while conducting the investigation, purposely did not keep those principles in view, Mr. D. M. Awan, the learned counsel for the principal accused wished to rely upon certain portions of the report which according to his contention, were favorable to his client. He also wanted to rely upon it to prove his assertion that Ahmad Raza Kasuri P.W. 1 had in a statement made before the Tribunal referred to more than one person entertaining a motive to kill him. He also complained that contrary to the provisions of section 265-C the copy of that statement had not been supplied to the defence.

351. In reply to this last contention the learned Special Public Prosecutor made a categorical statement that only one statement was made by Ahmad Raza Khan Kasuri before the Tribunal and the copy of that statement had been supplied to the learned counsel for the defence. Ahmad Raza Khan Kasuri also denied having made any other statement before the Tribunal.

352. Mr. D. M. Awan relied upon *Malik Din v. Muhammad Aslam*<sup>9</sup> in which it was held that judgments, whether inter partes or not, are conclusive evidence for and against all persons whether parties, privies, or strangers, of its own existence, date and legal effect as distinguished from the accuracy of the decision rendered. In other words, the law attributes unerring verity to the substantive as opposed to the judicial portions of the record. It was also held in that case that where the judgment is inter partes, even recitals in such a judgment are admissible to prove a statement or admission or an acknowledgment made by a party or his predecessor-in-interest in his pleadings in a previous litigation. Mr. D. M. Awan also relied upon the provisions of section 4 of the West Pakistan Tribunals of Inquiry Ordinance, 1969 which confers upon the Tribunal powers of a civil Court for certain specified purposes. He argued on this basis that the report of the Tribunal is a judgment to which the authority of the Supreme Court would apply.

353. None of the arguments have any force. The authority relied upon by Mr. D. M. Awan is distinguishable for several reasons. The Evidence Act does not make findings

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<sup>9</sup> PLD 1969 SC 136



arrived at on the evidence before the Court in one case evidence of that fact in another case. Each case is to be judged upon its own facts established by the evidence led therein. *Muhammad Khurshid v. State*<sup>10</sup>. *Malik Din v. Muhammad Aslam* does not depart from this principle. It only lays down the principle that (1) a judgment is evidence of its own existence (2) of the date on which it purports to have been delivered and (3) of its effect as provided by law, as distinguished from the accuracy of the decision rendered. A judgment which decides disputes between two parties is admissible even to prove recitals of pleadings, admissions, or acknowledgements made during the course of litigation provided that the same parties are ranged as litigants and disputants in the case in which the earlier judgment is admitted in evidence.

354. Now the Tribunal constituted under the above Ordinance is not a Court and is not competent to render any judgment. The Tribunal is appointed under section 3 of the above Ordinance by the Government for the purpose of making an inquiry into any definite matter of public importance. Section 4 confers powers of a civil Court upon the Tribunal in order to enable it to perform its functions of enforcing attendance of persons for their examination on oath, for discovery and production of documents, for receiving evidence on affidavits or through Commissions. Analogous powers are conferred by subsection (6) of section 5 for the limited purpose of requisitioning any public record or copy thereof from any Court or office.

355. The Ordinance does not envisage the adjudication of any controversy between two contending parties or trial of any offence. These provisions neither confer upon the Tribunal the status of a Court (except for the limited purpose expressed in the above two sections) nor render its report effective or executable in any manner, or even binding upon the Government. The report cannot be held to be a judgment.

356. It was held in *Muhammad Saeed v. Election Tribunal, West Pakistan etc.*<sup>11</sup> that generally a person performs judicial functions if he is confined by the law to adjudicate upon and determine, as between the parties, some controversy relating to the existence or non-existence of a right or liability, whether such right or liability be the creation of common law or Statute, provided the right or liability is actionable under the general law or special law, and the duty to determine the controversy is derived from the State and rests on the ascertainment, with notice and opportunity to parties of the facts and the law applicable to them and not on policy, expediency or some other extraneous considerations, for reasons given in the foregoing para., many of the criteria laid down in this case would not apply to the Tribunal under the Ordinance aforementioned. The report of the Tribunal is not therefore a judgment.

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<sup>10</sup> PLD 1963 SC 157

<sup>11</sup> PLD 1957 SC 91

357. In this view of the matter the authority of the Supreme Court which deals with settlement of disputes inter partes by a judgment of the Court is clearly distinguishable.

358. The report being merely an opinion of a Tribunal based upon the evidence recorded by it is not relevant under any section of the Evidence Act nor reference to any such section was made by the learned counsel during arguments. The contents of the report and the reference in it to any statement made before the Tribunal is not therefore relevant.

359. The relevant portions of the report which were relied upon by Mr. D. M. Awan were read before us. I do not find those extracts susceptible of any interpretation in favor of the existence of a supplementary statement of Ahmad Raza Kasuri in the record of the Tribunal. Mr. D. M. Awan during the course of trial had been referring again and again to a similar statement which Ahmad Raza Kasuri is alleged to have made before a Deputy Superintendent Police under section 161, Cr. P.C. during the investigation of the incident of firing on him at Islamabad. It is quite possible that the Tribunal might have referred to some statement alleged to have been made by Ahmad Raza Kasuri before the Police Officer. Even if it is assumed that such a statement under section 161, Cr. P.C. was made by Ahmad Raza Kasuri P.W. 1 (although this is denied and no such statement has been proved) it would not be relevant except for the purpose of contradicting the witness (P.W. 1). It is, therefore, difficult to hold that the Tribunal's report, if it refers to this statement can be relevant for any other purpose or in the absence of independent proof of the existence of such a statement can be used even for the purpose envisaged in section 162, Cr. P.C. I am, therefore, of the view that the report of the Tribunal is inadmissible in evidence.

360. Some statements are attributed to the persons who are now dead. They were Abdul Ahad, D.S.P., Ichhra, an investigating Officer in this case, Abdul Hameed Bajwa an Officer on Special Duty in the Prime Minister's Secretariat who assisted P.W.3, and Haq Nawaz Tiwana prior Director General F.S.F.

361. The evidence about Abdul Ahad is that he prohibited Abdul Hayee Niazi, S.H.O., Ichhra, P.W. 34 from preparing the recovery memo, of articles on 11-11-1974 until he reached the place of occurrence, on the ground that the name of the Prime Minister was mentioned in the First Information Report, that he asked P.W. 34 to show the empties to the Ballistic Expert before they were sealed, that he sealed the F.L.R. P.W. 34/3, that on 11-11-1974 he took the empties and bullet in loose condition in a service envelope to the residence of the Inspector-General of Police and on return from there informed P.W. 34 that the Inspector-General had kept the above articles and said that he would pass further orders and investigation should be conducted according to his orders, that after his return from Rawalpindi, two or three days after the 13th November, 1974, he showed to P.W. 34 a draft for preparation of the recovery memo. The empty cartridges were not present but the D.S.P. told him that the same would be

returned later, that P.W. 34 found the number of the empties on the draft recovery memo different from the empties actually recovered and when he questioned the D.S.P. about the empty cartridges he intimated to him that it was an order which must be complied with "otherwise both of us would find ourselves in trouble and not only our services would be also terminated but we would also be involved" (in criminal cases)" that the D.S.P. gave empty cartridges still unsealed on 23rd of November, 1974 (i.e. 12 days after their recovery), and ordered P.W. 34 to seal them and send them to the Inspectorate of Armaments and that the lead bullet and two metallic pieces recovered from the spot were given much later and sent to the Inspectorate of Armaments on 24-11-1974 under orders of D.S.P.

362. Similarly, there is evidence in regard to certain statements made at different times, orally as well as in writing by Abdul Hameed Bajwa. It is in the evidence of Muhammad Asghar P.W. 12, Sardar Abdul Wakil Khan, P.W. 14, Muhammad Waris, P.W. 15 and Abdul Hayee Niazi P.W. 34 that Abdul Hameed Bajwa on different occasions showed his resentment that the F.I.R. was recorded on the statement of Ahmad Raza Kasuri, P.W. 1. His view was that this report ought to have been recorded on the statement of some other complainant in which case Ahmad Raza Kasuri could be examined under section 162, Cr. P.C. as a witness only and in such a case the name of the Prime Minister would not have been recorded in the F.I.R. and received publicity. To the same effect is a note Exh. P.W. 3/20A, /I dated 20th November, 1974, by Abdul Hameed Bajwa. There is also evidence that Abdul Hameed Bajwa made inquiries about the empty cartridges recovered from the place of occurrence but Sardar Abdul Wakil Khan, P.W. 14 tried to put him off by saying that they had already been sealed. Abdul Hameed Bajwa was very much upset and remarked, "What was the hurry when the name of the Prime Minister was involved in it". Sardar Abdul Wakil Khan also stated that he enquired about a fortnight later from Abdul Ahad (D.S.P.) whether the result from the Ballistic Expert to whom the empties were sent, had been received. He was surprised to hear that the sending of the empties had been delayed because they had been taken by Abdul Hameed Bajwa and returned to him after 2 or 3 days.

363. Similarly there is evidence of Masood Mahmud, P.W. 2 to the effect that before he accepted the post of Director-General, Federal Security Force, Abdul Hameed Bajwa impressed upon him the fact that if he did not accept the job offered to him, his wife and children might not be able to see him again. He reminded him several times about the mission to liquidate Ahmad Raza Kasuri P.W. 1. He communicated to him an order of the principal accused to keep his mouth shut when it was discovered that P.W. 2 knew about the delivery of arms and ammunitions to Jam Sadiq Ali in the office of the Defence Secretary.

364. There is evidence that secure reports were sent by Abdul Hameed Bajwa to the Prime Minister vide covering letters Exhs. P.W. 3/1-A, P.W. 3/1-B and P.W. 3/1-C. There is not only evidence that Abdul Hameed Bajwa made efforts to bring Ahmad

Raza Kausri to the fold of the People's Party but there are also reports sent to the then Prime Minister (the principal accused) regarding Ahmad Raza Kasuri's activities in this regard. These are Exh. P.W. 3/2-C, P.W. 3/2-F, P.W. 3/2-J, P.W. 3/2-K, P.W. 3/2-L, P.W. 3/2-N, P.W. 3/2-O, P.W. 3/2-Q, P.W. 3/2-R and P.W. 3/2-S. Some other documents bear the signature of Abdul Hameed Bajwa e.g. Exhs P.W. 3/2-H, P.W. 3/2-G, P.W. 3/2-P, and P.W. 3/4-A. There are T. A. Bills of Abdul Hameed Bajwa bearing signature Exh. P.W. 3/5, P.W. 3/6, P.W. 3/7, P.W. 3/8, P.W. 3/9, P.W. 3/10. There is evidence that Abdul Hameed Bajwa directed Ashiq Muhammad Lodhi P. W, 28 to report to him the description of the gunman of Ahmad Raza Kasuri who accompanied him to the National Assembly.

365. Mr. D. M. Awan sometimes raised specific objections in regard to such and similar statements, oral or written, that they do not fall under any of the clauses of section 32 of the Evidence Act and as such are inadmissible. This objection was not taken specifically in regard to some documents emanating from or signed by Abdul Hamid Bajwa and some oral statements ascribed to him. It was however, understood that the objection under section 32 of the Evidence Act would relate to each statement/document attributed to Abdul Hameed Bajwa or Abdul Ahad.

366. Section 32 of the Evidence Act provides that a statement , written or verbal, of relevant facts made by a person who is dead ... are themselves relevant facts in the following cases:-

- (1) .....
- (2) When the statement was made by such person in the ordinary course of business, or in the discharge of professional duty, .....
- (3) When the statement ..... if true, it would expose him ... to a criminal prosecution
- (4) .....
- (5) .....
- (6) .....
- (7) .....
- (8) .....

The evidence objected to either consists of threats to witnesses or efforts to tamper with evidence clearly with a view to save the actual offenders from legal punishment or

statements and reports in writing sent to the Prime Minister or other officers. The evidence of P.W. 28 relates to something done in furtherance of the conspiracy.

367. The provisions in Chapter XIV of the Code /of Criminal Procedure particularly sections 154, 157 leave no manner of doubt that it is incumbent upon the officer-in-charge of the police station to record the first information report (*See Sawant v. S. H. O., police Station, Saddar , Kasure and another*<sup>12</sup>) *Ch. Shah Muhammad v. S.H.O., police Station Rahim Yar Khan and 2 others*<sup>13</sup> and *Haji Muhammad Khan v. Ch. Khizar Hayat and 3 other*<sup>14</sup> as well as to start investigation on receipt of such information to apprehend the real culprit and to bring him to book. Similar is the provision of section 23 of the Police Act. It provides that it shall be the duty of every Police Officer to detect and bring offenders to justice and to apprehend all persons whom he is legally authorized to apprehend, and for whose apprehension sufficient grounds exist. A Police Officer no doubt acts subject to supervision by higher officers in the same hierarchy as is clearly laid down in paragraph No. 25.17 of the Police Rules, 1934, but he cannot act arbitrarily, capriciously and whimsically since he is as much bound by law as any other person and may for violation of duty or willful breach of subject to lawful orders made by any competent authority or supervision by higher Officers, to investigate the matter without interference from any other agency.

368. In the case of *Emperor v. Khawaja Nazir Ahmad*<sup>15</sup> the following observations were made by their Lordships of the Privy Council deprecating interference even by the Judiciary although honest investigation of a case is necessary for correct administration of justice:-

"In their Lordships' opinion however, the more serious aspect of the case is to be found in the resultant interference by the Court with the duties of the police. Just as it is essential that every one accused of a crime should have free access to a Court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. In India as has been shown there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is

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<sup>12</sup> PLD 1975 LAH 733

<sup>13</sup> PLD 1976 LAH 1412

<sup>14</sup> PLD 1977 LAH 424

<sup>15</sup> AIR 1945 PC 18

only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate case when moved under section 491, Criminal Procedure Code to give directions in the nature of habeas corpus."

In the case of *Shahnaz Begum v. Hon'ble judges of the High Court of Sindh & Baluchistan*<sup>16</sup>, it was held that the High Court has no power of supervision or control over Investigation Agencies under the Letters Patent. In *Wali Muhammad v. Haq Nawaz*<sup>17</sup> the High Court suggested to the Inspector-General of Police to transfer investigation and it was accordingly transferred from the local police to the Crime Branch. The order was held to be without jurisdiction.

369. If therefore, the investigation which is a step towards administration of justice is outside the purview of the Court it cannot obviously brook any interference from any other quarter much less from persons who have the least connection with any Police Agency. Moreover, the investigation in this case was carried on by the Punjab Police. The Constitution does not permit any interference by the Central Executive in matters within the sphere of the Provincial Government.

370. It is obvious from the evidence that illegal interference in the investigation of the case by Abdul Hamid Bajwa etc. was plainly with a view to harbor the real offenders and to make it impossible for the Officer investigating the case to detect the persons who had committed the offence.

371. It was the duty of Abdul Ahad to investigate the case or supervise its investigation according to law in order to detect and bring the offenders to justice. In order to preserve the evidence, it was his duty to see that the empties were sealed and a recovery memo, prepared immediately after the recovery. He delivered the empties to Abdul Hamid Bajwa and subjected himself to his influence in the investigation of the case. The directions given by him to P.W. 34 in this connection would have exposed him to the prosecution under section 217 and 218 of the Pakistan Penal Code since what he did amounted to disobedience of a direction of law as to the way in which he was required to conduct himself as such public servant and charged with the preparation of any record, as he was, he prepared that record in manner which he knew to be incorrect. These illegal acts and omissions were clearly with a view to save the actual offenders from legal punishment. The threats would have exposed him to persecution under section 506, of Penal Code.

372. Abdul Hamid Bajwa would have been exposed equally to prosecution for abetting those offences. In these circumstances, I have no doubt in my mind that the

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<sup>16</sup> PLD 1971 SC 677

<sup>17</sup> 1971 SC MR 717

statements attributed to these dead persons regarding threats and interference with the course of investigation would be admissible under clause (3) of section 32 of the Evidence Act.

373. The order to P.W. 28 to report to him the description of the gunman of Ahmad Raza Kasuri would have exposed Abdul Hamid Bajwa to prosecution for the offence of conspiracy in this case. It would also be covered by section 32 (3) of, Evidence Act. Mr. Qurban Sadiq Ikram did not argue in favor of interference by Abdul Hamid Bajwa etc. in the investigation of the case. He argued that the Investigating Officer was only brought on the right lines so that P.W. 1 may not exploit the situation. I do not feel impressed by this argument. This argument ignores that the superior authority of Abdul Hamid Bajwa and Saeed Ahmad Khan in that regime gave an advantage to them over the entire police organization including the Inspector-General of the Police. Their orders of directions could not be disobeyed by any of them. This was not, therefore, only an interference but a case of directing the investigation according to the whims of those officers.

374. The evidence about the report is admissible as relevant under clause 2 of section 32 as a statement made in due course of business or in discharge of professional duty. Saeed Ahmad Khan P.W. 3 specifically stated about file Exh. P.W. 3/2 that it was being maintained in the ordinary course of business. The documents bearing the signature of Abdul Hamid Bajwa proved that file would fall under this provision. This principle will apply to the documents also from files Exh. P.W. 3/1 and Exh. P.W. 3/3 and the remarks or entries in the Peon Book since these are all official documents maintained presumably in the ordinary course of business and in discharge of duties.

375. This fact is virtually admitted by the principal accused in his statement under section 342, Cr. P.C. While on the one hand refusing to answer questions about the above- mentioned files he added that so far as he remembered "from British time, the D.I.B, the D.G., I.S.I. Special Branches of the Provincial Government and the District Magistrates kept copious files of prominent individuals. This practice has continued from that time to our time". In view of his refusal to answer the question it would be necessary to refer to section 342, Cr. P.C., which, in case of refusal of an accused examined under that section to answer any question, allows the Court to draw such inference from such a refusal as it thinks just. The Court would be justified in drawing an inference of admission about the maintenance of these files, from the analogy drawn in his answer by the said accused from the working of the Intelligence Branches in the British period and subsequently.

376. Similar objection was raised by Mr. D. M. Awan to the questions put by Haq Nawaz Tiwana (now dead) former Director-General of the F.S.F. to Ghulam Hussain P.W. 31 at the time of his interview for appointment, regarding his qualifications. The statement attributed to his duties and in due course of business.

The objections raised under section 32, Evidence Act are therefore repelled.

377. During the course of cross-examination the learned counsel for the defence, in order to make out case of improvements made by witnesses in their examination in chief before this Court, drew the attention of the witnesses to certain omissions in their earlier statements made before the Police under section 161, Cr. P.C. and sometimes also made before a Magistrate under section 164, Cr. P. C. The witnesses explained the omissions and sometimes pleaded want of memory. In case where the witness pleaded lack of memory the learned counsel invariably requested the Court to make a note in bracket that the statement put to the witness from his examination in Court was not recorded in some or all of earlier statement would be relevant under section 145 of the Evidence Act if it is intended to contradict the witness. The questions put to the witness only pertained to omissions which may or may not amount to contradiction. The defence would therefore be allowed to provisionally prove the earlier statements formally and the questions whether in the circumstances of the case an omission is a contradiction would be decided after hearing the final arguments. It is in view of this undertaking that the defence was allowed to prove statements Exh. P.W. 39/5-D, Exh. P.W.39/6-D, Exh. P.W. 39/7-D, Exh. P.W. 39/8-D, Exh. P.W. 39/9-D, Exh. P.W. 41/3 D, Exh. P.W. 41/4-D, Exh. P.W. 41/5-D, Exh. P.W. 41/6-D and Exh. P.W. 41/7-D made by the witness before P. Ws. 39 and 41 under section 161, Cr. P. C. and statements Exhs. P.W. 10/15-D, Exh. P.W. 10/16-D, Exh P.W. 10/17 - D, Exh. P.W. 10/21-D made under section 164, Cr. P. C. before P.W. 10.

Mr. D. M. Awan argued that the answer "I do not remember" itself amounts to a contradiction within the meaning of section 145, Evidence Act. He relied upon *Mohinder Singh v. Emperor*<sup>18</sup> and *Gopi Chand v. Emperor*.<sup>19</sup>

These authorities deal with the manner in which the provisions of section 145, Evidence Act should be sued by counsel and Courts while confronting a witness with his statement made before the police under section 61, Cr. P.C. After reproducing the provisions of section 145, Evidence Act, it was laid down in the case of *Gopi Chand* that:-

"... The proper procedure would, therefore, be to ask a witness first whether he made such and such statement before the police officer. If the witness returns the answer in the affirmative, the previous statement in writing need not be proved and the crossexaminer may, if he so chooses, leave it to the party who called the witness to have the discrepancy, if any, explained in the course of re-examination, If, on the other hand, the witness denies having made the previous

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<sup>18</sup> AIR 1932 LAH 103

<sup>19</sup> AIR 1930 LAH 491



statement attributed to him or states that he does not remember having made any such statement and it is desired to contradict him by the record of the previous statement, the cross-examiner must read out to the witness the relevant portion or portions of the record which are alleged to be contradictory to his statement in Court and give him an opportunity to reconcile the same if he can. It is only when the cross-examiner has done so, that the record of the previous statement becomes admissible in evidence for the purpose of contradicting the witness and can then be proved in any manner permitted by law."

This statement of law was relied upon with the approval in the other case.

378. These authorities are distinguishable since the dictum laid down therein would apply only to a case where a witness has specifically made a statement in his earlier statement which is said to be contradictory to the statement made during his examination at the trial. It cannot be applied to a case where the statement made at the trial was not made at the earlier stages and is a mere omission as distinguished from a contradiction.

379. Strictly speaking, the words "I do not remember" cannot be interpreted as either an affordance or a denial of the query put to the witness. These words can make out a contradiction only, if in the previous statement the witness admits remembering something which in the statement at the trial he denies re-calling. It cannot, therefore, be laid down as a rule of law that a statement of a witness that he does not remember should always be treated as akin to denial of having made the earlier statement. It may be treated as a denial only in case the previous statement is clearly contradictory to the statement made at the trial. But this principle would not apply to a mere omission. Where an omission in the earlier statement is put to the witness the words "I do not remember" will only mean that he is not in a position to state whether he made such a statement or not. A specific contradiction becomes admissible when the witness does not distinctly admit having made the statement. An example of it is furnished where the witness does not remember if he made a statement. But the converse cannot be true because the principle "does not distinctly admit having made the statement", cannot be stretched to include "does not distinctly admit having omitted to make the statement."

380. It is true that sometime an omission may have the force of an inconsistent or contradictory statement and may be used for the purpose of impeaching the credit of the witness but such cases are rare. A witness may omit to furnish details in his previous statement or the previous statement may be absolutely devoid of details. The omissions of details do not amount to contradiction. They may have the force of contradiction only if the witness omits to refer to anything in the previous statement which he must have mentioned in it in the circumstances of a particular case.

381. The question whether an omission amounts to contradiction was considered in *Ponnuswami v. Emperor*.<sup>20</sup> It was pointed out in that case that whilst the bare omission can never be a contradiction a so-called omission in a statement may sometimes amount to a contradiction, for example, when to the police three persons are stated to have been criminals and later at the trial four are mentioned. This statement of law by Burn, J., is clearly based upon the principle that in order to amount to inconsistency the omission must be of such material fact which the witness would not have omitted to state.

382. Generally the witness is confronted with his statement made either before the police under section 161, Cr. P.C. or made before a Magistrate under section 164 of the same Code. As regards the statement under section 162, Cr. P. C. it was pointed out in *Queen-Empress v. Nazir-ud-Din*<sup>21</sup> that such statements are recorded by the Police Officers in a most haphazard manner. The Officers conducting investigation not unnaturally record what seems in their opinion material to the case at that stage and omit many matters equally material, and, it may be of supreme importance as the case develops. Besides that, in most cases they are not experts of what is and what is not evidence. The statements are recorded hurriedly in the midst of crowd and confusion subject to frequent interruption and suggestion from by standers. Over and above all they cannot in any sense termed "depositions" they have not been prepared in the way of deposition, they are not read over to, nor are they signed by, the deponent. There is no guarantee that they do not contain much more or much less than what the witness has said. In *Deo Lal Mohtan and others v. Emperor*<sup>22</sup> it was observed that such statements are notoriously very condensed and the omission of some detail in the note of a statement is not always a sure indication that such detail was absent from the statement. What was observed in the Allahabad case is borne out by the statement of the Investigating Officer Abdul Khaliq P.W. 41 who made it clear that while interrogating the witnesses whose statements have been proved by the defence as Exh. P.W. 41/3 - D, P.W. 4/4-D P.W. 41/5-D, Exh. P.W. 41/6-D and P.W. 41/7-D, he had merely kept note on the basis of which he subsequently reduced the statement to writing. In these circumstances, it is not safe to rely upon the statement under section 161, Cr. P. C. made before P.W. 41 as depositions of the witnesses before the Investigating Officer.

12 383. It may happen sometimes that the witness himself may not consider a fact as material, and that fact may be brought on the record on specific questions by the prosecution. Such are the questions which the Prosecutor might have considered to be material in the light of the law governing the matter or after he has gone through the police record or after the case for the prosecution has developed. The omissions of such fact cannot be considered to verge on inconsistency. There are numerous examples on the present record of such matters.

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<sup>20</sup> AIR 1933 MAD. 372

<sup>21</sup> ILR 16 ALL 207

<sup>22</sup> AIR 1933 PAT 440

384. The only example of such omissions which on the present record would have been considered equivalent to contradiction was the statement made about the role of Mian Muhammad Abbas made at the trial, by P.W. 24. But in view of the clarification made by Muhammad Boota P.W. 39 that he had recorded another statement of that witness under section 161, Cr P.C. pertaining to Islamabad incident I am of the view that the omission of that role in the statement under section 161, Cr. P.C. recorded about the Lahore incident cannot be considered as amounting to an inconsistency. The learned counsel for the non-confessing accused did apply for copy of the earlier statement alleged to have been made by Ahmad Raza Kasuri in the Islamabad incident. He could have also applied for the copy of such statement made by P.W. 24. It can, therefore, be assumed that his statement to the police during that investigation was in accord with the evidence he gave at the trial. In my view the omissions put to the witnesses in the present case do not amount to contradictions and are not sufficient to discredit them.

385. During the course of the statement of Raja Nasir Nawaz P.W. 23 who appeared before the Court to prove the F.I.R dated 24th August 1974, Exh. P. 23/1, which pertained to the earlier occurrence at Islamabad Mr. D. M. Awan made an effort to get the writing of the Deputy Superintendent of Police of the same circle identified on which was stated to be a photostat copy of statement alleged to have been made by Ahmad Raza Kasuri P.W. 1 before the said Deputy Superintendent of Police under section 161, Cr. P. C. He was not allowed to prove this document through P.W 23 for two reasons firstly Kasuri denied having made such a statement. In such circumstances, even if the identity of the handwriting of the Deputy Superintendent of Police was established, it would not have proved that the statement was really made by Ahmad Raza Kasuri. It would be necessary for the principal accused to prove by legal evidence, the fact that the statement was made by P.W. 1, the factum of the making of the statement cannot be proved by the writing being in the hand of the Officer, who purports to have recorded it. The second ground was that the witness did not have before him the original signature. No justification was made for proving the photostat copy of the original statement. The D.S.P. could be produced as a defence witness but this course was not adopted.

386. When Muhammad Yousaf Qazi, P.W. 26 proved the writing of Abdul Hamid Bajwa in Exh. P.W. 3/2-B (which had already been proved by P.W. 3 Mr. Saeed Ahmad Khan), Mr. D. M. Awan raised an objection that it would not be permissible to let the same document be proved by two witnesses. In support of this objection he submitted that he was not allowed by the Court to prove the copy of the statement of Ahmad Raza Kasuri made by him under section 161, Cr. P. C. before the Deputy Superintendent of Police, Islamabad, through P.W. 23 who had worked with the Deputy Superintendent of Police. This point has already been dealt with in some detail. However, there is no analogy between the objection raised and the order passed earlier. In fact the reference to the earlier order was absolutely irrelevant. The only objection taken to the statement of P.W. 26 was that he could not prove what had already been proved by another

witness. To say the least the objection is absurd because it would amount to suggesting that a matter can be proved only by the evidence of a single witness and the evidence of another witness to corroborate or support the testimony would be inadmissible. This objection was therefore, overruled.

387. The argument in support of this last objection and the irrelevant reference to the earlier ruling brings in bold relief uncounted like arrogance of Mr. D. M. Awan which has been discussed in detail while disposing of the petition of the principal accused dated 18-1-1978 for transfer of the case.

388 At this stage an objection by Mr. Ijaz Hussain Batalvi, the learned Special Public Prosecutor may be considered. He argued that a statement recorded under section 161, Cr. P.C. during the investigation of the occurrence at Islamabad cannot be used in this case. This objection was held to be without substance, since section 162 bars the use of a statement made under section 161, Cr. P.C. during the course of the investigation of the same case which is being tried except for the purpose of contradicting him in the manner provided by section 145, Evidence Act. There is no such bar regarding the statements made before a police officer by the same witness in the investigation of any other case which is not before the Court. Such a statement can, therefore, be used for the purpose of contradicting a witness under section 145, Cr. P.C. as well as for other purposes admissible in law.

389. P.W. 28, Ashiq Muhammad Lodhi stated that in January 1975, Abdul Hamid Bajwa called him and ordered him to give the description of the gunman of Ahmad Raza Kasuri, who accompanied him to the National Assembly Cafeteria and the gallery. Mr. D. M. Awan raised an objection to the admissibility of this evidence on the ground that it was a matter subsequent to the accrument in which a murderous attack was made on Ahmad Raza Kasuri resulting in the murder of his father. Mr. Ijaz Hussain Batalvi stated that this matter fell within the four-corners of section 7 of the Evidence Act. The matter was adjourned to enable the learned counsel to address arguments on the question.

390. Since there is a charge of conspiracy to murder Ahmad Raza Kasuri Mr. D. M. Awan argued that the said conspiracy culminated in the murder of Nawab Muhammad Ahmad Khan and as such any evidence relating to the period after the said murder was not relevant. He, however, conceded that if the charge had related to the second part of section 120-B, P.P.C. or if the challan had been of conspiracy simplicitor the evidence would have been relevant. Mr. Ijaz Hussain Batalvi drew our attention to charge No. 1, which relates to a conspiracy to commit murder of a particular person, namely Ahmad Raza Kasuri and not only to commit the murder of a person. He argued that there was no culmination of the conspiracy. He referred to sections 5, 6 and 10 of the Evidence Act in support of the arguments. In reply, Mr. D. M. Awan submitted that the charge was

about a conspiracy between the principal accused and Masood Mahmood P.W. 2, and not between the principal accused and Abdul Hamid Bajwa.

391. It is clear from the record that the conspiracy to which Charge No. 1, relates, did not culminate with the death of Nawab Muhammad Ahmad Khan since it was a conspiracy to murder Ahmad Raza Kasuri. Any event subsequent to the murder in furtherance of the conspiracy would be relevant both under section 6 as well as section 10 of the Evidence Act. The acts sought to be proved are so connected with the charge of conspiracy (fact in issue) as to form part of the same transaction though the persons other than the actual conspirators may have participated in it. Such persons might have acted on the directions and orders of the actual conspirators. Moreover conspiracy may be proved by the surrounding circumstances or by the antecedent or subsequent conduct of the accused. *Bhola Nath and others v. Emperor*.<sup>23</sup>

392. The prosecution case is that Ahmad Raza Kasuri had adopted certain measures for his safety. The evidence of P.W. 28 related to a survey of those measures obviously with the object of achieving the successful culmination of the conspiracy. Such acts cannot be held to be isolated acts or acts unconnected with the conspiracy.

393. Mr. D. M. Awan conceded that if the matter was covered by the second part of section 120-B, P.P.C with which it is undoubtedly covered, the evidence would not be irrelevant. This is sufficient answer to his objection.

394. The learned Special Public Prosecutor wished to prove, on the 15th of December 1977, diaries in which the departure and arrival of P.W. 31, Ghulam Hussain, was recorded in the month of October 1974. Mr. D. M. Awan objected to this evidence on the ground that these diaries were not produced with the Chllan and as such their copies could not be supplied to the defence. Mr. M. A. Rahman, the learned Public Prosecutor, argued that this record was summoned by the defence itself. Moreover, it was filed with an application of necessary permission to prove it. In reply, Mr. D. M. Awan submitted that document summoned by the defence can be used by it for the purpose of cross-examination of the witness but it cannot be availed of by the prosecution. When he was asked to show the legal bar and to distinguish between evidentiary value and admissibility of the document, he submitted that he had no objection to its admissibility.

394-(A). After considering the argument, particularly the provisions of section 265-C and section 265-F on which reliance was placed by Mr. D. M. Awan, we found that neither these sections nor any other law preclude the production of additional evidence or the proof by the prosecution of documents summoned by the defence. Such evidence can be allowed to be produced under section 540, Cr. P.C. It appears that for this reason

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<sup>23</sup> AIR 1939 ALL 567.

Mr. Qurban Sadiq Ikaram made it clear that he had no objection to the admission of these documents in evidence.

395. The reliance on Sections 265-C and 265-F was misconceived. Section 265-F is not at all relevant while section 265-C provides only for providing to the defence copies of certain documents a week prior to the commencement of the trial. This section neither provides for a copy of the documents in question to be supplied to the defence nor places any limitation on the powers conferred upon the Court under section 540, Cr. P.C. to allow additional evidence. The objection was, therefore, overruled.

396. Mr. D. M. Awan objected to the admissibility in evidence of a document which apparently was carbon copy of the original and bore the initials of one of the accused, namely Iftikhar. This objection was overruled and the document was exhibited, as P.W. 31/3 and P.W. 31/4 on the evidence of P.W. 31 who proved that it was a carbon copy of the original and that the same was initialed in his presence by Iftikhar accused. The objection had to be overruled in view of the clear provisions of section 62 of the Evidence Act, the first portion of Explanation-2 of which clearly provides that where a number of documents are all made by one uniform process as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest. Clearly, where several copies are prepared by inserting carbon papers between different leaves, each copy is as much primary evidence as the first copy.

397. Sometimes a witness had to be allowed to make a statement about the contents of the documents either for clarification of ambiguities, if any, or for proper appreciation of the oral evidence. On such occasions Mr. D. M. Awan invariably objected to any reference to the contents of documents in view of the provisions of section 92, Evidence Act. This objection is without force since section 92 forbids evidence of oral agreement of statement for the purpose of contradicting, varying, adding to or subtracting from the terms of the document. This is subject to some provisions with which I am not concerned. There is, however, no bar to the recording of contents of proved documents in the statement of a witness. The Court can allow the contents of a proved document to be brought on the record for the sake of convenience.

398. Moreover, section 92 of the Evidence Act deals with a specific category of documents i.e. contract, grant or other disposition of property or any letter required by law to be reduced to the form of a document. The rule embodied in the section cannot be applied to document not included in this category. The objection is not tenable in law.

399. An objection was taken to the proof of unsigned reports enclosed with a signed covering letter. This objection cannot be sustained. There is evidence on the record that many a documents e.g. secure reports were never signed. There is no law making it obligatory for each document to be signed before it is admitted in evidence. It is a

different matter that the factum of a document being unsigned may affect its reliability but it cannot affect its admissibility in evidence. Moreover, the enclosures to signed documents were not produced to prove the correctness of what was contained therein. They were produced to prove the conduct or reaction of the witness or the accused. This objection is unsustainable.

400. Strangely enough an objection was taken even to the refreshing of memory by P.W. 3, although there are clear provisions in section 159 of the Evidence Act permitting a witness to refresh his memory.

401. An objection was also taken to a reference to a letter written by P.W.2 to the Chief Martial Law Administrator in which the witness "made a clean breast of the misdeeds of F.S.F. conducted, by him "under the orders of Mr. Zulfikar Ali Bhutto". Mr. D. M. Awan raised an objection that these are contents of a document which cannot be proved except by the production of that document. This objection could have force if the contents of the document had been material. It is not the object of the prosecution to prove the correctness of this assertion. Reference was made to the documents to bring on record the circumstance which led to the confession of the witness with regard to the murder of the deceased. Attempt was made by Mr. D. M. Awan to prove a photostat copy but he was not allowed to do in the absence of proof of any circumstance laid down in section 65 of the Evidence Act prior to leading secondary evidence.

402. The learned Public Prosecutor objected to the admission in evidence of photostat copy as Exh. P.W. 3/16-D. The document was admitted in evidence subject to this objection since it was stated at that time that the original was not forthcoming. This objection must be upheld since no attempt was made by the principal accused to prove the loss of the original nor did he summon the original.

403. The fatal injuries received by Nawab Muhammad Ahmad Khan and his death as a consequence thereof is established by the evidence of his son Ahmad Raza Kasuri, P.W. I, Dr. Muhammad Asif Chaudhury P.W. 6 and Dr. Sabir Ali. P.W. 7. This evidence is supported by the out-patient card Exh. P.W. 6/1, Entry No.1 24 (Exh. P.W. 6/2-A) at page 2 of the Emergency Room register, Exh. P.W. 6/2 X-RAY Exh. P.W. 6/5 and Exh. P.W. 6/4, X-Ray report Exh. P.W. 6/5 Death certificate Exh. P.W. 6/6. medico-legal Report Exh. P.W. 6/7 and post-mortem Examination Report Exh. P.W. 7/2 Nawab Muhammad Ahmad Khan was brought to the Emergency Room at 12.30 a.m. on the 11th November 1974, was admitted there at 1 a.m., and expired at 2-55 a.m. the same day of bullet injury to the brain. One bullet and two thin metallic pieces were recovered by P.W. 7 during the post-mortem examination. P.W. 7 recovered the bullet from the right cerebral hemisphere in the middle and two thin metallic pieces from the margin of the wound which were handed over to the police vide memo. Exh. P.W. 7/6. According to the both Medical Experts, the injuries which were the result of the fire-arm were sufficient to cause death in the ordinary course of nature.

404. Some other witnesses, namely, Abdul Aziz P.W. 11, Asghar Khan also, in their depositions, referred to the injuries and death of Muhammad Ahmad Khan.

405. It is proved by the evidence of Ahmad Raza Kasuri P.W. 1, that while he, accompanied by his parents and aunt, was returning from a wedding in his self-driven car, after midnight on the night between 10th and 11th of November 1974, he was fired at by automatic weapons near Shadman-Shah Jamal Round-about, Lahore. As a result of this attack his father received fatal injuries. This finds support from the evidence of Ghulam Hussain approver P.W. 31, who described the details of the time, place and the manner of that attack. It is proved that the shots by sten-gun were fired by Arshad Iqbal and Rana Iftikhar Ahmad accused both of whom have confessed their role in this attack in their statements under section 164, Cr. P. C. Exh. P.W. 10/3-1 and Exh. P.W. 10/2-1 as well as their statements under section 342 Cr. P. C. The evidence of Ghulam Hussain approver in regard to the details about the time, place and the manner of attack is corroborated fully by the evidence of P.W. 1 the bullet marks on the car (vide photographs Exh. P.W. 36/1, and Exh. P.W. 36/2, Exh. P.W. 36/3 and Exh. P.W. 36/4), the recovery of broken pieces of glass and blood of Nawab Muhammad Ahmad Khan from it (vide memo. Exh. P.W. 1/6), the recovery by P.W. 34 of 24 empties bearing No. 661/71 which have been proved (vide Exh. P.W. 24/1, Exh. P.W. 24/3, Exh. P.W. 24/5 as well as Exh. P.W. 39/1 and Exh. P.W. 39/2 and Exh. P.W. 39/3) to have been supplied by the Central Ammunition Depot, Havelian, to the Headquarters of the Federal Security Force. The version about the place of occurrence given by the aforementioned approver is also corroborated by the site plan Exh. P.W. 34/2.

406. The statement of Ghulam Hussain approver that he made a reconnaissance of the locality (Shadman Colony) at about 8-00 a.m. on the 10th November 1974, prior to the attack, to trace out the car of Ahmad Raza Kasuri near the place where the wedding was being held, is corroborated by the statement of Muhammad Amir Driver P.W. 19. All the three confessing accused who had taken part in this reconnaissance admitted their presence in it.

407. It is further established by the evidence of Abdul Wakil Khan P.W. 14, Saeed Ahmad Khan P.W. 3, and Fazal Ali. P.W. 24, that the ammunition and weapons of this caliber 7.62 mm were in the use and possession of the Federal Security Force.

408. The supply of weapons (Chinese sten-gun of 7.62 mm. bore used in this attack) to Ghulam Mustafa accused is corroborated by the statement of Amir Badshah Khan P.W. 20 who made the supply on the specific order of Mian Muhammad Abbas accused. It is further corroborated by Muhammad Amir Driver who took Ghulam Mustafa accused in his jeep to the office of Amir Badshah P.W. 20 and saw him bringing something wrapped in a cloth which appeared to be a weapon.



409. It is, therefore, proved that Nawab Muhammd Ahmad Khan died as a result of the murderous attack by Arshad Iqbal and Rana Iftikhar Ahmad accused made under the supervision of Ghulam Hussain P.W. 31 near the Shah Jamal-Shadman Roundabout, Lahore on the night between the 10th and 11th November 1974, with weapons of 7.62 mm. bore obtained by Ghulam Mustafa confessing accused from Amir Badshah Khan P.W. 20 for that purpose under order of Mian Muhammad Abbas accused.

410. Mian Muhammad Abbas has denied the presence of Ghulam Hussain at Lahore during the period from 31st October 1974, to the 12th of November 1974, His learned counsel relied upon the T.A. Bill of Ghulam Hussain Exh. P.W. 31/6 by which the travelling allowance was claimed by him for his visit to Karachi during this period as also for his visit to Peshawar from the 21st November 1974 to the 28th November 1974. Ghulam Hussain P.W. 31. in his evidence has categorically stated that this document was fabricated under the orders of Mian Muhammad Abbas accused and he neither visited Karachi nor Peshawar during the period referred to in this document. Similarly, he deposed that the entries Exh. P.W. 31/4 and Exh. P.W. 31/5 about his departure from Peshawar and return from there on the dates mentioned in the T. A. Bill (Exh. P.W. 31/6) were also fabricated. He referred to the entry Exh. P.W. 31/3 in the Roznamcha of Battalion No. 4 of the Federal Security Force. This entry proves departure of Iftikhar Ahmad accused and P.W. 31 on 31-10-1976 for an undisclosed destination on special duty. P.W. 31 explained that this destination was not disclosed since he had to perform the secret mission of the murder of Ahmad Raza Kasuri at Lahore. He further stated that he left Lahore on the morning of the 12th November 1974, in the car of the Director General (P.W. 2)

411. The statement that P.W. 31 travelled in the car of the Director General from Lahore to Rawalpindi on the morning of the 12th of November, 1974, is corroborated by the Driver of the car, namely, Manzoor Hussain P.W. 21, who had arrived from Multan a day before after the conclusion of the tour of P.W. 2. He stated that Ghulam Hussain travelled with him to Rawalpindi where they reached at about 2-00 p.m. on the 12th of November, 1974. The statement of Ghulam Hussain about his presence at Lahore on the 10th November, 1974, finds corroboration from the statement of Muhammad Amir P.W. 19 who had driven him in a jeep LEJ-7084, when he (P.W. 31) reconnoitered the place where the car of Ahmad Raza Kasuri was parked near the house where the marriage ceremony was going on.

412. In his cross-examination by Mr. Irshad Ahmad Qureshi, Ghulam Hussain stated that 2 or 3 days before the occurrence while he and his party were going towards Model Town in a jeep without number-plate he was checked by Abdul Wakil Khan D.I.G. who on being informed by him about his designation of Inspector of F.S.F. had allowed him to proceed only after checking the information from Mr. Muhammad Irfan Mallhi, Director, F.S.F., Lahore Abdul Wakil Khan P.W. 14 has corroborated this statement

though he could not state the name of person who had informed him that he was an Inspector in the F.S.F.

413. It appears that Mian Muhammad Abbas too is not serious about this objection since in his second written statement filed after the close of the defence evidence, he referred to the Roznamcha of Muhammad Yousaf, Head Constable in the Federal Security Force, brought by Abdul Khaliq D. W. 3 and the copies of two entries dated 25-10-1974 and 7-11-1974 made in it in order to show that P.W. 31 had obtained weapons directly from Muhammad Yousaf, Head Constable of Federal Security Force, Battalion No. 3 posted at Lahore inter alia on the 7th of November, 1974. The entries have not been proved on record, but it is clear from this written statement that on the one hand the plea of Mian Muhammad Abbas is that Ghulam Hussain was not in Lahore from the 31st October, 1974 to the 12th November, 1974 and on the other hand he pleads that he had obtained weapons at Lahore from Muhammad Yousaf, Head Constable on the 7th of November, 1974. There is no doubt left in my mind that Ghulam Hussain was not at Karachi during this period but was at Lahore.

414. The statement of Ghulam Hussain that the entries Exh. P.W. 31/4 and Exh. P.W. 31/5 in the Roznamcha about his visit to Peshawar and the T.A. Bill P.W. 31/6 were all fabricated is borne out and corroborated further by both the oral and the documentary evidence. Ghulam Hussain stated that empties of 1500 cartridges received by him (vide road certificate Exh. P.W. 24/7) from Fazal Ali P.W. 24, were returned by him to the same witness on the 25th November, 1974 (vide road certificate Exh. P.W. 31/9). He also stated that he had gone to return the empties in the Armoury of F.S.F. Headquarters, Rawalpindi, three or four days earlier but Fazal Ali P.W. 24 refused to receive them since they were short by 51 empties including 30 rounds fired at Lahore and 7 rounds fired at Islamabad. He reported the matter to Mian Muhammad Abbas who asked him to return the same three or four days later. One the next meeting after 3 or 4 days, Mian Muhammad Abbas gave to him 51 empty cases of sten-gun ammunition. The deficiency having thus been made good he returned all the 1500 empty cases to Fazal Ali, P.W. 24 on the basis of road certificate Exh. P.W. 24/9 dated 25-11-1974. Fazal Ali corroborated P.W. 31 about his visit to him two or three days prior to 25th November, 1974 that Ghulam Hussain P.W. 31, was at Rawalpindi on the above date when according to the record Exh. P.W. 31/4, P.W. 31/5 and P.W. 31/6 he should have been at Peshawar. The oral evidence proves that even two or three days prior to this date Ghulam Hussain was at Rawalpindi. This evidence oral and documentary establishes the contention of Ghulam Hussain that the entries in the Roznamcha Exh. P.W. 31/4 and Exh. P.W. 31/5 were fabricated and so Exh. P.W. 31/6 was fabricated with the active connivance of Mian Muhammad Abbas who had signed this document presumably in token of its correctness. The argument of the learned counsel for Mian Muhammad Abbas based on these fabricated documents is, therefore, without merit.

415. The murderous attack on Ahmad Raza Kasuri in Lahore which resulted in the death of his father was preceded by an incident of firing at Islamabad which is proved by Ahmad Raza Kasuri P.W. 1 and Ghulam Hussain approver P.W. 31, who had supervised the firing. Under instructions from Ghulam Hussain, Mulazim Hussain who was armed with a sten-gun had fired in the air whereas he was supposed to fire at Ahmad Raza Kasuri who was then driving his car at an intersection while coming from the M. N. A. Hostel and going towards his residence at Islamabad. This statement is further corroborated by Nasir Nawaz, S. H. O., Police Station Islamabad P.W. 23, who recorded the statement of Ahmad Raza Kasuri Exh. P.W. 23/1 and registered F.I.R. No. 346 under section 307, P. p. C. on the basis of this statement on the 24th August, 1974. He also recovered five empties from the spot vide copy of the recovery Memo. Exh. P.W. 23/3, Prepared a site-plan, copy of which is Exh. P.W. 23/2 and sent the empties in a sealed parcel to the Inspectorate of Armaments, General Headquarters, Rawalpindi, from where he obtained report Exh. P.W. 23/4 which proved the above mentioned empties to have been fired from Chinese weapons of 7.62 mm. caliber.

416. P.W. 31 obtained the sten-gun used in the firing from Fazal Ali P.W. 24 under orders of Mian Muhammad Abbas accused. This was fully corroborated by Fazal Ali.

417. It is proved from Exh. P.W. 23/4 that the ammunition used in the Islamabad incident was of 7-62 mm. bore of Chinese weapon of the same caliber. Exh. P W. 23/3, the recovery memo, of the empties, establishes that these empties were engraved at their base with No. 661/71. According to the evidence of Abdul Hayee Nizai P.W. 34, the 24 empties recovered by him from the spot in the Lahore incident were also engraved with similar numbers at their base. It is further proved by his evidence which is corroborated by Abdul Ikram P.W. 18 and Nadir Hussain Abidi, Ballistic Expert P.W. 36, that the 24 empties and a piece of metallic metal recovered by P.W. 34 were not sealed on the 11th November 1974.

Nidir Hussian Abidi P.W. 36 gave an opinion that they were not fired from a G-3 rifle caliber of which is also 7.62 mm., but he could not say what type of automatic weapon was used without detailed inspection and study of the relevant literature. It is clear from this evidence that the empties recovered by P.W. 34 were of the cartridges fired from automatic weapons. It is further implied in the statement particularly in his reference to G-3 rifle of 7.62 mm. caliber that he was convinced that the empties were of ammunition of the same caliber.

418. The Ballistic Expert P.W. 36 found the empties unsealed in the morning of 11th November, 1974. There is evidence that they were not sealed till 23rd of November, 1974.

419. P.W. 34 stated that Abdul Ahad, D. S. P. of circle Ichhra, Lahore took these unsealed empties and lead bullet during the night of the 11th November, 1974, to the

residence of the Inspector-General of Police on the latter's instructions, in a service envelope. The same is a statement of Abdul Ikram P.W. 18, who corroborates P.W. 34 in this point.

420. Abdul Hayee Niazi further stated that Abdul Ahad did not bring the empties with him when he returned from the residence of the Inspector General of Police in the night of 11th November, 1974, and on his inquiry Abdul Ahad informed him that they had been kept by the Inspector General of Police with him and that he would return them later. P.W. 34 further stated that Abdul Ahad left for Rawalpindi on the 13th November, 1974 and took the site plan Exh. P.W. 34/2 with him. He returned two or three days later and directed him to prepare the recovery memo, of the empty cartridges and the lead bullet from a draft which he (Abdul Ahad) showed to him. The draft was taken away after the witness had prepared the recovery Memo Exh. P. -W. 34/4. At that time P.W. 34 raised an objection before Abdul Ahad that the memo (Exh. P.W. 34/4) did not make any mention of the lead bullet and that the number of 24 empty cartridges given on this memo, was also different, in so far as 22 empties bore number BBI/71 while 2 contained No. 31/71. He also asked Abdul Ahad to give back to him the 24 empty cartridges but he put him off by promising to return them later. On further questioning Abdul Ahad informed him that it was an order which had to be complied with otherwise both of them would be in trouble. He also stated that the entry P.W. 16/1-1 about the recovery memo. Exh. P.W. 34/4 which purports to be dated 11th November, 1977, after the return of Muhammad Basir, A. S. L, Moharrir Malkana P.W. 16 from leave. He directed P.W. 16 that entry should be made in the handwriting of Abdul Ikram, Head Constable. On inquiry from Muhammad Bashir about the parcel of the empties which was not in the Malkhana, he promised that it would be given to him later. Abdul Ahad gave the 24 empty cartridges on the 23rd November, 1974, on which date they were sent to the Inspectorate of Armaments.

421. This evidence finds support from the statement of Muhammad Basir P.W. 16 who gave the same circumstances leading to the entry Exh P.W. 16/1-1 in Register No. 19. This was corroborated by Abdul Ikram P.W. 18. Muhammad Bashir P.W. 16 corroborated P.W. 34 that Muhammad Sarwar A.S.I. received the parcel of empties directly from P.W. 34. It is clear from his statement that Muhammad Sarwar asked Abdul Ikram, P.W. 18 to issue a road certificate for taking the parcel containing the empties to Rawalpindi. The fact that Abdul Hayee Nizi had given the parcel of empties directly to Muhammad Sarwar P.W. 17 on the 23rd November , 1974, is further corroborated by the latter's own evidence as well as the evidence of Abdul Ikram. P.W. 18.

422. The parcels containing the blood and lead bullets with two metallic pieces were however with Muhammad Bashir P.W. 16. Their entry was also made on the 17th November, 1974 in the portion encircled as Exh. P.W. 16/1-1. P.W. 16 gave this parcel to Abdul Ikram on the 24th December, 1974, for issuing the road certificate. The parcel

containing the lead bullet and 2 metallic pieces was taken by P.W. 17, who took it to the Inspectorate of Armament on the 24th of December, 1974, on the basis of a road certificate entered in P.W. 16/1-2

423. The fact that the empties remained unsealed is also corroborated by the evidence of Abdul Wakil Khan P.W. 14 who stated that he gave incorrect information to Abdul Hamid Bajwa about the sealing of the empties in order to avoid any suggestion from him to tamper with them in order to exonerate the Federal Security Force. He later enquired from Abdul Ahad, D.S.P. if any result had been received from the ballistic expert to whom the empties were sent but he was surprised to hear from him that the empties had been taken away by Abdul Hamid Bajwa on the ground that the empties were required to be taken to the Prime Minister's House to be shown to the high officers and returned after two or three days.

424. From this evidence it is clearly established that the crime empties were not sealed up to the 23rd November, 1974, nor their recovery memo, was prepared at the time of the recovery nor were they ever deposited in the Malkhana. It is further clear that the crime empties which were engraved clearly with No. 661/71 were changed with 22 empties on which the number could be read as BB1/71 and on the rest to the number was 31/71. It is true that Nadir Hussain Abidi P.W. 38 had read the number on the 22 empties as 661/71 but the change of the empties is established by the fact that while Abdul Hayee Niazi P.W. 34 had read this number on the bases of the crime empties as 661/71 the number of the empties as given in the recovery memo. Exh. P.W. 34/4 is BB1/71 which implies that the person who prepared the draft of the recovery of empties read the number as such The number on the bases of the present empties is not, therefore easily readable. This finds support from the evidence of P.W. 36. He stated that what is inscribed on the bases of 222 empties is No. 661/71 but this number can be read as BB1/71 by a person who has weak eyesight and who does not examine them closely. The two of the empties bear an absolutely different number 31/71 which itself is a proof of the substitution of the crime empties by the empties. P. 8. to P. 31

425. Mian Qurban Sadiq Ikram criticized the statement of P.W. 34 on the ground that the statement made by him now was not made before the Tribunal. This argument overlooks the explanation given by the witness about the circumstances in which he made the statement before the Tribunal. There is no reason to disbelieve Abdul Hayee Niazi or any of the above mentioned witness since they have no animus against the accused nor is reason to favor the prosecution. The evidence of Abdul Hayee Niazi is corroborated almost on each point either by one or several witness from amongst P. Ws. 14, 16, 17, 18, and 36.

426. P.W. 36 very clearly stated that at the time of his examination of the empties in the Police station on the 11th November, 1974, he found them unsealed. The same statement appears to have been made by him before the Tribunal and it is for this

reason that Abdul Hayee Nizi N. W. 34 was confronted there with this statement of P.W. 36. This is clear from the following question put by the defence counsel and the answer given by P.W. 34.

Q ... I put it to you that in this Court you stated that under the direction of the D.S.P. empty cartridges were shown to Mr. Abidi at the police station while you stated before Mr. Justice Shafi-ur Rehman on 25-12-1974 that it is also incorrect in the statement of the Director that the empties were shown to him there and they had not been sealed at the spot.?

A ... I made a statement to that effect but it had been made under some compulsion.

This question and answer proves that P.W. 36 had made a similar statement before the Tribunal and that this was the correct statement.

427. Faced with this situation Mian Qurban Sadiq Ikram argued that it is quite possible that the empties might have been sealed the same day. This argument is just conjectural and ignores the evidence of P.W.s 14, 16, 17 and 18. In view of the considerable corroboration there appears to be no reason to doubt the correctness of the statement of Abdul Hayee Niazi P.W. 34.

428. It is established by the evidence of Fazal Ali P.W. 24 and the documents Exh. P.W. 34/1 read with Exh. P.W. 39/2 and Exh. P.W. 24/3 Exh. P.W. 38/2 respectively), that the cartridges of S.M.G/L.M.G. of 7.62 mm. caliber bearing number 661/71 and cartridges of rifle bearing No. 31/71 were supplied by the Central Ammunition Depot, Havelian to Headquarters of the Federal Security Force.

429. This evidence corroborates the statement of Ghulam Hussain P.W. 31 that the 24 empties recovered by P.W. 34 in the Lahore incident and the 5 empties recovered by P.W. 23 in the Islamabad incident vide Memo. No. P. W 23/3 were part of the 1500 rounds issued by Fazal Ali It does not require much imagination to safely conclude that the 22 empties bearing No. 661/71 and 2 bearing No. 31/71 which have now been proved as Exh. P 8 to P 31 also come from the consignment sent by C.A.D Havelian to the headquarters. F.S.F.

430. It is in the evidence of Fazal Ali P.W. 24 that the empties of the used cartridges are kept in the Armoury and after 40 to 50 boxes of the empties are collected there, they are sent to the Wah Factory. He stated that 8 to 10 days before Ghulam Hussain deposited 1,500 fired rounds (this approximately comes to 15th of November, 1974,) Mian Muhammad Abbas accused enquired from him if he had fired cartridges in the Armoury On his answer being in the affirmative, Mian Muhamad Abbas accused asked him to bring 25-30 fired cartridges of S.M.G. L.M.G. He returned to the Armoury and

took 30 such empties to the said accused who ordered him to place them on the table saying that he would let him know when he was required to collect them. The accused sent for him again after 1½ hours and directed him to take away the empties which on physical checking were found to be correct.

431. This evidence accords with the statement of Abdul Ahad, D. S. P. made to Abdul Wakil Khan. P.W. 14 about the taking away of empties, by Abdul Hamid Bajwa and their return two or three days later. This evidence, the circumstance of letting the crime empties remain unsealed and finally the statement of Abdul Hayee Nizi P.W. 34 about the difference in the number engraved on the bases of empties recovered by him and the number of the empties recorded on the belatedly prepared recovery memo. Exh. P.W. 34/4 prove beyond a shadow of doubt that the crime empties recovered from the spot were substituted with empties Exhs. P. 8 to P. 31 and this substitution was effected by Mian Muhammad Abbas accused.

432. It has already been seen that Amir Badshah Khan P.W.20 supplied the sten-guns which were used in the Lahore incident under the direction of Mian Muhammad Abbas only on a chit which was given back to Ghulam Mustafa accused on the return of the weapons. Similarly Fzazl Ali gave to Ghulam Hussain the sten-guns used in the Islamabad incident on the direction of and threat from Mian Muhammad Abbas, on a chit which was given back to Ghulam Hussain on the return of the weapons. P.W. 20 and P.W. 24. both were directed by Mian Muhammad Abbas not to make entries of the issue of these weapons in their registers. Thus both these witnesses corroborate the evidence of Ghulam Hussain P.W. 31 in material particulars regarding the supply of arms for launching an attack on Ahmad Raza Kasuri under the specific order of Mian Muhammad Abbas.

433. Mian Qurban Sadiq Ikaram argued that P.W. 20 has made the statement on account of his enmity with Mian Muhammad Abbas. He referred in support of the argument to inquiry report Exh. P.W. 20/1 and the admission by this witness that he had filed Service Writ Petition. He further argued that the statement of P.W. 24 regarding the delivery of arms to Ghulam Hussain P.W. 31 and the involvement of Mian Muhammad Abbas is an improvement in the statement made by him under section 161, Cr. P. C. (Exh. P. W 39/9-D) and should not be given any credence.

434. Mr. Ijaz Hussain Batalvi, learned Special Public Prosecutor on the other hand argued that the report is really against Abdul Hamid, Deputy Director in which Amir Badshh Khan P.W. 20 appeared as a witness only He referred to the statement of P.W. 20, who said that he was never given a copy of the report Exh. P.W. 20/1) nor was he served with a charge-sheet, rather he had tendered his resignation and had obtained his discharge in 1975 on account of ill-health. P.W. 20 admitted that he had filed a writ petition but he explained that it was filed on a claim of the salary for the post of Deputy Director since he had been paid his salary only for the post of Assistant Director.

435. It appears from Exh. P.W. 20/1-D that Mian Muhammad Abbas had visited Mandi Bahauddin under a directive of the Director-General (P.W. 2) that the "atmosphere prevailing in Mandi Bahauddin Camp warrants pulling out the Deputy Director in charge of Battalion No. 3 and the Acting Deputy Director Battalion No 15." The report shows that at the end a recommendation was made against Amir Badshah Khan also, here is, however, no evidence that any action was taken on the basis of this report or it had ever come to the knowledge of P.W. 20. Amir Badshah Khan P.W. 20 stated in his cross-examination that he retired from the service on the 16th October, 1975. He denied that he was removed from the job by Mian Muhammad Abbas or that in his place Zulfiqar was appointed or that Mian Muhammad Abbas made any observation against him. He stated that he had resigned from the job and presented his resignation to M. M. Hussan, Additional Director-General. Despite this line of cross-examination, Mian Qurban Sadiq Ikram's only suggestion to P.W. 20 was that he had made the statement against the accused because he was threatened by the F.I.A. that he would be involved in this case as a accused person. P.W. 20, no doubt, denied this. A similar suggestion was put by Mr. D. M. Awan in his cross-examination that the witness had made a false statement because of the fear of Martial Law. But he replied that he was afraid only of God and had never been to the Martial Law Authorities.

436. A question was also put to P.W. 2 that Amir Badshah Khan had to quit the force on the report of Mian Muhammad Abbas accused but his answer was that his services were terminated since the Officer had outlived his utility.

437. It was suggested to P.W. 20 that the writ petition was filed since he was only an Assistant Director but he had started writing his designation as Acting Deputy Director to which Mian Muhammad Abbas had taken an objection. He denied this allegation and stated that he had filed a writ petition since he was not being paid the salary of the Deputy Director.

438. The suggestion that Mian Muhammad Abbas objected to the writing by the witness of his designation as Acting Deputy Director is proved incorrect by Exh. P.W. 20/1-D in which he is referred to by the same designation. There is no evidence that the witness ever had any notice or knowledge of this report or any action was taken against him on its basis. On the other hand he is proved to have resigned his job.

439. There is, therefore, no justification for holding that the relations between Mian Muhammad Abbas and Amir Badshah Khan P.W. 20 were ever strained and that he had any motive to involve him in this case. He appeared to be a truthful witness whose testimony is corroborated to a certain extent by the statement of Muhammad Amir Driver P.W. 19 and finds further support in the confessional statemnt of Ghulam Mustafa accused.



440. As regards Fazal Ali, P.W. 24, the learned Special Public Prosecutor referred to the statement of Muhammad Boota P.W. 39 that he recorded two statements of P.W. 24 under section 161, Cr. P. C. one of which pertained to the case under section 307 in regard to the Islamabad incident. He also made reference to the persistence with which P.W. 24 repeated that he had stated in his police statement what he had stated in Court. He therefore argued that the other statement recorded by Muhammad Boota P.W. 39 about the occurrence at Islamabad definitely contained what has been said in the statement in Court.

441. It is true that the statement made in Court regarding the directions of Mian Muhammad Abbas to give the required weapons to Ghulam Hussain P.W. 31 on a chit without recording the same in his register and the threats given by him in this connection do not find any mention in the statement under section 161, Cr. P. C., Exh. P.W. 39/9-D; but P.W. 24 positively stated that he had given all the details of facts to the investigation officer though he had not read his statement nor had he signed it. In answer to a question that he had made improvement upon his statement under section 161, Cr. P. C. to bring the present statement in line with the prosecution version and that he had done this dishonestly, he stated that he had already taken an oath before he started making a statement and had stated what had really happened. The statement of Muhammad Boota. P.W. 39 is clearly explanatory of the omissions in Exh. P.W. 39/9- D which were put to P.W. 24. While proving the statement Exh. P.W. 39/0-D he stated that so far as Fazal Ali's stand is concerned, I would like to point out that his statement was also recorded in case under section 307, P. P. C. which was being investigated contemporaneously with the present case and a few things deposed by him which are incorporated in his statement in the other case were not reduced to writing in the present case ... "307, P.P.C. case related to the attack on Ahmad Raza Kasuri at Islamabad".

442. This statement explains the above omission. According to the evidence of P.W. 24 and the approver P.W. 31, the weapons were taken from P.W. 24 for being used in the Islamabad incident. It is, therefore, clear that the portion of the statement of Fazal Ali put to him as an omission was relevant for the case registered under section 307, P.P.C. as a consequence of murderous attack on Ahmad Raza kasuri at Islamabad. The witness would have been confronted with that statement in order to prove such omission or improvement. There is, therefore, no reason to disbelieve the evidence of Fazal Ali.

443. Reference may also be made to the statement of Mian Muhammad Abbas that Ghulam Hussain was in direct contact with Masood Mahmud P.W. 2 and that he had been rewarded by him and also promoted as Inspector. This statement was made clearly to exonerate himself from the criminal liability and further to show that Ghulam Hussain was in direct contract with Masood Mahmud who must have directly assigned to him the task of murdering Ahmad Raza Kasuri. The learned counsel for Mian

Muhammad Abbas placed great reliance for this proposition upon the statement made by Ashiq Muhammad Lodhi P.W. 28.

444. The evidence on the record does not justify this conclusion. It appears clear from the statement of Ghulam Hussain P.W. 31, Amir Badshah Khan P.W. 20 and Fazal Ali P.W. 24 that Mian Muhammad Afebas was supervising the operation against Ahmad Raza Kasuri and these witnesses were directly in contact with him. It is further clear from the evidence of Masood Mahmud that he did not even know Ghulam Hussain P.W. 31. Ghulam Hussain also stated clearly that he had appeared before Masood Mahmud along with other candidates on the 20th August, 1974 only at the time of his interview for promotion to the post of Inspector.

445. A suggestion was put to P.W. 2 that Ghulam Hussain was one of his favorite Officers but he denied the suggestion. A question was put to him that under his orders the Deputy Director had awarded to Ghulam Hussain a first class certificate and Rs. 5,000 as cash prize for efficient performance of his duties in the National Assembly. P.W. 2, however, stated that as a Director-General he had to act on the notes put up before him but he did not have to see or know the person to whom the award or certificate was given nor did he remember whether any such award was given on 5-6-1974. On the other hand, Exh. D. W. 4/4 proves that Ghulam Hussain was promoted as Sub-Inspector on 15-1-1974 by Mian Muhammad Abbas and was also given by him an award of Rs. 75 with Commendation Certificate for running a Commando course with great pain and efficiency (Vide order Exh. D. W. 4/5). In this state of evidence it is not possible to hold that Ghulam Hussain obtained order directly about the mission to kill Ahmad Raza Kasuri from P.W. 2.

446. Ashiq Muhammad Lodhi P.W. 28 was produced by the prosecution to prove the report Exh. P.W. 22/1 submitted by him along with the covering letter Exh. P.W. 3/2-T to Abdul Hamid Bajwa on the letter's orders regarding the description of the gunman of Ahmad Raza Kasuri who accompanied him to the National Assembly Cafeteria and the gallery. In cross-examination by Mian Qurban Sadiq Kkram he stated that he was promoted by Haq Nawaz Tiwana as Assistant Director, Federal Security Force, on the 1st of April, 1974, and that this promotion was opposed by Mian Muhammad Abbas. He then stated that Ghulam Hussain approver was posted on duty during the Ahmadiya Agitation outside the National Assembly. He was given a special award of Rs. 500 by the Director-General (P.W. 2) for his good work in June, 1974, in the National Assembly. Mr. Masood Mahmud did send for Ghulam Hussain through him once or twice and it was correct that at the end of July, 1974, he sent for Ghulam Hussain through him and the two were closeted together while the red light remained glowing. He also stated that Rana Iftikhar Ahmad accused was one of the gunmen attached to the Director General in those days. He stated that Mian Muhammad Abbas had told him in June, 1974, that he tendered his resignation which had not been accepted and this information was repeated by him in February, 1976.

447. The learned Special Public prosecutor argued that this witness had made some uncalled for concessions which the Court can disbelieve, He cited *Bagu V. The State*<sup>24</sup> and *Sikandar Shah v. The State*.<sup>25</sup> In *Sikandar Shah v. The State* it was held that:-

"It is well settled that when such like formal witness make certain concessions in favor of the accused in their cross-examination, their statements cannot be considered to be of any credence, no matter, if they had been produced by the prosecution."

This was approved by their Lordships of the Supreme Court in *Bagu v. The State* and it was observed that "the obliging concessions made by formal witness in cross-examination cannot be considered to be of any value."

448. I agree with the argument of the learned Special Public Prosecutor that the concessions made by P.W. 28 fall under this category. He was produced to prove only his report Exh. P.W. 28/1. By admitting that Mian Muhammad Abbas accused had opposed his promotion he plainly attempted to prove that he had no reason for having any soft corner for him. He thus laid the foundation for his concessions to be taken as true and then agreed with the suggestion of the learned counsel for Mian Muhammad Abbas that Ghulam Hussain was sent for by P.W.2 through him once or twice in the end of July, 1974, and that he remained closeted with him in his room while the red light was glowing on the door.

449. Ghulam Hussain, as stated above, admitted having an interview with P.W. 2 on the 20th July, 1974. Mian Qurban Sadiq Ikram also argued that obviously Ghulam Hussain was sent for through Ashiq Muhamma Lodhi P.W. 28 and remained closeted with P.W. 2 on this very date. But it is clearly established in the evidence of P.W. 31 that it was the date on which he was promoted as Inspector. He stated that other candidates were also interviewed along with him. If the interview was for the purpose of promoting him, it is not conceivable that he would be sent for through P.W. 28. No suggestion was made to Masood Mahmud about the exclusive interview or about the glowing of the red light on the door during the interview nor was Ghulam Hussain cross-examined about having been called for the interview through P.W. 28. It was suggested to him that he was summoned for interview through a letter but he stated that he had appeared in response to a wireless message by Mian Muhammad Abbas. I cannot prefer the evidence of P.W. 28 over the natural statement of P.W. 31.

450. Even otherwise this evidence is not sufficient to impeach the credit of Ghulam Hussain in regard to his evidence about the role played by Mian Muhamad Abbas

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<sup>24</sup> PLD 1972 SC 77

<sup>25</sup> PLD 1965 PEAK. 134

which in its material particulars has been corroborated by the independent witnesses like P.W. 20 and P.W. 24.

451. It is clear from the record that Mian Muhammad Abbas who instigated and goaded Ghulam Hussain to kill Ahmad Raza Kasuri and helped him in obtaining the arms both for the attack in Islamabad as well as in Lahore had no motive of his own to commit the offence. P.W. 31 and the three confessing accused either had no such motive. The evidence establishes that this motive was on the part of the principal accused.

452. The evidence of motive is furnished by the testimony of P.W. 1, P.W. 2 and P.W. 3 and the same is corroborated by the documentary evidence produced by P.W. 1 and P.W. 22.

453. It is established from the evidence that relations between Ahmad Raza Kasuri P.W. 1 and the principal accused though cordial before 1970 became strained from the beginning of 1971 on account of acute difference of views on political matters and the former's opinion about the latter being power hungry and ambitious. In fact Ahmad Raza Kasuri held the view that the ambition of the principal accused was to attain power even if the country was broken and its East Wing was lost to it. In his statement he made a pointed reference to the failure of the principal accused to secure an agreement with Sh. Mujeeb-ur-Rehman on the point of sharing power and the threats given by him that his party would not participate in the National Assembly meeting at Dacca scheduled to be held in March, 1971, that the legs of any person going to Dacca would be broken and that such a person would be going on a single fare. He referred to a demand made by the said accused at Public meeting held at Nishter Park, Karachi for separate transfer of power in each Wing of Pakistan to the majority party of that wing by saying "*Idhar Ham Udhar Turn*".

It is proved by this evidence that Ahmad Raza Kasuri became a strong and virulent critic of the principal accused and offered provocation to him day in and day out. This is corroborated by documentary evidence.

454. Exh. P.W. 1/9, is the official report of the debates, held in the National Assembly on the draft of the Constitution of 1973. It reproduced the speech made on that occasion by Ahmed Raza Kasuri P.W. 1 as a Member of the Opposition. He deplored that the Parliament of half of Pakistan was meeting in the absence of 167 members from East Pakistan. He queried why the Members from East Pakistan were not present and then furnished the answer that they were not present here because the leader of the minority party, had decided to overthrow the majority party. He used such epithets about the principal accused as a leader obsessed with power, a leader who destroyed this country for the sake of power". He said that "it was that leader who on the 14th February, 1971, in Peshawar said that the P.P.P. would not be attending the forthcoming session of the

National Assembly because they would be treated as "double hostages". He continued that "again, the same leader on the 28th of February, 1971, in Lahore said that whosoever would go to Dacca, his 'legs would be broken' and whosoever would be going to Dacca, he would be going on a 'single fare'."

455. He also referred to the speech of 14th March, 1971, made in Karachi in which the principal accused is said to have uttered the formula "*Idhar Ham Udhar Tum*" and thus, demanded separate transfer of power in West Pakistan when he failed to secure an agreement with Sh. Mujeeb-ur-Rehman,, on the point of sharing power, and said:-

"It was not my fault if the majority party leader was not prepared to share power. It was not the fault of the people of Punjab if the majority party leader was not prepared to share power. It was not the fault of the toiling teeming millions of Pakistanis if the majority leader was not prepared to share power, but then why my country suffered, why my country was made to face the humiliation It was done by no other man except one who was obsessed with power, and the history will catch that man, history will bring him to the bar of public opinion and that man will have to answer. He will not go scot-free."

456. He also criticized the concept of equating the stability of the country with a strong centre defined as meaning "self centre". He referred to Machiavelli and how Hitler became a dictator through a "terrorized Parliament" and compared the conditions of the country to the conditions; in Hitler's Germany. He said that witch hunting was going; on in Pakistan similar to the witch hunting which took place after the burning of the German Parliament of which victims were Ch. Zahur Elahi and Maulana Tufail Muhammad who had already been detained. He warned that anybody who wanted to follow Hitler, must read the Rise and the Fall of the Third Reich because the fall was terrible. He referred to the detention of General Agha Muhammad Yahya Khan, who had been declared as a usurper in Asma Jilani's case and said "is it a house arrest or is it a protection to the traitor from the people of Pakistan?" He criticized the elimination of the world "East Pakistan" from the definition of Pakistan this according to him, was an indirect way to try to give recognition to Bangla Desh. Referring to the coining of the phrase "New Pakistan" he said:-

"I don't believe in the term 'New Pakistan'. I only believe in Quaid-e-Azam's Pakistan. For me there is only one Pakistan and that is Quide-Azam's Pakistan. What "New Pakistan"? Because you should be the Quaid-e-Awam of a new Pakistan. This is not good. Don't think that only you are the oracle of the wisdom. Don't think that only you know the politics. There are much brighter people on the other side of the fence also who can understand every gesture of yours, who can give meaning to your every antics. Now it is being said that Himalaya will weep. If the Pakistan Army is purposely to be defeated by the Indian Army, then of course Himalaya will weep."

This speech continued on the 20th February, 1973 as is clear from the official report of the debates of the National Assembly Exh. P.W. 1/8 while dealing with the fundamental rights guaranteeing protection and privacy of home, he stated that –

"...our telephones are being taped. Our talk is being checked. We are being chased by the CID agencies, and in this particular Assembly you will find in the lobbies and in the Cafeteria less visitors, more C.I.D. people. Now is this right of privacy being given to us? There are particular gadgets which are being fixed on our telephones through which, even if the telephone is just lying, they can hear our talks in their cozy intelligence headquarters."

He said that the regime was talking of *Roti, Kapra* and *Makan* and although the country's economy is virtually in shambles and the country is dying of poverty "*Jashans*" were being held in Larkana and Bahawalpur. After citing Lord Action "that power corrupts and absolute power corrupts absolutely" he stated "if a dishonest man becomes a Prime Minister in this country, surely under these powers he can ruin the country and can become virtually the 'civilian dictator'. He hit mercilessly at the provisions in the draft Constitution for Vote of No-Confidence on the Prime Minister by 2/3rd majority and said –

"He wants this particular Article to be inserted in the body of the Constitution for fifteen years in order to continue in office. This is their argument, a very convenient argument, a very excellent argument. This is an argument for their own personal interests. A man invariably cannot go beyond 15 years in power. So this particular argument is not for the stability of the country but for the stability of the man because he can expect to be in power for 15 years If the country's stability is needed, then we must create stable institutions. You cannot give stability to a country by giving protection to the personalities."

At another place he said that the principal accused had become the strongest Dictator in the world and will be so powerful that he will not go out of the House as a living person. He opposed the provision about giving commission in the Armed Forces of Pakistan in the name of the Prime Minister (and not in the name of the Head of the State). He said that this was being done to make it the Army of the Prime Minister. Regarding Chief Election Commissioner he said that he should be appointed on the recommendation of the Chief Justice of Pakistan because in this country there had been the traditions of rigged elections.

457. Exh. P.W. 1/10 contains the speech of Ahmad Raza Kasuri P.W. 1 on the draft bill of the F.S.F. Act. He stated that –

"For instance, if I spell out, one of the charges of duty of this special force is to quell disturbances. Sir, to check the smuggling, to stop the highway robbery. But, Sir, the people of Pakistan feel that the charter of duty which is assigned to them by the special law is to disturb the public meetings to commit the political murders to plant bombs into the places of the political leaders, to fire at their houses, to abduct their children. These are the duties which have been assigned to this force. This force has been established to create terror in the minds of the opponents of the regime. This force has been created to check the process of democracy in Pakistan. This force has been created to dislodge the opponents of the Government."

458. That such speeches and immediate reaction is proved by Exh. P.W. 22/2, an official report of the Assembly dated 26th May, 1973 which contains the privilege Motion moved by P.W. 1 in regard to a telephone call received by him on the 7th March, 1973 from Iftikhar Ahmad Tari, Minister of Works and Communications, Government of the Punjab in which he used threatening language that he would be meeting the same fate as that of late Kh. Mohammad Rafique, if he did not stop criticism either regime and its policies forthwith. The witness recounted in this Privilege Motion, the history of at least 9 earlier attacks made upon him by the P.P.P. workers from 2nd May, 1971 to the 20th December 1972. The document also proves that this Privilege Motion was ruled out of order with the observation by the Speaker that the purpose of the mover (P.W. 1) was served by the Motion being placed on the record.

459. The episode of the 3rd June, 1974 deposed to by Ahmad Raza Kasuri, is corroborated by the official reports of the National Assembly dated the 3rd June, 1974. It proves that on the pointing out of P.W. 1 that nine persons had not signed the Constitution, the principal accused said: —

"You keep quiet I have had enough of you; absolute poison. I will not tolerate your nuisance."

Then followed an exchange of hot words. The principal accused once again said "I had had enough of this man. What does he think of himself?"

460. A Privilege Motion (Exh. P.W. 22/3) was moved by P.W. 1, on the 4th June, 1974, in order to bring forth the reaction of this altercation with the principal accused. He stated in the Motion that he had been receiving threatening calls of dire consequences on this altercation and some *Goondas* had also visited the Government Hostel and tried to find out his whereabouts. This, according to the Privilege Motion, was a gross breach of Privilege of Freedom of Expression of Members of the Elected Bodies.

461. It appears clear from the Official Report of the Debates of National Assembly dated the 4th June, 1974, that this Privilege Motion was to be taken at No. 2 in the

Agenda regarding Privilege Motions. The Speaker, however, announced in the presence and despite the protest of P.W. 1, that it would be taken up later. It was taken last on that date and was ordered to be filed on account of his absence.

462. It is proved by the evidence of P.W. 3 that a file in respect of Ahmad Raza Kasuri was opened by him in the month of December, 1973 under the orders of the principal accused since he had become very bitter and critical and, in fact, virulent against the said accused. Orders were, therefore, issued that he should be kept under strict surveillance. As a result of this directive, his telephone was taped by the Intelligence Bureau and his movements were checked by the Provisional Special Branches.

463. This evidence of P.W. 3 finds corroboration from Exh. P.W. 3/1-A, with which was enclosed a secure report about a telephone talk of P.W. 1 with a lady and the note Exh. W. 3/1-A given by the principal accused on it on the 13th December, 1973. This note reads as follows:—

"This is very interesting but who is the 'lady'. Surely, if we were efficient, we would know by now. What is the use of half-baked information coming to us with the taping of telephone which requires no efforts. It is effort we want....."

Similar are the secure reports about the taping of telephone Exhs. P.W. 3/1-B, P.W. 3/1-C and P.W. 3/1-D. Exh. P.W. 3/1-C bears a remark by the principal accused (Exh. P.W. 3/1-C/I).

"How stupid can you get?"

Similarly, Exh. P.W. 3/1-D bears the signature of the principal accused (Exh. P.W. 3/1-D/1) in token of this having seen it.

464. This evidence, oral as well as documentary, proves the parliamentary but strong attacks by Ahmad Raza Kasuri, P.W. 1 on the principal accused and his reaction as well as the reaction of his followers it appears from the statement of Masood Mahmud that orders had already been passed by the principal accused and communicated by him to Mian Muhammad Abbas through Haq Nawaz Tiwana. After the altercation in the National Assembly on the 3rd of June, 1974, he made Masood Mahmud (P.W. 2) responsible for execution of the order already given to Mian Muhammad Abbas and to direct the latter to produce the dead body of Ahmad Raza Kasuri or his body bandaged all over. The motive to kill Ahmad Raza Kasuri is proved to be on the part of the principal accused.

465. Mian Qurban Sadiq Ikram argued that in order to prove the motive it was necessary for the prosecution to establish by evidence the truthfulness of the allegation leveled by P.W. 1 against the principal accused in his speeches before the National



Assembly as well as in his statement in Court. He particularly referred to the two speeches made in the month of February and March 1971 and one statement given in February of the same year from which Ahmad Raza Kasuri concluded that the principal accused was power-hungry and was after securing power even at the cost of dismemberment of Pakistan.

466. I do not agree with this argument. The proof of the allegations is not relevant to this case. What is relevant is the virulence and poignancy of the criticism of Ahmad Raza Kasuri. If the allegations are incorrect they would give much more provocation to the accused than would accrue to him if they be correct. Even if they were correct, the principal accused would not have liked this chapter of his politics to be revealed to the public at large and to be called a person responsible for the dismemberment of the country. The argument is thus repelled.

467. According to P.W. 2 he protested against this order but the principal accused said that he would have no nonsense from him or from Mian Muhammda Abbas and said to him –

"You don't want Vaqar chasing you again." The witness further continued that he repeated the orders of the principal accused to Mian Muhammad Abbas accused who was the least disturbed and he asked him not to worry about it. The said accused promised that the orders of the Prime Minister would be duly executed because he had already been reminded of this operation by his predecessor more than once.

468. This statement is corroborated by Saeed Ahmad Khan P.W. 3, who stated that in the middle of 1974, in one of his usual interviews with the principal accused, after all subjects had been discussed, he (the accused) abruptly asked him whether he knew Ahmad Raza. He replied that he did not know him personally. On this the principal accused said that he had given some assignment to Masood Mahmud P.W. 2 about Ahmad Raza Kauri and asked him to remind him. On his return to his office he (P.W. 3) passed the message to P.W. 2 on the green telephone in the same words P.W. 2 said in answer "alright". This evidence of P.W. 3 also corroborates the evidence of P.W. 2 that the principal accused kept on reminding and goading him through Saeed Ahmad Khan (P.W. 3) and Bajwa for the execution of the order.

469. The evidence of Masood Mahmud P.W. 2 which is corroborated by independent evidence of P.W. 3 is sufficient proof of the directive of the principal accused to Masood Mahmud P.W. 2 to get executed the order of assassination of Ahmad Raza Kasuri through Mian Muhammad Abbas. It also proves that Masood Mahmud after a mild protest which was followed by threats from the principal accused agreed, to the execution of the order.

470. Mian Quban Sadiq Ikram argued that this evidence falls short of the proof of agreement as envisaged in the definition of "conspiracy" in section 120-A, P.P.C. He argued that the emphasis in this definition is on an agreement, but the same is not proved in this case. He relied upon paragraphs Nos. 58 and 60, Volume 11, of the Halsbury's Laws of England, (Fourth Edition).

471. The relevant portion in para 58 is :—

"The essence of the offence of conspiracy is the fact of combination of agreement, express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however it may be. The "*actus reus*" in a conspiracy is the agreement to execute the illegal conduct, not the execution of it. It is not enough that two or more persons pursue the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It is not, however, necessary that each conspirator should have been in communication with every other."

Paragraph No. 63 says that "*mens rea*" is an essential ingredient of conspiracy.

472. Clearly, therefore, the agreement is a consensus to do that which is illegal. It can be express or implied, or in part express and in part implied and can be proved from facts and circumstances which taken together apparently indicate that they are part of some complete whole. It is an offence which is complete as soon as an agreement is made and it is immaterial whether an agreement was ever carried out.

473. Conspiracy is an offence in which *actus reus* (guilty act) is complete the moment there is an agreement. It is not essential that the agreement should have been reached in one or several sittings or that an express agreement should be proved. The agreement can be implied by subsequent conduct, by acts done, by anything said and/or written by any one of such persons. In *Punjab Singh-Ujagar Singh v. Emperror*<sup>26</sup> it was held that though the essence of the offence of criminal conspiracy is agreement between two or more persons to commit an offence or do any of the acts mentioned in section 120-A in the matters described therein, the findings of criminality in such cases is a matter of inference deduced from the acts of persons done in pursuance of an apparent criminal purpose in common between them. Same is the ratio decided in *Benoyendra Chandra*

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<sup>26</sup> AIR 1933 LAH 977

*pandey v. Emperor*,<sup>27</sup> *Golake Behan Takol and other v. Emperor*<sup>28</sup> and *Keshabdeo Baghat v. Emperor*.<sup>29</sup>

474. It was held in *Amir-ud-Din v. State*<sup>30</sup> that an agreement as referred to in section 120-A, P.P.C. is to be inferred from the facts and circumstances of each case. The offence of conspiracy by its very nature is secretive and surreptitious, and if a rule of evidence is laid down to the effect that an agreement, as referred to in section 120-A, P.P.C. is to be positively proved, the proof of conspiracy would become impossible. It is very seldom that there is direct evidence available with regard to conspiracy. It is a matter of inference from the sequence of circumstances and if an inference from circumstances can legitimately be drawn that privacy between the persons concerned existed to commit an offence or to achieve an object by unlawful means, the offence of conspiracy will be said to have been proved.

475. The principle relied upon by Mian Qurban Sadiq Ikram does not at all help the principal accused or Mian Muhammad Abbas. The protest made by P.W. 2 in regard to the execution of the illegal order is immaterial in the face of the evidence that P.W. 2 communicated the order to Mian Muhammad Abbas. He also indicated his assent to P.W. 3 on his communicating to him the pressing demand of the principal accused for the execution of the offence. There is considerable evidence of subsequent facts which proves that Masood Mahmud was a party to the completion of the agreement to commit the illegal act. The argument is without force.

476. The conspiracy in the present case became complete as soon as Masood Mahmud P.W. 2 agreed to and did convey the unlawful order of the principal accused to Mian Muhammad Abbas. The next significant development of this conspiracy was the order of the principal accused to P.W. 2 to take care of Ahmad Raza Kasuri P.W. 1 on his visit to Quetta P.W. 2 gave directions to M.R. Welch. P.W.4 to get rid of Ahmad Raza Kasuri P.W. 1. This part of the statement of P.W. 2 is not only corroborated by M. R. Welch P.W. 4 in his testimony before the Court but it finds further corroboration from the documentary evidence on the record.

477. On the 14th September 1974, P.W. 4 submitted a secure report Exh. P.W. 2/1 to P.W. 2 by his designation in which he informed him about the arrival of Ahmad Raza Kasuri and others at Quetta by P.I.A. on the 13th September 1974. There is a reference in this report to Air Marshal Asghar Khan of Tehrik-e-Istaqlal and several others and the speeches made by Ahmad Raza Kasuri and retired Air Marshal Asghar Khan, what is important to note in this document is the information which pertained to Ahmad Raza Kasuri only (out of the whole of the party) that he was not residing in the room

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<sup>27</sup> AIR 1936 CAL 73

<sup>28</sup> AIR 1938 CAL 51

<sup>29</sup> AIR 1943 CAL 93

<sup>30</sup> PLD 1967 LAH 1190

reserved for him in Imdad Hotel. This document does not contain such information about any other person.

478. Another report wide office copy P.W. 4/1) bearing No. 9681 was sent by P.W. 4 to P.W. 2 by name on the 18th September 1974, in which the departure of Ahmad Raza Kasuri and one Feroze Islam from Quetta to Lahore on the 18th September 1974, at 11-30 a.m. by P.I.A. was reported. The departure of retired Air Marshal Asghar Khan and some others for Rawalpindi on the 17th September 1974, was also reported. It was stated that throughout his stay at Quetta the Party was protected by at least 20 persons. These persons were exceptionally cautious and the persons wishing to see the visitors were usually searched by the persons detailed for their security. The time of their movements was never disclosed and they spent little or no time in the hotel room reserved for them. It is also stated that a source who had infiltrated into their ranks on a false claim of being a relative of Sattar Khan of Mardan was detected when Sattar Khan himself arrived at Quetta and was removed from the inner circle. A photostat copy of the original report (Exh. P.W. 2/Z) bears an endorsement dated the 21st September, 1974, by P.W. 2 to Mian Muhammad Abbas to discuss and return this document after seeing it.

479. Mian Muhammad Abbas wrote a letter Exh. P.W. 2/2 on 25th September 1974 to M.R. Welch P.W. 4 with reference to the intelligence report dated the 14th September 1974 (Exh. P.W. 2/1) enquiring from him:

"If Ahmad Raza Kasuri did not stay at Imdad Hotel which was reserved for him, where else did he stay during his sojourn at Quetta?"

This query was answered by M. R. Welch P.W. 4 on the 17th November, 1974 by letter Exh. P.W. 2/3 which states that the gentleman in question had reserved a particular room in the Imdad Hotel but seldom stayed in that room during the night. He occupied some other room reserved for members of the Party in the Hotel.

480. The documentary evidence therefore shows that although there was evidence of the stay of several persons belonging to the party of Ahmad Raza Kasuri P.W. 1 in Imdad Hotel, but the report Exh. P.W. 2/1 and the query of Mian Muhammad Abbas accused (Exh. P.W. 2/2) were confined to the dwelling place of Ahmad Raza Kasuri P.W. 1. It is clear in this context that report Exh. P.W. 4/1 about the arrangements of the security of the party of Ahmad Raza Kasuri is a device to submit a report that he was well-protected. This was explained by M. R. Welch P.W. 4 who stated that since he had no intention of committing the heinous murder he had to find a plausible excuse for not executing the order of P.W. 2 and he took refuge in the fact that Ahmad Raza Kasuri was well-protected.

481. The learned counsel for Mian Muhammad Abbas argued that the words "Ahmad Raza Kasuri should be taken care of" used by Welch P.W. 4 in his statement, are not borne out by the evidence of Masood Mahmud. This is not correct because Masood Mahmud used the expression 'to be got rid of or 'to take care of'.

482. Alternatively, the learned counsel argued that the words "to take care of" could not necessarily mean "assassination." It might be a case of looking after the security of Ahmad Raza Kasuri, an MNA, since there were disturbances in Baluchistan in those days and there were bomb-blasts there on the visit of the principal accused.

483. This argument is without force in view of the explanation by Welch P.W. that "get rid of" meant elimination or assassination. This argument cannot also be reconciled with the subsequent perturbed state in which P.W. 2 and Mian Muhammad Abbas accused found themselves on the receipt of intelligence report Exh. P.W. 2/1 and Exh. P.W. 2/Z (which is the same as Exh. P.W. 4/1) and the inquiry made by Mian Muhammad Abbas accused by Exh. P.W. 2/2 about the stay of Ahmad Raza P.W. 1 at a place other than the one reserved for him. In fact, the query Exh. P. 2/2 appears clearly to have been put with the object of making a probe why Welch P.W. 4 could not execute the order at Quetta. It is proof of the collaboration of Mian Muhammad Abbas in the conspiracy.

484. The incident at Islamabad also lends full support to the evidence of conspiracy. This incident was in aid of the execution of the unlawful act for which the conspiracy was hatched. The statement of P.W. 31 about this incident has been corroborated by Fazal Ali P.W. 24 who supplied the weapons used in this incident under orders of and threats by Mian Muhammad Abbas, the site plan of the occurrence Exh. P.W. 23/2, the recovery of five empties from the spot bearing no. 661/71 by Recovery Memo Exh. P.W. 23/3 and the reports of the Ballistic Expert Exh. P.W. 23/4 that the empties were of 7.62 mm. caliber originating from China. P.W. 31 has stated clearly that the rounds fired in the Islamabad incident were a part of the cartridges issued to him on the road certificate Exh. P.W. 24/7. The statement of Fazal Ali and the documents Exh. P.W. 24/1 read with Exh. P.W. 39/2 connects these empties with the rounds supplied by the C.A.D., Havelian to the Armoury at the Headquarters of the Federal Security Force.

485. The learned counsel for Mian Muhammad Abbas urged in his argument that there is no evidence that the Islamabad incident was engineered by the Federal Security Force. This argument is without merit in view of the evidence referred to above.

486. He also argued that in case the shots were fired by Mulazim Hussain from the back window of the jeep, the empties could not have been ejected on the road. This argument ignores the statement of P.W. 31 in cross-examination of Mr. Irshad Ahmad Qureshi, Advocate that an empty is always ejected from a sten-gun in such a way that it is thrown outside towards road and in front of the muzzle. Normally an empty would

fall in the jeep when a sten-gun is fired from a jeep if in the course of being ejected it hits some other object and its progress is thus altered." It is clear from this statement that the possibility of these empties falling inside the jeep could arise only if in the course of being ejected they had hit some other object and their course had thus been altered.

487. It is in the evidence of P.W. 31 that he was reprimanded by Mian Muhammad Abbas accused for his failure in carrying out the mission of assassination of Ahmad Raza Kasuri P.W. 1 despite his being a Commando having jeep and automatic weapons at his disposal and despite the attack having been launched from a distance of 30 yards only in broad day light. Mian Muhammad Abbas told him that the principal accused was very angry and directed him to remain on the job and give no time to Ahmad Raza Kasuri to collect his wits. He also directed him to return the weapons to Fazal Ali. He advised him to obtain arms from the nearest Battalion as and when he was able to locate P.W. 1 under orders of Mian Muhammad Abbas, he sent Zaheer and Liaquat to go to Lahore in search of Ahmad Raza Kasuri. He was himself sent for by Mian Muhammad Abbas a day before Eid in October 1974 and admonished that he was staying at Rawalpindi while his men (Zaheer and Liaquat) were enjoying holidays. He also warned him that the principal accused was abusing him.

Under the directions of Mian Muhammad Abbas, P.W. 31 left immediately for Lahore where he stayed for ten days and thereafter returned to Rawalpindi after finding out the whereabouts of Ahmad Raza Kasuri.

488. The evidence of P.W. 31 regarding the return of the weapons issued to him for the Islamabad incident under orders of Mian Muhammad Abbas accused is corroborated by P.W. 24. Similarly his visit to Lahore is supported by the entries of departure for Lahore on the 16th of October 1974, and his arrival at Rawalpindi on the 26th of October 1974. Exh. P.2. 31/1 and Exh. P.W. 31/2 respectively. It is clear from these documents that he had come to Lahore on a special duty.

489. The evidence of P.W. 31 about the Lahore occurrence is supported in material particulars, (i) about the supply of arms under the orders of Mian Muhammad Abbas by Amir Badshah Khan, P.W. 20, (ii) about his being checked while going in a jeep without number-plate by Sardar Muhammad Abdul Wakil Khan, P.W. 14, (iii) about reconnaissance of the wedding place in Shadman Colony to find out the car of Ahmad Raza P.W. 1 by P.W. 19, (iv) about his departure on the 12th November 1974 for Rawalpindi by Manzoor Hussain P.W. 21 and (v) about his absence from Rawalpindi from the 31st October 1974 onwards, by Exh. P.W. 31/6. The story about attack on the car of Ahmad Raza Kasuri on the night between 10th and 11th of November 1974, about automatic weapons belonging to the Federal Security Force is corroborated by the site plan Exh. P.W. 34/2 the recovery of empties bearing the same number as the empties of the Islamabad incident i.e. 661/71, by P.W. 34, the finding implied in the evidence of

Nadir Hussain Abidi P.W. 36 about their caliber being 7.62 mm and the evidence of P.W. 14 and P.W. 3 about the knowledge that the weapons of this caliber were in the use of the Federal Security Force.

490. The substitution of the crime empties so recovered by empties P.8 to P. 31 is proved conclusively by the evidence of Abdul Hayee Niazi P.W. 34, Abdul Ikram P.W. 18, Muhammad Bashir P.W. 16 and Fazal Ali P.W. 24, 22 of these empties which have now been proved bear No. 661/71 and 2 bear No. 31/71. It is established by Exh. P.W. 24/1 read with Exh. P.W. 39/2 and the document Exh. P.W. 24/3 read with Exh. P.W. 38/1 and Exh. P.W. 38/3, that these empties also emanate from the stock of the Armoury at the Headquarters of the Federal Security Force and are part of the ammunition supplied by the C.A.D. Havelian to this Armoury.

491. The prosecution has led considerable evidence to prove the subsequent conduct of the principal accused and his Officers in the uncalled for and illegal tampering with the evidence and investigation of the case. The fact that the empties were not sealed initially, were not kept in the Malkhana of the police station and were allowed to be substituted is proved beyond any shadow of doubt by the evidence of P.W. 34, P.W. 36, P.W. 14, P.W. 16, P.W. 18 and P.W. 24. This story proves the tampering of evidence by Abdul Hamid Bajwa and Mian Muhammad Abbas.

492. It is in the evidence of Asghar Khan P.W. 12 that Abdul Hamid Bajwa was at Lahore on the 11th November 1974 and he participated the meeting held that day at the residence of the Inspector-General of Police. He also held meetings later with P.W.s. 12 and 14. The presence of Abdul Hamid Bajwa at Lahore is corroborated by his T.A. Bill, Exh. P.W. 1 which proves that he remained at Lahore from 8th November 1974 to 13th November 1974, and during this period he made only a few hours\* visit to Samundari on the 12th November 1974. He was again in Lahore from the 16th November 1974 to 20th November 1974. In fact his T.A. Bills exh. P.W. 3/5, Exh. P.W. 3/6, Exh. P.W. 3/7, Exh. P.W. 3/8 Exh. p.w. 3/9 and Exh. P.W. 3/10 prove his frequent visits to Lahore during the months of November and December 1974 and January and February 1975. This is corroborative of his unusual and illegal interest in the investigation of this case.

493. I have already referred to the evidence that P.W. 34 did not seal, the empties recovered from the spot on a specific direction by Abdul Ahad D.S.P. Abdul Ahad had given this direction on the ground that the name of the Prime Minister had been mentioned in under F.I.R. There is documentary evidence of direct liaison between Abdul Ahad and Abdul Hamid Bajwa. Exh. P.W. 3/20A is a note of Abdul Ahad dated 22nd November 1974, with which was enclosed the copy of the F.I.R. It bears the comments Exh. P.W. 3/2-A/1 of Abdul Hamid Bajwa which means that the note of Abdul Ahad was meant for him. Abdul Hamid Bajwa in his comments referred to the desire of the Chief Security Officer of the Prime Minister (P.W. 3) to see the F.L.R. After

referring to the time of occurrence (12-30 a.m.) and the time of the registration of the case on the statement of Ahmad Raza Kasuri (after 3-00 a.m.), he wrote: —

"What prevented them to register case immediately it was known that attempt to murder was made. This statement would have formed part of the cases diary in that case and not in the F.I.R."

This note is followed by the Exh. P.W. 3/2-B written by Saeed Ahmad Khan on the 24th November 1974, and sent to the Secretary to the Prime Minister. The note records that the F.I.R. had been sealed yet a good deal of publicity had been given to it. He concluded by saying that such an incident involving firing in the heart of the town, not far away from the police station could have been detected immediately, by the Police and the case registered *suo motu* by it. This note bears an endorsement of the principal accused (Exh. P.W. 3/2- B/1):—

"I agree with you."

493-A. These two documents prove that Abdul Hamid Bajwa was perturbed over the registration of the case on a first information report given by Ahmad Raza Kasuri since it named the principal accused. He suggested in his note that this could have been obviated by registration of the case by the police *suo motu* and by making the statement of Ahmad Raza Kasuri P.W. 1 as a part of the case diary. The same suggestion was given by Abdul Hamid Bajwa to P.W. 12 and P.W. 14 also. These documents further show that the principal accused as well as P.W. 3 agreed to this suggestion.

494. It is in evidence of P.W. 3 that the principal accused took serious exception to his remaining at Rawalpindi when his name was being taken before a judicial inquiry being held at Lahore by my learned brother Shafi-ur-Rehman, J. in the murder case of Muhammad Ahmad Khan and he directed him to proceed to Lahore immediately and meet the Advocate General, the Chief Secretary, the I.G. of Police and the Investigating Officers and look into the case. P.W. 3 arrived in Lahore and had a meeting with the above mentioned officers. He found that nothing worthwhile had been done in the investigation of the case. He also came to know about the caliber of the bullets used for the offence which indicated the use of Chinese weapons which were in the official use of the Federal Security Force. He however, noticed the helplessness of the local police who were deliberately avoiding to make the investigation on this line.

495. It was decided in the meeting that Malik Muhammad Waris of the CIA who had been entrusted with the investigation, should go to Rawalpindi and seek further instructions from him. Malik Muhammad Waris P.W. 15 and Abdul Ahad, therefore, saw him at Rawalpindi on the 14th January 1975. The principal accused had already laid down the guiding principles for the investigation and had directed him to find out from the Joint Army Detection Organization about the availability of such arms in the



country and also to write to the Defence Secretary to find out which Army units were using the Chinese weapons officially. He had also directed him to make inquiries from Bara, regarding availability of these arms. These directions were given because the principal accused was keeping the F.S.F. out of the investigation. The principal accused had further talked to him about the family disputes of Ahmad Raza Kasuri, P.W. 1 the local political rivalries and previous litigation in the family and directed him to help the investigating officers in collecting all the evidence on the lines and to see that this material was produced before the Tribunal.

496. P.W. 3 stated that on the visit of Malik Muhammad Waris P.W. 15 and Sh. Abdul Ahad to him on the 14th January 1975, he rang up the Officer-in-charge of J.A.D.O. and informed him that he was sending Malik Muhammad Waris to him in order to find out whether the Chinese weapons in question were available elsewhere. He asked him to give his report in writing. It was in these circumstances that the report Exh. P. W. 3/3-B was brought to him.

497. He directed Malik Muhammad Waris P.W. 15 to find out if such weapons were available at Bara, and further directed him to collect material regarding the family disputes, political rivalries with Ahmad Raza Kasuri and his family.

498. This evidence is corroborated not only by Malik Muhammad Waris P.W. 15 but also, though partly, by the report of the J.A.D.O (Exh. P. W. 3/3-B) which refers to the visit by the Investigating Officer to the Director General in connection with this case and states that such arms and ammunition were available in Darrah Adam Khel as well as from the underground elements in the settled Districts. Exh. P.W. 3/3-4 a letter dated 17th January 1975, written by P.W. 3 to the Defence Secretary, proves that the report of J.A.D.O Exh. P.W. 3/3-B was already with him (P.W. 3) because he sent a copy of this report to the Defence Secretary. In this letter P.W. 3 requested the Defence Secretary to clarify which Army Units used the weapons of this calibre. The Defence Secretary answered by letter Exh. P.W. 3/30C that the Chinese arms of the caliber which were issued to Army Units in West Pakistan had almost been withdrawn from all units and were being held only by the Federal Security Force, Frontier Corps Units and the Armoured Corps Tank Crews.

499. P.W. 3 further stated that on receiving the above report of the Defence Secretary, he was perplexed because it was mentioned that the Chinese arms were in the use of the Federal Security Force while he had been given positive instructions by the principal accused to keep the Federal Security Force out. He, therefore, had no other alternative but to go back to the principal accused. In his meeting with him he showed the said letter of the Defence Secretary and enquired as to whether it should be produced before the Tribunal. On this, the principal accused got infuriated and asked him whether he had been sent to safeguard his interest or to incriminate him. He also said that this letter would not be produced before the Tribunal.

500. This portion of the statement has been corroborated by the fact that the original D.O. letter Exh. P.W. 3/3-C has remained throughout in the file Exh. P.W. 3/3 and has been proved on this record from that file.

501. According to the evidence of P.W. 3, the Investigating Officer, Malik Muhammad Waris, carried on the investigation in accordance with the directions given to him and collected some material regarding the family disputes, political rivalries etc. of Ahmad Raza Kasuri and his family. Malik Muhammad Waris as P.W. 15 supported him in this respect.

502. Although this exercise in finding for local disputes and political rivalries was to change the venue of investigation in order to exonerate the real culprits, yet it is important to note that despite concentrating all his efforts in conducting the investigation on the lines directed by Saeed Ahmad Khan, P.W. 3, Malik Muhammad Waris completely failed to make any headway. The investigation about the alleged disputes with the local persons and about the distribution of family property led to no worthwhile results. He found that the disputes of Ahmad Raza Kasuri with Yaqoob Maan's party had already come to close.

503. The learned counsel for Mian Muhammad Abbas accused argued vehemently that the evidence of Ahmad Raza Kasuri P.W. 1 itself reveals that he was attacked by Yaqoob Maan's and Toor's Party several times. This evidence, therefore, is compatible with the possibility of P.W. 1 having been attacked by the same party.

504. This argument is without force for the simple reason that if such was the case there was no reason why P.W. 15 might not have brought those culprits to book in order to free the principal accused from the blame of this attack. It is, therefore, proved beyond any shadow of doubt that the guidelines given by the principle accused to Saeed Ahmad Khan and communicated by him to P.W. 15 were not correct and were not given for the purpose of helping the discovery of the actual culprits. The purpose of these guidelines and direction was only to lead the Investigation officer astray.

505. This conclusion is supported by the helplessness pleaded by P.W. 15 as well as P.W. 12 in carrying on investigation according to their own views. P.W. 12 stated in answer to a cross-examination question by Mr. D. M. Awan that investigation of blind murder cases is always started on the basis of motive but the present case could not be investigated on those lines despite the fact that the motive in the F.I.R. was clearly mentioned by P.W. 1 since he or his subordinates were not in a position to interrogate the Prime Minister (the principal accused). He also made a statement about the pressure brought upon him in connection with the investigation of the case by Saeed Ahmad Khan, P.W. 3, Abdul Hamid Bajwa and Rao Abdul Rashid. He stated that even Mr. D. M. Awan, learned counsel for the defence joined these persons in this connection. Malik

Muhammad Waris complained that he was not allowed to conduct the investigation freely and he did not join any employee of the Federal Security Force in the investigation of this case.

506. I am in complete agreement with the statement of Asghar Khan P.W. 12 that to start with, the Investigating Officer should have had access to the principal accused in order to interrogate him since his name was recorded in the F.I.R. In view of the evidence about the use of Chinese weapons of 7.62 mm. caliber which were in the use of the Federal Security Force, the Investigating Officer ought to have taken his investigation into the ranks of that force but the efforts of the principal accused and his Officers namely, Abdul Hamid Bajwa and Saeed Ahmad Khan, P.W. 3, were to keep the Federal Security Force as well as the principal accused out of the reach of the Investigating Officer. This nominal investigation ultimately ended in a report Exh. P.W. 35/4, a memo dated 27th September, 1975, by the Inspector- General of Police to the Home Secretary recommending the filing of this case as untraced.

507. Exhibit P.W. 3/3-D is a note by Saeed Ahmad Khan, to the Director General of Information and Broadcasting Division, proposing that publicity might be given to the statements of S.S.P., Lahore (P.W. 3) and Malik Muhammad Waris, D.S.P. (P.W. 15) made by them before the Inquiry Tribunal on the 29th January, 1975, in the inquiry into the murder case of Nawab Muhammad Ahmad Khan. The portions to be given publicity were side-lined. It is proved from the signature of the principal accused Exh. P.W. 3/3-E on this note that he approved the suggestion. The statements were given publicity in the newspapers on the 30th January 1975 (vide Exh. P.W. 3/3-F which is initialed by P.W. 3 at Exh. P.W. 3/3-G and by Abdul Hamid Bajwa at Exh. P.W. 3/3-H). Despite the publicity given to a portion of the inquiry proceedings, the principal accused did not agree to the publication of the inquiry report of the Tribunal.

508. This inquiry report was sent by the Tribunal by covering letter Exh. P.W. 35/1 dated the 26th February 1975 on which there is an endorsement (Exh. P.W. 35/1-A) by the Chief Secretary Punjab that: — e

"Secretary, to the C.M. may kindly see and bring the matter to C.M.'s notice."

The Chief Secretary wrote a separate note Exh. P.W. 35/2 in the noting part of the file that he had discussed the report with Saeed Ahmad Khan P.W. 3 and the latter had suggested that the report may be sent for information to the Prime Minister (the principal accused) and a copy may be sent to him. He also suggested that a copy may be sent to Inspector-General of Police for taking necessary action, for obtaining explanation from the Investigating Officers against whom aspersions had been made and for implementing the directions of the Tribunal. Lastly it was suggested by him that: —

"C.M. may kindly consider asking for P.M.'s advice whether the document is to be made public."

Then follows the note of Shahid Hameed, Secretary to the Chief Minister Punjab (Exh. P.W. 35/2-A) dated the 7th March, 1975, that the Chief Minister had seen the above note and had written a letter to the Prime Minister. He had also desired that another copy may be sent to Saeed Ahmad Khan P.W. 3 and yet another copy to the Inspector-General of the Police. The Chief Minister had sought advice whether or not the report of the Tribunal should be made public.

509. According to the statement of P.W. 3, he put up a note Exh. P.W. 3/3-1 to the effect that the Tribunal had criticized the lapses in the investigation at the initial stages but seemed to have been satisfied with the investigation carried on later by the D.S.P., C.I.A. Lahore. He recommended publication of the relevant portion of the report. The document fully supports his statement. The principal accused made a note (Exh. P.W. 3/30J) on this document that he would decide after seeing the report. This matter was, therefore kept pending. Later he received letter Exh. P.W. 3/3-K, dated the 8th March, 1975, from the Chief Secretary, Punjab, with which was enclosed a copy of the Tribunal's report "as desired by the Chief Minister". This letter also referred to the discussion with P.W. 3 on this case on his last visit to Lahore. P.W. 3 wrote a note Exh. P.W. 3/3-L, on the body of this letter on the 14th March, 1975, directing for preparation of a draft which could be recommended for publication. P.W. 3 stated that on receipt of the D.O. letter from Mr. Muhammad Haneef Ramay, Chief Minister (copy of which has been proved as Exh. P.W. 35/3), the principal accused marked it to him (P.W. 3) with the remarks : —

"What was the point of discussing it with you? Please discuss."

He met the Prime Minister who told him that the report should not be publicized as it was adverse and that he should have nothing to do with the case anymore. Since the original D.O. letter of Mr. Muhammad Haneef Ramay to the principal accused is not available, the prosecution proved the latter's aforesaid remarks by an entry made in the challan form Exh. P.W. 27/2. In order to prove that these remarks were communicated to and received by P.W. 3 the Peon Book Exh. P.W. 3/4 containing entry of dispatch of the letter containing the remarks (Exh. P.W. 3/4-A has been proved).

510. These documents further corroborate the evidence about the undue interference in the investigation of the case and the interest of the principal accused in publicizing what he considered to be in his interest and to withhold the publication of what he considered to be against him. It throws lurid light on the interest of the principal accused in misdirecting the investigation as well as in directing the publicity pertaining to the case.

511. Reports Exhs. P.W. 3/2-K, P.W. 3/2-L, P.W. 3/2-N, P.W. 3/2-N, P.W. 3/2-O, P.W. 3/2-Q are the intelligence reports of Abdul Hameed Bajwa while Exh. P.W. 3/2-M is an intelligence report of Saeed Ahmad Khan which proves the surveillance by Abdul Hamid Bajwa as well as P.W. 3 on the activities of Ahmad Raza Kasuri which were continued even after the death of his father.

512. Exh. P.W. 3/2-K dated the 28th November, 1975, states that Ahmad Raza Kasuri was trying to win sympathies of the police by saying that the Government had made no arrangements for providing them the food while on duty. It further states that Ahmad Raza Kasuri claimed that four persons had been deputed to kill him, that they had fired with automatic weapons while hiding near Shadman Round-about, that his friends had collected some empties from the spot, and that a message was passed from Lahore to Rawalpindi after "the mission was complete." The report also refers to the condolence by Lt. General Niazi and the opinion of Senior Army Officers that the assailants were armed with heavy caliber automatic weapons not available with private persons. It further states that Ahmad Raza Kasuri who had 40 relatives in the Army would not sit idle till they traced out and dealt with the culprits. It further refers to the threat by Lt. General Niazi that the murder would be avenged. It concludes by the remarks that Ahmad Raza Kasur was harsh to Muhammad Haneef Ramay for the latter's statement that the murder was due to his enmity in Kasuri and party faction in Tehrik-e-Istaqlal.

513. On the 29th November, 1974, Ahmad Raza Kasuri P.W. 1 filed a Privilege Motion Exh. P.W. 1/17 in which he made reference to numerous attacks on him by the PPP workers, the threat by the principal accused in the Assembly on the 3rd June, 1974, the attack on him on the 24th August 1974 to eliminate an "absolute poison", the incident at Lahore resulting in the death of his old father and that no investigation had been made in the case despite the recovery of bullet empties. He made a demand that the principal accused should resign and submit himself to the process of law since he had been mentioned in the FIR.

514. Another Privilege Motion Exh. P.W. 22/6 was tabled a day earlier on the 28th November, 1974, by another member of the National Assembly namely, Ch. Zahoor Elahi.

515. Both the Privilege Motions were considered together on the 2nd December, 1974, vide proceedings of the National Assembly of that day Exh. P. W. 22/7, and were ruled out of order by the Speaker on the 3rd December, 1974. This ruling is printed on pages 135 to 137 of the Official Reports of the Debates of the National Assembly of Pakistan Exh. P.W. 22/8.

516. Saeed Ahmad Khan, P.W. 3 attached a copy of the Privilege Motion Exh. P.W. 1/7 to his note Exh. P.W. 3/2-M which bears the signature of the principal accused in token of his having seen it. It appears from the note that the privilege Motion was not

brought on the record of the proceedings of the National Assembly. P.W. 3 commented in the note that the privilege motion contained a pack of lies and remarked that its copies had been distributed by Ahmad Raza Kasuri and his hence men to foreign Embassies and to Foreign Journalists including Chinese new Agency. It concludes with the report that Ahma Raza Kasuri was in a desperate state and had been heard saying that he will take revenge of the murder of his father personally.

517. It appears from the ruling of the Speaker on the Privilege Motion of Ahmad Raza Kasuri and Ch. Zahur Elahi Exh. P.W. 1/7 and Exh. P.W. 22/6 that the Speaker had expunged certain remarks of Ahmad Raza Kasuri from the record. In his report Exh. P.W. 3/2-N dated the 8th December, 1974, which bears the signature of the principal accused, Abdul Hamid Bajwa reproduced a talk between Ahmad Raza Kasuri and a friend in which Ahmad Raza Kasuri had stated that: –

"He had said at the Floor of the House that Mr. Bhutto is the murderer of his father and he should be brought before the Court of law", but "it was expunged by that bloody dishonest man – Speaker.

He also complained that the statement of Ch. Zahoor Elahi and Mian Mahmood Ali Kasuri who had spoken on this issue were not published in the newspapers.

518. The report Exh. P.W. 3/2-L submitted on the 29th November, 1975, the date on which the Privilege Motion Exh. P.W. 1/7 was moved is a revealing document. It states that Ahmad Raza Kasuri had employed some persons from NWFP as his personal gunmen and as guards at his residence and he would request for the favor of police guard if asked by the Speaker or some other Cabinet Minister fbr any help. He would also request that Army intelligence should investigate into the murder case of his father and he might project this demnad through Party or some MNA in the National Assembly. The report continues that the father of Ahmad Raza Kasuri was a holder of fire-arms license for a gun and for a prohibited bore revolver. Ahmad Raza Kasuri was thinking of depositing these weapons with the Speaker and requesting him to help him in getting a license for himself so that he could retain those weapons as souvenir. The report concludes with the following sentence: –

"He is being conveyed through a contact that such arms have to be deposited with Police or Arms Dealers, under the orders of the District Magistrate."

519. It is clear from this document that special emphasis was laid in the report on the ways in which Ahmad Raza Kasuri had taken steps for his security by keeping personal gunmen as well as guards at his residence, and by requesting the Speaker to help him in securing the license for the arms left by his deceased father, but Abdul Hamid Bajwa had engaged the services of some 'contact' to advise Ahmad Raza Kasuri to deposit these arms with the police or Arms Dealers.

520. Exh. P.W. 3/2-Q is the report dated the 9th December, 1974 by Abdul Hamid Bajwa (and signed by the principal accused), conveying the satisfaction of Ahmad Raza Kasuri on the appointment of the Tribunal to inquire into this case. It is a reproduction of the talk between him and his brother Sher Ali regarding a scheme for violating section 144, Cr. P.C. by collecting 300 to 400 guns for confrontation with F.S.F. and the Police. The report makes a particular reference to an advice of Sher Ali to Ahmad Raza Kasuri P.W. 1 to get license for a carbine from Mr. Qayyum and the promise made by Ahmad Raza Kasuri to abide by this.

521. There is the evidence of Ashiq Muhammad Lodhi, P.W. 28 about report Exh. P.W. 28/1 which he submitted to Abdul Hamid Bajwa with covering letter Exh. P.W. 3/2-T dated 10-1-75 conveying to him on his demand, the description of the gunman of Ahmad Raza Kasuri who accompanied him to the National Assembly.

522. These documents particularly Exh. P.W. 3/2-L, Exh. P.W. 3/2-Q and secure report Exh. P.W. 28/1 prove that Abdul Hamid Bajwa continued, with the consent of the principal accused, his witch-hunting against Ahmad Raza Kasuri even after the Lahore occurrence and left no stone unturned to drive a wedge in the security measures taken by the latter to effect a break through obviously in order to facilitate the completion of the performance of the conspiracy. There could be no other object of collecting information about the security measures taken by Ahmad Raza Kasuri and about the description of his gunman. Similarly there could be no other motivation for gathering information about his intention to obtain arms license or for dissuading him through a contact for keeping the weapons of his father.

522-A Mr. Qurban Sadiq Ikram urged that such reports are usually collected by the Intelligence about persons perusing a political career. But he could not give any motive for collecting reports about measures of security adopted by Ahmad Raza Kasuri and the description of his gunman or for infiltrating contacts to dissuade him from keeping the arms of his father. The argument is not sound.

523. It appears from the evidence that after experiencing frustration upon frustration in the performance of the conspiracy efforts started for bringing Ahmad Raza Kasuri to the fold of the People's Party. P.W. 3 gave the background of how he was made to rejoin the PPP. He stated that somewhere in the middle of 1975 when there was rift growing between Ahmad Raza Kasuri and Retired Air Marshal Asghar Khan, he was instructed by the principal accused to win over Ahmad Raza Kasuri and bring him back to the Pakistan People's Party's fold. He told him that he did not know Ahmad Raza Kasuri but he would ask Abdul Hamid Bajwa to initiate the matter. The principal accused, however, told him that Abdul Hamid Bajwa had already been instructed in this matter.

524. P.W. 3 had meetings with Ahmad Raza Kasuri. In the first meeting he advised him to consider rejoining the People's Party as he claimed to be a founder member. On this Ahmad Raza Kasuri blurted out how could he rejoin the Party of which the Chairman was the principal accused who was responsible for the murder of his father and was after his life. The witness prevailed upon him by resort to threat as well as persuasion that being a marked man it was in his own interest to rejoin the party. Ahmad Raza Kasuri took time to think over and ultimately consented to the course proposed to him.

535. Exh. P.W. 3/2-C is report by Abdul Hamid Bajwa bearing the signature of the principal accused about Ahmad Raza Kasuri's intention to establish a forward block in Tehrik-e-Istaqlal. It shows he was thinking of forming an independent political party at that time.

536. Exh. P.W. 3/2-D dated the 4th June, 1975, is a report by Saeed Ahmad Khan about the criticism by Ahmad Raza Kasuri of Air Marshal Asghar Khan. It states that arrangements were in hand to widen the gulf between Air Marshal Asghar Khan and Ahmad Raza Kasuri through other sources also.

537. Exh. P.W. 3/2-E is another report of Saeed Ahmad Khan P.W.3 about his meetings with Ahmad Raza Kasuri, about his views that he claimed to be a founder member and about his request for audience with the Prime Minister (accused) at his convenience.

538. Exh. P.W. 3/2-F, Exh. p.W. 3/2-H, Exh. P.W. 3/2-1 and Exh. P.W. 3/2-J are reports which prove the process how by holding various meetings with Ahmad Raza Kasuri, Saeed Ahmad Khan P.W. 3 and Abdul Hamid Bajwa chiselled "his rough edges" and sobered him.

539. The statement of P.W. 3 about how and in what circumstances Ahmad Raza Kasuri was made to rejoin the People's Party is corroborated by the documents which show inter alia that the officers of the Prime Minister's staff attempted to widen the gulf between Ahmad Raza Kasuri and Air Marshal Asghar Khan and they held a number of meetings with him to achieve the object of bringing him back to the party. The evidence of P.W. 3 read along with these documents would show that when Ahmad Raza Kasuri was compelled to feel that all avenues of help, the police and the Assembly combined, had been foreclosed to him and he was in constant danger to his life, attempts were initiated for making him to rejoin the Pakistan People's Party "in his own interests" and these efforts ultimately succeeded. The evidence is fully supported by the statement of Ahmad Raza Kasuri himself. The defence is not benefited by P.W. 1 rejoining Pakistan People's Party.



540. The conspiracy to murder Ahmad Raza Kasuri is thus further proved not only by what transpired at Quetta as well as the incidents at Islamabad and Lahore but also by the subsequent conduct of the principal accused, P.W. 3 and Abdul Hamid Bajwa in misdirecting the investigation thus rendering it impossible for the actual culprits to be detected, in continuing the witch-hunting against Ahmad Raza Kasuri by taking special precautions and steps that he should be kept unarmed and unprotected and ultimately after being frustrated in achieving the object of conspiracy, in prevailing upon him to let bygones be bygones, condone what had happened and join the Pakistan People's Party.

541. The learned counsel for Mian Muhammad Abbas criticized the evidence of Masood Mahmud and Saeed Ahmad Khan only on the ground that they had made some improvements in their earlier statements. He pointed out certain omissions are more or less omissions of details or omissions of matters which have been brought on record by the Public Prosecutor by putting specific questions. There are no inconsistencies or contradictions between their earlier statements and the statements before the Court.

542. It is clear from the record that neither Masood Mahmud P.W. 2 nor Saeed Ahmad Khan P.W. 3 have any motive to involve any of the accused falsely. Masood Mahmud could not have any motive since his father and the deceased were great friends. Moreover it is the principal accused's own case as brought out by suggestions in cross-examination that he had been given a post of utmost importance and was given concessions which are not afforded to other Government servants similarly placed. He was allowed to stay in Delux Hotels during his tours, he was sent to visit foreign countries and enjoyed such visits by staying in costly hostels. His wife was also allowed to visit foreign countries at Government expense and Government bore considerable expenses on his medical treatment outside the country even on his purchase of spectacles fitted with a hearing aid. These questions were put to him when he dubbed the principal accused and Waqar Ahmad, Establishment Secretary as his enemies in the sense that he was used for illegal purposes. The reason suggested to P.W. 2 by the learned counsel for the principal accused and to P.W. 3 by both the counsel was that false statements were made by them on being pressurized from the Martial Law Authorities. But they denied this, it is, therefore, established that they have no motive of their own to involve the principal accused falsely. There is similarly no personal motive on the part of Mian Muhammad Abbas and the confessing accused to commit the offence.

543. The suggestion about the pressure from Martial Law Authorities has been put to most of the witness but I am convinced that no such pressure was brought. On the other hand most of the witnesses have been corroborated in what they stated, by documentary evidence and sometimes by oral evidence.

544. The learned counsel for Mian Muhammad Abbas argued that the relations between Masood Mahmud and Mian Muhammad Abbas have been strained. Nothing is farther from the truth. There is no evidence about this except bare suggestions in cross-examination. The said accused summoned three witnesses to prove this, but ultimately gave them up.

545. It is on the other hand clear from the documentary, evidence that during the years 1974, 1975 and 1976 Masood Mahmud had been giving extremely good Confidential Annual Reports in favor of Mian Muhammad Abbas (Exh. D.W. 4/1, Exh. D.W. 4/2 and Exh. D.W. 4/3). Mian Muhammad Abbas was only an Acting Director when Masood Mahmud took over, but it was on his recommendation that he was promoted to the post of Director in Grade 19 (Exh. D.W. 4/6). He was also awarded honorarium amounting to Rs. 700 for the performance of work of special merit vide D.W. 4/9, which proves that he was held in great esteem by P.W. 2, P.W. 2 also went to see him in the hospital when he was ill. All these documents prove that the relations between Mian Muhammad Abbas and the P.W. 2 had throughout been cordial.

546. It was urged that Mian Muhammad Abbas had twice tendered his resignation, but the same was not accepted by P.W. 2 this is denied by the P.W. 2. It is strange to note that these resignations Exh. P.W. 2/12-D and P.W. 2/13-d have been produced by the accused from his own custody. They bear no indication that they were ever submitted to the Director-General or any Officer in his office. No reliance can therefore, be placed upon these documents. Even if it is conceded that these resignations were not accepted by Masood Mahmud, it will only prove that Masood Mahmud did not want to lose the service of Mian Muhammad Abbas, accused for whom he had the highest regard.

547. The learned counsel ultimately referred to a statement of Mian Muhammad Abbas accused (Ex. D.W. 1/1) made by him on the 21st of July, 1977 before some inquiry Committee appointed by the Martial Law Authorities. In this statement the said accused has only thrown light on the misdeeds of the Federal Security Force and has corroborated the statement of P.W. 1 and P.W. 2 about the manner in which this force was used by the principal accused. It, however, proves that P.W. 2 had always been taking Mian Muhammad Abbas in confidence. Though the statement is mostly self-exculpatory and incriminating against P.W. 2 but it does not prove that the relations between the two were in any manner strained. It rather proves otherwise.

548. It was suggested that it was on account of this statement that Masood Mahmud has involved Mian Muhammad Abbas. There is no justification for these arguments since there is no proof that this statement had ever been brought to the knowledge of P.W. 2.

549. A suggestion was put to Welch P.W. 4 that in an inquiry against Mustafa Jan, Deputy Director, Mian Muhammad Abbas had made a report attributing lack of control

to him (P.W. 4). This apparently surprised the witness and he stated that it was the first time he was hearing about such a report. P.W. 4 is an independent witness. There is nothing on the record to show that what he was stating was not truthful.

550. Some exception was taken during cross-examination to his statement that the photo-stat copy of Ex. P.W. 2Z was given to him by Mian Muhammad Abbas. It was suggested that this copy was given to him by Nazir Ahmad, Deputy Director and not Man Muhammad Abbas. This was denied. The suggestion proves Ex. P.W. 2/Z to be a genuine document since it was not denied that this copy was given by the F.S.F., Rawalpindi.

551. Mian Qurban Sadiq Ikram criticized that material witnesses were withheld thus causing prejudice to the offence. These are Muhammad Yousaf, H.C., Col. Wazir Muhammad Khan of C.A. D. Havelian, and the recovery witness in the Lahore incident. Muhammad Yousaf, Head Constable, Walton, Lahore had given the weapons and ammunition to Ghulam Mustufa accused under orders of Amir Badshah Khan, P.W.20. It was urged during arguments that the intervention of Mian Muhammad Abbas for ensuring the supply of weapons to Ghulam Hussain at Lahore was unnecessary since the latter had obtained weapons directly from Muhammad Yousaf on the 25th of October, 1974 and 7th of November, 1974. Reference was made to the Roznamcha of Muhammad Yousaf But. Neither the Roznamcha nor its relevant entries were proved.

552. This argument firstly falsifies the plea of Mian Muhammad Abbas that Ghulam Hussain was not in Lahore between 31st of November, 1974 to the 12th of November, 1974. Secondly it is not understandable why the said accused did not produced Muhammad Yousaf as a defence witness to prove the Roznamcha entries when he had summoned Abdul Khaliq, D.W. 3 for proving Ex. D.W. 3/1, recovery memo of that Roznamcha.

553. An application was submitted by the prosecution to summon Col. Wazir Ahmad Khan, Colonel In-charge of C.A. Havelian, but it was disallowed by the Court as no case was made out for permission to examine him. No protest was made at that time by any of the counsel for the defence.

This argument is, therefore, absolutely without merit.

554. The learned counsel urged that if Col. Wazir Ahmad Khan had been produced it could have been proved in cross-examination that C.A. D. Havelian did not supply the entire lot bearing No. 66171 of 7.62 calibre ammunition SMG, LMG to the Federal Security Force Headquarters. Thus a case could be made that no adverse inference should be drawn from the row-very of the empties engraved with this number in the two incidents at Islamabad and at Lahore. This is no ground for permitting the

prosecution to produce the witness since Mian Muhammad Abbas could have produced him in his defence; in the manner he has produced other defence evidence.

555. There is no reason why he should have with-held this record. On the other hand it appears clear from the statement of Ghulam Hussain made in answer to a cross-examination question of Mian Qurban Sadiq Ikram that the lot bearing a particular number and manufactured in any particular year cannot be issued to anybody else.

556. In view of this answer which excludes the possibility of lots bearing the same number and year of manufacture to be issued to two different organizations it can safely be presumed under Section 114 Evidence Act that if Col. Wazir Muhammad Khan had been summoned as a defence witness, he would not have supported Mian Muhammad Abbas.

557. Objection was also raised about non-production of the report of the Fire Arms Expert which admittedly was a negative report and was not therefore relevant in view of the non-recovery of the weapons used in the attack.

558. Mian Qurban Sadiq Ikram further argued that two witnesses of recovery of 24 crime empties were not produced. I do not think that the evidence of these witnesses would have made any difference, in view of the independent evidence of P.W. 36 Nadir Hussain Abidi that the recovered empties were not sealed.

559. The learned Public Prosecutor argued that it is not necessary under the law that all the witnesses cited in the calendar should be produced by the prosecution. He referred to *Shaukat Ali v. The State*<sup>31</sup>, *Nazir Jat and others v. The State*<sup>32</sup> and *Malak Khan v. Emperor*<sup>33</sup> which support his contention. I agree that in the circumstances of this case no adverse inference can be drawn by the non-production of any particular witness since the prosecution has produced sufficient evidence not only to corroborate the approvers in material particulars but even other witnesses.

560. Mian Qurban Sadiq Ikram took objection to the mode of proof of Ex. P.W. 1/2, Ex. P.W. 3/3-I, Ex. P.W. 36/1, Ex. P.W. 36/2, Ex. P.W. 36/3, Ex. P.W. 36/4, Ex. P.W. 35/1, Ex. P.W. 35/2, Ex. P.W. 35/3, Ex. P.W. 35/4, Ex. P.W. 35/5, Ex. P.W. 38/2 and Ex. P.W. 38/3. This objection is also without force. The first six and the last two documents were admitted without any objection by any counsel. Objection was taken to the proof of other document, without the production of the writer thereof, by the evidence of a witness identifying the handwriting. This objection was held to be unsustainable in view of the provisions of Section 67 Evidence Act.

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<sup>31</sup> 1976 P.Cr. L.J. 214

<sup>32</sup> PLD 1961 Lahore 585

<sup>33</sup> AIR 1946 P.C. 16

561. It was argued that document Ex. P.W. 3/3/-I reproduces the report of the Tribunal which has not been allowed to be proved. As such this document should not have been admitted in evidence. It is true that document P.W. 3/3-I refers to some recommendation of the Tribunal, but this reference has been made only for the purpose of deciding whether the report should be given publicity or not. It does not prove the Tribunal's report as such and no objection can be taken to its being brought on record.

562. An objection was also raised that Mr. Irshad Ahmad Qureshi should not have been allowed to cross-examine the witness on behalf of the confessing accused after the cross-examination by the counsel of the principal accused since his role was that of a prosecutor. I do not agree with this argument. The order in which the cross-examination was conducted by different counsel was not regulated by the Court, but was left to the counsel themselves to determine. Mr. Irshad Ahmad Qureshi has done what he considered best for the technical defence of acting under superior order which his clients have taken. It would be a travesty to line him up with the prosecution.

563. It was urged that there was no motive either on the part of Mian Muhammad Abbas or on the part of the principal accused to conspire to kill Ahmad Raza Kasuri I have already dealt with this question. I agree that Mian Muhammad Abbas had no motive of his own but the principal accused had a motive on account of the venom in his criticism by Ahmad Raza Kasuri.

564. Reliance was placed upon Ex. P.W. 3/16- D for this argument. This is the report of Saeed Ahmad Khan dated 29.7.1975, that Ahmad Raza Kasuri had a number of meetings with him and he had requested for his audience with the principal accused. The note of Saeed Ahmad Khan has already been proved as Ex. P.W. 3/2-E. Ex. P.W. 3/16-D was put in cross-examination for proof of the following endorsement on it:

"He must be kept on the rails, he must repent and he must crawl before he meets me. He has been a dirty dog. He has called me a mad man. He has gone to the extent of accusing me of killing his father. He is a lick. He is ungrateful. Let him stew in his juice for some time."

There is another endorsement of the same date signed by the principal accused reading "Please file", and addressed to the Private Secretary.

565. This document was exhibited subject to objection by the learned Special Public Prosecutor because it was urged by the learned Defence Counsel that its original was not forthcoming. I agree with the arguments of the learned Special Public Prosecutor that since the conditions of Section 65 of the Evidence Act for leading secondary evidence, have not been proved, this document is inadmissible in evidence. I also agree that the first endorsement is clearly a forgery. There is no indication that the first

endorsement was addressed to or was required to be seen by anybody. It is not possible to reconcile it with the second endorsement "Please file".

566. The learned counsel also argued that the document Ex. P.W. 2/2 does not incriminate Mian Muhammad Abbas. This argument is without substance since in the circumstances discussed above the query about the residence of Ahmad Raza Kasuri, P.W. 1 at Quetta after he had left that place could be made only to find out why he was not attacked and this document is clearly incriminating in the context of the evidence on record.

567. Similarly it was urged that the reports of Abdul Hamid Bajwa about the surveillance of Ahmad Raza Kasuri did not incriminate the principal accused. It is true that some of the documents taken simply may not be incriminating but they become relevant and clearly prove the charge against him if they are read with documents about the probe by Abdul Hamid Bajwa in the arrangements for his personal security made by Ahmad Raza Kasuri and the reaction of 'the former to the desire of the latter to secure license for arms.

568. The learned counsel criticized Masood Mahmud in regard to his statement that the post which he was holding before being appointed as Director General, Federal Security Force was a punishment post. This part of the statement of the witnesses is not material except for showing that he was not in the good books of Waqar, Establishment Secretary. It is not, therefore, necessary to comment upon it.

569. The learned counsel argued that the F.I.R. P.W. 1/2 of the Lahore incident does not say that attack was made at the behest of the principal accused. This argument is preposterous in view of the explanation given by P.W. 1, the evidence about the delay in the recording of the F.I.R. given by P.W. 8, 12 and 14, the documents Exhibits P.W. 3/2-K, P.W. 3/2-M, P.W. 3/2-N and the privilege motion Ex. F.W. 1/7. It is clear from these documents that P.W. 1 had throughout been accusing the principal accused as being responsible for the murder of his father.

570. The learned counsel also argued that there was no interference with the investigation. What was done by Saeed Ahmad Khan and Abdul Hamid Bajwa was only to put the officers on "right lines". I have already dealt at length with this question on the legal plane and held that the law does not permit any inference, it is however proved that in the present case this interference was *mala fide* and was clearly with a view to make the detection of the actual culprits impossible.

571. Detailed arguments were addressed on the question that the story about the attack by Ghulam Hussain and the two confessing accused at the Shadman Shah Jamal Roundabout, Lahore was absolutely incorrect and unbelievable since there were no blood-stained earth, no foot marks and there was delay in the F.I.R. It is strange that

such arguments should have been put in the face of the confessional statements of those accused persons who were directly responsible for the firing.

572. The learned counsel argued that there was conflict between the statement of Ghulam Hussain and the confessions of all the three confessing accused. He pointed out that Ghulam Hussain did not say in his examination-in-chief that he fired his pistol, while Iftikhar and Arshad Iqbal said in their confessional statement that the pistol was fired by him. The argument clearly ignores the statement of Ghulam Hussain in cross-examination that he did not remember whether he fired the pistol. This statement does not exclude the possibility of his having fired it.

573. Certain omissions were also pointed in the confessional statements, but I do not understand how those omissions could help any of the accused persons. When the three confessing accused have all along stick to their confession and accepted all the prosecution evidence produced against them as true, some slight discrepancy was pointed out in the statement of Ghulam Mustafa and P.W. 2 about the ammunition supplied to him but it is not material in view of the above.

574. It was argued that these statements were not voluntarily given, but were given on promise of pardon. This argument is without force after the grant of pardon to P.W. 2 and P.W. 31 and the confessional statements made by the same accused in their statements under Section 342 Cr. P.C. It was suggested that they might have been promised remission of sentence after conviction. This argument is merely conjectural and no such suggestion was ever put to any witness.

575. It was argued that the confession of Mian Muhammad Abbas at least was not voluntary. In support of this it was urged that he was not directly taken to the judicial lock up, but was taken to the Directorate of F.I.A. at Temple Road, Lahore and kept there for several hours.

576. This argument is without force since P.W. 38 has explained that Mian Muhammad Abbas was taken from the Magistrate's Court to his own relations in Naz-Nagina Cinemas since he wished to collect some clothes. He not only collected his clothes but also took meals and offered his prayer. From the place of his relative he was taken directly to the judicial lock up. There is no reason why this statement should be disbelieved. There is no justification for such an argument. I feel convinced by the evidence of P.W. 10 that Mian Muhammad Abbas had made a voluntary statement under Section 164 Cr. P.C. before him.

577. It may be stated that the statement of Mian Muhammad Abbas Ex. P.W. 10/9-1 is partly self-exculpatory. He, however, confessed in that statement having talked to Ghulam Hussain on the subject that the mission about Ahmad Raza Kasuri should be executed with all haste since he was informed by P.W. 2 that the principal accused was

angry. On another occasion he admitted having asked Ch. Abdullah, Deputy Director to bring round Ghulam Hussain with the same end in view. The exculpatory part of the statement is clearly proved to be incorrect by the prosecution evidence. There is no reason to take it into consideration.

578. It is proved that after the commission of the offence at Lahore, Ghulam Hussain reached Rawalpindi at about 2.30 P.M. on the 12th November, 1974. The same day Mian Muhammad Abbas returned from Peshawar at 6.00 P.M. (Ex. D.W. 4/10). The learned counsel argued that the statement of Ghulam Hussain that immediately on his arrival at Rawalpindi he contacted Mian Muhammad Abbas is false and for this reason Ghulam Hussain should not be believed. He argued that from the evidence of Ghulam Hussain that on reaching Rawalpindi he contacted the said accused, it should be inferred that after reaching Rawalpindi he must have contacted him by about 3-00 P.M. which is an impossibility since the accused was at Peshawar at that time. This argument is without merit since no time was fixed by Ghulam Hussain. The words "on reaching Rawalpindi" cannot be interpreted to mean that he contacted Mian Muhammad Abbas immediately and without any delay. He might have contacted him after four or five hours after resting for a while.

579. The learned counsel argued that if the principal accused had any motive to commit the offence of murder he could have brought some persons from Larkana to commit it instead of involving the Federal Security Force. In the same strain he submitted that if he had any intention to cause the murder of P.W. 1 he would not have given vent to his fury in the National Assembly. He also submitted that Mian Muhammad Abbas had admittedly not much trust in Ghulam Hussain. It is not believable that he would ask him to go on the mission to Lahore. Similarly it was unnecessary to obtain the weapons from the armory at Headquarter when each battalion had an armory of its own.

580. These arguments presume that a criminal must act in a particular manner in the given circumstances. The reaction may differ from man to man. The planning may also differ. These arguments cannot create any doubt regarding the correctness of the evidence. As far as the distrust of Mian Muhammad Abbas is concerned, it is the distrust common to any efficient man, who knows his job and has to drive men otherwise honest, to commit a heinous crime and to degrade themselves as criminals. Ghulam Hussain, P.W. 31 has given reasons why the weapons were obtained from Fazal Ali P.W. 24 who is an absolutely independent witness.

581. The learned counsel pointed out that the two approvers have not been corroborated in certain particulars and their evidence is not, therefore, sufficient for the conviction of the accused. He argued that the corroboration must be on each point. He further submitted that the motive is no corroboration of evidence of approvers nor can one approver corroborate another approver.



582. There is no doubt that the uncorroborated testimony of an accomplice is admissible in law. It is a rule of prudence, which has virtually become equivalent to a rule of law and recognized by illustration (b) of section 114 of the Evidence Act which lays down that an accomplice is unworthy of credit, unless he is corroborated in material particulars. It is now well established that the particulars in which the corroboration by independent testimony is sought must be those which affect the accused by connecting or tending to connect him with the offence. In *King v. Baskervine*<sup>34</sup> the expression "corroborative evidence" is explained as "evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused." It is not necessary to corroborate by independent evidence each part of the statement of the accomplice since if this had been the requirement, his testimony would be unnecessary. The corroboration must, therefore, be of material particulars implicating the accused in the commission of the offence. The other rules laid down in the same case are that the corroboration need not be by direct evidence that the accused committed the crime. Circumstantial evidence is also sufficient, if it confirms the connection of the crime with the accused. The evidence of an accomplice cannot, however, be corroborated by the testimony of another accomplice; *Abdul Majid v. State*<sup>35</sup>, *Muhammad Bashir v. State*<sup>36</sup>, *Abdul Khaliq v. State*<sup>37</sup>, *Muzaffar v. Crown*<sup>38</sup> and *Bhuboni Sahu v. The King*<sup>39</sup>.

583. The argument that each particular given by the two approvers has not been confirmed is not relevant once it is proved that every material particular connecting the two contending accused has been corroborated by oral as well as documentary evidence. The participation of Mian Muhammad Abbas in the conspiracy and the role played by him in its execution is corroborated by direct testimony of P.W.s 20 and 24 and the other circumstantial evidence. Similarly,

the evidence of charges against the principal accused has been corroborated not only by the independent evidence of Saeed Ahmad Khan P.W. 3, but also by considerable circumstantial evidence of Saeed Ahmad Khan P.W. 3, but also by considerable circumstantial evidence motive as well as the conduct before and after the matter.

584. The argument of Mian Qurban Sadiq Ikram that the motive cannot corroborate the evidence of the approver is based upon *Qabil Shah v. State*<sup>40</sup>. It was observed in that

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<sup>34</sup> (1916) 2 K.B. 658

<sup>35</sup> PLD 1973 SC 595

<sup>36</sup> PLD 1971 SC 447

<sup>37</sup> PLD 1970 SC 166

<sup>38</sup> PLD 1956 FC 140

<sup>39</sup> AIR 1949 PC 257

<sup>40</sup> PLD 1960 KAR 697

case that the motive, however strong it may, cannot afford necessary corroboration of the testimony of an approver. The principle laid down cannot be stretched to mean that the motive is absolutely irrelevant for confirming the evidence of an accomplice. The principle laid down is not so wide but it only means that evidence of motive only may not furnish the necessary corroboration for conviction of the accused. It cannot be denied that motive like other evidence, circumstantial or direct, does play a part in the administration of criminal justice and if it is one of the links in the chain of evidence, however weak that link may be, it cannot be discarded as useless evidence. This proposition finds support from *Muhammad Bashir v. State* (Supra). It was observed in that case that

"Piece of evidence, which is weak enough by its own force to sustain a particular charge, may yet provide a link in the chain of evidence that may be available on the other charge or charges. So long as the links hold the chain, its weakness notwithstanding, it cannot be totally discarded as a useless evidence. What support it can impart to the whole chain will, of course, depend on its own inherent strength."

585. The rule of corroboration about the testimony of an approver is based upon the principle that it is dangerous to act on his uncorroborated testimony because he is a self-confessed criminal having betrayed his former associates under temptation of saving his own skin and as such his evidence cannot be viewed except with natural reaction of distrust and incredulity. What is, therefore, required is some additional evidence rendering it probable that the story of the accomplice is true and that is reasonably safe to act upon it.

586. But as pointed out in *Kamal Khan v. Emperor*<sup>41</sup> an accomplice is sometimes "not a willing participant in the offence, but victim to it." It was in view of this proposition that it was observed in *Brinivas Mall v. Emperor*<sup>42</sup> by the Judicial Committee that:—

"No doubt the evidence of accomplice ought as a rule to be regarded with suspicion. The degree of suspicion which will attach to it must, however, vary according to the extent and nature of the complicity; sometimes the accomplice is not a willing participant in the offence but a victim of it. When the accomplices act under a form of pressure which it would require some firmness to resist, reliance can be placed on their uncorroborated evidence."

I have already held that there is sufficient corroboration of the testimony of each approver which not only tends to connect but actually connects the two contending accused in this case with the crime charged against them. This is, however, a case in

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<sup>41</sup> AIR 1935 Bombay 230

<sup>42</sup> AIR 1947 PC 135

which it appears clear that both Masood Mahmood and Ghulam Hussain must have acted under pressure and their evidence to that effect is correct. The pressure on both of them was not only of superior orders but also threats. Even if there had not been such a strong corroboration, the conviction could have been based upon the evidence of these accomplices because in so far as the principal accused is concerned the motive was exclusively his. So far as Mian Muhammad Abbas is concerned, it may be worthwhile noting, and it was conceded by his learned counsel during the arguments, that all the charges could have been proved against the principal accused and the three confessing accused without involving him. His involvement by Masood Mahmood and Ghulam Hussain who have no score to settle with him is evidence of his connection with the offence. In these circumstances, the matter would have been governed by the principle laid down in *Brinivas Mall v. Emperor* (Supra).

587. Under section 30 of the Evidence Act it is open to the Court to take into consideration the confession made by Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad accused, at least against Mian Muhammad Abbas. The learned counsel argued that these confessions, though admissible, were practically not of much value. It is, however, conceded by him that the conviction of the three accused could be based on these confessions provided they are found to be voluntary. It was pointed out in *Joygan Bibi v. State*<sup>43</sup> that in case there is only the confession of a co-accused, the conviction of the non-confessing accused could not be sustained on it since confession of a co-accused is a matter which merits "to be taken into consideration" and does not have the quality of evidence as defined in section 3 of the Evidence Act. Similar view was taken in *Maqbool Hussain v. The State*<sup>44</sup>. It was held in *Bluboni Sahu v. The King* (Supra) that "section 30 applies to confession, and not to statements which do not admit the guilt of the confessing party. Section 30 seems to be based on the view that an admission by an accused person of his own guilt affords some sort of sanction in support of the truth of his confession against others as well as himself. But a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of "evidence" contained in section 3. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross, examination. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of those infirmities. Section 30, however, provides that the Court may take the confession into consideration and thereby, no doubt, makes it evidence on which the Court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence. The confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction".

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<sup>43</sup> PLD 1960 SC 313

<sup>44</sup> PLD 1960 SC 382

588. The rule is, therefore, established that an accused cannot be convicted solely on the confession of a co-accused unless it is corroborated by independent evidence. It is also established that it cannot sufficiently corroborate the evidence of an accomplice. But this rule has been made subject to an exception in *Rafiq Ahmad v. The State*<sup>45</sup>. It was held in that case that the view that the confession of an accomplice does not in any circumstances furnish sufficient corroboration of the testimony of an approver overlooks the provision in section 114 of the Evidence Act that while presuming that an accomplice is unworthy of credit unless he is corroborated in material particulars the Court shall have regard to facts to be found in the illustration appended to illus. (b) in considering whether the above maxim does or does not apply to the particular case before it, The illustration, reads: 'A crime is committed by several persons. A, B and C, three of the criminals are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D and the accounts corroborate each other in such a manner as to render previous concert highly improbable'. From this it follows that there are cases in which an account of crime given by an accused person implicating his co-accused can be taken into consideration as corroborating the approver.

589. In the present case, this principle could have been safely applied even if there had been no corroboration in view of the manner in which this offence was detected by the interrogation and arrest of different persons at different times obviously arrest of one leading to the next higher in the scale. But in view of the immensity of the corroborative evidence, direct as well as circumstantial, oral as well as documentary, it is unnecessary to rely upon the principle. However, this is a fit case in which the confession can be taken into consideration to give strength to the evidence of Amir Badshah Khan P.W. 20 and Fazal Ali P.W. 24.

590. This is not only the confession which can be pressed into service for the above purpose. There are also confessional statements made under section 342 Cr. P.C. Mian Qurban Sadiq Ikram, however, argued that only the statement under section 164 Cr. P.C. made by the co-accused can be availed of under section 30 but that section does not apply to statements made before the Court during the trial. He relied upon, AIR 1923 All. 322 and AIR 1931 Madras 820.

591. Section 30 as stated above provides that if confession of co-accused is proved the Court may take into consideration such confession as against such other persons as well as against the person who makes it. The ratio of *Mahadeo Prasad v. The King Emperor*<sup>46</sup> is that what is contemplated by section 30, is formal proof by the prosecution of a confession previously made. When you prove a confession made by a person, you

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<sup>45</sup> PL D 1958 SC 317

<sup>46</sup> AIR 1923 All. 322

tender evidence at the trial that on some previous occasion he did, in fact, make a confession and that is the only thing which was contemplated by the section.

592. In some other cases also the same view was taken. I may, however, take note of *Dial Singh v. Emperor*<sup>47</sup>. After considering the established principles of administration of justice it was held that section 30 was a departure from those principles and the word "proved" should be interpreted according to the definition of that word given in section 3 of the Evidence Act and confessional statement of an accused made on question put to him under section 342 Cr. P.C. is, therefore, covered by section 30 of the Evidence Act. The definition of the word "proved" in section 3 of the Evidence Act is as follows:-

"A fact is said to be proved when, after considering the matter before it, the Court either believes it to exist, or considers ' its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

It was, therefore, observed in the Lahore case —

"If a confession is made before the Court itself it 'is a matter before it' and the Court must believe it to exist. It must, therefore, be said to be 'proved'. A fact can be proved not only by 'evidence' as defined in Section 3, Evidence Act, but also by other matters before the Court. A confession recorded by the Court itself would not be 'evidence', but would be a 'matter before the Court.'

The language of Section 30, Evidence Act, does not justify a distinction between a confession made by an accused person before the trial and in the course of the trial. A confession made before the Court even at the close of the case for prosecution can, therefore, be said to be a confession 'proved' within the meaning of Section 30, Evidence Act."

I am in complete agreement with this reasoning which is based on meaning given by the Evidence Act to the word 'proved'.

593. The statements under section 342 can also therefore, be taken into consideration. They confer added strength to the corroboration furnished by the witnesses to the statement of Ghulam Hussain approver against Mian Muhammad Abbas.

594. The next question is whether any and what offence has been committed by each of the accused. The cases of the three confessing accused may be taken up together. They confessed all the facts on which the charges under different sections of the

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<sup>47</sup> AIR 1936 Lahore 33

Pakistan Penal Code are based but they raised a plea of not guilty on the doctrine of duress, superior order, and loss of will as a result of brain washing.

595. Ghulam Hussain P.W. 1 has made reference to threats administered by Mian Muhammad Abbas accused to exterminate him through another party deputed as an alternative to complete the mission. The same threat was transmitted by Ghulam Hussain to Arshad Iqbal and Iftikhar Ahmad. Ghulam Mustafa stated in his statement under section 342 Cr. P.C. that he was also intimidated by Mian Muhammad Abbas. All the three accused plead that they were not free agents and were compelled to act in the prosecution and execution of the conspiracy

596. They also pleaded that they belonged to a disciplined force and were under oath to be loyal to the Government of Pakistan. They were bound to obey all orders whether lawful or unlawful. Their learned counsel referred to section 3 (f) of the Federal Security Force Act which compels a new entrant to the force to subscribe to an oath prescribed in the Second Schedule but the oath administered to the accused was a different oath. The accused summoned Abdul Majid D.S.P. (D.W. 4) to produce their oaths subscribed to by them at the time of their entry into the force. But no such document was available on the record. The only oath of Ghulam Mustafa which was on his personal file was dated the 31st December, 1974, when he was actually recruited to the force on the 1st June, 1973. Similarly the oath of Arshad Iqbal on his personal file was made on the 9th November, 1973, though he was recruited as Foot Constable on the 19th March, 1973.

597. The learned counsel inferred from this that the oath which must have been signed at the time of the initiation of the accused in the F.S.F. has been removed from the file. He further argued that even the oath on record is not an oath in accordance with the Second Schedule, the distinction being that the oath provided by law is of loyalty to Pakistan (as a State) while the oath in Urdu claimed loyalty to the Government of Pakistan and bound the person signing the oath to obey all orders of the superiors or orders emanating from the Government through their superiors, whether lawful or unlawful.

598. I do not agree that the Act compelled the accused to obey even unlawful orders. Section 9 and 12 of the Act make particular reference to lawful orders. The oath signed by the accused must be interpreted in the context of the above provisions of law.

599. These pleas cannot, therefore, absolve these accused of their liability in the crime. The plea of superior orders does not help the accused in view of the language of the Federal Security Force Act which makes it their duty to obey and carry out only lawful orders. Para. 27 of Halsbury's Law of England, Volume II (Fourth Edition) deals with this question and states the law as follows:-

"The fact that a criminal act is done in obedience to the order of a duly constituted superior, whether civil or military, does not of itself excuse the doer of the act. A person, acting under superior orders which he carries out in good faith may, however, lack the element required for criminal liability."

600. A. V. Dicey writes at page 303 in '*An introduction to the study of the Law of the Constitution*' (Tenth Edition)

"A soldier is bound to obey any lawful order which he receives from his military superior. But a soldier cannot any more than a civilian avoid responsibility for breach of the law by pleading that he broke the law in *bona fide* obedience to the orders (say of the Commander-in-Chief)."

L.C. Greene in his book '*Law and Society*' has discussed case law of various countries including the United States and then summed up at page 426 that "most systems of Criminal Law rejected the idea that an accused can avoid liability by pleading ignorance of the law or that he was complying with the order of an hierarchic superior who, he had presumed, knew what the law is." The Army Act in Pakistan in its section 32 enforces obedience of lawful orders only.

601. The question whether the defence of duress is open to a person who is accused as a principal in the second degree (aider and abettor) was considered by the *House of Lords* in *Lynch v. Director of Public Prosecution for Northern Ireland*<sup>48</sup>. It was held by a majority of the noble Lords (Lord Simon of Glaisdale and Lord Killebrandon dissenting) that such defence could be taken by the accused i.e. that he had carried out the acts constituting the alleged offence under the threat of death or serious bodily injury, as a defence to the charge. Although the matter was left open but observations were made in favor of denial of such a defence to the actual killer. It is stated in the speech of Lord Morris of Borth-Y-Gest that "writers on criminal law have generally recorded that whatever may be the extent to which the law has recognized duress as a defence it has not been recognised as a defence to a charge of murder". The reason, as Hale said (see *Pleading of the Crown* 1800, Volume I, page 51) is that a person "ought rather to die himself, than kill an innocent" or as stated in *Attorney General v. Whelan*<sup>49</sup>, "the commission of murder is a crime so heinous that murder should not be committed even for the price of life."

602. The judgment in Lynch's case came up for consideration before the Privy Council on an appeal from *Trinidad in Abbot v. The Queen*<sup>50</sup> on the question of relevancy of duress as a defence in case of a principal in the first degree. The defence was rejected

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<sup>48</sup> 1975 1 All E. R. 913

<sup>49</sup> 1934 IR 518

<sup>50</sup> 1976 3 All ER 140

(Lord Wilberforce and Lord Edmund Davies dissenting) and Lynch's case distinguished. Lord Salmon observed:-

"It seems incredible to their Lordships that in any civilized society, acts such as the appellant's whatever threats may have been made to him, could be regarded as excusable or within the law. We are not living in a dream world in which the mounting wave of violence and terrorism can be contained by strict logic and intellectual niceties alone."

His Lordship also made observations about the unsatisfactory state of law relating to duress and the view that on a plea of duress succeeding, the offence of murder he reduced to man-slaughter. This will appear from the following:-

"There is much to be said for the view that on a charge of murder, duress, like provocation, should not entitle the accused to a clean acquittal but should reduce murder to manslaughter and thus give the Court power to pass whatever sentence might be appropriate in all the circumstances of the case."

603. The same is the purport of section 94 of the Pakistan Penal Code which excepts murder from the category of offences to which duress can be pleaded successfully as a defence. It cannot, therefore, be accepted that the confessing accused have committed no offence. All the offences with which they are charged are proved against them. They have acted like hired assassins. No case is made out by them for award of lesser sentence.

604. Mian Qurban Sadiq Ikram argued that since the conspiracy was only to kill Ahmad Raza Kasuri but he had escaped, the two contesting accused could at most be convicted under section 120-B and section 307 read with section 109 PPC. Only the actual killers can be convicted under section 301 PPC.

605. The argument is without force. The offence of criminal conspiracy is itself a substantive offence which is committed as soon as the agreement to do an unlawful act is made. It is immaterial whether the *actus reus* is executed. The offence committed in the course of performance of the unlawful act becomes the responsibility of the initial conspirators on the principle of their being abettors, since abetment though a separate offence is also one of the ingredients of criminal conspiracy in section 120-A and will attract the provisions of section 111 PPC which provides:-

"When an act is abetted and different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it; provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment."



606. Just as an actual killer is liable under section 301 PPC by killing another person instead of the one intended to be killed, so a person abetting the murder of the person intended to be murdered will be liable for offence under section 301 read with section 111 and 109 PPC. There is no substance in the argument.

607. The learned counsel lastly pleaded for the lesser sentence of Mian Muhammad Abbas on the grounds of sickness, old age and service under a hard task master like Masood Mahmud. Reference in support of this last proposition that Masood Mahmud was a hard task master was made to the evidence of, Welch P.W. 4.

608. This submission is not tenable. He is the person who supervised the entire operation, selected the assassins and supplied arms to them for the commission of the heinous offence. It would amount to miscarriage of justice if the normal sentence of death is not imposed upon him.

609. The principal accused is the arch culprit having a motive in the matter. He has used the members of the Federal Security Force for personal vendetta and for satisfaction of an urge in him to avenge himself upon a person whom considered his enemy. For his own personal ends he has turned those persons into criminals and hired assassins and thus corrupted them.

610. Indeed it is paradoxical that the ruler of a country with Islam Constitutionally declared as its State religion enabling the Muslims to order their lives in the individual and collective spheres in accordance with the teaching of Islam as set out in the Holy Quran and the Sunnah as its declared objective, and guaranteeing to the citizens their life and liberty should play with the valuable life of a citizen so whimsically and tyrannically. The constitutional provisions presuppose that before a person ventures to seek election to the office of the Chief Executive of the Federation he would order his own life in accordance with the injunctions and teachings of Holy Quran and Sunnah. Before undertaking to observe the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam he should inculcate these qualities in himself. Before a person embarks upon swearing to strive to preserve the Islamic ideology he would bring himself to believe in that ideology and test his firmness in that belief. Before presuming his ability to guarantee to the citizens the enjoyment of the protection of law and their treatment in accordance with law he would be a believer and a true adherent of law. He would consider himself to be as much subject to law as he would wish others to be. A person who considers the Constitution and the law as the handmaid of his polity is neither qualified to be elected to the high office of the Prime Minister nor can ever be true to his Oath.

611. It is, as is clear from the oath of the Prime Minister as prescribed in the Constitution, a constitutional requirement that the Prime Minister of Pakistan must be a

Muslim and a believer inter alia in the total requirements and teachings of the Holy Quran and the Sunnah. He should not be a Muslim only in name who may flout with impunity his oath without caring for its ugly consequences and terrible results, and treat the Constitution and the law as a source of unlimited power for himself which may satisfy his own inane craving for self aggrandizement and perpetuation of his rule. Such a person, in all probabilities, would destroy the very oasis of the Constitution and the law which he is sworn to uphold.

612. Islam does not believe in the creation of privileged classes. It believes in the equality before law of all-ruler and governed alike. It is opposed to all types of class distinction. Even the Caliph, the king, the Prime Minister or the President, by whatever name the ruler may be called, is as much subject to the law of the land as any ordinary citizen. Islam is opposed to the establishment of church or priesthood. It does not recognize any distinction between divine laws governed by priests and secular law administered by a secular Government. In this context the proclamation of the Holy Prophet "*ana basharummislokum*" is not only a refutation of divinity of any man but also acknowledgement of his subjection to all laws. By acknowledging himself to be a man like others he has preached the equality of all mankind as well as their equality before divine law. An apt illustration of equality before law in Islam is furnished by the oration of the first Caliph on his election to the Caliphate. He said that though appointed ruler of the people, he was no better than his people. The people ought to assist him in the just and upright performance of his duties but they should criticize him for his wrong actions. He directed them to obey him only for so long as he himself obeyed (the laws laid down by) Allah and the Prophet. They were free not to obey him if he himself was found to disobey Allah and his Prophet.

613. There can be no better illustration of equality before law. Equality before law and justice are corner-stones of Islamic polity and they were emphasized by the first Caliph who was one of the first believers and was distinguished not only for his piety and close intimacy with the Holy Prophet but also his understanding of the true letter and spirit of the religion. No constitution of the world in this era of material progress and unprecedented advancement of knowledge and democratic ideas can provide such example of liberty to disobey the illegal orders of a ruler without any fear of reprisal and of the right to impeach and depose a ruler for his disobedience of law. Freedom from obedience of a sinful order is approved by Sunnah also. (Muslim 341, 342, 343).

614. There are definite legislative injunctions in the Holy Quran against slaying save in the course of justice (vi: 152, xvii: 33 also see iv: 29, 93 and v: 32). The words "save in the course of justice" definitely point out the prohibition against slaying being equally applicable to persons whose duty is to administer justice or to arrange for administration of justice.

615. According to tradition *amanat* (Government) is a trust. The correct rule of law in Islam is much more progressive than the same concept in the modern world. There is however similarity to the extent that all governmental authorities are bound by law and are required to act according to law. This principle is the sheet anchor of our Constitution which specifically provides in its fourth Article that to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen and in particular no action detrimental to the life of a person shall be taken except in accordance with law. The Constitution does not grant immunity from law to anyone in the country however high his rank or status may be, nor does it declare any one to be above law and yet the principal accused has acted as if either there is no law in the country relating to homicide or that he enjoyed complete immunity from law. His function as head of the executive was to eliminate law breaking tendencies but he has tried to inculcate in his subordinates such tendencies and used them for eliminating a person whom he considered his enemy. There is no rule under which he can escape the extreme penalty.

616. It was observed in *Muhammad Sharif v. Muhammad*.<sup>51</sup>:- "No doubt having regard to the sanctity of human life and liberty the law has taken all conceivable precautions to safeguard it. The Law of Evidence and in particular the rules of admissibility including confessions made before a person or an authority, the rule of placing the onus on the prosecution, conceding to the accused the liberty of a privileged liar the Court's responsibility to spell out reasonable existence of an un-repealed defence, if warranted by the facts and circumstances of the case and above all the golden rule of giving the benefit of doubt to the accused are measures aimed at the protection of human life against false implication and undeserved punishment. The matter does not end with the finality of judicial proceedings as the executive has also been invested with the power to meet the failures of legal justice and undo the mischief found to have been done by it. As equally important aspect of this sanctity of human life often lost sight of is that once conviction is finally upheld the deliberate extinction of life is visited with the normal penalty of death which is not confined to the actual killer but is also extended to the other co-accused sharing the community of intention as the case may be and found to be constructively liable. The principal object behind this obviously is to avoid repetition of violent loss of life by award of deterrent punishment."

617. The principal accused is thus liable to deterrent punishment.

618. All the offences with which the accused are charged are thus proved to the hilt. It is also proved that the conspiracy to murder Ahmad Raza Kasuri did not end with the death of Nawab Muhammad Ahmad Khan but continued even thereafter. Since the object to assassinate Ahmad Raza Kasuri was not fulfilled, the case of punishment of conspiracy is governed by section 120-B read with the first part of section 115 PPC.

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<sup>51</sup> PLD 1976 SC 452

619. I convict Zulfikar Ali Bhutto, Mian Muhammad Abbas and Ghulam Mustafa accused under section 120-B PPC, 302 PPC read with section 301 PPC and sections 109 and 111 PPC and section 307 PPC read with section 109 PPC. I further convict Arshad Iqbal and Rana Iftikhar Ahmad accused under section 120-B PPC, section 302 PPC read with section 301 PPC and section 34 PPC and section 307 PPC read with section 34 PPC.

620. I sentence all the five accused persons under section 120-B PPC read with section 115 PPC to rigorous imprisonment for a period of 5 years each. I sentence Zulfikar Ali Bhutto, Mian Muhammad Abbas and Ghulam Mustafa accused under section 302 PPC read with sections 301, 109 and 111 PPC to death. I also sentence Arshad Iqbal and Rana Iftikhar Ahmad accused under section 302 PPC read with section 301 PPC and section 34 PPC to death. All these five accused shall be hanged by the neck till they are dead. I further sentence Zulfikar Ali Bhutto, Mian Muhammad Abbas and Ghulam Mustafa accused under section 307 PPC read with section 109 PPC to rigorous imprisonment for 7 years each. I sentence Arshad Iqbal and Rana Iftikhar Ahmad under section 307 PPC read with section 34 PPC to rigorous imprisonment for a period of 7 years each. Zulfikar Ali Bhutto shall also pay a sum of Rs. 25,000/- as compensation under section 544-A Cr. P.C. or in default undergo rigorous imprisonment for a period of 6 months. The compensation amount if recovered shall be paid to the heirs of Nawab Muhammad Ahmad Khan deceased. The sentences of imprisonment under each head shall be concurrent, and these sentences as also the sentence to be undergone in default shall be effective in case the sentence of death is commuted.

621. I have ordered only Zulfikar Ali Bhutto to pay the compensation because the offence was committed on his order.

622. Each accused has been furnished with a copy of the judgment and has been informed that as per Article 150 of the Limitation Act he can file an appeal to the Supreme Court within 7 days from today.

623. Before closing this case I would like to thank Mr. M. A. Rahman and Mr. Ejaz Hussain Batalvi, learned Special Public Prosecutors and Mr. Qurban Sadiq Ikram and Mr. Irshad Ahmad Qureshi for the assistance rendered by them to us in this trial. I wish I could have said the same thing about the learned counsel who appeared for the principal accused. I entertain great respect for the members of the Bar but it is unfortunate that the behavior of a certain member of the Bar has throughout the period he conducted this case, been arrogant and insulting to the Court despite all indulgence shown to him. The Court started the case in the morning according to his convenience and rose before time when he gave the slightest hint of inconvenience to himself. Copies of documents which were not required by law to be supplied to him were given to him whenever demanded. The Special Public Prosecutors were requested by the Court to

cooperate with him and give him advance information about the name of the witness or witnesses to be examined on a particular day. He was thus fully accommodated.

624. No doubt the counsel has to discharge his duty towards his client but he has also some duties towards the Court, which he cannot perform by aligning himself with his client. Yet this was done by the counsel. He aligned himself with his client completely and adopted his attitude. I hope that the learned counsel might be having second thoughts and mentally reviewing his conduct and regretting it.

625. The conduct of the principal accused has already been reviewed briefly. He had been hurling threats as well as insults on us and at times had been unruly. In addition, he has proved himself to be a compulsive liar. He was allowed thrice to dictate his statement directly to the typist and he dictated 9 pages on the 25th January, 1978, more than 11 pages on the 28th January, 1978, and about 11 pages again on 7th February, 1978 without the least interference by the Court. All the three statements are full of repetition of false and scurrilous allegations against the Court. The first two statements were made, although they were absolutely irrelevant, in answer to questions under section 342 and the last statement was allowed to be dictated after the close of the defence evidence when all legal avenues for the making of such statement before Court were legally closed and yet he came out with allegations that the statements were not fully recorded.

626. Out of the five accused he is the only person who has been leveling all sorts of imaginary and false allegations against the Court. Mr. Qurban Sadiq Ikram on the other hand thanked the Court profusely on his own behalf as well as on behalf of his client for the patient hearing and fair and full opportunity given to his client for his defence. He also thanked the learned Special Public Prosecutors for their cooperation in this respect.

627. This trial has revealed the flaws in our law to deal with a recalcitrant party like the principal accused. The Law of Contempt which empowers the Court to sentence the contemner to simple imprisonment is of little value in a case where the contemner is an under trial prisoner in a murder case. It is time that necessary legislation be passed to remove this flaw.

(Sd/-) Aftab Hussain  
JUDGE  
Announced.

18-3-78

(Sd/-) Mushtaq Hussain

I agree (Sd/-) M. S. Qureshi

I agree (Sd/-) Gulbaz Khan

I agree (Sd/-) Zakiuddin Pal

I agree (Sd/-) Mushtaq Hussain

**Judgement Supreme Court  
PLD 1979 Supreme Court 53**

Present: Anwarul Haq, C. J.,  
Muhammad Akram,  
Dorab Patel,  
Muhammad Haleem,  
G. Safdar Shah,  
Karam Elahee Chauhan and  
Nasim Hasan Shah

Criminal Appeal No. 11 of 1978

ZULFIKAR ALI BHUTTO - Appellant

*versus*

THE STATE - Respondent

Criminal Appeal No. 12 of 1978

MIAN MUHAMMAD ABBAS - Appellant

*versus*

THE STATE - Respondent

AND

Criminal Appeal No. 13 of 1978

GHULAM MUSTAFA AND 2 OTHERS - Appellants

*versus*

THE STATE-Respondent

**Criminal Appeals Nos. 11 to 13 of 1978, decided on 6th February 1979.**

(On appeal from the judgment and order of the Lahore High Court dated 18th March 1978 in Criminal Original No. EO of 1977).

Majority view - [Per Anwarul Haq, C. J., Muhammad Akram, Karam Elahee Chauhan and Nasim Hasan Shah, JJ.]

Dates of hearing 22nd August 21st 23rd December 1978

Criminal Appeal No. 13 of 1978

Irshad Ahmed Qureshi, Advocate Supreme Court for Appellants.

Ijaz Hussain Batalvi Senior Advocate Supreme Court and Special Public Prosecutor instructed by M. A. Rahman, Advocate-on-Record, Mahmood A. Shaikh, Advocate and assisted by Riaz Ahmed, Assistant advocate general (Punjab) for the State.

Dates of hearing 21st August 21st and 23rd December 1978.



## ORDER

### STATEMENT OF THE CASE

**ANWARUL HAQ, C. J.** - This judgment will dispose of Criminal Appeals bearing Nos. 11, 12 and 13 of 1978, all of which are directed against the judgment of a Full Bench, comprising five Judges, of the Lahore High Court, dated the 18th of March 1978, in Criminal Original No. 60 of 1977.

They were heard by the Full Court of nine Judges up to the 30th of July 1978, on which date our learned brother Qaisar Khan, J., retired from the Court on attaining the age of superannuation. Thereafter the bearing was continued before the remaining eight Judges until the 20th of November 1978, when unfortunately one of the members of the Bench, *viz.* Waheeduddin Ahmad, J., was taken ill, having suffered a Cerebro-Vascular stroke, resulting in impairment of his eye-sight, speech and general physical activity. I After an adjournment of three weeks to await his recovery, we decided to proceed without him, as prospects of his joining the Bench within a foreseeable future were described as uncertain by eminent physicians of Karachi, Lahore and Rawalpindi. Our learned brother was shifted to Karachi by his family, after three weeks of hospitalization at Rawalpindi. It is a matter of regret that we were thus deprived of the wisdom and experience of two of the Senior Judges of the Court.

2. The five appellants were tried by the High Court, on its original side, for conspiracy to assassinate Ahmad Raza Kasuri, a member of the National Assembly of Pakistan at the relevant time, and in pursuance thereof making a murderous assault on him by firing on his car on the night between the 10th and 11th of November 1974, and as a result causing the death of his father Nawab Muhammad Ahmad Khan. All of them have been convicted under section 120-B read with section 115 of the Pakistan Penal Code, and each of them has been sentenced to undergo rigorous imprisonment for five years. Zulfikar Ali Bhutto, Mian Muhammad Abbas and Ghulam Mustafa have been further convicted under section 307 read with section 109 of the Pakistan Penal Code, and sentenced to undergo rigorous imprisonment for seven years in each case; whereas the remaining two appellants have been convicted in this behalf under section 307 read with section 34 of the Pakistan Penal Code and awarded a similar sentence. Finally, appellants Zulfikar Ali Bhutto, Mian Muhammad Abbas and Ghulam Mustafa have been convicted under section 302 read with sections 301, 109 and 111 of the Pakistan Penal Code, and each of them has been sentenced to death, and a similar penalty has been awarded to the remaining two appellants under section 302 read with sections 301 and 34 of the Pakistan Penal Code. Appellant Zulfikar Ali Bhutto has also been directed to pay compensation to the heirs of the deceased in the sum of Rs. 25,000 under section

544-A of the Criminal Procedure Code, or in default to undergo rigorous imprisonments for a period of six months. The sentences of imprisonment have been ordered to run concurrently, and shall take effect in case the sentence of death is not carried out.

3. On the date of the incident Zulfikar Ali Bhutto was holding the office of the Prime Minister of Pakistan, which office he had held from August 1973, and continued to hold until the 5th of July 1977, when the country was brought under Martial Law. The other appellants were members of the Federal Security Force, Mian Muhammad Abbas being Director, Operations and Intelligence; Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad being employed in that force as Inspector, Sub-Inspector and Assistant Sub-Inspector respectively. The Director-General of the Federal Security Force, namely, Masood Mahmood, and one other Inspector, named Ghulam Hussain were also included in the list of accused persons, but were later granted pardon and gave evidence at the trial as approvers.

4. The incident took place at about 0.30 a.m. on the night between the 10th and 11th of November 1974, near Shadman-Shah Jamal Roundabout in Lahore, when Ahmad Raza Kasuri (P.W. 1), was returning to his house in Model Town after attending the wedding of one Bashir Hussain Shah in Shadman Colony. He was driving his car bearing No. LEJ 9495, and his father Nawab Muhammad Ahmad Khan deceased was sitting next to him, whereas his mother and her sister were occupying the rear seat of the car. As he negotiated the roundabout in question, less than a hundred yards from the wedding place, his car was fired upon with automatic weapons. The headlights of the car as well as other parts of its body were hit, and so was his father. The lights of the car went off, but Ahmad Raza Kasuri managed to drive on so as to take his injured father to the United Christian Hospital, where the deceased succumbed to his injuries at 2-55 a.m.

5. On hearing of the incident, the Deputy Commissioner of Lahore, as well as the Senior Superintendent of Police, Muhammad Asghar Khan (P.W. 12) and Deputy Inspector-General of Police, Sardar Muhammad Abdul Wakil Khan (P.W. 14) arrived at the hospital. At their suggestion a statement in writing (Exh. P.W. 1/2) was given by Ahmad Raza Kasuri at 3-20 a.m. and on its basis a formal First Information Report was recorded at Police Station Ichhra by S.H.O. Abdul Hayee Niazi (P.W. 34). In this report the complainant referred to an earlier murderous attack made on him on the 17th of January 1972, at Kasur, and another attack launched on him on the 24th of August 1974, at Islamabad, in which automatic weapons were used. After giving the details of the manner in which his car was fired upon near the Roundabout, Ahmed Raza Kasuri asserted that the firing on his car had been carried out for political reasons since he was a member of the Opposition in the National Assembly of Pakistan and was holding the office of Central Information Secretary of Tehrik-e-Istaqlal Pakistan, which used to criticize the Government in strong terms. He added that in June 1974, Zulfikar Ali Bhutto had addressed him in a meeting of the National Assembly saying that he was

fed up with the complainant, and it was not possible for him to tolerate the complainant any more. Ahmad Raza Kasuri stated that these words formed part of the record of the National Assembly, and had also been published in the newspapers.

6. The autopsy of the dead body of deceased Muhammad Ahmad Khan, as conducted by Dr. Sabir Ali (P.W. 7), Deputy Surgeon, Medico-Legal, Lahore, revealed that the deceased had received bullet injuries on the top right side and back of the left side of the head, resulting in fracture of the parietal bone as well as of the base of the skull. Two thin metallic pieces from the margins of the wound and one bullet from the right cerebral hemisphere in the middle were recovered, and handed over to the Investigating Officer Abdul Hayee Niazi after being sealed in a tube.

7. On inspecting the spot, S.H.O. Abdul Hayee Niazi, collected 24 empty cartridges from the ground, and also a lead piece of a bullet from one of the adjacent bungalows. He noticed bullet marks on the walls of these houses and found that one bullet had pierced through the door and also four books lying on a shelf in one of the rooms of this house. He prepared a site plan (Exh. P.W. 34/2), showing, *inter alia*, the four places, two in the roundabout, and two on the metal led portion of the road, from where he had collected the empty cartridges. He also indicated on the plan the estimated width of the Roundabout and the metal led road as well as distances between the various points shown on the plan. Subsequently he had another plan of the spot prepared by the draftsman Inam Ali Shah which was brought on the record as Exh. P.W. 34/5-D, and shows a somewhat different picture from that appearing in the first site plan as regards distances between various points.

8. The Investigating Officer first showed the 24 crime empties to Nadir Hussain Abidi (P.W. 36) then Director of the Forensic Science Laboratory, Lahore, so as to ascertain the type of weapon from which they had been fired. Later, on the 23rd of November 1974, he dispatched them to the Inspectorate of Armaments, General Headquarters, Rawalpindi, for an expert opinion as to their caliber, etc. and was informed, vide Exh. P.W. 32/1, that the crime empties were of 7.62 mm caliber, of Chinese Make and could be fired from rifle, L. M. G. and S. M. G.

9. In the initial stages the investigation was supervised by Deputy Superintendent of Police, Abdul Ahad, who is said to have died in 1975. As apparently, the investigation was not making much headway, the case was then entrusted to Malik Muhammad Waris (P.W. 15) of the Special Branch. The Punjab Government also appointed a Special Tribunal, comprising Mr. Justice Shafi-ur-Rehman of the Lahore High Court, to inquire into the incident. The Tribunal submitted its report to the Provincial Government on the 26th of February 1975, giving certain guidelines for the further investigation of the case. It appears that the report was not published. In October 1975, the case was filed as untraced by D.S.P. Muhammad Waris after

obtaining instructions from the Provincial Government through the Inspector-General of Police.

10. However, the case was re-opened after the promulgation of Martial Law on the 5th of July 1977. The Central Government had directed the Federal Investigation Agency to inquire into the working of the Federal Security Force and its officers, particularly into allegations relating to various political murders and kidnappings, as well as dispersing of political meetings and processions by the Federal Security Force. While investigating one such incident relating to the alleged bomb-blast in the premises of the Lahore Railway Station on the visit of Air Marshal (Rtd.) Asghar Khan in March 1975, Abdul Khaliq (P.W. 41), Deputy Director of the Federal Investigation Agency, came to suspect that the Federal Security Force might be involved in the murder of Nawab Muhammad Ahmad Khan. Appellants Arshad Iqbal and Rana Iftikhar Ahmad were interrogated in this behalf on the 24th and 25th of July 1977, and arrested in this case. They confessed their participation in the incident and their statements were recorded on the 26th of July 1977, under section 164 of the Criminal Procedure Code by Magistrate Zulfiqar Ali Toor (P. W: 10). Appellants Ghulam Mustafa and Mian Muhammad Abbas as well as approvers Masood Mahmood and Ghulam Hussain were also later arrested. All of them made confessional statements under section 164 of the Criminal Procedure Code, eventually leading to the arrest of the former Prime Minister.

11. An incomplete Chelan was submitted before a Magistrate at Lahore on the 11th of September 1977, and on the 13th of September 1977, the case was transferred to the High Court for trial on an application having been made in this behalf by the Special Public Prosecutor. The final report under section 173 of the Criminal Procedure Code was submitted in the High Court on the 18th of September 1977, where the trial commenced on the 11th of October 1977, and concluded on the 2nd of March 1978. The judgment of the High Court was announced on the 18th of March 1978, as already stated.

12. According to the evidence adduced at the trial, the case for the prosecution is that Ahmad Raza Kasuri was one of the founder members of the Pakistan People's Party (commonly known as the P.P.P.), which was founded on 1-12-1967, and of which Zulfikar Ali Bhutto was the Chairman. Kasuri was elected as a Member of the National Assembly in the 1970 general elections on the ticket of that party from Kasur Constituency No. N. A. 63. As he was a persistent critic of the actions, conduct and policies of Zulfikar Ali Bhutto, his relations with the latter, who was not only the Party Leader and Chairman, but had at various stages had the offices of the Chief Martial Law Administrator, the President of Pakistan, and later the Prime Minister of Pakistan, became seriously strained, with the result that Zulfikar Ali Bhutto developed a personal hatred against him. On the 17th January 1972, a murderous attack was made on the life of the complainant at Kasur and a criminal case was registered in that behalf. In the year 1973, Kasuri left the P.P.P. and joined another political party, namely, Tehrik-e-

Istaqlal, where after his criticism of Zulfikar Ali Bhutto became more severe and violent. On the 3rd of June 1974, a particularly unpleasant incident took place between Kasuri and Zulfikar Ali Bhutto in the National Assembly, during the course of which the former Prime Minister told Kasuri to keep quiet, adding:

"I have had enough of you; absolute poison. I will not tolerate your nuisance."

13. It is alleged by the prosecution that it was at about this time that Zulfikar Ali Bhutto entered into a conspiracy with approver Masood Mahmood (P.W. 2), who was then the Director-General of the Federal Security Force, to get the complainant eliminated through the agency of the Federal Security Force. Masood Mahmood brought in appellant Mian Muhammad Abbas, who was his Director of Operations and Intelligence, and Mian Muhammad Abbas in turn directed approver Ghulam Hussain (P.W. 31) to organize the murder of Ahmad Raza Kasuri. Mian Muhammad Abbas arranged the supply of arms and ammunition from the Armoury of the Federal Security Force for the execution of this design, and directed appellant Ghulam Mustafa to render all assistance to approver Ghulam Hussain. He also deputed Arshad Iqbal and Rana Iftikhar Ahmad to assist the approver, and it was in pursuance of these arrangements and directions that the attack was ultimately launched on the car of Ahmad Raza Kasuri on the night between the 10th and 11th of November 1974. According to the prosecution, the actual firing was done by appellants Rana Iftikhar Ahmad and Arshad Iqbal, who were armed with step-guns supplied to them by appellant Ghulam Mustafa, whereas approver Ghulam Hussain remained present near the spot to ensure that these appellants carried out the mission assigned to them.

14. It is also alleged by the prosecution that prior to the incident resulting in the death of Kasuri's father, approver Ghulam Hussain assisted by some other members of the Federal Security Force, had attacked Ahmad Raza Kasuri on the 24th of August 1974, when the latter was driving his car on the Embassy Road in Islamabad. A case was registered on that occasion, but it was also filed as untraced by D.S.P. Agha Muhammad Safdar, although he had recovered five crime empties of the same caliber as were used in the present incident, namely, 7.62 mm.

15. The prosecution produced 41 witnesses, besides a large number of documents, to prove the following:

(i) Strained relations and enmity between Zulfikar Ali Bhutto and Ahmad Raza Kasuri resulting in the threat extended on the floor of the Parliament on the 3rd of June 1974, by Zulfikar Ali Bhutto;

(ii) The conspiracy to murder Ahmad Raza Kasuri between Zulfikar Ali Bhutto and Masood Mahmood (P.W. 2), and joining of the other appellants as well as Ghulam Hussain approver (P.W.-31) in that conspiracy;

(iii) Attack on Ahmad Raza Kasuri firstly at Islamabad in August 1974, and later at Lahore on the 10/11th November 1974, the last occurrence culminating in the death of Kauri's father;

(iv) The steps taken by Zulfikar Ali Bhutto and his subordinates, particularly Saeed Ahmad Khan (P.W. 3) and his Deputy the late Abdul Hameed Bajwa, to channelize the investigation in a manner so as to exclude the possibility of detection of the actual culprits; and interference in the investigation of the case by officers of the Central, Government; and

(v) Preparation of incorrect record of the investigation in 1974-75 by the Police under the direction of the aforesaid officers of the Central Government with the object of shielding the then Prime Minister.

16. All the five appellants pleaded not guilty at the trial. Zulfikar Ali Bhutto expressed lack of confidence in the Bench on the ground that the presiding Judge, namely, the learned Acting Chief Justice of the High Court, was biased against him as he had been superseded by his Government in the matter of promotion to the office of Chief Justice of the Lahore High Court in October 1976; and also because the P.P.P. Executive Committee, presided over by the appellant, had criticized certain statements made by the same Judge in his capacity as the Chief Election Commissioner seeking to cast aspersions on the conduct of the P.P.P. Government in the March 1977 Elections. He unsuccessfully made various applications in the High Court as well as in the Supreme Court, and to the Governor of the Punjab, for the transfer of the case to another Bench or Court; and ultimately he cancelled the powers of attorney of all his counsel on the 9th of January 1978, and boycotted the proceedings of the trial from the 10th of January 1978, onwards. He also protested against the holding of part of the proceedings *in camera*, and refused to answer questions put to him under section 342 of the Criminal Procedure Code, stating that he would not be offering any defence since he had boycotted the proceedings of the trial, and that he would confine his statement mainly to two issues:

(a) The reason for his lack of confidence in the fairness of the trial; and

(b) The reason why this case had been fabricated against him.

However, he did answer some of the questions, denying the prosecution allegations against him. He did not produce any evidence in defence.

17. Appellant Mian Muhammad Abbas retracted his confession before the opening of the trial, asserting that his statement under section 164, Criminal Procedure Code was obtained under duress as well as promises. He stated that he did not have good relations with his Director-General Masood Mahmood; that he had no knowledge

whatsoever of the conspiracy in question and never gave any directions to approver Ghulam Hussain or to other officials of the Federal Security Force for the supply of arms and ammunition. He filed a written statement in the High Court mentioning certain facts and events to show that Masood Mahmood was annoyed with him, and similarly Amir Badshah (P.W. 20) was also inimical towards him. He admitted certain correspondence with M. R. Welch (P.W. 4), who was at the relevant time stationed at Quetta as Director, Federal Security Force, but explained that this correspondence was exchanged in routine. He summoned certain defence witnesses mainly to show that he had tendered his resignation twice as he did not want to be a party to the alleged illegal activities of the Federal Security Force.

18. It may be stated here that during the hearing of the appeal Mian Muhammad Abbas has filed a written statement admitting the prosecution allegations against him, but pleading that he acted under duress, inasmuch as pressure was brought to bear upon him by Director-General Masood Mahmood to carry out the mission for the elimination of Ahmad Raza Kasuri.

19. The remaining three appellants, namely, Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad stuck to the confessional statements initially made by them under section 164 of the Criminal Procedure Code, and acknowledged the role attributed to them by the prosecution. They, however pleaded that they had no option in the matter as they were bound by the oath administered to them on joining service in the Federal Security Force, and they were being pressurized and threatened by their superiors, particularly approver Ghulam Hussain and appellant Mian Muhammad Abbas. They also filed written statements in support of their pleas. They summoned one defence witness to show that there was no question of bad blood between Director-General Masood Mahmood and appellant Mian Muhammad Abbas as the Director-General had given good reports to Mian Muhammad Abbas and had also sponsored the case for his promotion to the rank of Director.

### **FINDINGS OF THE HIGH COURT**

20. After reviewing the entire evidence at length, the High Court has held that the prosecution has succeeded in proving that Zulfikar Ali Bhutto had strained relations with Ahmad Raza Kasuri, thus constituting a motive to get him eliminated; that this appellant had entered into a conspiracy with Masood Mahmood (P.W. 2), in which plan the other accused also joined at different levels to execute the mission along with Ghulam Hussain approver; that the attack on Ahmad Raza Kasuri in Islamabad was a part of the same operation; that the attack launched on Kasuri's car in Lahore, during the course of which his father was killed, was also in furtherance of the same conspiracy; and that the initial investigation in the case was not honest, and efforts had been made at various levels to divert its course for the purpose of screening the real offenders. The High Court has expressed the view that sufficient evidence,

circumstantial and documentary, has been brought on the record to provide corroboration necessary for the purpose of placing reliance on the statements of the two approvers Masood Mahmood and Ghulam Hussain. It has also taken note of the fact that the appellants Arshad Iqbal, Ghulam Mustafa and Rana Iftikhar Ahmad had stuck to their confessions throughout the course of the trial. Finally, the High Court has observed that there were no extenuating circumstances in favor) of the appellants, as Zulfikar Ali Bhutto was the Prime Minister of the country and it was his duty to protect the life and liberty of the citizens of Pakistan, and not to use the Federal Security Force for eliminating his political opponents; that the other appellants were under no obligation to obey the unlawful commands of their superiors, and such a plea could not afford a valid defence in law.

### **SUBMISSIONS ON BEHALF OF ZULFIKAR ALI BHUTTO**

21. During the course of elaborate and exhaustive arguments, spread over a period of nearly two months, Mr. Yahya Bakhtiar, the learned counsel for appellant Zulfikar Ali Bhutto has assailed the judgment of the High Court on three main grounds, namely:-

(a) It is a false, fabricated and politically motivated case, being the result of an international conspiracy aimed at eliminating the appellant both politically and physically;

(b) That the trial stands vitiated for the reason that the presiding Judge of the Bench, namely, Mr. Justice Mushtaq Hussain was biased against the appellant, and the trial was not conducted fairly inasmuch as evidence was not recorded faithfully in accordance with the depositions of the witnesses, objections raised by the defence counsel as to the admissibility of evidence were frequently not recorded, and were often illegally overruled; and that as a result of the cumulative effect of such prejudicial orders the appellant was compelled to boycott the trial from the 10th of January, 1978, onwards as a measure of protest; and

(c) That on merits, the prosecution had failed to prove its case beyond reasonable doubt; that inadmissible evidence had been allowed to be brought on the record and taken into consideration against the appellant in violation of the relevant provisions of law; and that admissible and relevant evidence had been illegally shut out to the prejudice of the appellant; that the prosecution witnesses, particularly the two approvers Masood Mahmood and Ghulam Hussain were not worthy of credit; and that the necessary corroboration, as required by law, was not available on the record.



Mr. Yahya Bakhtiar submitted that on these grounds the appellant was entitled to acquittal, or at least it was a case where a retrial should be ordered by an impartial Bench or Court.

### **THREE APPLICATIONS BY Z. A. BHUTTO**

22. On the 8th of July, 1978, the learned defence counsel presented three miscellaneous applications, which have been numbered as Criminal Miscellaneous 7, 8 and 9 of 1978, for facility of reference. In the first application the prayer is for resummoning M. R. Welch (P.W. 4) so that he could be questioned in respect of his religion and some other waters which could not be taken up in cross-examination owing to the appellant's absence from the Court on the day Welch was examined. The second application contains a request for summoning of D.S.P. Agha Muhammad Safdar and Col. Wazir Muhammad Khan of the Central Ordnance Depot, Kharian, as Court witnesses, so that the first named could prove the statement made by Ahmad Raza Kasuri (P.W. 1) under section 161 of the Criminal Procedure Code during the investigation of the Islamabad incident in August, 1974; and the second witness could depose as to the source and marking of the ammunition supplied to various units of the Army and para-Military Forces like the Federal Security Force. The 3rd application contains a prayer for summoning 10 defence witnesses including the former Chief of the Army Staff General Tikka Khan, former Minister of State for Foreign Affairs, Mr. Aziz Ahmad, former Inspector-General of Police of the Punjab Province Rao Abdul Rashid, and certain other officials of the Press Information Department and of the C.M.L.A. Secretariat, for the reason that the appellant did not have an opportunity of adducing defence evidence owing to his having boycotted the trial.

### **BHUTTO'S PERSONAL APPEARANCE IN SUPREME COURT**

23. An oral prayer was also made at the commencement of the hearing of the appeal, as well as at the close of arguments, that the appellant should be given an opportunity in this Court to make a full statement under section 342 - of the Criminal Procedure Code, as such an opportunity was denied to him in the trial Court.

24. A written application was also later submitted to the Court by the appellant himself requesting for an opportunity to personally address the Court on some aspects of the case. This request was allowed, and, accordingly, the appellant personally appeared before the Court for four days, from the 18th to the 21st of December, 1978.

25. During his elaborate address, spreading over nearly 12 hours, appellant Zulfikar Ali Bhutto denied the prosecution allegations regarding his having any motive to have witness Ahmad Raza Kasuri assassinated, and having entered into any conspiracy in this behalf with witness Masood Mahmood, the then Director-General of the Federal Security Force. He also contended that the evidence did not disclose the presence of an

essential ingredient of the offence of conspiracy, namely, agreement, on the part of the co-conspirators, particularly Masood Mahmood, who had pleaded duress on the part of the appellant. The appellant commented upon what he called the inherent contradictions in the evidence of witnesses Ahmad Raza Kasuri and Masood Mahmood, and submitted that they were acting under the compulsion of Martial Law prevailing in the country. He stated that if the prosecution wanted the Court to take judicial notice of the alleged social conditions prevailing in Pakistan during his tenure of office as President and Prime Minister of the country, then similar notice should also be taken of the fact that important witnesses were giving evidence at the trial during the continuance of Martial Law.

26. He vehemently contended that the entire case against him was false and fabricated, intended to eliminate him physically and politically, and that he was innocent. He bitterly complained that he had not been given a fair trial in the High Court, as its presiding Judge, Mr. Justice Mushtaq Hussain had a personal bias against him owing to his supersession for the office of Chief Justice of the Lahore High Court, and also because the Central Executive Committee of the Pakistan People's Party, presided over by the appellant, had joined issue with him in respect of certain statements made by him in his capacity as Chief Election Commissioner in August, 1977.

27. He strongly criticized the observations made by the High Court in paragraphs 609 to 616 of its judgment, describing him as a Muslim only in name and not living up to the ideals of conduct prescribed for Muslim rulers lay Islam. He submitted that this criticism was entirely unjustified, and was clear evidence of the bias of the trial Court against him; as, in fact, he had rendered greater service to Islam than any of the previous rulers of Pakistan, as he was instrumental in solving the age-old Qadiani problem, in convening the Islamic Summit at Lahore and being elected as its Chairman on a proposal made by no less a person than the late King Faisal of Saudi Arabia; that he had organized Seerat Conferences in the country, had formulated a liberal Haj Policy, had declared Friday as a closed holiday instead of Sunday, had introduced prohibition in the country, had changed the name of the Pakistan Red Cross to Red Crescent; and was primarily responsible for the unanimous adoption of the 1973 Constitution by the Parliament. He submitted that in the face of these achievements in the cause of Islam, the High Court had no justification, nor was it competent, to pronounce upon the nature of his conduct as a Muslim. He also submitted that no head of the Government could be held responsible for individual crimes committed in the State during his tenure of office. He resented the insinuations and innuendoes contained in paragraphs 613 to 616 of the judgment; which ostensibly spell out the Islamic injunctions regarding the conduct of Government by a Muslim ruler.

28. On all the four days of his appearance appellant Zulfikar Ali Bhutto expressed his full confidence in this Court, and also his gratitude for having been given an

opportunity of personally addressing the Court at length, even though his lawyers had already made full submissions on all aspects of the case.

### **PERSONAL APPEARANCE OF OTHER APPELLANTS AND THEIR ADMISSIONS**

29. The other four appellants, namely, Mian Muhammad Abbas, Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad were also allowed, on their request, to be present in Court during the days of appellant Zulfikar Ali Bhutto's address. At the close of his address they sought permission to make oral submissions.

30. Mian Muhammad Abbas re-affirmed the written application he had earlier sent to this Court, acknowledging responsibility for his part in the crime. He, however, pleaded that he had acted under the orders and threats of his Director-General Masood Mahmood, and that he had tendered his resignation twice, but the same was not accepted. He regretted that under the orders of the former Prime Minister Zulfikar Ali Bhutto and Director-General Masood Mahmood he was instrumental in the assassination of the late Nawab Muhammad Ahmad Khan, who was his personal friend. Finally, he asked for clemency in the matter of punishment.

31. The other three appellants also reiterated their confessions, and submitted that they had acted under the orders of their superiors, and requested for lenient treatment in the matter of sentence. Ghulam Mustafa narrated a fairly long list of political crimes allegedly committed by the Federal Security Force under the orders of the former Prime Minister, adding that Masood Mahmood or other members of the Federal Security Force had no personal interest in these matters. The other two appellants also asserted that they had no enmity with Ahmad Raza Kasuri or his late father Nawab Muhammad Ahmad Khan who was killed in the attack mounted by them on Ahmad Raza Kasuri's car.

### **POLITICAL CONSIDERATIONS IRRELEVANT**

32. Although in the grounds of appeal, as well as in the oral submissions made at the Bar, considerable emphasis has been laid on the point that the present case was politically motivated in the sense that there was an international conspiracy to remove the appellant from power, and to eliminate him both politically and physically, it is clear that these are matters extraneous to the record of the case and to its judicial determination. The fate of the present appeal must depend not on the motive of those who reopened the investigation of the case on the promulgation of Martial Law on the 5th of July, 1977, but on the strength or weakness of the evidence adduced in support of the allegations made by Ahmad Raza Kasuri in the First Information Report made by him as long ago as the 11th of November, 1974, minutes after his father had breathed his last owing to injuries sustained during the attack on the complainant's car. If the requisite evidence, satisfying the legal and judicial standards applicable in criminal

trials of the present kind, is available on the record to prove the guilt of the appellant beyond reasonable doubt, then the duty of the Court is clear, irrespective of the political considerations which might have led to the overthrow of the appellant's Government in July, 1977, and the reopening of the present case thereafter. The converse is equally true. If sufficient evidence is not available to sustain the convictions recorded against the appellant, then they must be set aside, regardless of any political considerations. On this view of the matter, we did not think it necessary to go into the details of the alleged international conspiracy alluded to by Mr. Yahya Bakhtiar.

### DETAILED CONTENTIONS ON MERITS ON BEHALF OF BHUTTO

33. Even though the learned counsel had mentioned the question of bias before commenting on the merits of the case, he agreed that it would be more appropriate if the merits were discussed first, leaving the question of bias to be considered later. I would, accordingly, proceed to outline the various contentions raised by Mr. Yahya Bakhtiar on the merits of the case.

34. Mr. Yahya Bakhtiar contended that:

(i) The trial stands vitiated by reason of serious prejudice having been caused to the appellant owing to the violation of the rule laid down by the Supreme Court in *Nur Elahi v. The State*<sup>52</sup> and others, namely, that the complaint case initiated by Ahmad Raza Kasuri should have been tried first before taking up the challan filed by the State;

(ii) A considerable amount of evidence, and he gave details, had been admitted at the trial in violation of the provisions contained in sections 10, 30 and 32 of the Evidence Act, which must now be excluded from consideration;

(iii) (a) The two approvers not having made a full and true disclosure of the whole of the circumstances within their knowledge, as required by section 337 of the Code of Criminal Procedure, they could not be regarded as approvers in the legal sense, and for that reason as well their evidence could not be brought within the ambit of section 10 of the Evidence Act; and

(b) All the confessions recorded in the case have been recorded in violation of the provisions of subsection (1-A) of section 164, Criminal Procedure Code as they were not recorded in the presence of the appellant, and the latter was not given an opportunity of cross-examining them, thus causing grave prejudice to the appellant;

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(iv) The appellant is alleged to have originally conspired with the late Malik Haq Nawaz Tiwana, the first Director-General of the Federal Security Force, but there is no charge in this behalf, and, accordingly, the prosecution was precluded from leading evidence to prove any conspiracy;

(v) As the alleged conspiracy came to an end with this incident resulting in the death of Kasuri's father, evidence as to the subsequent conduct of the appellant or of the co-conspirators, or of his subordinates was not only inadmissible but also irrelevant; that even otherwise these acts etc. were not of an incriminating nature and could not give rise to an inference about the existence of the alleged conspiracy;

(vi) Several important pieces of incriminating evidence, relied upon by the High Court, had not been put to the appellant under section 342 of the Criminal Procedure Code, with the result that they also had to be excluded from consideration by this Court;

(vii) The provisions of section 540-A of the Criminal Procedure Code had not been properly complied with by the High Court before proceeding with the trial in the absence of the appellant from the 16th of November, 1977 to the 5th of December, 1977, and on the 14th of December, 1977, as well as the 17th of December, 1977, with the necessary consequence that the evidence of the witnesses examined on these dates could not be legally used against the appellant;

(viii) Statements of several prosecution witnesses, namely, Masood Mahmood (P.W. 2), Ghulam Hussain (P.W. 31), and Abdul Hayee Niazi (P.W. 34), recorded under section 161 of the Criminal Procedure Code during the investigation of the case were not supplied to the defence as required by section 265-C of the Criminal Procedure Code, thus depriving the defence of its valuable right to cross-examine the witnesses in the light of their previous statements, which would amount to an illegality requiring that the entire evidence of these witnesses be excluded from consideration;

(ix) The High Court failed to apply the correct legal procedure in the matter of permitting the defence to cross-examine important prosecution witnesses as to significant omissions from their previous statements, as it erroneously took the view that omissions, or lapses of memory, did not amount to contradictions within the meaning of section 145 of the Evidence Act, thus causing grave prejudice to the appellant by denying him the opportunity to show that the witnesses were not reliable;

(x) The defence was illegally precluded from proving the log book of the jeep driven by Muhammad Amir (P.W. 19), although the matter was fully covered by section 35 of the Evidence Act read with illustration (e) to section 114 thereof, with the result that the defence was prejudiced in the matter of showing that the story of approver Ghulam Hussain regarding the deployment of this jeep on the day of the attack stood contradicted by documentary evidence;

(xi) The defence was seriously prejudiced by the failure of the prosecution to examine certain material witnesses like the then Chief Minister of the Punjab Mr. Hanif Ramay, the two witnesses of the recovery memorandum of the crime empties from the spot, the then Inspector General of Police of the Punjab Province Rao Abdul Rashid and others whose list was supplied), and it is necessary that all this additional evidence should be called in the appellate Court or an adverse inference should be drawn against the prosecution;

(xii) If full effect is given to the foregoing contentions, then no evidence whatsoever is left on the record for sustaining the convictions recorded by the High Court I but even otherwise the evidence of the important witnesses relied upon by the prosecution, like Ahmad Raza Kasuri (P.W. 1), Masood Mahmood (P.W. 2), Saeed Ahmad Khan (P.W. 3), M. R. Welch (P.W. 4) and Ghulam Hussain (P.W. 31), is full of contradictions, improvements, lies and improbabilities, so much so that even the manner in which Kasuri's car was fired upon cannot be satisfactorily determined, nor can any conclusion be safely drawn as to the nature of the conspiracy and the persons responsible for its execution, especially the presence of approver Ghulam Hussain in Lahore on that day;

(xiii) The two approvers as well as Saeed Ahmad Khan, who are the mainstay of the prosecution, being men of doubtful character and antecedents, and their evidence being inherently unreliable and full of contradictions, the question of finding any corroboration does not arise; and that in any event their evidence can be accepted only if it is corroborated by independent evidence, and as in the instant case the corroboratory evidence is that of accomplices, or persons who are no better than accomplices, it is not sufficient to sustain the conviction of the appellant;

(xiv) The appellant had no motive to do away with Ahmad Raza Kasuri, as the latter was a political non-entity and any criticism by him of the policies of the appellant could have no impact, the more so, as the appellant had other far more important and violent critics such as Khan Abdul Wali Khan; that Kasuri himself had mentioned other enemies; and that in any case, motive could not provide corroboration on a charge of conspiracy;

(xv) The High Court has erroneously relied on unproved secure reports and has misread the other documents in coming to the conclusion that the appellant had tried to win back Ahmad Raza Kasuri to the fold of the P.P.P., thus showing his guilty mind;

(xvi) The prosecution has failed to prove by positive evidence that the crime empties recovered from the spot had been fired from any of the 25 guns belonging to the Third Battalion of the Federal Security Force, then stationed at Walton; and the various theories of substitution of the crime empties by the police officers originally handling the case in 1974-75 were completely untenable and in the nature of an afterthought introduced only when the report of the Ballistics Expert was found to be negative; which report is fatal to the evidence of the approver Ghulam Hussain and of the other witnesses who claim to have supplied S. M. Gs. and ammunition to Ghulam Hussain for the purpose of carrying out attacks on Ahmad Raza Kasuri;

(xvii) No weight could be attached to the confessional statements of the co-accused, nor to the evidence of the approvers and witnesses like Saeed Ahmad Khan and M. R. Welch or the police officers of the Lahore District, as they were all acting under the fear of Martial Law, having been pressurized to give false evidence to save their own skins; or due to promises and inducements;

(xviii) Apart from showing the bias of the Court, camera proceedings of the trial held in violation of the provisions of section 352 of the Criminal Procedure Code and the established principles of holding criminal trials in the open, have vitiated the whole trial, thereby entitling the appellant to acquittal;

(xix) In any case, even if the facts alleged by the prosecution are taken as having been proved, an essential ingredient of the offence of conspiracy, *viz.* agreement among the conspirators, would be found wanting, as all the officers of the Federal Security Force, from the Director-General down to the A.S.I., were acting under duress and only carrying out orders of their superiors; and

(xx) Finally, section 111 of the Pakistan Penal Code is not attracted to the facts of this case, as the death of Nawab Muhammad Ahmad Khan could not be regarded as the probable consequence of the alleged conspiracy between the appellant and Masood Mahmood, and accordingly criminal liability for the same must rest exclusively on those who actually caused it. In any case the appellant was not charged under this section.

## SUBMISSIONS ON BEHALF OF MIAN ABBAS

35. On behalf of appellant Mian Muhammad Abbas it was submitted by Mr. Qurban Sadiq Ikram that although the appellant does not contest the case on facts and admits the various allegations made by the prosecution, yet his case is fully covered by section 94 of the Pakistan Penal Code for the reason that he was under constant threat from his Director-General Masood Mahmood, and his failure to comply would have entailed serious consequences for him and for his family. He next submits that, in any case, this appellant having no motive of his own to do away with Ahmad Raza Kasuri, be acted under duress and compulsion of circumstances which entitle him to mitigation in the sentence awarded by the High Court.

## SUBMISSIONS ON BEHALF OF REMAINING THREE APPELLANTS

36. Mr. Irshad Qureshi, appearing for appellants Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad has stated that his clients had made a clean breast of the whole affair and had admitted the prosecution allegations regarding the part played by them in the whole incident, but it was clear that they had also acted under duress and compulsion of circumstances, and the obligation of their oath as employees of the Federal Security Force. He contended that they were, therefore, protected under sections 76 and 94 of the Pakistan Penal Code as well as section 21 of the Federal Security Force Act, 1973. Lastly, he submitted that, in any case, all these factors were clearly in the nature of mitigating circumstances in the matter of sentence awarded to them under section 302 of the Pakistan Penal Code read with sections 301 and 34 thereof.

### *Bhutto's Applications Dismissed*

37. Before dealing with the several contentions raised by Mr. Yahya Bakhtiar on the merits of the case, I would like to dispose of the three applications made by him for recalling certain prosecution witnesses for further cross-examination summoning certain persons as Court witnesses, and others as defence witnesses. On the last day of the hearing of these appeals, viz. 23-12-1978, we announced a short order to the effect that, for reasons to be recorded in the judgment, we were of the view that no justification had been made out for granting any of these requests. I now proceed to record reasons for this view.

### *(1) Criminal Miscellaneous No. 7 of 1978*

38. It has been alleged in this application that 15 witnesses of the prosecution were examined and cross-examined in the High Court when the appellant, owing to his illness, was not present in the Court, and the various requests made on his behalf for



the adjournment of the proceedings were not only rejected, but the High Court imposed on him illegally and arbitrarily exemption from appearance in the purported exercise of power under section 540-A of the Criminal Procedure Code. It is maintained that the evidence of the said witnesses is, therefore, inadmissible against the appellant as also that the same has caused him great prejudice.

39. Upon these allegations, the prayer made in the application is that while the appellant reserves his right to make an application to recall the said witnesses at a proper time, for the present Mr. M. R. Welch (P.W. 4) may be recalled for cross-examination, as being Catholic Christian by faith his evidence was recorded in the High Court on solemn affirmation instead of having been sworn on the Bible.

40. Mr. M. A. Rehman, the learned A. O. R. for the State, has filed written objections and opposed the grant of the said application. The main reasons advanced by him in that behalf are that in line with the settled practice pursued in the High Court, the prosecution had informed the defence in advance that Mr. M. R. Welch was to be produced in evidence on 16-11-1977; that he was accordingly produced, examined and cross-examined by Mr. Ehsan Qadir Shah, the learned counsel for Mr. Bhutto; that neither on the said date nor at any other day was any grievance made by or on behalf of the appellant that the witness should have been examined in his presence, or that being a Christian by faith ought to have been sworn on the Bible; that Mr. Welch, when he was about to be administered the oath as a witness in the High Court, stated from the dock within the sight and hearing of all, including the learned counsel of the appellant, that he had embraced Islam, and consequently he was sworn on solemn affirmation; and that under section 13 of the Oaths Act, 1873 (Act X of 1873) no objection can now be taken to his evidence, even if he was actually Christian by faith.

41. Now, by going through the contents of the said application, as well as the reply made thereto on behalf of the State, I am satisfied that the application has no merit in it. It is true that the appellant remained absent from the Court from 13-11-77 to 30-11-77 when 15 witnesses were examined and cross-examined in his absence. But even so he does not seem to have been prejudiced. It is a matter of record that all the said witnesses were cross-examined at length by the learned counsel for the appellant; that the appellant used to meet with his counsel practically every day in jail, and therefore, it has to be presumed that the cross-examination of the said witnesses was made in accordance with his instructions, or at any rate his approval. Not only this, but no objection seems to have been taken by his learned counsel as to the faith of Mr. Welch when he declared in the open Court that he had converted to Islam, nor indeed was any question put to him in that behalf during his cross-examination. It is of some interest to note here that Mr. Yahya Bakhtiar, who hails from Quetta, stated at the Bar that Mr. Welch had embraced Islam for a brief period in order to be able to marry a Muslim lady. In these circumstances, the prayer made in this application is not only

misconceived, but belated, as also that in view of the lengthy cross-examination of the witness, the appellant has not been prejudiced.

42. Even otherwise, no objection can now be taken to his evidence in view of section 13 of the Oaths Act, 1873 (Act X of 1873), which runs as under:-

"No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever, in the form in which any one of them is administered shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth."

This application is, therefore, dismissed.

*(2) Miscellaneous Application No. 8 of 1978*

43. The prayer made in this application is that Mr. Agha Muhammad Safdar, the former Deputy Superintendent of Police, Islamabad and Col. Wazir Ahmad Khan, Central Armament Depot, Havelian, may be summoned as witnesses for the following reasons:-

That Agha Muhammad Safdar and Nasir Nawaz (P.W. 23) had jointly investigated the case in respect of the Islamabad occurrence in which the car of Mr. Ahmad Raza Kasuri was fired upon ineffectively; that in respect of the said occurrence Agha Muhammad Safdar had recorded the statement of Mr. Ahmad Raza Kasuri under section 161, Cr. P.C.; that a copy of the said statement had been supplied to the defence by the learned counsel for the prosecution; that during the cross-examination of Nasir Nawaz (P.W. 23) the said copy was put to the witness as he was conversant with the handwriting and signature of Agha Muhammad Safdar, but the High Court did not permit the learned counsel for the appellant to do so; that when the appellant, at a subsequent stage in the High Court, boycotted the proceedings an application was made by Mr. Qurban Sadiq Ikram the learned counsel for Mian Muhammad Abbas, for summoning Agha Muhammad Safdar as a witness, but the same was rejected; and that it would be in the interest of justice that Agha Muhammad Safdar be summoned as a Court-witness.

44. As to Col. Wazir Ahmad Khan, it is said that he is the author of Ammunition Vouchers, namely, Exhs. P.W. 38/ 1, P.W. 38/2, P.W. 38 3 and P.W. 39/2 and hence an essential witness; that in the High Court the prosecution had applied for permission to produce him as a witness, to which no objection was taken by the defence, but he was not summoned for reasons recorded in the judgment of the High Court. The prayer made in the application is that his evidence being essential, he should be summoned as a Court-witness in the interest of justice.

45. Mr. M. A. Rehman, the learned A. O. R. for the State, has filed written objections against this application also. The stand taken by him is that both the said witnesses were not only known to the appellant, but were available and could be produced in Court; that in any event they could be summoned as witnesses for the defence, as some of the appellants had indeed done so in their defence; and that the appellant was specifically asked by the High Court if he would wish to lead any evidence in defence but he replied in the negative. In these circumstances, it is alleged that no case has been made out by the appellant for summoning the said two witnesses and his prayer in that behalf ought to be rejected.

46. After having heard the learned counsel for the parties I feel that this application must be rejected. It may be noted that in the case of Agha Muhammad Safdar no application was made by or on behalf of the appellant that he be summoned as a Court-witness. It is true that an application was made on behalf of Mian Muhammad Abbas, but he has made no grievance of the fact as to its dismissal, or that he has been prejudiced. The main reason for which the appellant seems to have missed the opportunity to summon Agha Muhammad Sardar as a witness was because he had boycotted the proceedings. But this is hardly a ground which can be urged in support of his said application. The word 'boycott' is unknown in the legal system this country, therefore, the appellant, even if he can be said to have a valid grievance against the conduct of the trial by the High Court, ought not to have boycotted the proceedings, and instead placed on the record of the case his written objections pinpointing therein his reasons owing to which he felt D that he was not getting a fair trial.

47. Even otherwise, the summoning of the said two witnesses at this stage would be a waste of time. The object for which these witnesses are required to be summoned has been effectively achieved as Mr. Ahmad Raza Kasuri and Fazal Ali (P.W. 24) who had produced the said ammunition vouchers have been extensively cross-examined on behalf of the appellant in the High Court.

48. In these circumstances, I find no force in this application and the same is dismissed.

### *(3) Criminal Miscellaneous No. 9 of 1978*

49. The prayer made in the third application is that the ten witnesses mentioned therein namely, General (Rtd.) Tikka Khan, Mr. Aziz Ahmad, former Minister of Foreign Affairs, Government of Pakistan, Rao Abdur Rashid, former Inspector-General of Police, Punjab, Director, Press Information Department, Government of Pakistan, Islamabad, Officer concerned from the C.M.L.A. Secretariat, Record Keeper or any other concerned official of the Lahore High Court, Director, F.I.A., Lahore, Mr. Muhammad Ali (Film Star) Gulberg II, Lahore, Jam Sadiq Ali, former Minister, Government of

Sindh, now in London, and Ghulam Mustafa Khar, the former Governor and former Chief Minister, Punjab now in London, may be summoned as witnesses for the following reasons:-

That General (Retd.) Tikka Khan would give evidence to show that it was he who had got Mr. Masood Mahmood transferred from the Ministry of Defence. Mr. Aziz Ahmad would give evidence to show that he had recommended Mr. Masood Mahmood to the then Prime Minister for an appointment to some important post, e.g. Director, Intelligence Bureau, and that on his appointment as Director-General, F.S.F. he was happy, as also that in the year 1977 massive interference had taken place in the internal affairs of Pakistan; Rao Abdur Rashid would give evidence to show that the contents of his affidavit filed along with the additional memorandum of appeal, in this Court, were true; the Director of Press Information Department to produce the record/Press reports of the public speeches/addresses made to the nation by the C.M.L.A. on Radio/T.V. network from 5-7-1977, as also to produce the Press reports/Press releases of the interviews given by the C.M.L.A. to *Urdu Digest* and *Kehan International* of Iran in the month of September, 1977, as reported in the *Morning News* and daily *Musawaat* dated 11-8-1977 and 28-8-1977 respectively; that the officer from the Secretariat of C.M.L.A. also to produce any of the said documents and Press releases, etc. that the record-keeper or any other concerned official from the High Court to produce (i) the record of the complaint case instituted by Mr. Ahmad Raza Kasuri concerning the murder of his father; (ii) the record of the Habeas Corpus Petition filed by Mst. Roshan Bibi on behalf of Roshan Ali, bearing Writ Petition No. 2434 of 1977, (iii) the record of Habeas Corpus Petition filed on 6-7-1977 by Mr. Aftab Gul, Advocate, for the release of the appellant; (iv) the record of the bail application in this case which was disposed of by Mr. Justice K. M. A. Samdani on 30-9-1977; (v) the record of the Habeas Corpus Petition (No. 3732/77) filed by Begum Nusrat Bhutto against the detention of the appellant and others under M. L. O. 12; (vi) the Director, F.I.A., Lahore to produce the record pertaining to the orders of the Federal Government for the re-investigation of the present case, as also the correspondence of the said Government with the provincial police regarding the taking over of the investigation of the case by F.I.A.; Mr. Muhammad Ali (Film Star) to give evidence to show that the incident in which he was fired upon had nothing to do with the appellant, and the prosecution evidence in that behalf was false; Jam Sadiq Ali to give evidence to show that the contents of his affidavit sent by him to this Court are true; and Mr. Ghulam Mustafa Khar to give evidence to show that the contents of his affidavit sent by him to this Court are also true and correct.

50. Apart from the fact, that none of the aforesaid evidence has any real relevancy to the facts of this case, and is not at all necessary for its decision, the appellant has again pleaded that since he had boycotted the proceedings in the High Court he could not effectively defend himself. This ground, as already mentioned, is not available to him under the law. The application is, therefore, also dismissed.

## Objections as to the Mode of Trial

51. Before embarking upon an examination of the evidence produced and relied upon by the prosecution at the trial, it is necessary to deal with the several contentions raised by Mr. Yahya Bakhtiar as to the legality of the trial itself, as well as about the admissibility of certain pieces of evidence and other allied matters.

### Question of Prior Trial of Complaint Case

52. Mr. Yahya Bakhtiar contended, in the first instance, that the trial stands vitiated for the reason that the complaint cast filed by Ahmad Raza Kasuri should have been tried before taking up the challan case for trial. In support of his contention he relied on *Nur Elahi v. The State*<sup>53</sup>.

53. Before dealing with this contention it would be of advantage to recapitulate essential facts. The F.I.R. No. 402 (Exh. P.W. 1/2) relating to the present incident in which Nawab Muhammad Ahmad Khan lost his life was disposed of as untraced on 1st of October, 1975, on the basis of the letter of the Inspector-General of Police, Punjab, dated 27th of September, 1975, addressed to the Home Secretary, Government of the Punjab (Exh. P.W. 35/4). Ahmad Raza Kasuri took no further steps until the promulgation of Martial Law on 5th of July, 1977; and thereafter he filed a complaint before the Ilaqa Magistrate on 30th of July, 1977, in which an identical motive and version of the incident was given as in the challan charging Zulfikar Ali Bhutto, Masood Mahmood, former Director-General, Federal Security Force, Saeed Ahmad Khan, former Chief Security Officer to the Prime Minister, and Rao Abdur Rashid, former Inspector-General of Police, Punjab, for offences under sections 302, 307 and 34 read with sections 120-A/109 and 120-B etc. etc., P.P.C. The learned Magistrate on the same date ordered that it be entered in the relevant register and sent to the Sessions Court for trial.

54. On the motion of Ahmad Raza Kasuri, the complaint was transferred, by order dated 15th of August, 1977, to the High Court for trial by a Division Bench. In the meantime, as a result of the re-investigation of the case which commenced on 24th of July, 1977, on the basis of the F.I.R. (Exh. P.W. 1/2) an incomplete challan was presented on 13th of September, 1977, in the Court of the Ilaqa Magistrate which was transferred by the High Court, by order dated 13th of September, 1977, for trial by itself on the basis of an application filed by the Special Public Prosecutor; and the learned Chief Justice, by the same order; constituted a Bench of 5 Judges, including himself, to hear the case. The final challan presented in the Court of the same Magistrate was also sent to the High Court. During the interregnum, as would appear from the order-sheets, no progress in

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the complaint case was made. However, on 31st of August, 1977, Ahmad Raza Kasuri had showed his inclination to proceed with the complaint, as he was not satisfied with the statement of the learned Assistant Advocate-General that he was still not in a position to state whether the challan was intended to be filed in this case. He was directed to submit a list of witnesses with their addresses and the gist of their depositions. On the next date of hearing the Division Bench without issuing process transferred the complaint case to the larger Bench trying the challan case by order dated 18th of September, 1977. The challan case was tried and concluded by judgment dated 18th of March, 1977, with the awareness of the complaint case-pending before that Bench.

55. Adverting now to the contention that the violation of the procedure laid down in the above-cited case has caused prejudice to the appellant, it may be stated at the outset that the facts of the two cases are not parallel, as in the precedent case for the murder of Muzaffar Paracha, Nur Elahi had lodged a report with the police naming Ch. Zafarul Haq, Ihsanul Haq and Nawazul Haq as the alleged murderers. The police, on investigation, found Ch. Zafarul Haq and Nawazul Haq to be innocent and mentioned their names in Column No. 2 of the challan, and instead prosecuted Ch. Ikram and Banaras as culprits. Nur Elahi, thereupon, filed a complaint giving his version of the incident as set forth in the First Information Report. Consequently, there were two versions of the same incident with two sets of culprits, and a difficulty arose as to how the two cases should be dealt with at the committal stage, which was resolved by the High Court in the manner that the two cases should be consolidated for the purpose of recording evidence; and that common witnesses to both the cases should be produced only once and examined first by the State Prosecutor and then by the counsel for the complainant and thereafter they should be cross-examined by the counsel for the accused. The same procedure was laid down for examining witnesses not mentioned in the challan but called by the complainant. The Inquiry Magistrate by separate orders committed the two sets of accused for trial to the Court of Session.

56. The complainant made an application for trying the two cases separately, but the Additional Sessions Judge ordered the joint trial of the two sets of accused, which order was challenged in the High Court, and set aside. The High Court directed that the challan case should be tried first and the common witnesses in the two cases should be examined only once and their evidence read in both the trials. It was further laid down that any additional evidence which the complainant wished to lead in his case should be recorded after the conclusion of the evidence in the challan case, and the judgments should be pronounced simultaneously. This matter came up before this Court by special leave, and it was held that a fair procedure would be for the trial Court to take up the complaint case first for the reason as under:-

"This procedure is being suggested to avoid a difficulty that might otherwise confront the complainant. If the Police challan is taken up first for trial, the

complainant would be under a handicap in so far as he would not be in a position to cross-examine the witnesses for the prosecution."

57. In the instant case the version is the same which is not the feature in the above-cited case; and as for the accused cited in the complaint case, the appellant is common in both the cases, whereas Masood Mahmood who would have also been an accused in the challan case has been granted pardon and examined as an approver. Saeed Ahmad Khan is a witness in the challan case, while Rao Abdur Rashid is neither a witness nor an accused in that case; and it may be stated that the complainant has not implicated either of them as accused in his evidence in the challan case. Therefore, there was no necessity for a separate trial of the two cases when, technically speaking, there were neither two sets of accused nor different versions nor any additional evidence to be examined by the complainant. It was only to avoid prejudice to the complainant that a particular procedure was devised in the reported case of Far Elahi, but to say that invariably it should be followed even if the facts are distinguishable is not correct, as it does not amount to a declaration of law. Having held so, we might also point out that the objection to the trial, if any, should have been taken before the trial Bench; and not having done so, it is too late in the day to urge that it has caused prejudice to the appellant, when factually none is shown. Accordingly, this contention has no force.

58. I shall now deal with the objections raised by the learned counsel for appellant Zulfikar Ali Bhutto that a considerable amount of evidence, and he gave details, had been admitted and used at the trial in violation of the provisions contained in sections 32, 30 and 10 of the Evidence Act, which must now be excluded from consideration in arriving at any findings in his appeal.

### **Objections under sections 32 and 60 of the Evidence Act and hearsay evidence**

59. In the course of evidence and also at the stage of the arguments in the trial Court objections were raised against the admissibility of pieces of evidence in the depositions of prosecution witnesses in which they orally attributed certain statements and conduct to Abdul Hamid Bajwa who was at the relevant time serving as the Officer on Special Duty for the Chief Security Officer to the Prime Minister of Pakistan; Abdul Ahad, the then Deputy Superintendent of Police, Ichhra, Lahore who supervised the investigation of this case by the local police in 1974-75; and Malik Haq Nawaz Tiwana, the first Director-General of the Federal Security Force. All the three had died before the commencement of this trial. The precise objection raised before the learned trial Bench was to the effect that the statements and conduct attributed to them by the prosecution witnesses in their evidence constituted hearsay evidence of the dead persons, which was not admissible under any of the clauses of section 32 of the Evidence Act. But the High Court repelled the objection as discussed in paragraphs 360 to 376 of the judgment under appeal and held that the pieces of evidence in question were admissible under clauses (2) and (3) of section 32 of the Evidence Act. But in this Court, it was vehemently

argued by the learned counsel for Zulfikar Ali Bhutto appellant that this view formed by the learned trial Bench was wholly untenable and the objectionable pieces of evidence do not properly fall under clauses (2) and (3) of section 32 of the Evidence Act and are, therefore, inadmissible in evidence.

60. In this connection the, entire argument of the learned counsel for the appellant as well as the findings recorded by the learned trial Bench proceeded on the supposition that the pieces of evidence in question constituted hearsay evidence. The general rule is that all oral evidence must be direct. Section 32 of the Evidence Act is operative as an exception to this general rule against hearsay evidence. However, it was submitted by the learned State Counsel that the pieces of evidence in question did not constitute hearsay evidence, and were admissible as direct oral evidence deposed to by the prosecution witnesses. In this view of the matter, according to the learned State Counsel, any recourse to the provisions of section 32 of the Act was by and large misconceived.

61. I shall therefore, first deal with this last-mentioned contention. Indeed in this Court before us much confusion was raised in defining hearsay evidence. Section 3 of the Evidence Act defines a "fact" to mean and includes (1) anything, state of things, or relation of things capable of being perceived by the senses; and (2) any mental condition of which any person is conscious. Section 59 dealing with the mode of proof of facts lays down that all facts, except contents of documents, may be proved by oral evidence. In this connection section 60 further lays down that oral evidence must be direct; that is to say if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it; if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it; if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner; and if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those ground. This section thus excludes what is commonly known as the "hearsay" evidence.

62. In this connection Monir in his invaluable treatise on the Law of Evidence, 1974 Edition (Volume I, p. 690) has observed that in English law the expression "direct evidence" is used to signify evidence relating to the fact in issue *factum probandum*, whereas the terms "circumstantial evidence", "presumptive evidence" and "in erect evidence" are used to signify evidence which relates only to relevant facts (*facts probantia*). In section 60 of the Evidence Act, however, the expression "direct evidence" has an altogether different meaning; it is used in the sense of "original" evidence as distinguished from "hearsay" evidence, and it is not used in contradiction to "circumstantial" or "presumptive evidence". Thus, under the Act all evidence, whether direct or circumstantial in the English sense, must, in the sense of the Act, be "direct", i.e., the fact to be deposed to, whether it is a fact in issue or a relevant fact, must be deposed to by a



person who has seen it if it is one which could be seen, by a person who has heard it if it is a fact which could be heard, and by a person who perceived it by any other sense if it is a fact which could be perceived by any other sense; and if the fact to be deposed to is an opinion, it must be deposed to by the person who holds that opinion. According to the learned author this section enacts the general English rule that "hearsay" is no evidence.

63. This distinction between direct and hearsay evidence is best illustrated by Wigmore on Evidence, 3rd Edition (Volume V, section 1361), According. to the learned author: when a witness A on the stand testified, 'B told me that event X occurred', his testimony may be regarded in two ways: (1) He may be regarded as asserting the event upon his own credit, i. e. as a fact to be believed because he asserts that he knows it. But when it thus appears that his assertion is not based on personal observation of event X, his testimony to that extent is rejected, because he is not qualified by proper sources of knowledge to speak to it, (2) But suppose, in order to obviate that objection, that we regard A as not making any assertion about event X (of which he has no personal knowledge), but as testifying to the utterance in his hearing of B's statement as to event X. To this, A is clearly qualified to testify, so that no objection can arise on that score.

64. In this connection Phipson on Evidence (Eleventh Edition, paragraphs 631-32) has observed that it is a fundamental rule of evidence at common law that hearsay evidence is inadmissible. Simple as this fundamental is, in principle if not in application, there nonetheless exists "a superstitious awe-about having any truck with evidence which involves A's telling the Court what B said." Conspicuous uncertainty exists amongst practitioners, Magistrates and Judges as to what evidence does and does not fall within the hearsay rule. One of the reasons, according to the learned author, for this widespread misunderstanding is the failure to appreciate that the hallmark of a hearsay statement is not only the nature and source of the statement but also the purpose for which it is tendered. In this connection the learned author in paragraph 638 has by way of elaboration observed that in *Subramaniam v. Public Prosecutor*<sup>54</sup> the position was summarized in this way "Evidence of statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made".

65. Phipson in paragraph 643 has drawn the distinction between the original (term used by the English writers for the term direct within the meanings of section 60 of our own Evidence Act I of 1872) and hearsay evidence. He emphasizes that out-of-Court statements may constitute either original evidence (where the statement is in issue, or relevant, independent of its truth or falsity), or hearsay (where it is used as an assertion

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<sup>54</sup> (1956)W L R 965 (PC)

to prove the truth of the matter stated). The key to this distinction is the purpose for which the evidence is tendered. Section 60 of the Evidence Act is based on this concept of the hearsay rule under the common law of England.

66. According to *Corpus Juris Secundum*, Volume 22-A, section 718, pages 998 generally, the hearsay rule excludes extra judicial utterances when, and only when, offered as evidence of the truth of the matter asserted; it does not operate to exclude evidence of a statement, request or message offered for the mere purpose of proving the fact that the statement, request, or message was made or delivered, where such occurrence established a fact in issue or circumstantially bears on such a fact.

67. In *Subramaniam v. Public Prosecutor* the appellant was found in a wounded condition in the Rangam District in the State of Johore by members of the security forces operating against terrorists. He was tried on a charge of being in possession of ammunition contrary to Regulation 4 (1)(b) of the Emergency Regulations, 1951, of the Federation of Malaya. He put forward the defence, *inter alia*, that he had been captured by terrorists and that at all material times he was acting under what the terrorists said to him, but the trial Judge ruled that evidence of the conversation with the terrorists was not admissible unless they were called. The Judge said that he could find no evidence of duress, and in the result the appellant was convicted of the offence charged and sentenced to death. In allowing the appeal their Lordships of the Privy Council held that the learned trial Judge was in error in ruling out peremptorily the evidence of the "conversation" between the terrorists and the appellant. Evidence of a statement made to a witness by a person who was not himself called as a witness was not hearsay evidence, and was admissible when it was proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. Statements could have been made to the appellant by the terrorists which, whether true or not, if they had been believed by the appellant, might within the meaning of section 94 of the Penal Code of the Federated Malay States, reasonably have induced in him an apprehension of instant death if he failed to conform to their wishes.

68. In *Sm. Bibhabati Devi v. Ramendra Narayan Roy and others*<sup>55</sup> the relevant issue that arose was as to whether the plaintiff-respondent was the Second Kumar Ramendra Narayan Roy of Bhowal who was still alive. The two Courts in India had concurred in finding in favor of the plaintiff respondent on this issue. On appeal by special leave their Lordships of the Privy Council observed that whether the apparent death of the plaintiff took place shortly before mid-night or at dusk was the crucial point in the case and the witnesses stated that while they were seated in a common room in a sanatorium at about 8 p. m. a man came with the news that the plaintiff was just dead, and he made a request for men to carry the body for the cremation and the question was as to the admissibility of the evidence of these witnesses. In that connection the Court held:-

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<sup>55</sup> AIR 1947PC19

"Their Lordships are of opinion that the statement and request made by this man was a fact within the meaning of sections 3 and 59, Evidence Act, 1872, and that it is proved by the direct evidence of witnesses who heard it, within the meaning of section 60, but it was not a relevant fact unless the learned Judge was entitled to make it a relevant fact by a presumption under the terms of section 114. As regards the statement that the Kumar had just died, such a statement by itself would not justify any such presumption, as it might rest on mere rumor, but, in the opinion of their Lordships, the learned Judge was entitled to hold, in relation to the fact of the request for help to carry the body for cremation, that it was likely that the request was authorized by those in charge at Step Aside, having regard to "the, common course of natural events, human conduct and public and private business", and therefore to presume the existence of such authority."

69. The man who had brought the news and the request in connection with the death of the Kumar of Bhowal was neither identified nor examined as a witness. In spite of this the Privy Council held that the statement and request made by this man was a fact within the meaning of sections 3 and 59, Evidence Act, and that it stood proved by the direct evidence of the witnesses who heard it, within the meaning of section 60 of the Act. These observations by their Lordships of the Privy Council are highly pertinent to the mode of proof of a fact in accordance with section 60 of the Act. The rest of the observations by the Privy Council relate to the relevancy, of this evidence to the facts of that case only.

70. Under the Indian Jurisdiction in *Umrao Singh and others v. State of M.P.*<sup>56</sup> the High Court in relying on the observations of Lord Parker, C. J. in *R. v. Willis*<sup>57</sup> held that there is a distinction between factum and truth of a statement. Evidence of a statement made to a witness by a person who is not himself called as witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish what is contained in the statement; it is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement but the fact that it was made.

71. But in reply learned counsel for the appellant relied on *Malik Muhammad Ishague v. Messrs Erose Theatre and others*<sup>58</sup>. In that case the dispute came up to the Supreme Court arising out of a suit tried on the original side of the former High Court of Sindh & Baluchistan. In the plaint it was averred that the firm running the business of the Erose Cinema was formed as a result of the partnership deed dated 31-12-1948. In that connection it was pleaded that Mst. Qamar Bano senior widow of Parekh and Mst. Samad Begum sister and Mst. Bismillah Begum step-mother of Rizvi were *benami*

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<sup>56</sup> AIR 1961 Madh. Pra. 45

<sup>57</sup> (1960) 1 W L R 55

<sup>58</sup> PLD 1977 SC109

partners for Parekh and Rizvi respectively. In that connection in the evidence Mst. Amine Bai, junior widow of Parekh admitted that she was once told by her husband that Mst. Qamar Bano was shown in the deed of partnership as a *farzi* partner only to save income-tax. In holding that this statement attributed to the husband was not admissible under any of the clauses of section 32 of the Evidence Act, this Court observed:-

" .... the correct position appears to be that this statement is not admissible under any of the clauses of section 32 of the Evidence Act. Even otherwise, a perusal of the lengthy statement made by this lady leaves no doubt that she had no first-hand knowledge of the affairs of her husband; and a finding as to the legality or otherwise of the 1948 partnership could hardly be based on her evidence. She did not even remember as to when she married the late M. C. Parekh. We would not, therefore, attach any importance to any admission elicited from her on the question of the evasion of income-tax."

In that case the purpose behind the statement attributed to the deceased husband through the mouth of the lady was to prove the correctness of the real issue raised in the case as to whether these ladies were *benami* partners only and this statement constituted hearsay evidence and could not be used as direct evidence for that purpose under section 60 of the Evidence Act. Even as the statement of a dead man it was not covered by any of the clauses of section 32 of the Act and was therefore, held to be inadmissible.

72. Mr. Yahya Bakhtiar also referred us to *Emperor v. Nga Hlalng*<sup>59</sup>, *Gulzaman Khan v. Emperor*<sup>60</sup>, *Kashi Nath Panday v. Emperor*<sup>61</sup>, *Yenkata Reddy v. Emperor*<sup>62</sup>, *Sh. Aslauddin v. Emperor*<sup>63</sup>, *Channu and others v. Emperor*<sup>64</sup>, *Khurshid Ahmad v. Maqbool Ahmad*<sup>65</sup>, and *Pahlwan and 4 others v. The State*<sup>66</sup>. All these cases are distinguishable for the simple reason that in each one of them the evidence of a statement made to the witness concerned by a person, who was not himself called as a witness, was sought to be relied upon in order to establish the truth of what was contained in the statement of that other person in support of the conviction, and was, therefore, rightly held to be inadmissible as hearsay evidence to prove the truth.

73. In the light of this discussion it is necessary now to carefully examine the objection raised before us in this Court against the admissibility of the specified pieces

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<sup>59</sup> AIR 1928 Rang. 295

<sup>60</sup> AIR 1935 Pesh. 73

<sup>61</sup> AIR 1942 Cal. 214

<sup>62</sup> AIR 1431 Mad. 689

<sup>63</sup> AIR 1938 Cal. 399

<sup>64</sup> AIR 1948 Cal. 125

<sup>65</sup> PLD 1964 Kar. 356

<sup>66</sup> PLD 1975 Kar. 847

of evidence of the witnesses attributing statements, acts, and conduct to the dead persons. In this connection during the course of the arguments, the learned counsel for the appellant filed a chart in which he has tabulated the pieces of evidence against which he pressed his objection before us at the hearing. It shall be convenient to deal with them one by one in the light of the above discussion.

(1) According to P.W. 2 Masood Mahmood between 12-4-1974 and 23-4-1974, before his actual appointment by the then Prime Minister as the Director-General, Federal Security Force, he was visited several times, by Mr. Saeed Ahmad Khan, the then Chief Security Officer to the Prime Minister and his Assistant, late Abdul Hamid Bajwa. In that connection the witness deposed (Vol. I, pages 66-67) that: "During these visits, the latter who is now dead, impressed upon me the fact that if I did not accept the job offered to me, my wife and children may not be able to see me again." In this statement P.W. 2 Masood Mahmood deposed to the visits by late Abdul Hamid Bajwa. He also deposed that the impression created on him by the deceased was that in case he did not accept the job offered to him the life of his entire family may be in danger. The witness was competent to depose to his meeting with the deceased, and the talk that he had with him and the impression that he gained in that meeting. All this constituted direct evidence of what he himself perceived with, his senses, within section 60 of the Evidence Act and was admissible as such. It is, however, altogether a separate question as to what weight could be attached to the testimony of the witness in the circumstances of the case.

(2) P.W. Masood Mahmood stated that the Prime Minister had told him that Mian Muhammad Abbas had already been given directions to get rid of Mr. Ahmad Raza Kasuri. The witness stated that the Prime Minister then instructed him that he should ask Mian Muhammad Abbas to get on with the job. In that connection the witness further deposed (Volume I, pages 70-71) that "After the Prime Minister had given me these orders he kept on reminding me and goading me for their execution. This was done by him personally as well as on the green telephone through Mr. Saeed Ahmad Khan and through his Assistant, Mr. Bajwa." In this passage, according to P.W. 2 Masood Mahmood late Abdul Hamid Bajwa, in his lifetime used to remind him about it on the green telephone. The statement of the witness that the deceased used to remind him about it constituted direct evidence of what he heard from him. It is admissible under section 60 of the Evidence Act to prove simply what he heard and not to prove the truth of that statement.

But a portion of this statement of P.W. 2 Masood Mahmood would constitute hearsay evidence if its object was to establish and prove that Zulfikar Ali Bhutto had in fact deputed late Abdul Hamid Bajwa to remind him about the execution of the order given by him.

(3) In his cross-examination, P.W. 2 Masood Mahmood stated that he had knowledge of the fact that arms and ammunition had been given to Jam Sadiq Ali and late Mr. Abdul Hamid Bajwa for operation against the Hurrs, in Sindh. He went on to add that after this information became available to him, he noticed a certain amount of coolness in the dealings with him by the then Defence Secretary. In that connection the witness further deposed that: "I think in order to ensure that I did not blurt out the secret, the Prime Minister sent Abdul Hamid Bajwa to me to keep my mouth shut (Vol. I, p. 92)." That Abdul Hamid Bajwa came to the witness and represented to him that he had been sent by the Prime Minister to keep his mouth shut constitutes direct evidence about what the witness saw, heard and felt in his meeting with the deceased and to that extent was admissible under section 60 of the Evidence Act.

But a portion of this statement would constitute hearsay evidence if its purpose is to prove that in fact Zulfikar Ali Bhutto had deputed late Abdul Hamid Bajwa on this mission to see P.W. 2 Masood Mahmood.

(4) In his cross-examination P.W. 2 Masood Mahmood was asked a question if he knew as to when, where and how this conspiracy was hatched. In reply the witness deposed that when he talked to Mian Muhammad Abbas, after having been asked by the then Prime Minister "He (Mian Muhammad Abbas) told me that the orders in that behalf had already been conveyed by Mr. Bhutto through my predecessor Mr. Haq Nawaz Tiwana who had directed him to do the needful (Vol. I, p. 100)." This answer was elicited in cross-examination of P.W. 2 Masood Mahmood. He deposed to what Mian Muhammad Abbas, co-accused-appellant had told him that orders in that behalf had already been conveyed by Mr. Bhutto through Mr. Haq Nawaz Tiwana deceased who had directed him to do the needful. This statement of the witness about what Mian Abbas accused told him is admissible to that extent as direct evidence under section 60 of the Act.

But any implication from this statement to the effect that Zulfikar Ali Bhutto appellant had in fact deputed Haq Nawaz Tiwana deceased to appoint Mian Abbas accused for the execution of the plan constitutes hearsay evidence in the mouth of the witness.

(5) P.W. 3 Saeed Ahmad Khan deposed that Mr. Abdul Hamid Bajwa (since dead) had direct access to the Prime Minister over the head of others and according to the witness (Vol. I, page 201) "Mr. Bajwa was very elusive being an old police officer and at times he put me off by saying that the political situation in the country was discussed but I knew that he was doing something more than that." In this statement Saeed Ahmad Khan P.W. 3 has mostly deposed to his own observations and opinion formed about Abdul Hamid Bajwa deceased who was at the time working as his assistant. As such he was competent to depose to what he noticed about him and gathered from his talks and dealings with him as direct evidence admissible under section 60 of the Evidence Act.

(6) P.W. 12 Muhammad Asghar, S. S. P, Lahore in his evidence (Vol. 11, pp. 361-362) deposed that: Mr. Abdul Hamid Bajwa met me in connection with this case and questioned me as to why the name of the then Prime Minister was mentioned in the F.I.R. I told him that Mr. Ahmad Raza Kasuri was serious to get the name of the Prime Minister recorded in the F.I.R. and as such we had no other option but to register the case on his written statement. He had suggested that the case could be registered on the statement of any other person. He said that the services of some other person could have been procured to act as a complainant and he could have lodged an F.I.R. so that the name of the Prime Minister could have been avoided. The witness deposed to the conversation that he had with Abdul Hamid Bajwa deceased about this occurrence and the F.I.R. registered in that connection. It constituted direct evidence about the conversation to which the witness was competent to depose under section 60 of the Evidence Act. The fact that late Abdul Hamid Bajwa had died before the date of the evidence is hardly a ground for excluding this evidence.

(7) P.W. 12 Muhammad Asghar, S.S.P., Lahore also deposed about another meeting and his conversation with Mr. Abdul Hamid Bajwa in the Civil Lines Police Station, in the presence of the D.I.G., Sardar Abdul Vakil Khan. He stated that "He (Abdul Hamid Bajwa) again told that the name of Mr. Bhutto could be avoided. My D.I.G. and myself told him that it was not possible. He asked the D.I.G. about the empties which were recovered from the plea of occurrence. The D.I.G. told him that those were properly sealed. Mr. Abdul Hamid Bajwa remarked that what was the hurry in sealing those empties. I do not know why he asked about the empties." (Vol. II, p. 362). P.W. 14 Abdul Vakil Khan, D.I.G. has also deposed to this incident. The witness has competently deposed to the conversation that he had in this tripartite meeting in which late Abdul Hamid Bajwa was also present. The statement of the witness about these talks in the meeting in which he also participated constituted direct evidence admissible under section 60 of the Evidence Act.

(8) Muhammad Asghar Khan P.W. 12 (Volume II, page 363) further deposed that "As S.S.P., Lahore, I did not have a free hand in the investigation of the case, because during that investigation instructions were being issued by Mr. Abdul Hamid Bajwa and Mr. Saeed Ahmad Khan, which we had to obey. These instructions related to this investigation". In this statement the witness deposed to his own personal difficulties that he as S.S.P., Lahore did not have free hand in the investigation of this case. According to witness instructions were being issued to them by Abdul Hamid Bajwa and Saeed Ahmad Khan P.W. 2, which they had to obey. As such he was the best witness competent to depose to them from his own observations and personal knowledge as the direct evidence admissible under section 60 of the Act. The fact that Abdul Hamid Bajwa had died before the evidence did not adversely affect the competency of this witness to appear and depose to them.

(9) P.W. 14 Abdul Vakil Khan, the then D.I.G. Police, Lahore Range, Lahore deposed (Vol. II, p. 383) that: "One or two days after the registration of this case Mr. Abdul Hamid Bajwa, who was then attached to the Prime Minister's House as subordinate to Mr. Saeed Ahmad Khan, met me in Police Station, Civil Lines, Lahore. Mr. Asghar Khan, who was then S.S.P. Lahore was also present at the time. Mr. Bajwa enquired from me as to why the name of the then Prime Minister had been recorded in the F.I.R. I told him that the son of the deceased was driving the car at that time and was with the deceased when fired at, and he had given report in writing and thus the name of the Prime Minister could not be avoided. Mr. Bajwa suggested that a report could be recorded on the statement of any other person saying that the fire was opened by some unknown persons and the accused had fled away and the name of the Prime Minister thus could have been avoided. Mr. Bajwa then asked me if he could see empties which had been recovered from the spot. Up to that time the empties had not been sealed and I avoided by saying that the empties had been sealed." The witness further deposed that: "Mr. Bajwa was very much upset to hear that the empties had been sealed and said as to what was the hurry when the name of the Prime Minister was involved in it." The witness deposed to his meeting with and conversation he had with late Abdul Hamid Bajwa about the registration of the F.I.R. and the investigation into this case. He was competent to depose to them as direct evidence admissible under section 60 of the Evidence Act.

(10) P.W. 14 Mr. Abdul Vakil Khan also deposed that (Vol. II p. 385): "I remember Mr. Ahad met me after about a fortnight when I enquired from him if any result has been received from the ballistic expert to whom the empties were sent. I was surprised to hear from him that he had delayed the sending of the empties because these were taken away by Mr. Abdul Hamid Bajwa and then he returned to him after two or three days and after that the empties were sent for the examination. I got annoyed with Mr. Ahad and asked him as to why did he hand over the empties to Abdul Hamid Bajwa. He told me that Mr. Bajwa contacted him and told him that these empties were to be taken to the Prime Minister's House to be shown to the high officers and because of this threat these empties were given to him." P.W. Abdul Vakil Khan was the D.I.G., at the time. In this portion of the evidence the witness has at first deposed about the enquiry made by him from his subordinate Abdul Ahad, D.S.P. deceased about the empties in question and the conversation he had with him in that connection. He was annoyed to hear from him that late Mr. Bajwa had taken away these empties for 2/3 days to the Prime Minister's House to be shown to the high officers. This is admissible as direct evidence under section 60 of the Evidence Act merely to prove the conversation between this witness and Ahad deceased. The witness has competently deposed to his talk which he had with Ahad in this connection.

(11) In case, however, the object of this evidence is to establish that Abdul Ahad had in fact given the empties to Abdul Hamid Bajwa, then this would constitute hearsay evidence. Similarly, the statement of Abdul Ahad that Abdul Hamid Bajwa had told



him that these empties were to be taken to the Prime Minister's House to be shown to high officers, constituted hearsay upon hearsay evidence of one dead person from another who was also dead and as such this was inadmissible in proof of its truthfulness.

(12) P.W. 14 Muhammad Abdul Vakil Khan further deposed that "Most probably I met Mr. Abdul Hamid Bajwa at Civil Lines Police Station on the 12th or 13th of November 1974. I did not ask Mr. Abdul Ahad in the fortnight after which I made enquiries from him whether he had actually dispatched the empties because I was not the Investigating or the Supervising Officer. I do not know the name of the S.H.O. who was investigating the case but I am aware that Mr. Abdul Ahad, D.S.P. was his "immediate Supervising Officer". I did not make any enquiries about the time of the recovery of the empties but I had come to know on the morning of the 11th that they had been recovered. (Vol. II, p. 397). The objection raised against this portion of the evidence is misconceived. The witness has deposed from his own personal knowledge and about the enquiries made by him from Abdul Ahad. This constituted direct evidence admissible under section 60 of the Evidence Act.

(13) P.W. 15 Muhammad Waris, another Investigating Officer in the case, deposed as under:-

(a) that "Saeed Ahmad Khan and Abdul Hamid Bajwa told us that the name of the Prime Minister had appeared in the F.I.R. and that we should proceed with wisdom and caution. They further told us that Ahmad Raza Kasuri had named the Prime Minister in the F.I.R. dishonestly (vide Vol. II, p. 407)".

(b) that "Saeed Ahmad Khan and Abdul Hamid Bajwa had ordered me to find out disputes over the division of the land of Kasuri family. They had also directed me to find out the family disputes of Nawab Muhammad Abroad Khan with local persons. They had thus kept me busy in accordance with their instructions (vide Vol. II, p. 409)".

(c) that (Vol. II, pp. 409-10) "Saeed Ahmad Khan and Abdul Hamid Bajwa used to keep on repeating that Ahmad Raza Kasuri had named the then Prime Minister Zulfikar Ali Bhutto dishonestly and falsely".

The witness (Muhammad Waris Khan P.W.) was entrusted with the investigation into this case. He has competently deposed that during the course of the investigation late Abdul Hamid Bajwa had told him that Ahmad Raza Kasuri had named the Prime Minister in the F.I.R. dishonestly and that they should proceed with the investigation with wisdom and caution. He also ordered and instructed him to find out about the family disputes of Nawab Muhammad Ahmad Khan with the local persons. In these statements the witness deposed from his personal knowledge about the talks that he

had with Abdul Hamid Bajwa (deceased) and the orders and directions issued to him. This constitutes a direct evidence about which the witness could depose under section 60 of the Evidence Act.

(14) P.W. 34 Abdul Hayee Niazi, S.H.O. Police Station, Ichhra who was the local Investigating Officer, deposed:-

(a) that (Vol. II, p. 625): "Before I left for the spot Abdul Ahad, D.S.P. told me that he would reach the spot after visiting Model Town. He directed me not to prepare any memo of the articles, which I found at the spot, as the Name of the Prime Minister had been mentioned in the F.I.R. He told me that he would give me further directions on reaching Police Station, Ichhra after his return from Model Town"

(b) that (Vol. III, p. 626): "The D.S.P. Abdul Ahad directed me to show the empty cartridges to the Ballistic Expert and car also so that it could be ascertained what type of arms had been used".

(c) that (Vol. III, p. 627): "Abdul Ahad, D.S.P. was my Circle Officer. On 11th of November 1974, at 9/10 p. m. Abdul Ahad, D, S. P. who had his office adjacent to the police station told me to accompany him to Rao Rashid, I.G. Police's residence. The D.S.P. informed me that the I.G. had ordered for the production of 24 empty cartridges, lead bullet and cap of the deceased".

(d) that (Vol. III, p. 623): "The D.S.P., informed me that I.G. Police had kept the 25 empties and lead bullet with him and had returned the cap. The D.S.P. further informed me that I.G. Police told him that he would pass further orders and investigation should be conducted according to his orders".

(e) that (Vol. III, pp. 628-29): "On the 13th of November 1974, Abdul Ahad, D.S.P. left for Rawalpindi. He obtained site plan Exh. 34/2 from me and took along the same. Abdul Ahad returned from Rawalpindi after two or three days. He sent for me in his office. He showed me a draft with regard to empty cartridges and lead bullet. He told me that he had been given the draft from Prime Minister's House. The D.S.P. told me to make a copy of that draft. After I prepared its copy, the original was taken back by the D.S.P. Recovery Memo. Exh. P.W. 34/4 was prepared by me and bears my signatures and is a reproduction of the draft given to me."

(f) that "I questioned the D.S.P. about empty cartridges and he told me that it was the order and it was to be complied with otherwise both of us would find ourselves in trouble and not only our services would be terminated but we

would also be involved in a case. Under these circumstances I had prepared memo. Exh. P.W. 34/4 (Vide Vol. III, p. 629)."

(g) that (Vol. III, p. 630): "On 23rd of November 1974 the D.S.P. gave me twenty-four empty cartridges and ordered me to seal them and send the same to the Inspectorate of Armaments, G.H.Q., Rawalpindi. I. complied with the orders and prepared a sealed parcel of these empty cartridges."

(h) that (Vol. III, pp. 630-1): "I had sent the lead bullet and the two metallic pieces which had been recovered from the head of the deceased and given to me by Police Surgeon to the Inspectorate of Armaments through Muhammad Sarwar, A. S. L, on the 24th of December 1974 under the direction of the D.S.P."

In the relevant chart filed in Court before us the appellant has raised his objections against the veracity of the witness (Abdul Hayee Niazi P.W. 34) rather than against the admissibility of these portions of the evidence. The question as to how far reliance could be placed on the testimony of the witness shall be discussed elsewhere at its proper place in the judgment. But as to the admissibility of these portions of evidence it may be observed that the witness was the local Investigating Officer who conducted the initial investigation (for whatever it was worth) into this case under the supervision of his immediate superior namely late Mr. Abdul Ahad, D.S.P., Ichhra. In that connection according to the witness (P.W. 34 Abdul Hayee Niazi) Abdul Ahad, D.S.P. (deceased) had been issuing directions to him from time to time. He was therefore, the best person to directly depose to the instructions and directions issued to him by the deceased and the steps taken by him in pursuance to these, and as such the evidence was admissible under section 60 of the Evidence Act in proof to the limited extent of the instructions and directions issued by the deceased to the witness and the steps taken by him in that connection from time to time.

According to the witness on 11-11-1974 late Mr. Abdul Ahad, D.S.P. had informed him that Rao Rashid, I. G. Police had ordered for the production of 24 empty cartridges and the lead bullet and kept them with him. The deceased also told P.W. 34 Abdul Hayee Niazi that the I. G. had told him that he would pass further orders and that the investigation should be conducted on the lines according to his orders. Similarly, there is the evidence of the witness to the effect that after Abdul Ahad, D.S.P. had returned from Rawalpindi, he gave a draft recovery memo to him and told him that this was given to him from the Prime Minister's House. All this evidence constituted hearsay evidence in case the object of these statements was to prove their truth. The witness further deposed that on questioning late Abdul Ahad D.S.P. about the empty cartridges, he told him that it was the order which had to be complied with otherwise both of them would find themselves in trouble. This portion of the evidence in the statement of P.W. 34 Abdul Hayee Niazi to the effect that Abdul Ahad deceased was in fact acting under

the orders actually received from his superior in communicating them to him, constituted hearsay evidence.

(15) In this connection before us the learned counsel for Zulfikar Ali Bhutto appellant also raised a similar objection against the admissibility of another piece of evidence in the statement of P.W. 2 Masood Mahmood (Vol. 1, p.65) when he deposed: "I was asked by Mr. Vaqar Ahmad to call on the then Prime Minister in the morning of the 12th of April 1974. I was told that I had to call on Mr. Vaqar Ahmad before this interview. Mr. Vaqar Ahmad was very good to me at that meeting and he informed me that the Prime Minister was going to offer an appointment to me which I must accept (Mr. D. M. Awan at this stage objects to the admissibility of this question on the ground that Mr. Vaqar Ahmad's name is not mentioned in the calendar of witnesses of this case). He drew my attention to the state of affairs of myself and my wife, to the fact that I had small children, and to a rule which provided for the retirement at any time of officers of Grade 21 and above." The precise objection raised by the learned counsel for the accused-appellant before the trial Court was that Mr. Vaqar Ahmad was not mentioned as a prosecution witness in the calendar of witnesses in the case and that therefore P.W. 2 Masood Mahmood was not competent to depose about him and as such this evidence about which Mr. Vaqar Ahmad alone could depose was inadmissible through the mouth of this witness. But there is no force in this objection which is wholly misconceived. P.W. 2 Masood Mahmood could competently depose to the meeting that he had with Mr. Vaqar Ahmad, the then Establishment Secretary and the conversation that he had with him. It is admissible as direct evidence of the meeting and what transpired between them. The witness competently deposed to it from his personal knowledge under section 60 of the Evidence Act. Indeed the prosecution is not obliged to produce each and every witness concerning a fact in issue or relevant fact. This may be depending on the circumstances in each case to affect the weight to be attached to the evidence but not its relevancy.

74. As a result of this discussion, I find that bulk of the evidence, against which the objections were raised on behalf of the appellant, was admissible as direct evidence under section 60 of the Evidence Act subject to the observation made above. Therefore, to that extent these objections are repelled. In this view of the matter and to the extent indicated above, even the learned trial Bench was not justified in taking it for granted and acting on the erroneous assumption that the entire evidence against which this objection was raised constituted hearsay evidence.

75. In this connection, however, on the above analysis, certain specified pieces of the evidence of the witnesses attributing statements and conduct to those who were dead, have been held by me to constitute hearsay evidence. The next question, therefore, to consider is whether they were rightly held by the High Court to be admissible in the evidence under section 32 of the Evidence Act.

76. In the evidence, according to P.W. 2 Masood Mahmood, after the Prime Minister had instructed him to ask Mian Muhammad Abbas to get on with the job, he kept on reminding him and goading him for its execution. This was, according to the witness, done by the appellant personally, as well as, on the green telephone through Mr. Saeed Ahmad Khan and "through his assistant Mr. Bajwa". This statement of the witness that in fact at the instance of the appellant late Mr. Bajwa used to remind him about the execution of his orders constituted hearsay evidence, and is therefore inadmissible.

77. The High Court has no doubt observed that such a statement would be admissible under clause (3) of section 32 of the Evidence Act as tending to incriminate the deceased person, but this observation is not based on a full analysis of the position of Abdul Hamid Bajwa and of Saeed Ahmad Khan. In a later part of this judgment I have reached the conclusion that there was no material on the record to show that Saeed Ahmad Khan knew the nature of the assignment entrusted by appellant Zulfikar Ali Bhutto to Masood Mahmood, when he had asked Saeed Ahmad Khan to remind Masood Mahmood in this behalf. It is, therefore, possible that the reminder given by Abdul Hamid Bajwa to Masood Mahmood may be of the same kind. In the absence of full material on the record it is not possible to conclude that at the time Abdul Hamid Bajwa reminded Masood Mahmood about the mission entrusted to him with regard to Ahmad Raza Kasuri, Abdul Hamid Bajwa was fully conscious of the nature of the assignment. I would, therefore, hold that the statement cannot be said to be covered by clause (3) of section 32 of the Evidence Act.

78. Next, Abdul Hayee Niazi P.W. 34 has deposed that on 11-11-1974 late Abdul Ahad, D.S.P. Ichhra, Lahore, had told him that Rao Rashid, the then Inspector-General of Police had sent for the production of the 24 empty. cartridges, and lead bullet and kept them with him. He further told the witness that the Inspector-General had further said that he would pass further orders and the investigation should be conducted on the lines according to his orders. Moreover, according to P.W. 34 Abdul Hayee Niazi, after Abdul Ahad deceased had returned from Rawalpindi, he gave him a draft and told him that this was given to him from the Prime Minister's House. It was in accordance with it that he prepared the recovery memo in Question for the recoveries of the empties. According to the witness when he questioned late Mr. Abdul Ahad, D.S.P. about the empty cartridges, he told him that it was an order which must be obeyed, otherwise they would find themselves in trouble.

79. As already discussed above all this evidence and statements attributed to Abdul Ahad deceased, who was at the relevant time the D.S.P., Ichhra supervising the investigation into this case, constituted hearsay evidence. As such public servant it was his duty to see that the investigation was conducted fairly on the right lines. But, in case the above conduct and statements attributed to him are believed, then there is hardly any doubt that he would have been criminally liable for knowingly misdirecting the investigation along incorrect lines under sections 217, 218, 506, P.P.C., read with section

29 of the Police Act. In this view of the matter therefore, these statements and conduct attributed to Abdul Ahad deceased by P.W. 34 Abdul Hayee Niazi are admissible in evidence under section 32(3) of the Evidence Act.

80. In this connection an objection was also raised against the evidence of Ashiq Mohammad Lodhi P.W. 28. He was working as the Acting Assistant Director in Headquarters F.S.F., Rawalpindi in January 1975. He deposed that late Abdul Hamid Bajwa had sent for him in January 1975. He accordingly went to see him in the Prime Minister's, House. He ordered him to give the description of the gunman of Ahmad Raza Kasuri who accompanied him to the National Assembly, Cafeteria and the gallery. It was contended that this part of the statement attributed to Abdul Hamid Bajwa (who had already died) was not admissible under section 32 of the Evidence Act. But there is no force in this objection. P.W. 28 Ashiq Mohammad Lodhi competently deposed to the verbal order issued by the deceased asking him to find out the particulars of the gunman of Ahmad Raza Kasuri. He deposed to this directly from his personal knowledge and as such his evidence is admissible under section 60 of the Evidence Act. In that connection the witness deposed that he complied with the order of Abdul Hamid Bajwa and sent a description of the gunman. He further deposed that he had sent his report Exh. P.W. 28/1 along with the covering letter (Exh. P.W. 3/2-T) which bears his signatures addressed to Mr. Abdul Hamid Bajwa. This letter stands duly proved by the testimony of its author, P.W. 28 Ashiq Mohammad Lodhi himself. In this connection I may, however, add that with this letter he had enclosed a source report of the Intelligence Cell F.S.F., Headquarters, Rawalpindi, concerning the gunman of Ahmad Raza Kasuri. But it does not appear that the witness was himself its author who was not produced to prove it. In *Islamic Republic of Pakistan v. Abdul Wall Khan*<sup>67</sup> it was held that for the purposes of a judicial inquiry the source or intelligence reports cannot be of any assistance at all unless the sources themselves are produced for giving the evidence. In the circumstances the report Exh. P.W. 28/1 containing the particulars of the gunman was not duly proved in the evidence and must be excluded from the evidence. But for this however, the evidence of P.W. 23 Ashiq Mohammad Lodhi is otherwise admissible on the point and can be relied upon.

81. Before us objections were also raised against the admissibility and the mode of proof of the reports submitted by late Mr. Abdul Hamid Bajwa to the Prime Minister (Z. A. Bhutto) from time to time. These documents were proved by P.W. 3 Mr. Saeed Ahmad Khan, the then Chief Security Officer to the Prime Minister. At the time late Abdul Hamid Bajwa was attached under him as Officer on Special Duty. He deposed that a file in three volumes (Exh. P.W. 3/1, P.W. 3/2 and P.W. 3/3) was maintained under his supervision about the "Activities of Ahmad Raza Kasuri, M.N.A." The witness proved some of the reports on the file Exh. P.W. 3/1 bearing the signatures of late Abdul Hamid Bajwa identified by him. Exh. P.W. 3/1-A, Exh. P.W. 3/1-B, Exh. P.W.

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<sup>67</sup> PLD 1976 SC57

3/1-C and Exh. P.W. 3/1-D are the secret reports submitted by late Mr. Abdul Hamid Bajwa to the Prime II Minister during December 1973 enclosing therewith secure reports about certain telephone calls received by Ahmad Raza Kasuri from third persons. The secure reports enclosed by Bajwa with his secret report are not signed by their respective authors nor have they appeared in the witness-box. As such these have remained unproved on this record and cannot be read in the evidence. In this connection all that can be said from the secret reports and endorsement made thereon by the appellant is that Ahmad Raza Kasuri was kept under surveillance and his telephone was also tapped. Exh. P.W. 3/2-R and Exh. P.W. 3/2-B are the reports sent by Abdul Hamid Bajwa endorsing therewith the source report (Exh. P.W. 28/1) to the Speaker of the National Assembly and the Deputy Inspector-General, Police, Rawalpindi.

82. In addition to these then there are the reports Exhs. P.W. 3/2-C, P.W. 3/2-F, P.W. 3/2-J, P.W. 3/2-K, P.W. 3/1-L, P.W. 3/2-N, P.W. 3/2-O and P.W. 3/2-Q submitted by late Mr. Abdul Hamid Bajwa from time to time during 1974-75, about his talks with and the activities of Ahmad Raza Kasuri and the efforts made by him to bring him back to the folds of Pakistan People's Party. As already stated above, these were proved by P.W. 3 Saeed Ahmad who produced from the record maintained under him and had identified Bajwa's signatures on them. These reports were submitted by the deceased to the appellant in the ordinary course of business or in the discharge of professional duty and were admissible in the evidence under section 32(2) of the Evidence Act. In the context of this provision the term "business" includes trade, profession, occupation and calling of every kind. In *Keolapati v. Raja Amar Krishan Narain Singh*<sup>68</sup>, the question was whether a certain talukdar had embraced Islam, a letter written by the Deputy Commissioner to the Commissioner about the conversion and reporting that the estate of the talukdar should be taken under the Court of Wards, was held admissible under clause 2 of section 32 of the Act. So also a post-mortem report submitted by a Civil Surgeon was held admissible as a statement made by a dead person in the ordinary course of business and in the discharge of his professional duty in *Mohan Singh v. King Emperor*<sup>69</sup>, under this clause. There are also the T. A. bills of Abdul Hamid Bajwa Exh. P.W. 3/5, Exh. P.W. 3/6, Exh. P.W. 3/7, Exh. P.W. 3/8, Exh. P.W. 3/9 and Exh. P.W. 3/10 bearing his signatures. They were produced from official custody and were proved by P.W. 3 Saeed Ahmad Khan who identified the signatures of late Mr. Abdul Hamid Bajwa on them.

**Re: Section 10, Evidence Act embodying a special rule as to admissibility of evidence In conspiracy cases.**

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<sup>68</sup> AIR 1939 PC 249

<sup>69</sup> AIR 1925 All. 413

83. Mr. Yahya Bakhtiar, learned senior counsel for Zulfikar Ali Bhutto appellant, further argued before us that the learned trial Bench acted illegally in admitting evidence pertaining to the charge of conspiracy and its use against the accused contrary to the provisions of section 10 of the Evidence Act. He submitted that according to this section the prosecution evidence in proof of the conspiracy had to be produced in two stages; at first to establish that in this case there are reasonable grounds to believe that the accused had conspired together to commit the offence; and only after the ground was thus prepared and the foundation laid, the evidence should have been produced, in the next stage, about anything said, done or written by any one of them in reference to their common intention during the continuance of the conspiracy, so as to be relevant against each of the other accused believed to be so conspiring, both for the purpose of proving the existence of the conspiracy and also for showing that each one of them was a party to it. But, according to the learned counsel in this case the entire prosecution evidence at the trial was produced at a stretch in utter disregard of this provision of the law and to the great prejudice of the appellant. Moreover, the learned counsel submitted, prosecution had failed to establish that there were reasonable grounds to believe that these accused had conspired together to commit the offence and in the absence of any *prima facie* proof to that effect, the provisions contained in section 10 of the Act cannot be invoked so that the evidence led about anything said, done or written by any one of the accused who was allegedly a party to the conspiracy could not be relevant against the other accused and cannot be read against them. In this connection, in particular the learned counsel submitted that the evidence of P.W. 2 Masood Mahmood approver is tainted and could not be relied upon for this purpose under section 10 of the Act, and this by itself was not sufficient to form any reasonable ground to believe about the existence of the conspiracy generally and that the accused were parties to it.

84. In reply Mr. Ijaz Hussain Batalvi, the learned Special Public Prosecutor, repudiated these contentions advanced on behalf of the appellant and submitted that these were based on a misinterpretation of section 10 of the Evidence Act. He explained that section 10 of the Evidence Act does not prescribe any sequence in which the entire evidence must be adduced under it. It merely regulates the use of such evidence, when and how it is to be evaluated and put to use against the co-conspirators. According to him, in the circumstances of this case the testimony of the approver recorded in Court on solemn affirmation about anything said, done or written by any one of the conspirators, in reference to their common intention and during the continuance of the conspiracy, is relevant against each of the other conspirators and can be used against them at the hearing. He further submitted that it was sufficiently cogent to fulfill the requirement of section 10 of the Act in forming the opinion that there are reasonable grounds to believe that the accused, including the appellant, had conspired together in this unholy and criminal alliance and also to warrant a finding in support of the prosecution case about the existence of this conspiracy and its members beyond any reasonable doubt.



85. We have carefully considered these contentions advanced before us by the learned counsel for the parties on this part of the case. Section 10 of the Evidence Act is a special provision regarding the rule of evidence applicable to cases of conspiracy. It lays down that:

"Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."

86. In criminal law a party is not generally responsible for the acts and declarations of others unless they have been expressly directed, or assented to by him; "*nemo reus est nisi. mens sit rea*". This section, however, is based on the concept of agency in cases of conspiracy. Conspiracy connotes a partnership in crime or actionable wrong. A conspirator is considered to be an agent of his associates in carrying out the objects of the conspiracy and anything said, done or written by him, during the continuance of the conspiracy, in reference to the common intention of the conspirators, is a relevant fact against each one of his associates, for the purpose of proving the conspiracy as well as for showing that he was a party to it. Each is an agent of the other in carrying out the object of the conspiracy and in doing anything in furtherance of the common design.

87. In support of his contention the learned counsel for the appellant relied on two authorities, the first one decided by the Privy Council in *H. H. B. Gill and another v. The King*<sup>70</sup> and the other by this Court in *Maqbool Hussain v. The State*<sup>71</sup>.

88. In the first-mentioned case, Gill and Lahiri were convicted by the trial Court for offences under section 165 read with section 120-B, Penal Code. The appellant Gill had joined the Indian Army Ordnance Corps and was serving as the Deputy Assistant Director of Contracts at Calcutta at the relevant time. As such he was responsible for the issue and acceptance of tenders for purchase of material in compliance with the indents made by the proper authorities, while Lahiri appellant was a Contractor engaged in supplies to the Military. Both Gill and Lahiri along with others were charged, *Inter alia*, with conspiracy to cheat the Government of India in the Department of Supplies by dishonestly and fraudulently inducing its Financial Officers to pay larger sums of money than due to Lahiri in respect of supplies made by him. Gill and Lahiri were also

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<sup>70</sup> AIR 1948 PC 128

<sup>71</sup> PLD 1960 SC 382

specifically charged, the former for having accepted illegal gratification and the latter for having abetted in the payment of the illegal gratification amounting to Rs. 500 by cheque, under section 161 and section 109, P.P.C., In the evidence the prosecution relied on a diary kept by Lahiri and counterfoils in his cheque-book in which there were notes purporting to refer to Gill in the handwriting of Lahiri, which were compendiously referred to as "Lahiri's notes". That these were evidence against Lahiri himself was not denied. The question that however, arose was as to whether they were admissible against Gill co-accused as well. In this connection their Lordships of the Privy Council in relying on the provisions contained in section 10 held:-

(a) that apart from the evidence relevant to the specific charge there was no other competent evidence upon which such a reasonable ground for belief could be rested and (b) that the notes were clearly not admissible against Gill unless section 10 could be invoked. It was plainly admitted by counsel for the respondent that it was upon section 10 only that he relied for the admission of such evidence, though it is not clear what course was taken in this respect in the Courts of India. Upon the case going to appeal, the High Court accepted or at least did not reject the explanation given by Gill in regard to the specific charge, and having accepted it were left with nothing upon which they could found the belief that Gill and Lahiri were conspiring to commit an offence. But without this belief they could not under section 10 justify the admission of Lahiri's notes as evidence against Gill and without such evidence they had no material upon which they could convict him of conspiracy."

Continuing their Lordships of the Privy Council further observed:-

"But it appears to their Lordships that just as a trial Judge may admit evidence under section 10, when he has such a reasonable ground of belief as is postulated, yet must reject it if at a later stage of the trial that reasonable ground of belief is displaced by further evidence, so the appellate Court, which has from the outset refused that belief, must refuse also to admit evidence which was admissible only upon the footing of the belief being entertained. It is not the true view that in a conspiracy charge of this kind evidence once admitted remains admissible evidence whatever new aspect the case may bear whether in the original or the appellate Court."

89. Indeed these observations by the Privy Council far from supporting the contention advanced at the bar by the learned counsel go against him, as they do not lay down that the entire evidence admissible under section 10 of the Act must necessarily be produced in two separate installments, one dependent on the other, and not all at once in one stretch. It appears to me that this section rather regulates the mode of the use of the evidence at the time of its evaluation rather than the sequence in which it is produced in Court.

90. In the other case of *Maqbool Hussain v. The State* cited on behalf of the defence, the facts were that the father of Maqbool Hussain appellant wanted to make a gift of some of his lands to his sons from different wives, including the appellant and for that purpose got mutations Entered by the Patwari. According to the prosecution, the appellant was anxious to have the mutation in his favor sanctioned at an early date and in order to achieve his object he offered Rs. 5,000 as illegal gratification to the Tehsildar, Maqbool Hussain Khan, through Ghulam Yasin Patwari and Yasin Ahmad Girdawar, the two co-accused. The Tehsildar passed on the information to his superiors and it was arranged that the culprits should be arrested in the act of passing the bribe. The Patwari and the Girdawar subsequently went to the house of the Tehsildar and tendered the sum in currency notes in a bag. The Patwari also presented the mutation register containing the mutation in favor of the appellant. There was a raid led by the Additional District Magistrate, the money and the revenue papers were taken into possession, and the Patwari and the Girdawar were arrested. In their statements recorded by the Additional District Magistrate on the spot, they repudiated the allegation that they had brought any money to bribe the Tehsildar, and suggested that they were being made the victims of an intrigue by him. The prosecution sought to establish their case by the evidence of Maqbool Hussain Khan, Tehsildar, one Barkat Ali P.W. 5 who was present when Ghulam Yasin and Yasin Ahmad co accused were said to have tendered Rs. 5,000 to the Tehsildar, and Mr. M. A. Majid, Additional District Magistrate. The accused asserted their innocence at the trial and Ghulam Yasin and Yasin Ahmad adhered to their allegation that the Tehsildar was inimically disposed towards them. No evidence was adduced on behalf of the prosecution that the appellant, Maqbool Hussain had at any time come into personal contact with the Tehsildar. The case against him, therefore, rested entirely on what Ghulam Yasin and Yasin Ahmad were supposed to have stated to the Tehsildar before or at the time of offering the tainted money to him. The learned Judge who dealt with the case in the High Court was of the opinion that the statements of the accused of the appellant made to the Tehsildar could be taken into consideration against him both under section 10 and section 30 of the Evidence Act. The learned Judge went on to observe that, if these statements had stood alone, it was obvious that the conviction of Maqbool Hussain would not have been justified. He rejected the suggestion that the step-brother of Maqbool Hussain might have had him named falsely. In these circumstances, a question of law was raised in the appeal before the Supreme Court as to whether the alleged statements of Ghulam Yasin and Yasin Ahmad, as proved by the Tehsildar, were available to the prosecution against the appellant, by virtue of section 10 of the Evidence Act. In that connection the Supreme Court observed that:

"A plain reading of this section makes it clear that apart from the act or statement of the co-conspirator some *prima facie* evidence must exist of the antecedent conspiracy in order to attract section 10. Such evidence of a pre-existing conspiracy between the appellant and the two Revenue Officers is conspicuous

by its absence in this case. Indeed in the questions that were put to Yasin Ahmad and Ghulam Yasin at the beginning of the trial, it was not even put to them that they had offered money to the Tehsildar in pursuance of any conspiracy with Maqbool Hussain appellant. On the contrary, the questions addressed to them clearly mentioned that the two Revenue Officials had approached the Tehsildar with a request to attest mutation No. 332 in the name of Maqbool Hussain on the promise that they would pay him the sum of Rs. 5,000 as illegal gratification for this favor. In the circumstances, it was idle for the prosecution to throw up any suggestion of a 'conspiracy at the conclusion of the trial'."

91. This Court further repelled the argument that as the appellant was to get the benefit of the mutation, he must have inspired the attempt to get its sanction expedited. In conclusion the Court disagreed with the opinion of the learned Judge of the High Court to the effect that the statements made by the co-accused were relevant within the meaning of section 10 of the Evidence Act.

92. We find that in this case some of the facts are not sufficiently clear from the reported judgment of this Court and therefore our attention was drawn to the judgment of the High Court under appeal before the Supreme Court. It shows that the accused were tried under the Chief Martial Law Administrator's Regulation No. 30 read with Regulation No. 5 for attempting to give bribe to the Tehsildar, Maqbool Hussain Khan. There was no charge of conspiracy against the accused and therefore, the recourse made by the High Court to the provisions contained in section 10 of the Evidence Act was not warranted under the law and the observations made in this behalf were misplaced. Even otherwise this Court merely observed that a plain reading of section 10 of the Evidence Act makes it clear that "apart from the act or statement of the co-conspirators some *prima facie* evidence must exist of the antecedent conspiracy" in order to attract this provision. But there is hardly any quarrel with this proposition and this case also does not even remotely advance the precise contention raised before us for the appellant.

93. It is interesting to find that incidentally a somewhat similar case on facts also came up before the Supreme Court of India in *Badri Rat and another v. The State of Bihar*.<sup>72</sup> The appellants were prosecuted on charges under section 120-B read with section 165-A of the Indian Penal Code for having conspired to commit the offence of bribing a public servant in connection with the discharge of his public duties. The case against them was that on August 24, 1953, when the Inspector of Police who was at the time in charge of the investigation of a case in which the second appellant was involved, was on his way to the Police Station, the appellants accosted him on the road and the second appellant asked him to bush up the case for valuable consideration. Some days later, on August 31, 1953 the first appellant offered to the Inspector at the Police Station a pocket book

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<sup>72</sup> AIR 1958 SC 953

containing Rs. 500 in currency notes and told him that the second appellant had sent the money through him in pursuance of the talk that they had with him on August 24, as a consideration for hushing up the case. The Courts below accepted the evidence adduced on behalf of the prosecution and convicted the two appellants. On appeal by special leave, it was contended that the Court had no reasonable grounds to believe that the appellants had entered into a conspiracy to commit the offence and that the statement of August 31 by the first appellant was not admissible against the second appellant *inter alia*, because the charge under section. 120-B had been deliberately added in order that the act or statement of the one would be admissible against the other. In that connection reliance was placed on the provisions contained in section 10 of the Evidence Act. But repelling this contention the Supreme Court observed:-

"The incident of August 24, when both the appellants approached the Inspector with the proposal that he should hush up the case against the second appellant, for which he would be amply rewarded, is clear evidence of the two persons having conspired to commit the offence of bribing a public servant in connection with the discharge of his public duties. There cannot, therefore, be the least doubt that the Court had reasonable grounds to believe that the appellants had entered into a conspiracy to commit the offence. Therefore, the charge under section 120-B had been properly framed against both of them. That being so, anything said or done by any one of the two appellants, with reference to the common intention, namely the conspiracy to offer bribe, was equally admissible against both of them. The statement made by the first appellant on August 31, that he had been sent by the second appellant to make the offer of the bribe in order to hush up the case which was then under investigation, is admissible not only against the maker of the statement the first appellant but also against the second appellant, whose agent the former was, in pursuance of the object of the conspiracy. That statement is admissible not only to prove that the second appellant had constituted the first appellant his agent in the perpetration of the crime, as also to prove the existence of the conspiracy itself. The incident of August 24, is evidence that the intention to commit the crime had been entertained by both of them on or before that date. Anything said or done or written by any one of the two conspirators on and after that date until the object of the conspiracy had been accomplished, is evidence against both of them."

94. The Court went on to further observe that;

"Ordinarily, especially in a criminal case, one person cannot be made responsible for the acts or statements of another. It is only when there is evidence of a concerted action in furtherance of a common intention to commit a crime, that the law has introduced this rule of common responsibility, on the principle that everyone concerned in a conspiracy is acting as the agent of the rest of them. As soon as the Court has reasonable grounds to believe that there is identity of

interest or community of purpose between a number of persons, any act done, or any statement or declaration made, by any one of the co-conspirators is, naturally, held to be the act or statement of the other conspirators, if the act or the declaration has any relation to the object of the conspiracy. Otherwise, stray acts done in darkness in prosecution of an object hatched in secrecy, may not become intelligible without reference to the common purpose running through the chain of acts or illegal omissions attributable to individual members of the conspiracy."

95. Here it would be useful to make a brief comparative analysis of the ratio laid down in the foregoing three authorities - *Gill's case* decided by the Privy Council, *Maqbool Hussain's case* by this Court, and *Badri Rai's case* by the Supreme Court of India, bearing on the interpretation of the identical provisions contained in section 10 of the Evidence Act. In the first two cases on the findings that in the absence of any *prima facie* evidence on the record to fulfill the requirement of the opening words of this section or, in other words, in the absence of any evidence to show that there were reasonable grounds to believe that there were two or more persons who had conspired together to commit the conspiracy, it was held that anything said, done, or written by one of the alleged conspirators was not relevant against the others and the law of agency between them could not be invoked. The third case under the Indian jurisdiction is the converse of the first two. In that case there was evidence on the record, and the Court found reasons to believe about the existence of the conspiracy and was therefore, justified in holding that anything said, done by one of the two conspirators was also relevant against his co-conspirators. But the point that emerges, and which I need stress at this stage, is that there is nothing in the three authorities to lend support to the contention advanced before us on behalf of the appellant that in these cases the evidence under section 10 of the Act had been produced piecemeal and in two installments, in the first instance to comply with the requirements of the opening words of the section for holding that there were reasonable grounds to believe about the existence of the conspiracy, and only thereafter in the second round under the latter part of the section for the purpose of holding that anything said, done or written by any one of the conspirators was relevant against the others as well.

96. In *Bhagwan Swarup Lal Bishan Lal and others v. The State of Maharashtra*<sup>73</sup>, and *Niamat Singh and others v. The State*<sup>74</sup>, the two ingredients of section 10 were reiterated. The observations in the last mentioned case are directly relevant to the point we are considering here;

"The condition precedent to the application to the rule of law laid down in this section is that there should exist a "reasonable ground" to believe that two or more persons have

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<sup>73</sup> AIR 1965 SC 682

<sup>74</sup> I LR2 All. 250

conspired together if there is no reasonable ground to justify such a belief the special rule of law laid down in this section cannot be applied. It is true that the expression "Were is reasonable round to believe" does not mean "it is proved". It certainly contemplates something short of actual proof. In our opinion, it means that there should exist *prima facie* evidence in support of the existence of conspiracy between two accused, and it is then only that anything said, done or written by one can be used against the other.

We do not mean to suggest that evidence to prove the existence of conspiracy or participation of the defendants must be tendered first. The order in which evidence is tendered may not be of importance but the section requires that the use of acts and declarations of one conspirator against the other is strictly conditional upon there being reasonable grounds to believe that two or more persons have conspired together. In our opinion, no such *prima facie* evidence has been given in this case, and, therefore, the special rule of evidence cannot be availed of by the prosecution."

This is a clear pronouncement based on good reasons to refute the contention advanced on behalf of the appellant.

97. Again in *Balmokand v. Emperor*<sup>75</sup>, the Court observed that the law, as enacted in section 10 of the Indian Evidence Act, 1872, is much wider and more general than the English Law. Rattigan, J. further observed;

"In order, therefore, to decide in the present case whether any act done or statement made or thing written by an alleged co-conspirator is admissible in evidence against any of the accused persons, the test we shall have to adopt is to see, in the first place, whether there is reasonable ground to believe that a conspiracy existed between him and any such person, and in the second place, whether such act, statement or writing had reference to their common intention."

98. In *Mirza Akbar v. Emperor*<sup>76</sup>, their Lordships of the Privy Council after reference to section 10 of the Evidence Act observed that;

"Things said, done or written while the conspiracy was oh foot are relevant as evidence of common intention, once reasonable ground has been shown to believe in its existence."

99. In *Seth Chandrattan Moondra and 8 others v. Emperor* it was stated that;

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<sup>75</sup> AIR 1915 Lah.16

<sup>76</sup> AIR 1940 PC 176

"The application of section 10 of the Evidence Act follows and does not precede the finding that there is reasonable ground to believe a conspiracy exists and certain persons are conspirators. It is only on the basis of a conspiracy between accused persons that section 10 applies and the act or statement of one can be regarded as the act or statement of all, on the principle of agency."

100. The methodology employed in the actual application of section 1 of the Evidence Act is fully demonstrated in these cases to the effect that its actual application follows and does not precede the finding that there is reasonable ground to believe that a conspiracy exists and certain persons are conspirators. It merely speaks of the use of evidence in the case, and the section does not control the sequence in which the evidence should be let in. It appears to that these are but only two phases in the exercise of the application of section 10 of the Act, and not two distinct and separate stage laying down the order in which evidence is to be led. In the initial phase and as a condition precedent under this section; the Court has got to find from evidence *aliunde* on the record that there are reasonable grounds to believe that two or more persons have conspired together to commit an offence or an actionable wrong. After having passed this test, the next phase in the exercise consists in the actual application of the operative part of this section whereby anything said, done or written by any one of such persons in reference to their common intention, during the continuance of the conspiracy, is treated as a relevant fact against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of conspiracy as for the purposes of showing that any such person was a party to it. In fact this section deals with the mode of evaluation and the use of the evidence brought on the record. It does not provide that the proof of existence of the conspiracy must necessarily precede any proof of the acts and declarations of the co-conspirators of the accused for use against them.

### **Conclusions as to section 10, Evidence Act**

101. To sum up, it will be seen that the facts in issue in a case under section 10 of the Evidence Act are, whether there was an agreement for the alleged purpose and whether the accused was a party to it. Evidence in support of either may be given first. It may be that evidence is first allowed to go on the record about anything said done or written by one of the accused in reference to their common intention during the continuance of the alleged conspiracy for use against the other accused of their participation in the offence, subject to the condition that there were reasonable ground to believe about the very existence of the conspiracy and the partners in it This course is thus provisionally admitting the evidence has a merit in it and is conducive to the expeditious disposal of the trial and, if I may say so, suited to the prevailing conditions in this country where the delays in the administration of justice have become proverbial and moral especially because, as in this case, the trial is not by jury. So that the trial Court at the same time is the Judge both on facts and law in the case.



101. In this connection it will not be out of place to also refer to the provisions contained in section 136 of the Evidence Act. It, *inter cilia*, expressly lays down that;

"If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact."

In appropriate cases this course could be followed in accordance with the provisions contained in section 136 read with section 10 of the Evidence Act (*vide* Principles and Digest of the Law of Evidence by M. Monir, Volume I, page 90). Therefore, there can be nothing wrong in the course adopted at the trial of the instant case in recording the evidence at a stretch and not in two separate installments as advocated by the learned counsel for the appellant.

103. This view also coincides with the opinion of some of the modern English writers under the common law even where the jury trial is held. Cross on Evidence (Fourth Edition). Butterworth's Publication, on page 481 has observed that;

In determining whether there is such a common purpose as to render the acts and extra-judicial statements done made by one party in furtherance of the common purpose evidence against the others, the Judge may have regard to these matters, although their admissibility is in issue, as well as to other evidence. This doctrine is obviously liable to produce circularity in argument.

"Since what A says in B's absence cannot be evidence against B of the truth of what was said unless A was B's agent to say those things, how can one prove that A was B's agent to say them by showing what A said?"

The answer is that the agency may be proved partly by what A said in the absence of B, and partly by other evidence of common purpose. It makes no difference which is adduced first, but A's statements will have to be excluded if it transpires that there is no other evidence of common purpose; it is another instance of conditional admissibility.

104. Similarly Phipson on Evidence (Eleventh Edition), on pages 119-120 has said that:

"Where two persons are engaged in a common enterprise, the acts and declarations of one in pursuance of that common purpose are admissible against the other this rule applies in both civil and criminal cases and in the latter whether there is a charge of conspiracy or not. It is immaterial whether the

existence of the common purpose or the participation of the person therein be proved first although either element is nugatory without the other."

105. In fact in this connection, it has to be said in fairness to Mr. Yahya Bakhtiar, learned counsel for Zulfikar Ali Bhutto, that after having heard the learned Special Public Prosecutor in this behalf, he candidly gave up the objection initially raised by him against the mode of recording evidence under this section at the trial of this case.

### **Meaning of the phrase reasonable ground to believe.**

106. The phrase "reasonable ground to believe" in the context of section 10 of the Evidence Act is not defined in the Act. However, some assistance can be derived from cases defining this or similar phrases used in some other laws. In *(Moulvi) Fazlul-Quadar Choudhury v. Crown*<sup>77</sup> a somewhat similar term "reason to believe" in the context of the provisions contained in section 4 (1) of the Bengal Criminal Law Amendment Act (1942), came under discussion for its interpretation before the Federal Court of Pakistan. According to this section, whoever has in his possession anything for which there is "reason to believe" to have been stolen, if he fails to account for such possession to the satisfaction of the Magistrate, shall be liable to fine or to imprisonment. In judicially construing the phrase "reason to believe" in the context, the Court observed that "It is not enough to show that there is reason to suspect that the articles found have been stolen or fraudulently obtained. Something more is required and that something is "reason to believe"; 'belief' being a conviction of the mind arising not from the actual perception or knowledge but by way of inference of evidence received or information derived from others. It falls short of an 'absolute' certainty because the accused, in accounting for his possession, may be able to show that the grounds upon which it is based are unsubstantial."

107. In *Niamat Singh and others v. State*<sup>78</sup>, in interpreting section 10 of the Evidence Act, the Court held that the expression "there is reasonable ground to believe" does not mean that "it is proved." It certainly contemplates something short of actual proof and only means that there should exist *prima facie* evidence in support of the existence of the conspiracy between those who were at least believed to be the conspirators. In simple English it means something more than merely acting upon conjectures or suspicion. It reflects a state of mind where the lurking doubts, if any, have been dispelled and in their place an amount of conviction and assurance has developed giving rise to a belief based on some reasons, although it has not yet fully ripened into an absolute certainty or proof of the thing. In other words, before this section is pressed into service in the sense that before anything said, done or written by any one of the conspirators in reference to their common intention during the continuance of the conspiracy, is used

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<sup>77</sup> PD 1952 FC 19

<sup>78</sup> ILR 2 All. 25

as a relevant fact against the other fellow conspirators, there must be sufficient evidence on the record for holding, at least, *prima facie* generally as to the existence of the conspiracy and its members.

108. Mr. Yahya Bakhtiar next contended that at any rate under section 10 of the Evidence Act things said, done or written by one of the conspirators, are relevant as evidence of common intention, only if they relate to the time when the conspiracy was continuing. In other words, according to him the words of this section are not capable of being widely construed, so as to include the statement made by one of the conspirators with reference to the past acts, after the conspiracy has already come to an end. In developing his argument, he submitted that on this premises even the evidence of an approver in Court about the things said and done by one of the conspirators in the past in reference to their common intention, is not relevant against the other conspirators.

109. On a plain reading of the section, it is clear that things said, done or written by one conspirator in reference to their common intention to be admissible against his coconspirator, must have taken place when the conspiracy is still in existence or in progress. Hence, a declaration or act of one of the conspirators is not admissible in evidence against the other members of the conspiracy, if it was made after termination of the conspiracy. In this connection, there are two necessary requirements to be fulfilled, *viz*, that it must be (a) in reference to their common intention and (b) when the conspiracy is still in existence or in progress, before its termination. If these requirements of the section are fulfilled, in a case of conspiracy, a witness may give evidence about the things said, done or written by one of the conspirators in reference to their common intention, during the existence of the conspiracy, so as to be admissible against the other co-conspirators. An approver to whom pardon has been granted is a competent witness. Therefore, section 10 does not cease to apply to anything said, done or written by a conspirator during the relevant period, simply because that conspirator gives evidence as an approver.

110. In this connection in *Vishindas Lachmandas and others v. Emperor*<sup>79</sup>, it was observed that the act of one conspirator is the act of ail; each conspirator is deemed the agent of his fellow-conspirator, and section 10, Evidence Act, does not cease to apply to "anything said, done or written" by a conspirator simply because that conspirator gives evidence as an approver. In *Tribuvan Nalh v. The State of Maharashtra*<sup>80</sup>, although the facts are a little different, yet its ratio is in point. The Court, while dealing with the evidence given on oath by one of the accused as a defence witness, observed:

"Of course, as accused person cannot be compelled to give evidence as a prosecution witness in view of the expression "in disproof of the charges" in

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<sup>79</sup> AIR 1944 Sindh I

<sup>80</sup> AIR 1973 S C 450

section 342-A. But once his evidence as a witness for the defence is on record, under section 10 of the Evidence Act, 1872, evidence as to the communications between one conspirator and the other during the time that the conspiracy is going on and relating to implementing that conspiracy, is relevant evidence. The statements by one accused to another and the evidence as to the acts done by him disclosing participation by the other accused in the conspiracy are also relevant."

111. In *Balmokand v. Emperor*<sup>81</sup> and *Bhala Nath and others v. Emperor*<sup>82</sup>, in spite of the weaknesses inherent in the statements of the respective approvers as witnesses on solemn affirmation in Court, their evidence was relied upon and made use of against the accused on this principle contained in section 10 of the Act. Similarly in *R. V. Gagher*,<sup>83</sup> where two prisoners were jointly indicted for conspiracy, and one of them pleaded guilty, and the other not guilty, the evidence of the prisoner who pleaded guilty was held admissible against the other in support of the indictment.

112. In this connection, I find that the following cases cited before us by the learned counsel for the appellant are not in point and are distinguishable. In the leading case under the Common Law of England in *Queen v. Blake*<sup>84</sup>. Tye who was a Customs House agent and Blake, a landing waiter, had allegedly conspired for evading custom duty payable on the import of goods. In evidence the prosecution produced an entry in Tye's day-book in order to prove that the quantity of the goods actually imported was much larger than the duty paid on them. The counterfoil of a cheque issued from the cheque book of Tye was also produced in which an account was written by him showing, as suggesting, payment of a certain sum, and dated after the goods were passed, representing the share of Blake in the mal-profits thus made by the evasion in the payment of the custom duty under the conspiracy. In that connection the Court was of the opinion that Tye's day-book was evidence of what was done towards the very acting in concert which was to be proved, and was therefore, receivable in evidence against Blake in proof of the conspiracy. As to the counterfoil and the writing on it, it was observed that those were made after the conspiracy had been carried into effect and therefore, the same could not be used in evidence against Blake. Lord Denman, C. J. in rejecting this document said:

"..... on the principle that a mere statement made by one conspirator to a third party on any act not done in pursuance of the conspiracy is not evidence for or against either conspirator."

and Coleridge, J. said that it "did not relate to the furtherance of the common object." The ratio in this case was followed with approval by their Lordships of the Privy

<sup>81</sup> AIR 1915 Lah. 16

<sup>82</sup> AIR 1939 All. 567

<sup>83</sup> 15 COX 291 (CCR)

<sup>84</sup> (1844) 6 Q B 125

Council in *Mirza Akbar v. King-Emperor*<sup>85</sup>. It may be seen from the discussion that follows that both these authorities are distinguishable.

113. In *Mirza Akbar v. King-Emperor* the facts were that Mst. Mehr Taja and her paramour Mirza Akbar appellant had entered into a conspiracy and had hired the services of one Umar Sher to murder her husband Ali Askar deceased. The Additional Sessions Judge, Peshawar, convicted them under section 302/120-B. Their appeals were dismissed by the learned Judicial Commissioner, Peshawar and the appellant filed a further appeal to the Privy Council. Before the Privy Council a contention was raised on behalf of the appellant to the effect that the findings against him were vitiated by the admission of the statement made by Mst. Mehr Taja before the examining Magistrate after she had been arrested on the charge of conspiracy. That statement made in his absence was admitted in evidence under section 10 of the Evidence Act against him by both the Courts below. Their Lordships of the Privy Council in interpreting section 10 of the Evidence Act accepted the contention that the statement of Mst. Mehr Taja was wrongly admitted by the two Courts below against the appellant. But the Privy Council found that on the material before the Court, even after excluding the statement, there was otherwise sufficient evidence in upholding the conviction. On the interpretation of section 10 of the Evidence Act their Lordships were of the opinion that the words of section 10 must be construed in accordance with it and are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. Their Lordships of the Privy Council observed that:-

"The common intention is in the past. In their Lordships' judgment the words 'common intention' signify a common intention existing at the time when the thing was said, done or written by the one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference. In their Lordships' judgment section 10 embodies this principle."

114. In this case their Lordships of the Privy Council have rightly drawn a distinction between communications among conspirators, while the conspiracy was going on, with reference to the carrying out of the conspiracy, and statements made, after arrest or after the conspiracy has ended, by way of description of other events then past. Thus, in

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<sup>85</sup> AIR 1940 PC 176

substance all that their Lordships of the Privy Council have held is that the statement of Mst. Mehr Taja made outside the trial Court in the absence of the appellant with reference to their past acts done in the actual course of carrying out the conspiracy, after it has been completed, cannot be used against him under section 10 of the Act. The act of making this statement, as such, after the termination of the conspiracy, cannot be held to be "anything said, done or written" by one of the conspirators "in reference to common intention", as an agent for her co-conspirator so as to bind him with its contents. It may at best be usable against the appellant (co-accused) for whatever its worth, under section 30 of the Act as a confession of a co-accused but not as evidence of anything said, done or written by a conspirator "in reference to their common intention" for the purposes of section 10 of the Act so as to be binding against him as well. But all these considerations would be irrelevant in case she was not a co-accused and had appeared as an approver as a competent witness at the trial of the murder of her husband. Then in that event her statement in Court at the trial recorded in the presence of the appellant directly deposing to anything said, done or written by any one of the conspirators in reference to their common intention during the existence of the conspiracy, would have been admissible against him under section 10 of the Act.

115. In *Mirza Akbar v. King-Emperor* the Privy Council on its construction of section 10 of the Act relied on some decisions in India, as for instance in *Emperor v. Ganesh Raghunath*<sup>86</sup> and *Emperor v. Abani*<sup>87</sup>. But the ratio laid down in these two rulings is not applicable to the facts of the instant case. In *State v. Shankar Sakharam Jadhav and another*<sup>88</sup> it was laid down that anything said, done, or written by one of conspirators must be in reference to the common intention and it is difficult to say, once the object of criminal conspiracy is carried out, that any common intention existed with reference to the criminal conspiracy. Where the confessional statements made by accused are made after the object of criminal conspiracy is carried out, the confessional statements refer to past events, and can have no reference to any common intention animating the co-conspirators. No exception can be taken to this principle which is, however, distinguishable and not applicable to the facts in the instant case before us. For all these reasons, therefore, I find that the evidence of the two approvers who have competently appeared as prosecution witnesses, for whatever their worth, could not be brushed aside as irrelevant under section 10 of the Evidence Act against the appellants.

#### APPLICATION OF SECTION 10, EVIDENCE ACT TO THE PRESENT CASE

116. Now, the question is whether the prosecution has succeeded in establishing reasonable grounds to believe that there was a conspiracy in this case, so as to attract the application of section 10 of the Evidence Act. Mr. Ijaz Hussain Batalvi submitted that if the evidence of the two approvers is taken into account, then this requirement is

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<sup>86</sup> ILR 55 Bom. 839

<sup>87</sup> ILR 38 Cal. 169

<sup>88</sup> AIR 1957 Bom. 226

amply fulfilled. In the preceding paragraph I have reached the conclusion that there is no legal impediment in the way of considering the direct testimony of an approver, who appears at the trial as a competent witness, for the purpose of determining whether there is reasonable ground or not within the meaning of section 10 aforesaid.

117. The evidence of the two approvers Masood Mahmood and Ghulam Hussain need not be recapitulated here at any length, and it would suffice to say that they have given sufficient details of the marine in which the conspiracy was initiated, and subsequently executed through the agency of the Federal Security Force. This evidence *prima facie* shows that there was, indeed, a conspiracy between the appellants as well as the two approvers to commit the murder of Ahmad Raza Kasuri, and that in execution thereof his father was killed. On the basis of this evidence section 10 would be clearly applicable. It is to be noted that at this stage the question is not whether a conviction can be based on the evidence of the two approvers, but merely whether it furnishes a basis for reasonable ground to believe, that certain persons had conspired to commit a particular offence. This requirement is clearly fulfilled by the detailed evidence of the two approvers.

118. Even if for any reason the evidence of the approvers is kept out of consideration for the purpose of determining of application of section 10 of the Evidence Act, there is still ample material to furnish reasonable ground for the belief mentioned in the section. The evidence of the complainant Ahmad Raza Kasuri supported by the documentary evidence as to motive, the oral and documentary testimony of M. R. Welch (P.W. 4), the supporting evidence of Saeed Ahmad Khan (P.W. 3), the identity of the ammunition employed in the Islamabad incident and the present occurrence at Lahore, as well as the evidence of witnesses like Fazal Ali (P.W. 24), Amir Badshah (P.W. 20) and Driver Muhammad Amir (P.W. 19) as to the supply of arms and ammunition from the F.S.F. units, besides the oral and documentary evidence as to the subsequent conduct of appellant Zulfikar Ali Bhutto, all *prima facie* go to show that there was, indeed conspiracy involving the present appellants and the two approvers. Her again, the submissions made by Mr. Yahya Bakhtiar as to the value to be placed on these pieces of evidence, and the question of their final admissibility in law are not relevant for the purpose of determining the question of the application of section 10 of the Evidence Act. The cumulative effect of this evidence on the mind clearly is to create a reasonable ground for the belief that the present murder was the result of a conspiracy involving specified persons.

119. As a result I am of the view that the learned Judges in the High Court were right in thinking that the requirements for the application of section 10 of the Evidence Act were amply fulfilled in this case. It has already been stated that the section does not require that the prosecution evidence should be led in any prescribed manner.

## Scope and Application of Section 30 of the Evidence Act regarding confessions and statements made under Section 342, Cr. P.C. by co-accused

120. As regards the misapplication of section 30 of the Evidence Act, Mr. Yahya Bakhtiar submitted that the High Court was in error in taking into consideration confessional statements of the co-accused which were in fact self-exculpatory; or were not proved as confessions, as required by section 30 of the Evidence Act, but were made during the course of the trial when the co-accused were examined under the provisions of section 342 of the Criminal Procedure Code, at a stage when the appellant had already been examined under this section and had no opportunity of rebutting or explaining these statements. The learned counsel submitted that in the circumstances these so-called confessions and statements should be altogether excluded from consideration.

121. He further contended that the written statements filed during the trial, or during the hearing of the appeal, by some of the co-accused, particularly appellant Man Abbas, could similarly, not be taken into consideration by the Court against the accused other than the makers thereof.

122. I find that the High Court has dealt with these questions in paragraphs 587 to 593 of its judgment. The learned Judges have rightly observed that under section 30 of the Evidence Act, the confession of a co-accused can be taken into consideration not only against the maker thereof but also against the other accused person, but the section does not say that the confession is to amount to proof, and, therefore, there must be other evidence. However, they have also gone on further to hold, relying upon the case of *Dial Singh v. Emperor*<sup>89</sup>, that a confessional statement of an accused made on questions put to him under section 342 of the Criminal Procedure Code is also covered by section 30 of the Evidence Act. On this view of the matter, they have concluded that it is open to the Court to take into consideration the confessions made by accused Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad as well as the statements made by them under section 342 of the Criminal Procedure Code, at least against Mian Abbas. They have added that these confessions and statements confer added strength to the corroboration furnished by the prosecution witnesses to the statement of Ghulam Hussain, approver against Mian Abbas.

### MEANING OF THE TERM 'CONFESSION'

123. The first question in the present context is as to what is the meaning of the term confession, as used in section 30 of the Evidence Act. This term is not defined in the Evidence Act, but ordinarily a confession is construed as an acknowledgment in express words, by an accused in a criminal case, of the truth of the guilty fact charged or of

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<sup>89</sup> AIR 1963 Lab. 33



some essential part of it. A statement in order to amount to a confession must either admit in terms the offence, or at any rate substantially all the P facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession. A statement that contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed. This definition finds support from a number of authorities cited at the Bar by Mr. Yahya Bakhtiar, namely, *Sant Ram v. Emperor*<sup>90</sup>, *Sheocharan v. Emperor*<sup>91</sup>, *Raghunath v. Emperor*<sup>92</sup>, *Abdul Jalil Khan and others v. Emperor*<sup>93</sup>, *Shambhu v. Emperor*<sup>94</sup>, *Pakala Narayan Swami v. Emperor*<sup>95</sup>, *Ram Bharose and others v. Rex*<sup>96</sup> and *Zahid Hassan Khan and others v. The State*.<sup>97</sup>

124. It was, however, contended by the learned Special Public Prosecutor that a statement, partly inculpatory and partly exculpatory, can also be used under section 30 of the Evidence Act as amounting to a confession. Mr. Batalvi placed reliance in this behalf on *Lakhan v. King Emperor*<sup>98</sup>, *Rama Kariyappa Pichl and others v. Emperor*,<sup>99</sup> *Narain Chandra Biswas and others v. Emperor*<sup>100</sup>, *Bala Aajhi v. The State of Orissa*<sup>101</sup>, *The State v. Jamalana and others*<sup>102</sup> and *Ghulam Qadir v. The State*.<sup>103</sup>

125. A perusal of the facts and observations appearing in these cases, however, does not fully support the learned Special Public Prosecutor, as there is in fact no departure from the basic definition as given by the Privy Council in the case of Pakala Narayan Swami already referred to namely, 'a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence'. I find it difficult to adopt or follow any observations to the contrary appearing in these judgments, in view of the clear enunciation of the law by the Privy Council, which is fully in accord with the terms of section 30 of the Evidence Act. The principle underlying the section is that the consequences of self-implication in an offence afford some sort of guarantee for the truth of the statement, and when the maker of such statement also implicates another prisoner, it is very difficult, if not practically impossible, to require the Court to exclude that statement altogether from its mind when it comes to consider the case against the other accused. An admission by an accuse person of his own guilt affords some sort of

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<sup>90</sup> AIR 1924 Oudh 188

<sup>91</sup> AIR 1926 Nag. 117

<sup>92</sup> AIR 1926 Nag. 119

<sup>93</sup> AIR 1930 All. 746

<sup>94</sup> AIR 1932 All. 228

<sup>95</sup> AIR 1939 PC 47

<sup>96</sup> AIR 1949 All. 132

<sup>97</sup> PLD 1964 Dacca 600

<sup>98</sup> AIR 1924 AIL 511

<sup>99</sup> AIR 1929 Bom. 327

<sup>100</sup> AIR 1936 Cal. 101

<sup>101</sup> AIR 1951 Orissa 168

<sup>102</sup> PLD 1959 Lab. 442

<sup>103</sup> PLD 1960 S C 254

sanction in support of the truth of his confession against others as well as himself. These considerations, however, do not apply when the question is whether statement party inculpatory and partly exculpatory should be used against the maker thereof. In his case, even if the statement does not amount to a confession in the full sense of the term, it could still be used as an admission against him.

### POSITION IN RESPECT OF S. 342, CR. P.C. STATEMENTS

126. The next question is whether an admission of guilt made during the trial under section 342 of the Criminal Procedure Code or otherwise can be taken into consideration against the co-accused, under section 30 of the Evidence Act. Mr. Yahya Bakhtiar placed reliance on *Mahadeo Prasad v. King-Emperor*<sup>104</sup>, *In re: Marudamuthu Padayachi*,<sup>105</sup> *Mt. Sumitra v. Emperor*<sup>106</sup>, *Malla Mahmadoo and others v. State*<sup>107</sup>, *Ghulam Hussain v. The State Bank of Pakistan*<sup>108</sup> and *Qazi Parvaiz Iqbal and 2 others v. The State*<sup>109</sup> in order to contend that a confessional statement made under section 342 of the Criminal Procedure Code during the trial cannot be said to be a confession proved in the case for the purposes of section 30 aforesaid, especially when the co-accused against whom it is to be used, has already been examined by the Court as to the incriminating pieces of evidence appearing against him, and has thus no opportunity to rebut or explain the admission of guilt made by his co-accused.

127. The learned Special Public Prosecutor has supported the view taken in this behalf by the High Court by placing reliance on *Dial Singh v. Emperor*<sup>110</sup> but this case was not followed in AIR 1940 Nag. 287, PLD 1960 Pesh. 170 and PLD 1976 Kar. 583. He has further referred us to AIR 1930 Bom. 354 which had also taken the view that the statements under section 342 are covered by section 30 of the Evidence Act. In view of the recent judgment delivered by our learned brother Muhammad Haleem, J., as a Judge of the Sindh High Court in the case of *Qazi Parvez Iqbal and 2 others* it is not necessary for me to examine the various cases cited by the learned counsel in support of their respective contentions. Most of the judgments cited at the Bar before us have been noticed in this case, and I find myself in respectful agreement with the conclusions reached by Muhammad Haleem, J., to the effect that "upon a consideration of the authorities we are inclined to hold that section 30, Evidence Act, does not specify the form, the confession may take. It may be judicial or extra-judicial. Judicial confession is one which is recorded in the manner laid down by sections 164 and 364, Cr. P.C. while the extra judicial confession may take the form of a document or other statement. Such

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<sup>104</sup> AIR 1923 All. 322

<sup>105</sup> AIR 1931 Mad. 820

<sup>106</sup> AIR 1940 Nag. 287

<sup>107</sup> AIR 1940 Nag. 287

<sup>108</sup> AIR 1952 J & K 49

<sup>109</sup> PLD 1976 Kar. 583

<sup>110</sup> AIR 1936 Lah. 337

document may be filed as the statement made in the courts of the trial. Section 30R provides an exception to the rule that an admission can only be used against its maker under section 21 of the Evidence Act. Therefore, in construing section 30 of the Evidence Act regard must be had to the fact that the confession, which is sought to be used against the co-accused like any other piece of prosecution evidence, must be proved before the prosecution closes its side, so as to provide an opportunity to the accused to rebut it. This being the minimum of a fair trial, the keyword 'proved' must have relation to the stage of trial, otherwise it cannot be used in evidence against him. Concluding, therefore the implication cannot be on the meaning of the word 'proved' in section 3 of the Evidence Act." I fully endorse this view of the law in respect of 342, Cr. P.C. statements.

### CONFESSION IS NOT PROOF AGAINST CO-ACCUSED

128. One last point arising in this connection may also be disposed of. Relying upon *Bhubont Sahu v. The King*<sup>111</sup>, *Kashmira Singh v. The State of Madhya Pradesh*<sup>112</sup>, *L. S. Raju v. The State of Mysore*,<sup>113</sup> *Rafiq Ahmad v. The State*<sup>114</sup>, *Maqbool Hussain v. The State*<sup>115</sup>, *Ibrahim and another v. The State*<sup>116</sup>, *Shera and 3 others v. The State*<sup>117</sup> and *Abdul Sattar v. The State*.<sup>118</sup> Mr. Yahya Bakhtiar submitted that the confession of a co-accused, even when admissible is not evidence and can only be taken into consideration, but cannot itself form the basis of the conviction of the co-accused.

129. This submission indeed has the support of authority. In the case of *Bhuboni Sahu*, their Lordships of the Privy Council observed that "a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of evidence contained in section 3. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of these infirmities. Section 30, however, provides that the Court may take the confession into consideration and thereby, no doubt, makes it evidence on which the Court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence. The confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction". The other judgments mentioned by

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<sup>111</sup> PLD 1949 P C 90

<sup>112</sup> AIR 1952 S C 159

<sup>113</sup> AIR 1953 Bom. 297

<sup>114</sup> PLD 1958 S C (Pak.) 317

<sup>115</sup> PLD 1960 S C 382

<sup>116</sup> PLD 1963 Kar. 739

<sup>117</sup> PLD 1972 Lah. 563

<sup>118</sup> PLD 1976 S C 404

the learned counsel follow the same rule. Nothing was said by the learned counsel for the prosecution to the contrary.

### **POSITION OF CONFESSIONS AND 342 STATEMENTS IN THE PRESENT CASE**

130. Acting in accordance with the principles brought out in the preceding paragraphs, I would exclude from consideration against appellant Zulfikar Ali Bhutto and Mian Abbas the statements made during the trial by appellants Soofi Ghulam Mustafa, Rana Iftikhar and Arshad Iqbal in answer to questions put to them under section 342 of the Criminal Procedure Code at the close of the prosecution evidence, and after the other two appellants had already been similarly examined. Although, these statements could be said to be proved in terms of section 3 of the Evidence Act, having been made before the trial Court, and although they are self-inculpatory affecting the makers of the statements as well as the other two appellants, yet they cannot be used against the latter for the reason that they were not afforded any opportunity to rebut or explain them. It appears that the High Court has, in fact, used these statements only against Mian Abbas, and not against appellant Zulfikar Ali Bhutto, but even that was erroneous in the light of the legal position explained above.

131. For the same reasons, I would also exclude from consideration against appellant Zulfikar Ali Bhutto, the written statement filed by appellant Mian Abbas in this Court, admitting all the allegations made against him, by the prosecution. Appellant Zulfikar Ali Bhutto had no opportunity of rebutting this statement, as it could not be formally put to him in terms of section 342 of the Code; on the contrary at the trial Mian Abbas has pleaded not guilty.

132. As regards the confessional statements made by Soofi Ghulam Mustafa, Rana Iftikhar Ahmad and Arshad Iqbal, I find that they were duly proved at the trial by the Magistrates who had recorded them under the provisions of section 164 of the Code. They were also put to the non-confessing accused during their examination under section 342 of the Code at the close of the prosecution case. I further find that these confessional statements fully implicated the makers thereof and also affected the other two appellants. It is true that these three accused have pleaded that they did all the guilty acts attributed to them by the prosecution, under orders and pressure from their superiors, but this plea does not detract from the self-inculpatory nature of their statements, as they admitted substantially all the incriminating circumstances of the offences with which they were charged at the trial. These three confessions have therefore, been rightly taken into consideration by the High Court in terms of section 30 of the Evidence Act.

133. A perusal of the confessional statement made by appellant Mian Abbas under section 164 of the Code shows that he tried to exculpate himself by laying the blame on approvers Masood Mahmood and Ghulam Hussain and incidentally implicating

appellant Zulfikar Ali Bhutto in this crime. In the circumstances, this statement cannot be treated as a confession for the purpose of section 30 of the Evidence Act and was rightly not used as such by the High Court.

### **Requirements of sections 331 & 164, Cr. P.C. regarding approvers and their statements**

134. It was next contended by Mr. Yahya Bakhtiar that as both the approvers, namely Masood Mahmood (P.W. 2) and Ghulam Hussain (P.W. 31), had on their own admission, failed to make a full and true disclosure of the whole of the circumstances of the case within their knowledge, as required by section 337 of the Code of Criminal Procedure, they could not be regarded as approvers in the legal sense, and for that reason their evidence could not be brought within the ambit of section 10 of the Evidence Act. The learned counsel further submitted that there was also an illegality in the procedure adopted by Magistrate Mr. Zulfiqar Ali Toor (P.W. 10) inasmuch as he had not examined the two approvers as witnesses in the presence of the accused persons as required by subsection (2) of section 337 of the Code, although he had taken cognizance of the case in terms of section 190 of the Code. It appeared to the learned counsel that in these circumstances the evidence of both the approvers became inadmissible and had to be excluded; or at any rate much weight could not be attached to it. He placed reliance on *Mahla v. Emperor*<sup>119</sup>, and *In re: Arusami Goundan*<sup>120</sup>.

135. In reply it was submitted by Mr. Ijaz Hussain Batalvi that, in the first place, it was not factually correct to say that both the approvers had not made a full disclosure of the facts within their knowledge while giving evidence at the trial, and that at best this criticism could apply to the statements they had made under section 164 of the Criminal Procedure Code soon after the grant of pardon. He pointed out that approver Ghulam Hussain had written a letter to the High Court on the 31st of October, 1977, six weeks before he appeared as a prosecution witness at the trial on the 14th of December, 1977, saying that he had distorted his earlier statement to give some benefit to Mian Abbas, but he now undertook to speak the truth in Court. Similarly, approver Masood Mahmood had also asserted that he was making a full and true disclosure at the trial, although he might have omitted some details in his 164 Cr. P.C. statement. Mr. Batalvi contended that the requirement of law is that the approver must make a full and true disclosure while giving evidence in the case, and that stage arises only during the commitment inquiry or the trial, as a statement made under section 164 of the Criminal Procedure Code is not evidence in the case as defined in section 3 of the Evidence Act. He further submitted that if an approver sticks to the fundamentals then minor variations are of no consequence. In support of these submissions the learned counsel

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<sup>119</sup> AIR 1930 Lah. 95

<sup>120</sup> AIR 1959 Mad. 274

referred us to *Balmokand v. Emperor*<sup>121</sup>, *Bhola Nath and others v. Emperor*<sup>122</sup>, and *Emperor v. Shahdino Dhaniparto*.<sup>123</sup>

136. It will be useful to refer here to the words used in section 337, itself as to the purpose for which pardon is to be tendered and the condition which must attach to such pardon. The section lays down that the object of the pardon is to "obtain the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence"; and the condition attached to the tender of pardon is that the person concerned must "make a 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". Subsection (2) of the same section requires that every person accepting a tender of pardon shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any.

137. It will be seen that there is no provision in section 337 requiring that immediately after the grant of pardon the person concerned shall make a statement under section 164 of the Criminal Procedure Code before the commencement of the inquiry or trial. It seems, however, that in practice an approver's statement is generally recorded under section 164 of the Criminal Procedure Code soon after the grant of pardon. The object of adopting such a procedure appears to be to bind the approver to a particular version of the incident of which he has knowledge, and the question is whether his failure to make a true and full disclosure of all the facts during the course of such a statement would either deprive him of his status as approver, or otherwise render him liable to action under the law.

138. It seems to me that the answer to both the parts of this question must be in the negative. As already stated, the object of the grant of pardon is to obtain the evidence of the person concerned in regard to the offence to which he was privy in some manner or the other. Evidence as defined in section 3 of the Evidence Act means and, includes

(i) All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(ii) All documents produced for the inspection of the Court; such documents are called documentary evidence.

The word "Court" is again defined as including all Judges and Magistrates and all persons, except arbitrators, legally authorized to take evidence. Now, in the present

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<sup>121</sup> AIR 1915 Lah. 16

<sup>122</sup> AIR 1939 All. 567

<sup>123</sup> AIR 1940 Sindh 114

case Magistrate Zulfiqar Ali Toor, who recorded the statements of both the approvers under section 164 of the Criminal Procedure Code, was not authorized to take evidence for the reason that since 1972 the commitment proceedings in cases triable by the Sessions Court had been abolished, and subsection (3) of section 190 of the Code suitably amended to provide that a Magistrate taking cognizance under subsection (1) of an offence triable exclusively by a Court of Session shall, without recording any evidence, send the case to the Court of Session for trial. As a result, the true position which emerges is that the statement recorded by Mr. Toor under section 164 of the Criminal Procedure Code could not be regarded as evidence in this case. At best they are previous statements of the two approvers which could be used by the defence for the purposes of their cross-examination.

139. It is true that subsection (2) of section 337 contemplates that every person accepting a tender of pardon shall be examined as a witness in the Court by the Magistrate taking cognizance of the offence and in the subsequent trial, if any; but it is clear that this provision has to read in conjunction with the relevant part of section 190 of the Code which deals with the subject of cognizance of offences by Magistrates. With the abolition of commitment proceedings there should have been a corresponding amendment in subsection (2) of section 337 of the Code, but the omission of the Legislature to make this corresponding amendment would not in any manner confer jurisdiction on a Magistrate to record evidence by way of commitment proceedings in contravention of the prohibition contained in subsection (3) of section 190 of the Code. It follows, therefore, that under section 337 (2) read with section 190 (3) an approver has now to be examined as a witness only at one stage, namely, at the trial, as the inquiry stage has disappeared. As a necessary consequence, it further follows that the obligation resting on the approver, as a necessary condition of the grant of pardon, is to make a true and full disclosure of the events within his knowledge when giving evidence at the trial.

140. In passing it may be remarked that, while recording a statement under section 164 of the Criminal Procedure Code, there is no obligation on the Magistrate to require the presence of the accused person, as subsection (1-A) of section 164 is only an enabling provision, stating, that any such statement may be recorded by such Magistrate in the presence of the accused, and the accused given an opportunity cross-examining the witness making the statement. If the Magistrate does not choose to require the presence of the accused, he does not commit any illegality in recording the statement in question, as it is not to be used as substantive evidence against the accused who was not present.

141. In the two cases referred to by Mr. Yahya Bakhtiar it was laid down that an approver must be examined as a witness in the Court of the Committing Magistrate and the subsequent trial of every person tried for the same offence, but these observations had reference to the law when commitment proceedings were in force. The learned

Judges were at pains, in these cases, to point out that the approver was under an obligation to give evidence at both the stages, and he was liable to forfeit the pardon if he defaulted in giving truthful evidence at either stage. There can be no cavil with these propositions, but they have to be modified in the light of the fact that commitment proceedings have since been abolished in Pakistan.

142. In AIR 1940 Sindh 114, a Division Bench, of the Sindh Chief Court took the view that although, under subsection (2) of section 337 of the Code of Criminal Procedure, it was the duty of the prosecution to examine the approver both in the commitment inquiry and at the Sessions trial, yet it was not necessary that he should forfeit his pardon if he did not give a truthful account before the Committing Magistrate on account of the threats and influences of the co-accused with whom he was placed in the same prison cell, when he gave truthful evidence in the Sessions Court in accordance with the, conditions of his pardon. In other words, the learned Judges thought that in these circumstances the approver could be held to have substantially complied with the condition of his pardon.

143. It follows from what has been said in the preceding paragraphs that the object of the grant of pardon is to obtain the evidence of the approver, which can only mean, in the present state of procedural law in Pakistan, evidence during the trial, commitment proceedings having been abolished. It will only be his failure to give such evidence that will render him liable to penal action under the law. Any shortcomings or distortions in a statement recorded by a Magistrate under section 164 of the Criminal Procedure Code immediately after the grant of pardon cannot render the approver liable to any penal action, nor in any manner deprive him of the status of an approver, as such a statement is not an essential requirement of the provisions contained in section 337 of the Code.

144. The Criminal Procedure Code contains a specific provision, namely, section 339, to deal with a situation where an approve fails to fulfill the essential condition of the tender of pardon by not giving truthful evidence at the inquiry or trial, as the case may be. This section lays down that:

"Where a pardon has been tendered under section 337 or 338, and the Public Prosecutor certifies that in his opinion any person who has accepted such tender has, either by willfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made such person may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter.

Subsection (2) of this section contemplates: "The statement made by a person who has accepted a tender of pardon may be given in evidence against him at such trial."



145. It will be seen, therefore, that until such time as the procedure embodied in section 339 of the Criminal Procedure Code is adopted, it cannot be said that the person concerned has forfeited his pardon and cannot be regarded as a competent witness in the case. It is not enough that the prosecution or the defence should allege that the approver has not made a true and full disclosure of all the circumstances of the case; nor is it enough that the trial Court may hold that he has given false evidence. He forfeits his pardon only when the Public Prosecutor initiates action under section 339 of the Code. The question of the weight to be attached to his statement is altogether a separate question, and ought not to be confused with its legal admissibility.

146. As to the scope and applicability of section 10 of the Evidence Act, it has already been explained in the preceding paragraphs that it is concerned with anything said, done or written by any one of the conspirators in reference to their common intention, and this position is not affected by the fact whether the co-conspirator is made an approver in the case or is tried as a co-accused. Compliance or otherwise with the provisions of section 337 of the Code of Criminal Procedure is, accordingly, irrelevant for the purposes of determining the applicability of section 10 of the Evidence Act. An approver does not cease to be a co-conspirator even if he does not make a true and full disclosure of the circumstances of the case as required by section 337 of the Code of Criminal Procedure.

#### **Requirements of section 342, Cr. P.C. regarding examination of accused at close of prosecution**

147. I now turn to the contention that several important pieces of incriminating evidence relied upon by the High Court had not been put to the appellant under section 342, Cr. P.C., with the result that they had to be excluded from consideration by this Court. The learned counsel for the appellant listed the following pieces of evidence which were not put to the appellant:

(i) Statement of Saeed Ahmad Khan (P.W. 3) regarding his conveying the appellant's message to Masood Mahmood (P.W. 2) on the green telephone in P.W. 3's own words.

(ii) The evidence of M. R. Welch (P.W. 4) particularly the reports sent by him to P.W. 2 Masood Mahmood.

(iii) Evidence of Fazal Ali (P.W. 24) particularly the evidence bearing on the substitution of empties by Mian Muhammad Abbas, which was accepted by the trial Bench out of several theories or versions about the substitution of empties, but was not put for explanation to the accused. If this theory of substitution was kept out of consideration, the whole of the prosecution story would collapse

because it was otherwise an admitted position that the crime empties recovered from the scene of offence did not match with any of the weapons belonging to the Third Battalion of the F.S.F. and alleged to have been used in the commission of the crime.

(iv) The evidence relating to the issuance of ammunition to approver Ghulam Hussain (P.W. 31) on chits without entering them in the Register.

148. The submission of Mr. Ghulam Ali Memon, learned counsel for the appellant who argued this part of the case, was that those circumstances, which have been recorded by the trial Bench as incriminating against the appellant and on which his conviction has been based but were not put to him for explanation, should be excluded from consideration. According to him if that was done, the main basis of the prosecution would disappear, and the whole case would fall to the ground. In support of this submission reliance was mainly placed on the following judgments:

- (1) *S. M. K. Alvi v. Crown* (PLD 1953 F C 189).
- (2) *Abdus Salam Molla v. Crown* (PLD 1955 F C 129).
- (3) *Munawar Ahmad v. State* (PLD 1956 S C (Pak.) 300).
- (4) *The State v. Tasiruddin* (PLD 1962 Dacca 46).
- (5) *Addl. Advocate-General, W. Pak. v. Abdul Majid* (PLD 1965 Quetta 20).
- (6) *M. Akbar Khan Bugti v. State* (PLD 1967 Kar. 186).
- (7) *Imam Ali v. State* (1975 P Cr. L J 489).
- (8) *Gulzar Ahmad v. State* (1975 P Cr. L J 1207).

149. In all these cases the view has been expressed that section 342 deals with the examination of the accused with particular reference to the circumstances appearing in evidence against him, and that compliance with its provisions is absolutely essential in accordance with its terms; and where this is not done, the piece of incriminating evidence not put to the accused should be excluded from consideration, and as a result the conviction might be quashed, or the trial might be set aside, if the remaining evidence was not sufficient to sustain the conviction, or if some prejudice appears to have been caused to the accused.

150. Mr. Batalvi, the learned Special Public Prosecutor, submitted that the objection raised on behalf of the appellant that certain parts of the evidence were not put to him in his examination under section 342, Cr. P.C. was of no avail in the special circumstances of this case. He pointed out that the examination of this appellant, after the conclusion of the prosecution evidence, started on January 24, 1978. In answer to the very first question, he said: "I am boycotting the proceedings of the trial and would not be offering any defence. I will confine my statement to two issues: (1) Why this case has been fabricated against me, and (2) my lack of faith in getting a fair trial and justice. As for the other questions, if they do not directly pertain to my defence, I will be willing to give an answer". This was followed by his examination under section 342, Cr. P.C., but no answer was given by him to 53 questions put to him that day except in terms of the above propositions formulated by him in his first answer. The remaining 14 questions were asked from Mr. Bhutto on January 25 and 28, 1978. Camera proceedings had been ordered on January 25, 1978. The accused did not answer any question relating to the evidence appearing on the record against him, although he made a long statement complaining against the holding of the trial *in camera*. In reply to certain questions he did not even speak; he either shook his hand or his head.

151. The learned counsel submitted that it was apparent from the above that the accused had deliberately refused to answer any question, and did not endeavor to explain the evidence appearing against him or relating to his defence; and it was in this context and in this background that the question of the alleged failure of the Court to comply with the provisions of section 342 of the Code had to be considered. Mr. Batalvi contended that the examination of the accused was not a game of technicalities. If the accused wished to frustrate the process of law, he could not be heard to say in appeal that a particular question had not been asked from him, and the failure to do so had caused prejudice to his case. Prejudice, he submitted, had to be proved as a matter of fact. It could arise only when the accused had taken part in the proceedings of the Court.

152. As a matter of fact, according to Mr. Batalvi, once Mr. Bhutto had declared that he would not answer any question at all, the Court was not bound to ask him any further questions, but in this particular case, however, there had been full compliance with the provisions of this section. In support of these submissions, he placed reliance on:

(1) *Rameshan v. Emperor* (AIR 1936 Nag. 147).

(2) *Dawarka Singh v. Emperor* (AIR 1947 Pat. 107).

(3) *Mohyuddin v. Emperor* (AIR 1925 Pat. 414).

153. A perusal of these cases shows that they do indeed support Mr. Batalvi. In Rameshan's case, the accused had put in a written statement and said nothing more. It was observed that it was, undoubtedly, the duty of the Court to put to the accused the various points against him, and the filing of the written statement did not abrogate that duty. If, however, when the Court wanted to put the question and the accused practically refused to answer, saying that he had nothing to say beyond what is stated in the written statement filed by him, it will be useless for the Court to persist with the detailed questioning, and there was no prejudice to the accused.

154. In the case of Dawarka Singh it was observed that the primary matter to be ensured under section 342, Cr. P.C. is that the accused has been given an opportunity to explain vital matters in evidence against him, but if he fails or refuses to give an explanation, his failure or refusal should be made abundantly apparent on the face of the record so that the inference against him, authorized by section 342, may be drawn.

155. In the case of Mohyuddin, it was observed that it was not necessary that every part of the evidence of each prosecution witness should be put to the prisoner. He was at the trial and had heard what the witness had said. All that was required was that he should be given an opportunity to generally state his position. Principle required that the accused should not be convicted without being given an opportunity to explain the allegations against him. The judicial questioning, however, should not become inquisitorial. If these essentials are secured, the trial cannot be impeached. The trial is not vitiated for any deviation from the section unless the accused is prejudiced in his defence.

156. In *State v. Zia-ur-Rehman*<sup>124</sup> certain observations appearing at page 93 of the report though made in a somewhat different situation nevertheless have some relevancy in the present context and may, therefore, be reproduced here with advantage:

"The procedure adopted by the Court was also the summary procedure which was made still more summary by the non-participation of the detenus themselves who refused to participate. Actually, there was no acceleration of any date of hearing in the cases of the Printers and Publishers of the '*Urdu Digest*' and the '*Punjab Punch*'. The only acceleration of the date of hearing, which can be complained of, was in the case of the Publisher and Editor of the weekly '*Zindagi*'. But in this case, too, I find myself unable to say that the acceleration of the date of hearing rendered the proceeding *coram non judice* or *mala fide*.

As already pointed out, each of the detenus had filed long statements challenging not only the authority of the Military Court but even the validity of

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<sup>124</sup> PLD 1973 SC 49

the Martial Law Regulations and refused to participate in such proceedings. They had been given the liberty to appoint a friend to defend them, to cross-examine the witnesses produced on behalf of the prosecution and to adduce defence witnesses if they so desired; but they had all declined to do so on the ground that they did not recognize the Court or its proceedings. It does not, in the circumstances, lie in their mouths now to complain that they had been deprived of any valuable right or that the Military Court had in the circumstances acted in such a manner as to render its proceedings a farce."

157. In the alternative, Mr. Batalvi submitted that even if it was supposed that the appellant had answered the questions put to him, and the Court had failed to ask certain other questions, in such circumstances the inadequacy of the examination was not sufficient to vitiate the judgment, unless clear prejudice was shown. The mere possibility that prejudice was caused, was not enough. It was for the accused to satisfy the Court that, in fact, prejudice had been caused to the defence. The question of prejudice was definitely one of inference from all the facts and circumstances of each case.

158. In support of these submissions Mr. Batalvi relied on a large number of cases, wherein the same view had been taken. Some of the leading judgments taking this view are the following:-

- (1) *Sher Jang v. Emperor* (AIR 1931 Lah. 178).
- (2) *Ali Shan v. Crown* (PLD 1953 Lah. 14).
- (3) *Abdul Wahab v. Crown* (PLD 1955 F C 88).
- (4) *Ibrahim Bhak v. Crown* (PLD 1955 F C 113).
- (5) *Lalan v. Crown* (PLD 1955 F C 132).
- (6) *M. Yaqub v. Crown* (PLD 1956 F C 143).
- (7) *Bashir Ahmad v. State* (PLD 1960 Lah. 687).
- (8) *Rama Shankar v. State of Bengal* (AIR 1962 S C 1239).
- (9) *Aisha Khatun v. State* (1968 P Cr. L J 53).
- (10) *M. Sonafar Ali v. State* (1969 S C M R 461).
- (11) *Saleh Muhammad v. State* (1971 3 C M R 260).

- (12) *Ajit Kumar v. State of Bihar* (AIR 1972 S C 2058).
- (13) *Allah Dad v. State* (PLD 1978 S C 1.).
- (14) *Moseh Chauhdry v. West Bengal State* (AIR 1956 S C 536).
- (15) *Bimbhadur Pradhan v. State of Orissa* (PLD 1957 S C (Ind.) 68).

159. From a consideration of the above judgments it is clear that the failure to question the accused with respect to every piece of evidence will not result in vitiating the trial, or in the exclusion of that piece of evidence, unless the omission has caused prejudice to the case of the accused. In fact, this principle is decipherable even from the judgments cited by Mr. Memon, on behalf of the appellant to which a reference has already been made.

160. In the light of the above principles, we may proceed to consider whether the contention that the four incriminating pieces of evidence listed at the outset of this discussion should be excluded from consideration, can be given effect to.

161. So far as the failure to call the attention of the appellant to the first two pieces of evidence, namely:-

(i) the statement of Saeed Ahmad. Khan regarding his conveying the message of the appellant to Masood Mahmood on the green telephone in his own words, and

(ii) the evidence of M. R. Welch (P.W. 4), particularly the reports sent by him to Masood Mahmood (P.W. 2) is concerned, I find that the gist of these allegations was put to the appellant in questions Nos. 26 and 27 respectively. Question No. 26 was to the effect whether it was a fact that he had been reminding and goading Masood Mahmood with regard to getting rid of Kasuri, which he had done personally on the green line, and through Saeed Ahmad Khan and Bajwa. It was not necessary to mention the details of the evidence of Saeed Ahmad Khan. Similarly Question No. 27 drew the appellant's attention to Masood Mahmood's evidence that during the appellant's visit to Quetta on the 29th July, 1974, he had asked Masood Mahmood to get rid of Ahmad Raza Kasuri during the latter's visit to Quetta, and that in pursuance thereof Masood Mahmood had given directions to his local Director M. R. Welch to take care of Kasuri as he was one of the anti-State element. It is true that the reports subsequently sent by Welch to Masood Mahmood on Kasuri's visit to Quetta were not put to the appellant, but Question No. 27 does, indeed, contain a pointed reference to the action taken by the appellant and Masood Mahmood at

Quetta in furtherance of the alleged conspiracy. It seems, therefore, that the omission to refer specifically to the evidence of Welch, which was only in corroboration of Masood Mahmood, was immaterial inasmuch as the appellant had been given notice of this part of the prosecution case in no uncertain terms.

162. It is no doubt true that the remaining two incriminating pieces of evidence, namely, the evidence of Fazal Ali (P.W. 24) relating to the substitution of empties by Mian Muhammad Abbas, which was accepted by the trial Bench, and the evidence relating to the issuance of ammunition to the approval Ghulam Hussain (P.W. 31) on chits without entering them into the register, were not put in these terms to the appellant, although in question No. 39 the prosecution allegation regarding substitution of empties by the Police Officers at Lahore was mentioned. However, in our opinion, the above omission will neither vitiate the trial nor entail the exclusion of these pieces of evidence from consideration, by reason of the peculiar conduct of the appellant himself at the time of his examination under section 342, Cr. P.C.

163. Although this section is a mandatory provision, yet its compliance is dependent upon the conduct of the accused himself. In the present case, the accused frustrated these provisions by boycotting the proceedings and refusing to answer any questions put to him relating to his defence. Several judgments have been cited (AIR 1931 Lah. 178, AIR 1936 Nag. 147, AIR 1925 Pat. 414 and AIR 1947 Pat. 106) to show that it may be useless for the Court to persist with the detailed questioning if the accused preferred to be reticent. In fact, in view of the conduct displayed by him, the Court would have been justified not to ask any further questions. In point of fact, 67 questions were put to him whereby practically all the incriminating pieces of evidence except the two listed above, were mentioned. The answers furnished by him to these 67 questions establish beyond doubt that even if the trial Court had put the said two pieces of evidence to him for explanation, they would not have elicited any replies different from those given by him to the other questions put to him. In these circumstances, this omission has not caused any prejudice to the appellant in his defence.

164. It is now well-established that unless it is proved as a matter of fact that prejudice was caused to the accused with regard to his defence, the validity of the trial is not affected, as section 537, Cr. P.C. cures any such irregularity that might be found.

#### **SCOPE AND APPLICATION OF SECTION 537, CR. P.C. TO CURE IRREGULARITIES IN TRIAL**

165. Since the intendment and scope of section 537, Cr. P.C. has been argued at considerable length before us, we may appropriately discuss this question at this stage.

166. Section 537, Cr. P.C. as it stands at present runs as follows:-

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account-

(a) of any error, omission or irregularity in the complaint, report by a police officer under section 173, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or

(b) of any error, omission or irregularity in the *mode of trial including any misjoinder of charges*, unless such error, omission or irregularity has in fact occasioned a failure of justice.

*Explanation.-* In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

167. The shape in which this section stands at present is the result of a number of amendments made therein since it was enacted in 1898, *inter alia*, the amendments carried out by the Criminal Procedure Amendment Act (Act XVIII of 1923) and the recent amendments made by the Code of Criminal Procedure (West Pakistan Amendment) Act 1964 (Act XVII of 1964) and the Law Reforms Ordinance of 1972.

168. As originally enacted in 1898, this section was in the following terms "Subject to the provisions hereinbefore contained no finding, sentence, or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account-

(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or

(b) of the want of or any irregularity in any sanction required by section 195, or any irregularity in proceedings taken under section 476, or

(c) of the omission to revise any list of jurors or assessors in accordance with section 324, or

(d) of any misdirection in any charge to a jury unless such error, omission irregularity, want or misdirection has in fact occasioned a failure of justice.



*Explanation.*- In determining whether any error or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage. in the proceedings.

### Illustration

A Magistrate being required by law to sign a document signs it by initials only. This is purely an irregularity and does not affect the validity of the proceedings."

169. The provisions of this section came up for consideration in the case of *Subramania Iyer*<sup>125</sup>. In this case the Privy Council while dealing with the contravention of section 234 resulting in misjoinder of charges, described it as an illegality and not a mere irregularity that could be removed by section 537, Cr. P.C. and observed;

"Their Lordships are unable to regard the disobedience to express provisions as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment ....

It was further observed that it would be an extraordinary extension of such a branch of administration of criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission or irregularity.

170. This decision subsequently was, however, explained in a number of cases, because the Judicial Committee appears itself to have realized that the view taken by it to the effect that a violation of the mandatory provisions of the Code would be an incurable illegality was rather an extreme one. Consequently, in the later decisions of the Privy Council the pendulum began to swing towards the other side. In *Abdul Rehman v. Emperor*<sup>126</sup> there was a violation of section 360 of the Code of Criminal Procedure, which provides that deposition of each witness shall be read over to him in the presence of the accused or his counsel. The High Court held that the omission to do so was a mere irregularity and confirmed the conviction as no failure of justice had resulted. It was pointed out on appeal before the Privy Council that the section was applicable and that non-compliance of such a mandatory provision was illegal on the principle laid down in *Subramania Iyer's* case. Their Lordships, however, held that as there had been no actual or possible failure of justice, the appeal could not succeed whether the section of the Code had or had not been properly applied. As for

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<sup>125</sup> 28 I A 257

<sup>126</sup> 54 I A 96

*Subramania's case*, it was observed that the procedure adopted in that trial was one which the Code positively prohibited and it was possible that it might have worked actual injustice to the accused.

171. The matter came up again in *Pulukuri Kotayya v. Emperor*<sup>127</sup> where there was a breach of statutory requirements found in section 162 of the Code inasmuch as the accused were not supplied with copies of the statements first recorded by the police officer for cross-examining the prosecution witnesses. The defect was recognized to be a matter of gravity and it was observed that if there had been a total refusal to supply copies to the accused the convictions were liable to be quashed. But in the case before them as the statements were made available though too late to be effective, and the Circle Inspector's notes and the examination of the witnesses were put in the hand of the accused, the defect was taken to be merely an irregularity, which in the peculiar circumstances of the case had not occasioned prejudice to the accused. Referring to the contention that the breach of a direct and important provision of the Code cannot be cured but must lead to the quashing of the conviction, Sir John Beaumont observed:

"In their Lordships' opinion this argument is based on too narrow a view of the operation of section 537. When a trial is conducted in a manner different from that prescribed by the Code (as in 28 I A 257), the trial is bad and no question of curing an irregularity arises but if the trial is conducted substantially in the manner prescribed by the Code but some irregularity occurs in the course of such conduct the irregularity can be cured under section 537 and nonetheless so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code."

172. His Lordship went on to add:

"The distinction drawn in many of the cases in India between an illegality and an irregularity is one of 'degree' rather than of 'kind'. This view finds support from the decision of their Lordships in *Abdul Rehman v. King-Emperor*<sup>128</sup> where failure to comply with section 360 of the Code of Criminal Procedure was held to be cured by sections 535 and 537.

The present case falls under section 537, Cr. P.C. Their Lordships hold the trial valid notwithstanding the breach of section 162."

173. The above principle has been upheld by our Federal Court and Supreme Court in a number of decisions. In *Abdul Wahab v. Crown*<sup>129</sup>, which has already been mentioned, non-compliance with the provisions of section 342, Cr. P.C., in that the attention of the

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<sup>127</sup> AIR 1947 PC 67

<sup>128</sup> 54 I-A 96

<sup>129</sup> PLD 1955 FC 88

accused was not drawn to the point or points in evidence which could influence the mind of the Judge in arriving at conclusions adverse to the accused, and no opportunity afforded to him to give any explanation thereto if he had any, was held to be merely an irregularity curable under section 537, Cr. P.C. on the footing that the accused was literate and could very well follow the nature of the proceedings against him and was also aware of the prosecution case, and no miscarriage or failure of justice was proved. The same principle was adopted in *Ibrahim Bhak v. Crown*<sup>130</sup>, and later in *Faiz Ahmad v. State*.<sup>131</sup>

174. A detailed discussion of the scope and purpose of the provisions of section 537, Cr. P.C. was made by the Supreme Court of India in *W. Slaney v. State of Madhya Pradesh*<sup>132</sup> and it was observed that "the object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice. If he does, if he is tried by a competent Court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is substantial compliance with the outward forms of law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the Code and the trial is not vitiated unless the accused can show substantial prejudice".

175. After discussing *Subramania's* and *Puhkuri Kotayya's* cases, their Lordships went on to state: "Now it is obvious that the question of curing an irregularity can only arise when one or more of the express provisions of the Code is violated. The question in such cases is whether the departure is so violent as to strike at the root of the trial, and make it no trial at all or is of a less vital character. It is impossible to lay down any hard and fast rule, but taken by and large the question usually narrows down to one of prejudice. In any case, the Courts must be guided by the plain provisions of the Code without straining at its language wherever there is an express provision:

"For a time it was thought that all provisions of the Code about the mode of trial were so vital as to make any departure therefrom an illegality that could not be cured. That was due to the language of the Judicial Committee in 28 I .B, 257 P C (D). Later this was construed to mean that that only applies when there is an express prohibition and there is prejudice."

This, in our opinion, has been the trend of the more recent decision as of the Privy Council and indeed of latter-day criminal jurisprudence in England as well as in India. The swing of the pendulum has been away from technicality, and a greater Endeavour has been made to regard the substance rather than the shadow and to administer.

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<sup>130</sup> PLD 1955 FC 113

<sup>131</sup> PLD 1960 SC 8

<sup>132</sup> AIR 1956 SC 116

justice fairly and impartially as it should be administered; fair to the accused, fair to the State and fair to the vast mass of the people for whose protection penal laws are made and administered.

176. I may mention here that the recent amendments to section 537 (made in 1964 and 1972 as mentioned at the outset), whereby an irregularity in the mode of trial, including any misjoinder of charges, has been placed in the curable category, ought to set at rest the controversy that has raged around the true meaning of Subramania's case.

177. The judgment of the Supreme Court of India in *W. Slaney's* case was further explained by the same Court in *Gurbachan Singh v. State of Punjab*<sup>133</sup> and it was added:-

"In judging a question of prejudice, as of guilt, Courts must act with a broad vision and look to the substance and not to technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself."

178. Before us a large number of judgments delivered by Courts in Pakistan were cited, but they do not lay down a different principle. In *Rahmat v. State*<sup>134</sup> it was observed, referring to the amendment made in section 537 whereby an irregularity in the mode of trial has been made curable, that although an error or omission in the conduct of the trial will be curable under section 537, Cr. P.C. where no failure of justice has occasioned, but this amendment does not mean that the trial could be conducted in "utter disregard of the provisions of the Code".

179. In that case the trial of two sets of accused, who, were charged with the commission of some offence was held together and it was observed that the procedure adopted by the Magistrate was not only against the imperative provisions of the Code, but had actually resulted in causing prejudice to the accused.

180. In two recent decisions of this Court namely, *Wahid Bakhsh v. State*<sup>135</sup> and *Allah Dad v. State*<sup>136</sup>, the principle that unless the irregularity in the conduct of the trial has resulted in prejudice to the accused the trial is not vitiated, has again been reiterated. The observations made in the case of *Wahid Bakhsh*, where no specific question was put to the accused with regard to the dying declaration which was also the F.I.R. in the case, make instructive reading. It was observed that both before the Committing Court as well as the Court of Session the accused was represented by counsel, who had the

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<sup>133</sup> AIR 1957 SC 623

<sup>134</sup> 1968 Cr. LJ 35

<sup>135</sup> 1974 SCMR 219

<sup>136</sup> PLD 1978 SC1

fullest opportunity to cross-examine the witnesses. The F.I.R. was exhibited on the record in his presence, and was read over in open Court. The accused, in the circumstances, was not taken by surprise because of the reliance by the Court upon this evidence. The omission, therefore, was a mere irregularity which was curable under section 537, Cr. P.C. More or less similar remarks were made in the case of Allah Dad.

181. It will thus be seen that in determining whether an omission, error or irregularity in the conduct of the trial, using the phrase so as to embrace all aspects thereof, has vitiated the trial in any manner, the Court must look to the substance and not to technicalities; and if the accused has had a fair trial, and has not been prejudiced in his defence, then the error, omission or irregularity would stand cured under the provisions of section 537 of the Code. And as the distinction between an illegality and an irregularity is, to borrow the words of Sir John Beaumont of the Privy Council (in AIR 1947 P C 67), only one of degree rather than of kind, nothing turns on this distinction for the purposes of the application of this curative section.

132. Now, in the particular matter at present under discussion, *viz.* the failure of the trial Court to put some pieces of evidence to the appellant under section 342, Cr. P.C. we have seen that no prejudice has been caused to him, not, only for the reason that he or his counsel were fully aware of the entire evidence led by the prosecution; but also because he had, in any case refused to answer most of the questions put to him under a declared stance deliberately adopted by him. In these circumstances the omission, if any, would stand fully cured under section 537 of the Code.

**Application and scope of section 540-A of the Cr. P.C. In the matter of trial proceedings conducted on certain dates in absence of appellant Zulfikar Ali Bhutto**

183. I will next deal with the objection raised by the learned counsel for Zulfikar Ali Bhutto appellant that the trial of the accused held in his absence from the 16th of November, 1977 to the 30th of November, 1977 and on the 14th of December 1977, as well as on the 17th of December 1977 was not warranted under section 540-A of the Criminal Procedure Code and was vitiated. He further submitted that at any rate the requirements of these provisions were not properly complied with by the trial Bench, with the necessary consequence that the evidence of the witnesses examined on these dates of hearing could not be legally read against the accused-appellant, and the remaining evidence on the record was not at all sufficient to incriminate him. According to him, in proceeding against the accused in his absence the trial Court acted against the cardinal principle of criminal law embodied in section 353, Cr. P.C. that evidence of the prosecution witnesses must be recorded in the presence of the accused. He contended that the Court acted illegally in holding the trial in the absence of the appellant, resulting in grave miscarriage of justice and prejudice to him.

184. The learned Special Public Prosecutor submitted that during the trial Zulfikar Ali Bhutto had unfortunately fell ill twice and was incapable of personally appearing in and remaining before the Court. Consequently, his personal attendance in Court was dispensed with and the proceedings were taken in his absence, although the presence of his counsel who were all along afforded full opportunity to see their client, seek day to day instructions from him, and cross-examine the prosecution witnesses at length, so that no prejudice was, in fact, caused to the accused in the trial, thus held in his absence on those days. He added that no complaint on this account was subsequently made at any time before the trial Bench during the course of the trial.

185. The general principle of criminal law that the trial of an indictable offence has to be conducted in the presence of the accused, and that for this purpose trial means the whole of the proceedings including sentence, is stated in *Corpus Juris Secundum*, Volume 23, Sections 973 and 975; and has been reiterated in a number of decided cases. (See *Basil Ranger Lawrence v. Emperor*<sup>137</sup> and *Sultan Singh Jain v. The State*.)

186. There cannot be any quarrel with this well recognized general principle which is essential for the safe administration of justice in criminal cases. Indeed in this country the general rule is embodied in section 353, Cr. P.C. which expressly lays down that:-

"Except as otherwise expressly provided, all evidence taken under Chapters XX, XXI, XXII and XXII-A shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of the pleader."

187. Under this section it is imperative that all evidence in the trial of cases by Magistrates, summary trials, and trials before High Courts and Courts of Session shall be taken in the presence of the accused, or in certain Circumstances, in the presence of his pleader.

188. But this general rule stated in section 353 of the Code is subject to the opening clause - "Except as otherwise expressly provided", and it ceases to be applicable in the presence of an express provision to the contrary in the Code. Two of these express provisions to the contrary can be found in section 205 and section 540-A of the Code. Under section 205(1) whenever a Magistrate issues a summons, he may, if he sees reasons so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader. Similarly under section 540-A of the Code, under given circumstances, a Judge or Magistrate may dispense with the presence of the accused, if he is represented by a pleader. Also in section 512 of the Code we have another special rule of evidence by way of exception to the general rule. It provides that where the accused is absconding, or is unknown, witnesses may be examined and their deposition

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<sup>137</sup> AIR 1933 PC 218

recorded on behalf of the prosecution, even in the absence of the accused and that such deposition may be put in evidence against him subsequently after his arrest. The object of this provision is to see that important evidence is not lost by the time the accused is arrested and brought in Court.

189. In addition to the above some of the superior Courts in the Indo-Pakistan Sub-Continent have held that the power to dispense with the personal attendance of the accused is also implicit in and can be spelt out of the closing line of section 353, Cr. P.C. itself. The observations in *State v. Victor Henry and 2 others*<sup>138</sup>, *Sultan Singh Jain v. The State, Dewal Krishan v. The State*<sup>139</sup>, *Anand Martand and another v. Anant Pandurang*<sup>140</sup>, *Emperor v. C. W. King*<sup>141</sup> and *In re: Ummat Hassanath*,<sup>142</sup> lend support to this view.

190. In *Chamanlal and another v. Parashar Singh and others*<sup>143</sup> the High Court observed that it had inherent power under section 561-A of the Code to exempt an accused from appearance in Court beyond those contained in sections 205 and 540-A.

191. But, as already mentioned, the High Courts in India are not unanimous on this interpretation of section 353 of the Code. While some of the Indian High Courts have adhered to the view that the power to dispense with the attendance of an accused at the hearing in Court is implicit in section 353 of the Code, the others are of the opinion that this section by itself does not confer any independent power upon the Presiding Officer trying a case to dispense with the personal attendance of the accused.

192. In order to fully appreciate the respective contentions of the learned counsel it is necessary here to narrate the relevant facts in some detail.

#### **BHUTTO'S ABSENCE DUE TO ILLNESS BUT HIS COUNSEL WERE PRESENT**

193. In the trial Court the prosecution commenced its evidence on 11-10-1977. In the course of the evidence the statement of P.W. 3 Mr. Saeed Ahmad Khan was recorded on 31-10-1977 and he was cross-examined by the learned counsel for Zulfikar Ali Bhutto appellant for four days when on 8-11-1977 the case was adjourned to 12-11-1977 for his remaining cross-examination. But the case could not be taken up on 12-11-1977 and was adjourned to 13-11-1977 for evidence. At the hearing, on 13-11-1977, Zulfikar Ali Bhutto accused was not brought to Court from jail and it was reported that he would not be able to appear in Court for two days due to sickness. In the circumstances the Court while adjourning the hearing for two days to 15-11-1977 for further evidence, pointedly

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<sup>138</sup> PLD 1973 Kar. 273

<sup>139</sup> AIR 1954 Pepsu 36

<sup>140</sup> AIR 1956 Madh. Bha. 13

<sup>141</sup> 14 Bom. LR 236

<sup>142</sup> AIR 1947 Mad. 433

<sup>143</sup> AIR 1957 Nag. 101

drew the attention of his learned counsel to the provisions contained in section 540-A of the Code.

194. On 14th November 1977, the Superintendent, Jail, Lahore, wrote to the Registrar (Judicial), Lahore High Court, Lahore, enclosing therewith a medical certificate to the effect that Zulfikar Ali Bhutto accused was suffering from respiratory infection and had also some gastric trouble. He was also running temperature and was advised rest for the 15th and 16th November 1977. On the 15th he was again examined by Professor Iftikhar Ahmad, Secretary Health, Government of Punjab and according to his report the accused was suffering from acute influenza with debility. He had temperature also with severe nasal congestion and conjunctive congestion and was advised rest for three days.

195. In Court, on the next date of hearing on 15-11-1977, Mr. D. M. Awan, learned counsel for the appellant, filed an application (Criminal Miscellaneous No. 1106-M of 1977) under section 561-A, Cr. P.C. to the effect that Zulfikar Ali Bhutto accused was not in a position to attend the Court and prayed that the cross-examination of the prosecution witnesses be deferred until the recovery of the accused.

196. This application was placed on the record. At the hearing in Court, on 15-11-1977; Mr. D. M. Awan learned counsel for the appellant submitted that his client might recover from his ailment in two days. But at the same time he too requested that the case may be adjourned "till such time his client recovers". The Court however, told him to cross-examine the witness on 16-11-1977 and to seek instructions from his client meanwhile.

197. In these circumstances the proceedings in Court were continued in the absence of Zulfikar Ali Bhutto accused due to his illness on ten dates of hearing between 16-11-1977 to 30-11-1977 (both dates inclusive). But in Court he was all along represented by a team of lawyers who cross-examined the witnesses produced by the prosecution.

198. On 25-11-1977 Zulfikar Ali Bhutto appellant wrote to the Superintendent of Jail, Lahore that he had a severe attack of influenza combined with malaria, and was slightly better but was not well enough to attend the Court for over five hours at a stretch. He added that the Court had already observed that the case could proceed in his absence in spite of his illness. He therefore, expressed the opinion that: "Until I feel fully recovered it would not be in the interest of my health to attend the Court for the time being." This letter was forwarded in original by the Superintendent Jail to the Court.

199. In the course of the hearing on 26-11-1977 the prosecution produced Mr. Ahmad Raza Kasuri P.W. 1 in Court for his further cross-examination. But Mr. D. M. Awan, learned counsel for Zulfikar Ali Bhutto accused expressed his difficulty in cross-examining him and submitted that as the Court had earlier agreed, he may be allowed



to complete the cross-examination of the said witness in the presence of his client. On this the Court enquired from the learned counsel about his client's health. In reply he stated that he had met him a day before in jail and that he had no temperature but was only feeling weakness. On this the Court directed that the appellant may be medically examined by a Medical Board constituted by it.

200. But on 27-11-1977 the learned Special Public Prosecutor produced a report of the Medical Board which was to the effect that the accused did not submit himself to the medical examination for, according to him he had only a subjective feeling of weakness, and was of the view that nothing would be found on medical examination as he was not suffering from any organic disease. In these circumstances, in the absence of the medical report, the Court told his counsel to enquire from him as to when he would be able to attend the Court proceedings as Mr. Ahmad Raza Kasuri P.W.1 had to be cross-examined in his presence. On the next date of hearing on 28-11-1977 Mr. D. M. Awan informed the Court that the appellant would be able to attend the Court on 3-12-1977.

201. After 30-11-1977, the next date of hearing in the case was fixed for 6-12-1977, when Zulfikar Ali Bhutto again appeared in Court along with his counsel. In his presence, his learned counsel conducted the cross-examination of Muhammad Sarwar P.W. 17. The prosecution produced Mr. Ahmad Raza Kasuri P.W. I for his further cross-examination by the accused. But at the request of Mr. D. M. Awan the Court adjourned the case to 7-12-1977 when the further cross-examination of the witness was concluded by the learned counsel in the presence of his client.

202. In the circumstances narrated above a part of the cross-examination of P.W. 3 was conducted on 16-11-1977, the evidence of P.W. 4 to P.W. 16 and part of the evidence of P.W. 17 was recorded in the absence of Zulfikar Ali Bhutto accused, but in the presence of his learned counsel and all the remaining accused and their learned counsel, who were allowed full opportunity to cross-examine these witnesses.

203. On another occasion also; on the 14th December 1977, Zulfikar Ali Bhutto accused was not brought to Court from jail on account of his illness. His learned counsel, Mr. D. M. Awan, who appeared in Court for him at the hearing was asked to enquire from him if he wanted a team of doctors to examine him for his treatment. On this Mr. D. M. Awan after having contacted him on telephone, informed the Court that he would like his private physician Dr. Muhammad Iqbal of Lahore to examine him. The Court, thereupon passed an order that he should be examined by a team of leading Doctors nominated by it, including Dr. Muhammad Iqbal. The Court however, decided to continue with the proceedings for the day and dispensed with the attendance of the accused under section 540-A, Cr. P.C. Accordingly on 14-12-1977 the Court recorded a part of the statement of P.W. 28 Ashiq Muhammad Lodhi, and the statement of P.W. 30 Haroon Ahmad, Section Officer, Establishment Division, Rawalpindi, who simply produced the T. A. Bills of Abdul Hamid Bajwa and was not

cross-examined by any of the Defence counsel including the learned counsel for Zulfikar Ali Bhutto accused, in spite of the opportunity allowed to them. In addition to them the statement of P.W. 31 Ghulam Hussain approver in examination-in-chief was also partly recorded on that day in the absence of Zulfikar Ali Bhutto accused. All this was however, done in the presence of his learned counsel and the remaining parties and their learned counsel.

204. On the next date of hearing on 15-12-1977, it was brought to the notice of the trial Bench that Zulfikar Ali Bhutto did not submit to examination by the Medical Board appointed by the Court. He was however, examined by his own doctor, namely Dr. M. Iqbal alone, who reported that the accused had a severe relapse of colitis and was again developing a sore throat. However, on 15-12-1977 Zulfikar Ali Bhutto appeared with his counsel in Court at the hearing and participated in the proceedings.

205. In this connection mention may also be made about another incident which happened in Court on the 17th of December 1977. According to the order dated 17-12-1977 passed by the learned trial Bench after the examination-in-chief of P.W. 31 Ghulam Hussain approver was concluded, Mr. Irshad Ahmad Qureshi, Advocate, who was to cross-examine the witness first, asked for time to consult his clients. The Court therefore, directed that his cross-examination would begin at 10-30 a.m. after the recess. Before rising for the recess the Court enquired from the counsel about their reaction to continue the hearing of the case during the coming winter vacations about which the Court had already sounded them on a previous date of hearing. The Court desired that the counsel should give their reaction after conferring with each other. Mr. D. M. Awan, learned counsel for the appellant, then requested that the Court might meet at 10-45 a.m. instead of 10-30 a.m. because he had yet to get copies of a statement. As Mr. D. M. Awan was addressing the Court, Zulfikar Ali Bhutto appellant while trying to draw the attention of Mr. D. M. Awan, uttered the words "damn it". The Court told the appellant not to call his counsel "damn it" inside the Court, at which he stated that he was in a "very disturbed condition". The Court observed that it felt sorry that he was in a disturbed condition of mind but imp upon him that it would, nevertheless, not entitle him to abuse his counsel in Court. The Court further observed that "damn it" was a bad word, but the appellant insisted twice that it was not; and when the Court wanted Mr. Awan to resume his submissions, he (Bhutto) uttered the words: "I have had enough!". When asked as to enough of what, he replied: "of humiliation and insult": According to the Court, in view of this persistent unruly behavior, the appellant was asked to be taken out of the Court. After he was taken out, Mr. D. M. Awan was asked to meet his client during the recess and to request him to help keep the dignity and decorum of the Court and not to adopt an unruly attitude, for otherwise he would be liable under the law and the Jail Manual. The Court then rose for the recess. During the recess, Mr. D. M. Awan was called in the Chamber to know the reaction of his client whereupon Mr. D. M. Awan informed the Court that he had talked to the appellant but he says that he

knew the provision of law and the Jail Manual. The Court then passed the following order:-

"From Mr. Bhutto's attitude in the Court before the recess and his persistence in that attitude as conveyed to us by Mr. D. M. Awan during the recess, as well as by the fact that Mr. Bhutto was by his own admission, in a perturbed state of mind, the Court was satisfied that he was incapable of remaining in Court for the day. His presence was therefore, dispensed with for the rest of the day under section 540-A, Cr. P.C. "

206. It may be added here that this narration of the occurrence in Court substantially agrees with the account given by Zulfikar Ali Bhutto appellant in para. 23 of his miscellaneous application dated 18-12-1977 (Cr. Misc. 7-M of 1978, Volume of Applications, pages 163-164). The appellant explained that at the time he was in a very disturbed condition because he had just then learnt that his wife, Begum Nusrat Bhutto had received a head injury during a commotion that ensued when she had gone to see the Cricket match at Gaddafi Stadium in Lahore on 16-12-1977.

207. In these circumstances after the recess on 17-12-1977 when the Court reassembled, Mr. Irshad Ahmad Qureshi cross-examined P.W. 31 Ghulam Hussain approver. Mr. D. M. Awan had next to cross-examine him. But the Court observed that his client was, according to his own admission, mentally disturbed at the time and hence his presence in Court for the day had already been excused. In the opinion of the Court Ghulam Hussain was an important witness and it was proper that, if possible, he should be cross-examined by Mr. Awan when the appellant was present. The Court accordingly adjourned the hearing of the case to the 18th of December 1977 when the cross-examination of P.W. 31 Mr. Ghulam Hussain was resumed by the learned counsel of the appellant in his presence.

208. In the background of these facts let us now turn to the provisions contained in section 540-A, Cr. P.C. For the sake of convenience this section is reproduced below *in extenso*:-

"(1) at any stage of an inquiry or trial under this Code, where two or more accused are before the Court, if the Judge or Magistrate is satisfied, for reasons to be recorded, that anyone or more of such accused iii or are incapable of remaining before the Court, he may, if such accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks

fit, and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately."

209. V. V. Chitlay in his commentary on the Code of Criminal Procedure under section 540-A has observed that;

"It is a general provision designed to meet a practical difficulty which is occasionally experienced in trials involving a large number of accused persons, when during the trial, one or more of them are incapable of remaining before the Court, and for inquiries and trial being held in the absence of such persons ....."

210. By necessary implication it follows from these observations that section 540-A cannot be allowed to be used as a handle in the hands of the accused who is incapable of remaining before the Court so as to prolong the proceeding. Any other interpretation is likely to lead to mischievous results and defeat the very purpose for which this provision was designed.

211. It seems to me that section 540-A of the Code as is in force in Pakistan was enacted not merely for the benefit of the accused who is incapable of remaining before the Court, but also for the benefit of the other accused whose trial is likely to be delayed unnecessarily for no fault on their part. Subsection (1) of this section is attracted only where there are two or more accused before the Court and any one or more of such accused is or are incapable of remaining before the Court, the Judge or Magistrate may, under certain circumstances, dispense with his or their attendance and proceed with the inquiry or trial in his or their absence. In trials involving a large number of accused, it often happens that one or more of them, either by chance or design, keep on absenting, themselves in turn from the hearing on ground of ill-health, etc. and the Court finds it difficult to secure the presence of all of them together at the hearing thus resulting in inordinate delay in their joint trial. It was to meet w this practical difficulty that this section was enacted, in the interest of the expeditious disposal of such cases, for the benefit of the State and with a view to avoiding unnecessary harassment to the other accused in attendance at the hearing and for their benefit also.

212. The elements necessary for attracting the jurisdiction of the Judge or Magistrate under the section are:

(a) that there are two or more accused before the Court facing an inquiry or trial under the Code;

(b) that one or more such accused is or are incapable of remaining, before the Court; and

(c) that such accused is represented by a pleader.

It is only on the fulfillment of these conditions precedent that the jurisdiction of the Judge or Magistrate is attracted, and he may after having so satisfied himself in his discretion dispense with the personal attendance of such accused and proceed in his absence. (See PLD 1973 Kar. 273, 1968 P Cr. L J 791, AIR 1924 Lah. 705 and AIR 1940 All. 178).

213. The learned counsel for the appellant contended that under section 540-A of the Code the Judge or Magistrate seized of a case is empowered to dispense with the personal attendance of the accused, only on his application or request, and that he cannot by order impose any forced exemption on him against his wishes. In other words, according to the learned counsel, under section 540-A of the Code, in case one of the accused is incapable of remaining before the Court, then the Judge or Magistrate has no option but to simply act at his behest, either to dispense with the attendance of such accused at his will or else to adjourn the case before him until he is able to re-join the proceedings.

214. I find that there is nothing in subsection (1) of section 540-A of the Code to put this unwarranted curb on the discretion vested in the Judge or the Magistrate and to lend support to this restricted interpretation sought; to be placed on its plain meanings. Subsection (1) lays down that the Judge or Magistrate may dispense with the personal attendance of the accused who is incapable of remaining before the Court, and proceed with the inquiry or trial in his absence provided he is represented by pleader. But under subsection (1) if he considers that the personal attendance of such accused is necessary, he may for reasons to be recorded either adjourn the inquiry or trial or order his case to be taken up or tried separately. In the scheme of this section, reading the two subsections) together, it is clear that the power and discretion resting in the Court is not contingent on an application being made by the accused concerned.. The provision is, in fact, more for the benefit of the co-accused who are present rather than the one who is incapable of attending. It is, therefore, evident that under subsection (1) the Court may, in its discretion, dispense with the personal attendance of the accused in case it considers it necessary, provided that the other requirements of the subsection are fulfilled.

215. As to the meaning of the phrase "incapable of remaining before the Court" valuable assistance can be derived from *Emperor v. Radha Raman Mitra*<sup>144</sup>, *Kali Das Banerjee and another v. The State*<sup>145</sup>, *Trilochan Misra v. State*<sup>146</sup>, and *Chiman Lal and others v. Parashar Singh*<sup>147</sup>. In these cases the view was generally expressed that these words in the context must refer to an accused's physical incapacity to remain before the Court

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<sup>144</sup> AIR 1930 All. 817

<sup>145</sup> AIR 1954 Cal. 576

<sup>146</sup> AIR 1953 Orissa 81

<sup>147</sup> AIR 1957 Nag. 101

and that no accused is entitled under section 540-A, Cr. P.C. to any exemption from appearance in Court unless it is proved that he is physically incapable of remaining before the Court, although a somewhat wider meaning were assigned to this phrase by saying that it "related to some sort of incapacity from attendance arising either out of illness or some other reason such as social ban or peculiar customs of the class to which the parties belong."

216. The term "incapable" is not defined in the Code, although incidentally it occurs in section 512 as well. For the purposes of elucidation only it may be mentioned that the phrase "incapable of giving evidence" also occurs in sections 32 and 33 of the Evidence Act. It will not be out of place to also mention here that in section 3 of the Evidence Act a "fact" is defined to mean and includes anything, state of things or relation of things "capable" of being perceived by the senses.

217. In the absence of any definition of the term "incapable" in the Code of Criminal Procedure, it is permissible to rely on its ordinary dictionary meanings. According to the Law Lexicon of British India by Aiyar, the term "incapable" is an absolute term denoting inadequate mental, or physical, or moral power, or general unfitness or inability. According to the Oxford English Dictionary the word "incapable" means not capable, and not having the capacity, power or fitness for a specified function, action etc. In Webster's New International Dictionary of the English Language it is stated that in law the term "incapable" refers rather to the personal lack of the general ability, or power or understanding required to perform duties or exercise privileges, or to some general legal disqualification, as ineligibility; 'incompetent' often refers rather to lack of specific legal qualifications to perform or exercise, without implying anything as to personal condition. According to Funk and Wagnalls' New Standard Dictionary of the English Language in law the term "incapable" usually refers to personal inability, as the inability to exercise mental, moral or physical powers, as with an ebriate, whereas 'incompetent', as a rule deals with the lack of general qualifications.

218. In the light of the above discussion, in my opinion, without attempting to lay down an exhaustive definition of the term "incapable" in the context of section 540-A of the Code, it only means one who, is not capable of appearing in or remaining before the Court at the hearing to discharge his functions and duties. It may be due to inadequate physical, mental or moral power in him to do so. In the context it refers to, the personal inability, unfitness, and debility in the accused to remain in Court and perform his functions and duties at the hearing. An accused who is infirm, too weak and unfit for reasons of his bad health and illness to appear and remain in Court may be said to be "incapable" of appearing before or remaining in Court at the hearing within the meanings of section 540-A of the Code.

## HIGH COURT'S ORDER DISPENSING WITH BHUTTO'S ATTENDANCE WAS JUSTIFIED

219. With this exposition of the true legal position under section 540-A of the Code, let us now apply the same to the facts of this case before us. It is common ground that on 13-11-1977 Zulfikar Ali Bhutto appellant was not brought from jail to appear in Court at the hearing and it was reported that he would not be able to appear in Court for two days due to sickness. The medical certificate dated 14-11-1977 showed that the accused was suffering from respiratory infection and had also some gastric trouble. He was also having temperature. According to another report dated 15-11-1977 he was examined by Professor Iftikhar Ahmad, Secretary Health, Government of Punjab and was found to be suffering from acute influenza with debility and had temperature, severe nasal congestion and conjunctive congestion and was advised three days' rest. On the next date of hearing on 15-11-1977 once again the accused could not appear in Court at the bearing and his learned counsel filed an application (Criminal Miscellaneous No. 1106-R of 1977) on behalf of the accused in Court. In paragraph 3 of this application the appellant admitted that he was running high temperature and had a severe attack of flue and that consequently he was not in a position to attend the Court. Even on 25th November 1977, the appellant wrote to the Superintendent, Jail that he had a severe attack of influenza combined with malaria and was slightly better but not fit enough to attend the Court at the hearing for over five hours at a stretch. Indeed in this connection it was common ground between the parties, and there can be no two opinions about it, that Zulfikar Ali Bhutto appellant had been taken ill and was confined to bed from 13-11-1977 to 30-11-1977 and again on 14-12-1977. He was, consequently, incapable of appearing in and remaining before the Court at the hearings on these days. In the circumstances, therefore, in exercise of the discretion vested in it, the Court decided to dispense with his personal attendance in Court under section 540-A of the Code.

220. Paragraphs 1 to 3 of the above-mentioned application (Criminal Miscellaneous No. 1106-H of 1977) are reproduced below and it is stated:-

"(1) That *Pakistan Times* of 14th November, 1977 in reporting the proceedings of 13th November; 1977 in the above case, has reported that:-

"The Acting Chief Justice, Mr. Justice Mushtaq Hussain, who heads the Bench, observed that although under section 540-A of Cr. P.C. in the absence of one of the accused, his counsel could continue the cross-examination of the witnesses, yet the proceedings were being adjourned as a favor.

(2) That without prejudice to the interpretation of section 540-A, Cr. P.C., it is respectfully submitted that the petitioner has been running high temperature and had a severe attack of flue for the past three days. Consequently under the

advice of the Doctor, he is not in a position to attend the Court. His counsel finds himself severely handicapped in cross-examining the prosecution witnesses in the absence of petitioner/accused from whom instructions are needed all the time.

(3) That if in spite of the circumstances, this Honourable Court considers that it can proceed with the trial in the absence of the petitioner and that the case could be adjourned only by way of a 'favor' then the petitioner submits that he does not want any favor as he had already submitted in a previous application."

In the end it was prayed in the application that in the interest of justice the cross-examination of the prosecution witnesses be deferred until his recovery. Similarly at the hearing on 15-11-1977 his learned counsel stated in Court that the accused may be able to recover from his ailment in two days, nonetheless he at the same time made a request for a sine die adjournment till such time his client was able to recover.

221. At the hearing on 15-11-1977 the Court simply told the learned counsel for Zulfikar Ali Bhutto appellant to cross-examine the witness on 16-11-1977, and the case was thus adjourned for one day to enable the learned counsel to seek instructions from him meanwhile. From 16-11-1977 the evidence of witnesses in Court was recorded in the absence of the accused due to his illness but always in the presence of the team of his lawyers.

222. During this period on the 25th of November 1977 Zulfikar Ali Bhutto appellant wrote to the Superintendent of Jail that he had a severe attack of influenza combined with malaria and was slightly better but was not fit enough to attend the Court for over five hours at a stretch. He, therefore, expressed the opinion that until he was fully recovered, it would not be in the interest of his health to attend the Court for the time being. On 26-11-1977, the learned counsel for Zulfikar Ali Bhutto appellant informed the Court at the hearing that he, had met him a day before in jail and that he had no temperature but was only feeling the weakness. On this the Court constituted a Medical Board to medically examine the accused in jail. But he did not submit himself to the medical examination. According to him he had only subjective feeling of weakness and was of the view that nothing would be found on medical examination as he was not suffering from any organic disease.

223. It was in these circumstances that proceedings continued in Court in the absence of the accused for ten dates of hearing between 16-11-1977 to 30-11-1977. In this period a part of the cross-examination of P.W. 3 was conducted on 16-11-1977 and the evidence of P.W. 4 to P.W. 16 and a part of the evidence of P.W. 17 was recorded in the absence of Zulfikar Ali Bhutto appellant. In Court he was all along represented by a team of lawyers who fully participated in the day to day proceedings and cross-examined the prosecution witnesses after having obtained daily instructions by meeting him in jail.



224. Similarly on 14-12-1977 Zulfikar Ali Bhutto appellant was not brought from jail to attend the hearing in Court on account of his illness. In his absence his learned counsel was asked by the Court to enquire from him if he wanted a team of doctors to examine him for treatment. The learned counsel, after having contacted the appellant on telephone, told the Court that he would like Dr. Mohammad Iqbal to examine him. On this the Court appointed a team of doctors including Dr. Mohammad Iqbal to examine him in jail. But he refused to submit to the examination by the Board constituted by Court and was examined by Dr. Mohammad Iqbal only. On 14-12-1977 the Court at the same time observed that the appellant was represented by a counsel and therefore, dispensed with his attendance under section 540-A of the Code to continue the proceedings. In this manner the Court recorded the statements of P.W. 28 and P.W. 30 and the statement of P.W. 31 Ghulam Hussain in examination-in-chief was also partly recorded in the absence of appellant but in the presence of his learned counsel on 14-12-1977 without any objection.

225. Before us the learned Special Public Prosecutor submitted that all these facts go to show that Zulfikar Ali Bhutto appellant had in fact fallen ill and was incapable of personally attending and remaining in Court at the hearings from 16-11-1977 to 30-11-1977 and again on 14-12-1977. In defence the learned counsel for the appellant did not dispute the fact that the appellant had in fact fallen ill and was unable and unfit to put in appearance in Court on account of his illness. Indeed this is even otherwise also borne out from the record. The medical certificates, the application dated 15-11-1977 (Cr. Mist. No. 1106-H of 1977), the letter dated 25-11-1977 sent by the appellant to the Superintendent, Jail and para. 16 of the application dated 18-12-1977, 5-1-1978 (Cr. Misc. 7-VI of 1978) moved by the appellant in the trial Court, all go to establish that the appellant had fallen ill and was unable to appear in Court because of his prolonged illness during this period. He was, therefore, incapable of personally attending and remaining in Court at the hearing in those days within the meanings of section 540-A of the Code.

226. In view of the importance of this case, a large Bench of five Judges had been specially constituted for its disposal on the criminal original side of the High Court, and the prosecution evidence was being recorded almost from day to day as is usual in all murder trials. The importance attached to this case and the circumstances prevailing in the country demanded that it should be disposed of on the merits without any inordinate delay. It was in these circumstances that on 15-11-1977 the trial Court in its discretion decided to dispense with the formal attendance of the accused appellant at the hearing in Court and to proceed on with the trial in the presence of his learned counsel under section 54C-A of the Code.

## **EFFECT OF THE FAILURE OF THE HIGH COURT TO PASS A FORMAL ORDER UNDIR SECTION 540-A, CR. P.C. AND TO RECORD REASONS**

227. But in this connection before us the learned counsel for Zulfikar Ali Bhutto appellant submitted that the learned trial Bench in thus deciding to continue with the proceedings in the absence of his client had failed to pass any order, much less a speaking order as envisaged by section 540-A; that the Court did not properly comply with the mandatory requirements of the section; and also failed to properly and judicially exercise the discretion vested in it under the law. He contended that the failure of the Court to record its reasons as required by the section was a patent illegality which vitiated the trial.

Needless to emphasize here that the law envisages strict compliance with this mode of exercise of jurisdiction. But this does not mean that any error, omission or failure to strictly comply with the mode prescribed for the exercise of this jurisdiction must necessarily in every case result in the vitiation of the trial.

228. It is evident that on 13-11-1977 when the appellant Zulfikar Ali Bhutto was not brought from jail to appear in Court at the hearing because of his illness, the Court while allowing the adjournment to the appellant to 15-11-1977 for further evidence, had pointedly and expressly drawn the attention of his learned counsel, Mr. D. M. Awan to the provision of section 540-A of the Code. Even the appellant who was at the time lying ill in jail was left in no doubt about this order passed by the Court on 13-11-1977. In his own application (Cr. Miscellaneous No. 1106-H of 1977) filed in Court on 15-11-1977 reproduced above, he admitted that according to the *Daily Pakistan Times*; dated 14-11-1977, during the course of the proceeding in Court on 13-11-1977 the Acting Chief Justice, Mr. Justice Mushtaq Hussain, who heads the Bench, had observed that in the circumstances under section 540-A of Cr. P.C. in the absence of one of the accused, his counsel could continue the cross-examination of the witness. He further submitted in the application that without prejudice to the interpretation of section 540-A, Cr. P.C. he "had been running high temperature" and "had a severe attack of flue for the past three days" and consequently under the advice of the Doctor, he was "not in a position to attend the Court" and that if in spite of the circumstances, the Court considered that it could proceed with the trial in his absence then he did not want any adjournment as a favor to him. This application was actually before the Court on 15-11-1977 when it passed the impugned order. Moreover, the two medical reports dated 14-11-1977 and 15-11-1977 about appellant showed that he was ill and unable to, appear in Court at the hearing. Indeed, even according to the appellant himself he all along remained sick and was unfit to appear and remain in Court. In view of these admitted and incontrovertible facts patent on the face of the record the inevitable conclusion was and the Court must have satisfied itself that the appellant was incapable of appearing in Court, and had passed the order on 15-11-1977 in calling upon the learned counsel for the appellant to

reassume the cross-examination of witness in his absence on 16-11-1977 after obtaining the necessary instructions from him. There could be no doubt, that in issuing this direction the Court was all along conscious of the provisions contained and had acted under section 540-A of the Code when it passed the two successive orders on 13-11-1977, 15-11-1977 and in proceeding with the trial on 16-11-1977 and directing the resumption of the cross-examination of the witness by his counsel in his absence. The above-mentioned application dated 15-11-1977 itself showed that even the appellant was also fully aware that in thus proceeding in his absence, the Court was acting in the exercise of the powers vested in it under section 540-A of the Code. In the face of these patent facts obvious on the very surface of the record it cannot be seriously contended that the trial Bench had not satisfied itself that the appellant was incapable of remaining before the Court within the meanings of section 540-A of the Code on 15-11-1977 before deciding proceed on with the case in the absence of the appellant on account of his illness. The course adopted was thus fully justified in the facts and circumstances of the situation which had arisen owing to the illness of the appellant.

229. As to the failure to record reasons it cannot be denied that in the impugned order there are no reasons at all recorded for dispensing with the personal attendance of the appellant at the hearing of the case.

#### **OMISSION TO RECORD REASONS NOT MATERIAL, IF REQUIREMENTS OF SECTION OTHERWISE SATISFIED**

230. But the basic requirement that matters is the satisfaction of the Judge or the Magistrate. It is an indispensable condition for the Judge or Magistrate that he must be satisfied about it before dispensing with the presence of the accused. The further requirement of the section for the recording of reasons for such satisfaction relates only to the form of the order, and is procedural only. Any such failure or omission in this behalf a by itself is not sufficient to adversely affect the substance and merits of the order, provided the other requirements of the section have been complied with. The law recognizes a distinction between the elements or ingredients which are essential for the foundation of jurisdiction and the mode in which such jurisdiction is exercised.

231. Such a view was taken as to the identical provisions in section 540-A of the Indian Procedure Code in *Mrityunjoy Chatterji and others v. The State*<sup>148</sup>. In that case one of the five accused, by name Pulin Mondal, fell ill, and the Court then passed a brief order saying: "Let the trial proceed with the four accused persons," and the prosecution evidence was recorded in the absence of Pulin Mondal. The High Court set aside the conviction of Pulin Mondal as he was not represented by counsel in his absence, but it refused to interfere with the conviction of three others, observing that mere failure to pass an express order in terms of the second part of the section, separating the trial of

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<sup>148</sup> AIR 1955 Cal. 439

the remaining accused from that of Pulin Mondal, did not vitiate the trial of the remaining three accused and the defect, if any, was curable, as thereby no prejudice had been caused to them in their trial. In coming to these conclusions the High Court observed as under;

"Granting that there would be such contravention but for any appropriate statutory exception, it is quite clear that such exception would be furnished by the second part of section 540-A of the Code which empowers the Magistrate to order separate trial of the absent accused in such a case. There can be no question that this provision would have been applicable in this case and the actual proceeding with the trial of the other accused and the taking of evidence in the absence of Pulin would have been perfectly legal and quite regular, if only the learned trying Magistrate had made an order under this second part of section 540-A of the Code, directing a separate trial in the case of Pulin.

This however, he failed pr omitted to do and the defect, if any, in the trial of these co-accused really arose from this failure or omission. It was thus, at the worst, an illegality which did not go to the root of the trying Magistrate's jurisdiction to hold the trial. Such a trial is not absolutely prohibited by the Code but would have been perfectly legal, only if the learned trying Magistrate had availed of the enabling provision of section 540-A, second part, and exercised the relevant powers under that provision. It was thus curable under section 537 of the Code if, of course, no prejudice had been caused to the accused concerned on account of it."

In the opinion of the Court their trial was conducted to use the language of the Judicial Committee in the case of *Pulukuri Kottaya v. Emperor*<sup>149</sup> "substantially in the manner prescribed by the Code", though, "in the course of such conduct" the irregularity committed by the trying Magistrate in his failure or omission to pass an order under the second part of section 540-A was curable.

232. The observations of this Court in *Muhammad Ishague v. Nur Mahal Begum and others*<sup>150</sup>, are highly pertinent, and are of general application, although in that case they were made in connection with the requirements of section 145, Criminal Procedure Code. Subsection (1) of that section, which expressly lays down that whenever the Magistrate taking cognizance is "satisfied" from a police report or other information that a dispute likely to cause a breach of peace exists concerning any land, water or boundaries thereof, within the local limits of the jurisdiction, he "shall make an order in writing", stating "the grounds of his being so satisfied" and requiring the parties to attend the Court in person, or by pleader. But contrary to these requirements the trying

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<sup>149</sup> AIR 1947 PC 67

<sup>150</sup> PLD 1961 SC 426

Magistrate in that case did not state the reasons upon which he had passed the preliminary order under section 145 (1) of the Code. In that connection this Court observed that: -

"It is necessary, according to the tenor of the section, that before an order there under can be issued the Magistrate must first be satisfied with regard to the matters therein specified and then after being so satisfied he shall make an order in writing 'stating the grounds of his being so satisfied'. This statutory provision, therefore, does prescribe the mode for the exercise of the jurisdiction conferred by it and there can be no doubt the Magistrates exercising the said jurisdiction are expected to comply strictly with the said provisions of law. But to say that a failure to follow the prescribed mode must in every case render the exercise of the jurisdiction invalid and illegal is, in our opinion, too wide a proposition. In our view, there is a distinction between the elements, which are essential for the foundation of jurisdiction, and the mode in which such jurisdiction has to be exercised. The elements necessary for the foundation of jurisdiction under section 145 of Criminal Procedure Code are that the Magistrate must be satisfied:-

- (a) that a dispute likely to cause a breach of the peace exists,
- (b) that the dispute refers to land or water or the boundaries thereof, and
- (c) that such land or water is situated within the limits of his territorial jurisdiction.

If these elements exist, they are sufficient to vest the Magistrate with the jurisdiction to make the preliminary order in the mode prescribed therein. If the Magistrate after having acquired jurisdiction does not strictly comply with the other requirements of the section as to the form of the order and does not state the ground of his being so satisfied, the order is no doubt defective, but this does not mean that the order is also without jurisdiction. The jurisdiction to make the order depends upon the existence of the elements necessary for founding the jurisdiction. Once the Court has validly acquired that jurisdiction, it cannot be said that it has only the jurisdiction to make a correct order in the prescribed form and that whenever the order is incorrect or defective, the order must also be held to be without jurisdiction. We are unable, therefore, to hold that the mere omission to state the grounds, upon which the Court is so satisfied, in the initial order under section 145 of the Criminal Procedure Code necessarily makes the order also without jurisdiction. The most that can be said is that the failure to do so is a non-compliance with a rule of procedure and mere non-compliance with a rule of procedure generally is not illegality vitiating the entire proceedings.

233. In that case this Court further observed that in such cases the important thing is to see whether there was material on the record upon which the satisfaction of the Magistrate could be at all grounded. If there exists material, then the mere omission to state the grounds of satisfaction will not vitiate the order. In such a case it must be held that there has been a substantial compliance with the requirements of the said subsection and the defect is merely a technical defect. This case was followed with approval by this Court in *Shahzada and others v. Malik Shams-ud-Din and others*<sup>151</sup>.

234. In another case in *Deputy Legal Remembrancer v. Banu Singh and others*<sup>152</sup> the facts were that in granting a pardon to one Mohendra Bid approver the Magistrate recorded a short note to the effect that the pardon was tendered to him and he did not record any reasons for doing so contrary to the mandatory requirements of section 337, Cr. P.C. In that connection the Court observed that the circumstances which preceded the grant of the pardon were such that the Magistrate may very properly can be said to have considered that they in themselves afforded sufficient reasons for the action without his recording any further reasons of his own. The Court observed:-

"Taking however his first point, *viz.*, that the evidence of the approver is inadmissible because the pardon had not been tendered by the committing Magistrate in strict compliance with law, we are unable to agree in the opinion which he has expressed. The Magistrate who enquired into the case, has, it is true, recorded only a short note at the top of the deposition of Mohendra Bid to the effect that the pardon was tendered to him and that he understood and accepted the conditions. The Additional Sessions Judge has held that this is not a sufficient compliance with the law which requires that a Magistrate who tenders a pardon under section 337, Criminal Procedure Code, shall record his reasons for so doing, In this case, however, we are not prepared to hold that the omission, though it may be regarded as an irregularity, if indeed it can be placed so high, amounted to an illegality. The circumstances which preceded the grant of the pardon were such that the Magistrate may very properly have considered that they in themselves afforded sufficient reasons for his action without his recording any further reasons of his own....."

Section 337(1) of the Code allows for the tender of pardon to an accomplice. In this connection subsection (1-A) of this section, lays down that every Magistrate who, tenders a pardon under subsection (1) "shall record reasons for so doing" In *Emperor v. Shama Charan and others*<sup>153</sup> the Allahabad High Court held that this recording of reasons under this subsection is merely a matter relating to procedure and is not a condition precedent to the tender of pardon. In *Bawa Faqir Singh v. Emperor*<sup>154</sup> the Privy Council

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<sup>151</sup> PLD 1977 SC 237

<sup>152</sup> PLD 1977 SC 237

<sup>153</sup> 151 C 1004

<sup>154</sup> AIR 1938 P C 266

observed that this omission to record the reasons amounts only to an irregularity. Also in *Rafiq Ahmad v. The State*<sup>155</sup> it was held that the omission to record reasons for tendering pardon is a curable irregularity.

235. Similarly section 208 of the Code expressly lays down that a Magistrate taking cognizance of an offence on complaint shall at once examine the complainant on oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant and also by the Magistrate. But in that connection in *Shamim v. The State and another*<sup>156</sup> this Court has held that the language of this section does not lead to the inevitable inference that the examination of a complainant is a "*sine qua none*" of valid proceedings, in all circumstances. There is no provision in the Code to the effect that a failure to follow the provisions of section 200 in respect of examination of the complainant entails invalidation of the proceedings taken and the irregularity is curable under section 537 of the Code.

236. Here, at this stage it is not necessary to advert at any length to section 537, Cr. P.C., as this section has been discussed in greater detail elsewhere in this judgment; and it has been held that in determining whether an omission, error or irregularity, in the conduct of the trial, using the phrase so as to embrace all aspects thereof, has vitiated the trial in any manner, the Court must look to the substance and not to technicalities; and if the accused has had a fair trial, and has not been prejudiced in his defence, then the error, omission or irregularity would stand cured under the provisions of section 537 of the Code.

237. For this reason also, any infringement in the technical compliance with the provisions contained in section 540-A of the Code by the learned trial Bench in this case, in its omission to record the reason in the order dispensing with the personal attendance of Zulfikar Ali Bhutto appellant, amounts to a mere irregularity curable under section 531 of the Code. As already stated, the error related merely to the form rather than the substance of the order passed by the Court, which was preeminently justified on the facts.

238. However, the learned counsel for Zulfikar Ali Bhutto placed strong reliance on the case of the Lahore High Court reported as *Pokhar Dots Ganga Ram v. Emperor*<sup>157</sup>, to contend that the omission was not curable. In that case in all eight accused persons including one Khem Chand, were tried together for offences under sections 302 and 307, I. P.C. The trial took place in the absence of Khem Chand who was ill at its commencement. A few days before the trial was due to commence the learned Judge summoned Khem Chand at Matwali and in the presence of the Public Prosecutor, Khem Chand and his counsel, but in the absence of the other accused, made an order

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<sup>155</sup> PDL 1958 SC (Pak) 317

<sup>156</sup> PDL 1966 SC 178

<sup>157</sup> AIR 1938 Lah. 216

dispensing with the attendance of Khem Chand at the trial. The trial afterwards proceeded in the presence of all the accused except, Khem Chand, who was represented by a counsel. The trial Court eventually convicted seven out of the eight accused, including Khem Chand. In appeal their learned counsel raised an objection to the validity of the trial, on the ground that the power to dispense with the presence of an accused person is defined in section 540-A of the Code, that the learned Judge had not complied with the provisions of the section, which required the presence of all the accused "before the Court" as a condition precedent to an order dispensing with the attendance of one of them during the further proceedings; and that the trial of the accused should have already commenced before any order of dispensation could be passed. In reply, the learned Advocate-General, stated that although it might be argued that even the trial of Khem Chand was good, yet "for the purpose of argument" he conceded that the trial so far as he was concerned was bad. In spite of this the Court held as under:-

"We ourselves have not been able to discover any ground for holding the trial of Khem Chand good. Normally, a trial in the absence of the accused is a nullity and it is only by virtue of section 540-A that this consequence of the absence of the accused can be avoided; if the requirements of the section are not fulfilled, the trial remains a nullity. The learned Advocate-General sought to ignore the fact that Khem Chand had been tried with his co-accused and argued that the trial should be treated as the trial of the other seven accused, the inclusion of Khem Chand being ignored; that the trial of each accused was a separate trial, and that eight trials were actually conducted at the same time. No authority for any such view of a joint trial was cited to us.

In the absence of such authority, we are constrained to hold that a joint trial is a single trial and cannot be considered as a separate trial of each person accused; it is one and indivisible. It follows, we think, that an illegality which vitiates the trial so far as one of the accused is concerned, prevents the trial from holding good in respect of the remaining accused. We have therefore no option but to hold the trial bad, and order the appellants to be retried by the Sessions Judge Mianwali."

239. However, this case was dissented from in *Morityunjoy Chatterjee and others v. The State* by the Calcutta High Court, which was of the opinion that a defect of the kind was curable under section 537 of the Code, and observed as under:-

"I do not, therefore, agree with the broad proposition, laid down in the Lahore case of *Pakhar Das-Ganga Rang v. Emperor*<sup>158</sup>, relied on by the petitioners' Advocate. It states the proposition in absolute terms and it seems to have gone too far without due regard to

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<sup>158</sup> AIR 1938 Lah. 216 (D)



section 537 of the Code. The actual decision in the case may have been justified in spite of that section on the ground of prejudice, but the statement of the law, as contained in that judgment, is certainly too wide to be reconcilable with the Privy Council decision in AIR 1947 PC 67."

240. I am inclined to agree with these observations. Not only in the Lahore judgment the proposition laid down is too wide to be reconcilable with the later decision by the Privy Council in *Pulukurl Kottaya v. King Emperor*<sup>159</sup> on the true interpretation of section 537 of the Code, it is rendered all the more untenable after the amendment introduced in section 537 of the Code in Pakistan by the Law Reforms Ordinance, whereby within its scope and purview any error, omission or irregularity in the impugned order or even in the mode of trial is curable, provided it has not occasioned any failure of justice.

241. Before us the learned counsel for the Defence in his final reply relied on *Thakur Singh and others v. Emperor*<sup>160</sup>, *Began Singh v. King Emperor*<sup>161</sup> and *Sukhanraj v. State*<sup>162</sup> to contend that the illegalities in the compliance of the provisions contained in section 353, Cr. P.C., are not curable under section 537, and are sufficient to vitiate the trial. In the first mentioned case three persons were prosecuted and tried for murder of two persons in two trials. The defence evidence given by the accused in the first trial was, with consent, treated as evidence in the second case. The Court held that defence evidence in the second trial was not recorded in accordance with the requirements of section 353 in the presence of the accused and that the irregularity vitiated the trial. In the second case also the facts were almost similar. The evidence recorded in one case was treated as evidence in the other case as well. The Court held that the mandatory requirement of section 353, Cr. P.C. is that the evidence must be taken down in the presence of the accused. A contravention of this express provision goes to the root of the case and was held to be sufficient to vitiate the trial. Also in the third mentioned case the recording of the copies of statements of witnesses in one case as evidence in another case without examining the witness was held to be illegal, sufficient to vitiate the trial and the irregularity was not curable under section 537 of the Code. Similarly in *Bishmath and others v. Emperor*<sup>163</sup> the Court observed that in criminal trials, all evidence should be recorded in the presence of the accused and any breach of the rule vitiates the trial altogether. All these cases cited on behalf of the appellant are clearly distinguishable, as the illegality committed at the trial in these cases related to the jurisdiction of the Court inasmuch as section 353 is mandatory and it expressly lays down that with certain exceptions the evidence of witnesses shall be taken in the presence of the accused. In these cases no exception of the kind embodied in section 540-A was apparently found to be available.

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<sup>159</sup> AIR 1947 P.C. 67

<sup>160</sup> AIR 1927 Lah. 781

<sup>161</sup> AIR 1928 Pat. 143

<sup>162</sup> AIR 1967 Raj. 267

<sup>163</sup> AIR 1935 Oudh 488

242. Mr. Yahya Bakhtiar also referred to *Emperor v. Sukh Dev and others*<sup>164</sup>, which is not a case under section 537, Cr. P.C. In that case a Magistrate conducted an inquiry in the absence of an accused by appointing a counsel for him at State expense, and an application was made in that behalf in the High Court. But the High Court dismissed the application as in its opinion no Court had any authority to force upon a prisoner the services of a counsel, if he was unwilling to accept them. If at all, this case goes against the appellant inasmuch as it proceeds on the basis that under section 540-A the attendance of an accused can be dispensed with against his wishes provided he is represented by his pleader. All these cases are therefore of no assistance to the defence.

243. It may be stated here that at an early stage of the commencement of the trial, at the request of the learned defence counsel, it was arranged with the prosecution, that the names and particulars of the witnesses to be produced on a certain day, used to be supplied to him in advance. This was done during the course of the whole trial. Zulfikar Ali Bhutto accused admitted in his statement, recorded on 28-1-1978, under section 342, Cr. P.C. that "lists of prosecution witnesses are given in advance" (Vol. III p. 749). The trial Court has also referred to it in para. 20(i) of its order dated 9-1-1978 (Order-Sheets, p. 124). His learned counsel also used to receive instructions from him daily as admitted by Zulfikar Ali Bhutto appellant in his application dated 18-12-1977/5-1-1978 that Mr. D, M. Awan sought instructions from him daily by going to the Kot Lakhpat Jail (Volume of Applications, p. 137). In accordance with this practice the names of prosecution witnesses, whose statements were to be recorded on a certain day, were in fact intimated in advance to the defence counsel who was all along allowed the opportunity to see the appellant in jail and receive daily instructions from him for cross-examination of the prosecution witnesses examined in his absence from 16-11-1977 to 30-11-1977 and on 14-12-1977. The statement of these witnesses recorded under sections 161 and 164, Cr. P.C. had also been supplied to the appellant in advance about the version of the prosecution case about which they were expected to depose. As it is the appellant was all along represented in Court by a team of lawyers in his absence due to illness. They were allowed ample opportunity to see him in jail and to receive day to day instructions required by them for the cross-examination of each individual witness produced by the prosecution. In Court they were allowed full opportunity to cross-examine the prosecution witnesses. On the whole these witnesses were in fact subjected to lengthy and searching cross-examination by his learned counsel at the trial in his absence.

244. It does not appear that in the course of the examination of the prosecution witnesses in question the learned counsel for the appellant had actually experienced any difficulty or was in fact handicapped conducting the cross-examination on them in the absence of his client. At least none was in fact brought to the notice of the Court in

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<sup>164</sup> AIR 1929 Lah. 705

the course of the cross-examination of the witnesses or even afterwards, after the appellant had put in appearance after he had recovered from his illness. Indeed he could have applied to the trial Court at the earliest for the recall of any of the witnesses examined in the absence for further cross-examination if he was not in fact satisfied with it. Even in this Court in appeal at the hearing before us neither the appellant nor his learned counsel, but for the general and vague allegations, was able to show and demonstrate to our satisfaction that the cross-examination actually conducted on the witnesses in his absence was lacking in any material respect and that thereby he was in fact prejudiced and adversely affected or handicapped in his defence. In this connection it will not be out of place to mention here that in the course of the hearing of this appeal a Miscellaneous Application No. 7 of 1978 was filed before us on behalf of the appellant praying for the recall of Mr. W. R. Welch P.W. 4 only, out of the number of witnesses who had been thus examined in the absence of the appellant on account of his illness. In relation to this witness also all that is alleged in the application was that he is a Catholic Christian, but he gave his evidence before the trial Bench on solemn affirmation instead of on Bible as prescribed for Christians to avoid telling the truth, and that owing to the absence of the appellant he could not be cross-examined properly and effectively. This application was dismissed by u. on 23-12-1978 and the detailed reasons for it are set out in another part of this judgment. Suffice it to mention that it appears that this precise plea taken in the application was now raised only as an afterthought. Otherwise, even the statement of this witness under section 164, Cr. P.C. (of which an advance copy had already been supplied to the accused) was recorded on solemn affirmation and not on the Bible and about it the appellant was, therefore, fully aware. In fact in this Court during the course of the arguments addressed to us on behalf of the appellant it was even suggested that the witness had already embraced Islam merely for the sake of marrying a Muslim lady for whom he had a fancy. Be that as it may, there is no explanation before us whatever, as to why this precise objection was not promptly raised before the trial Court, immediately after the appellant had appeared in Court after his recovery from the illness.

245. The explanation to section 537, Cr. P.C. expressly lays down that in determining whether any error, omission or irregularity in any proceedings under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. As discussed above after the appellant had recovered from his ailments and appeared in Court, he never applied to the Court and raised any such timely objection that his counsel was in fact handicapped and that the cross-examination of the prosecution witnesses actually conducted was not to his complete satisfaction and had remained inconclusive or was wanting in any material respect and for the timely rectification of the wrong, if any, thus done to him.

246. In these circumstances, the proceedings of the High Court held on different dates in the absence of appellant Zulfikar Ali Bhutto because of his illness were fully covered

by the provisions of section 540-A of the Code. He was all the time represented by a team of lawyers who fully had effectively participated in the proceedings on these days, and conducted lengthy cross examination after obtaining daily instructions from the appellant. I am, therefore, of the opinion that no prejudice was caused to the appellant by the decision of the High Court to dispense with his presence on the dates in question, and to continue with the case in the presence of his lawyers. No objection as to inadequacy of instructions, or insufficiency of cross-examination of the relevant witnesses was taken by the appellant after he rejoined the proceedings on recovering from his illness on both the occasions. For all these reasons the omission of the High Court to record its reasons, as required by section 540-A was a mere technical omission, not touching the substance of the matter, and, therefore, fully curable under section 537, Cr. P.C.

#### **THE "DAMN IT" INCIDENT ON 17-12-1977 DURING THE TRIAL**

247. I am now left to deal with the unfortunate incident that took place in Court on 17-12-1977. Its facts in detail have already been stated. At this place it is enough to recall that as his counsel, Mr. D. M. Awan, was addressing the Court, appellant Zulfikar Ali Bhutto while trying to draw his attention uttered the words "damn it". The Court told the appellant not to use such words, but he insisted that it was not a bad word. The Court then asked his learned counsel, Mr. D. M. Awan to resume his submission. On this the appellant uttered the words: "I have had enough". The Court then asked him enough of what and he replied: "of humiliation and insult". According to the Court, in view of this persistent unruly behavior he was asked to be taken out of the Court. After he was taken out, Mr. D. M. Awan was asked to meet his client during the recess and to request him to help keep the dignity and decorum of the Court and not to adopt an unruly attitude, for otherwise he would be liable under the law and the Jail Manual. After the recess Mr. D. M. Awan informed the Court that he had talked to the appellant but the latter had told him he knew the law and the Jail Manual. On this the Court passed an order that in view of his persistent attitude and because of his own admittedly disturbed state of mind, the appellant was incapable of remaining in Court for the day and therefore, his presence for the rest of the day was dispensed with.

248. In the absence of the appellant on 17-12-1977, Mr. Irshad Ahmad Qureshi, learned counsel for the three confessing accused, conducted his cross-examination of P.W. 31 Ghulam Hussain approver. The Court then observed that P.W. Ghulam Hussain was an important witness and it would be proper that he should be cross-examined by Mr. D. M. Awan in the presence of the appellant. The Court, accordingly adjourned the hearing to 18-12-1977, when the appellant put in his appearance along with his counsel to proceed with the cross-examination of the witnesses.

249. It is, indeed, deplorable that such a situation should have developed in the face of the trial Bench. It no doubt appears that at the time the appellant was in a disturbed state of mind on having learnt in Court about the head injury unfortunately received by his wife. This must have come to him as a shock, and one cannot help sympathizing with him, but I am constrained to observe that even then he was expected to maintain the decorum of the Court, which he failed to do. He persisted in his discourteous behavior, and gratuitously observed that he had had enough of humiliation and insults. Even after having been given time for reflection he refused to make amends. He remained adamant and was not willing to extend the assurance wanted by the Court that he would help keep the dignity and decorum of the Court, and not adopt an unruly attitude.

250. I have already stated earlier that the word "incapable" as used in section 540-A of the Code has reference to the physical, mental or moral state of the accused which makes him unable or unfit to remain in Court and perform his obligations and duties at the hearing of the case against him. From the facts analyzed in the preceding paragraph, it is abundantly clear that on this particular day the appellant was incapable of remaining before the Court due to his disturbed mental state. This was fully brought out by his refusal to make amends even after having time for reflection. His case, therefore, fell squarely within the ambit of section 540-A of the Code.

251. Public trial means an orderly trial and not a disorderly one. Therefore, while an accused has a right to be present at his trial, he is at the same time under a corresponding duty to help keep the decorum and dignity of the Court by his good behavior. In *Re: Robert Edward Wenvard Jones*<sup>165</sup> it was laid down that whether a defendant be on bail or in custody, and whether he be represented by counsel or not, he has a right to be present at his trial, unless he abuses that right for the purpose of obstructing the proceedings by unseemly, indecent or outrageous behavior, in which case the Judge may have him removed and may proceed with the trial in his absence, or may discharge the jury. In the *State v. Ananta Singh and others*<sup>166</sup> a Division Bench of the Calcutta High Court has held that a direction to expel from the Courtroom an obstreperous accused who renders a fair trial impossible by his misbehavior and to exclude him from his own trial comes within the sanction under section 561-A and would not be inconsistent with any provision of the Code including sections 353 and 540-A and the Court can proceed with the trial of the expelled accused by recording evidence in his absence, but the accused can reclaim his right to be present at the trial on his expressing *bona fide* willingness to behave properly. These cases fully support the conclusion reached by me.

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<sup>165</sup> (1972) 56 Cr. App. Rep. 413

<sup>166</sup> 1972 Cr. LJ 1327

252. In conclusion, I might also mention that although on that date in the absence of the appellant from the Court, Mr. Irshad Ahmad Qureshi, learned counsel for the confessing accused, concluded his cross-examination of approver Ghulam Hussain, when learned counsel for appellant Zulfikar Ali Bhutto was present in Court, yet the Court *suo motu* postponed the cross-examination of this important witness by appellant Zulfikar Ali Bhutto's counsel to the next day, when the appellant rejoined the proceedings. In these circumstances it does not appear that any prejudice whatsoever was at all caused to the appellant by the cross-examination of Ghulam Hussain conducted by the learned counsel for the co-accused in his absence on 17-12-1977. This part of the objection also, therefore, fails.

### **Non-Supply of copies of Police Statements of certain witnesses of the Defence**

253. I now come to the question of the effect of the failure of the prosecution to supply to the accused copies of the statements of Masood Mahmood (P.W. 2), Ghulam Hussain (P.W. 31) and Abdul Hayee Niazi (P.W. 34), recorded by the police during the investigation of the case.

254. It appears that Masood Mahmood (P.W. 2) and Ghulam Hussain (P.W. 31) were initially joined as accused and were interrogated as such, the former by Abdul Khaliq (P.W. 41), and the latter by Muhammad Boota (P.W. 39), and the substance of their statements was incorporated in the case diaries of 23-8-1977 and 27-7-1977 respectively. Admittedly copies of these statements were not supplied to the defence. Similarly, a short statement of Abdul Hayee Niazi (P.W. 34), who originally investigated the case in 1974, was also recorded during the investigation by Muhammad Boota (P.W. 39), on 5-8-1977, which too was incorporated in the case diaries and also not supplied to the defence. The reason given for not supplying the copies of their statements to the accused is that these statements were not recorded under section 161, Cr. P.C., but were received in the case diaries under section 172, Cr. P.C. and, therefore, the prosecution was not obliged to supply their copies, unless the accused had themselves asked for them.

255. The case of the appellant is that these statements were reduced into writing and were in reality statements under section 161, Cr. P.C. even though they were incorporated in the diary, instead of being kept separate. Thus notwithstanding the fact that these statements were embodied in the case diaries they were not distinguishable from the statements recorded under section 161, Cr. P.C. and ought, therefore, to have been supplied to the defence along with the statements of all other witnesses recorded under section 161, Cr. P.C., seven days before the commencement of the trial, under the provisions of the newly-added section 265-C, Cr. P.C., even without any specific demand for them in this behalf. And as this was not done, the evidence of Masood Mahmood (P.W. 2), Ghulam Hussain (P.W. 31) and Abdul Hayee Niazi (P.W. 34) given at the trial was liable to be excluded and could not be taken into account. In support of

this contention reliance was placed on *Faiz Ahmad v. State*<sup>167</sup> and *Muhammad Ashraf v. State*<sup>168</sup>. In both these cases the evidence of the witness, a copy of whose statement made before the Police was not supplied to the defence, was excluded from consideration.

256. We find that the learned Judge in the High Court who decided *Muhammad Ashraf's case* has purported only to follow the ratio in Faiz Ahmad's case. The said case, therefore, requires to be considered in some detail. In that case the Investigating Officer had incorporated the substance of the statement made by the approver in the course of the investigation in the police diary. At the trial when counsel for the appellant asked for a copy of the statement of the approver made by him during the investigation he was told that no such statement had been recorded by the police under section 161 of the Cr. P.C. The appellant was convicted of murder on the basis of the testimony of the approver and the circumstantial evidence in the case. He appealed to the High Court and contended that since the record of the statement of the approver to the police had been prepared during the investigation, the refusal to supply a copy of the statement for the purposes of cross-examining him vitiated the trial. A copy of the approver's statement was offered to the appellant's counsel during the bearing of the appeal, but was refined. The substance of this statement was then read out to the counsel and, following the precedent in *Hazara Singh's case*<sup>169</sup>, the High Court informed the counsel of the appellant that any contradiction between the approver's statement to the police and the evidence given by him in Court could be taken as having remained unexplained. The High Court discovered two such contradictions, but instead of treating them as unexplained, proceeded to find an explanation for both and maintained the conviction. The Supreme Court examined the question whether the procedure adopted by the High Court was in conformity with law and held that having assured the counsel for the appellant that any contradiction between the statement of the approver to the Police and his evidence in Court would be treated as unexplained, it had contravened the assurance by discovering an explanation for the contradictions found. It was, however, further observed that the procedure suggested in *Hazara Singh's case* was not quite in accordance with the principles enunciated by the Privy Council in *Pulukuri Kotayya v. King-Emperor*<sup>170</sup> inasmuch as the mechanical mode of treating contradictions as unexplained could not be expected to produce the same result as actual cross-examination of those contradictions, which might completely break down the witness.

257. The Supreme Court then went on to discuss the possible courses which the High Court could adopt in such circumstances. The High Court could, it was observed, either order a retrial; or, if the irregularity was found to have occasioned a failure of justice, recall the approver, supply a copy of his statement to the defence counsel and direct

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<sup>167</sup> PLD 1960 SC 8

<sup>168</sup> AIR 1928 Lah. 257

<sup>169</sup> PLD 1968 Lah. 694

<sup>170</sup> 741 A 65

him to cross-examine the approver. It could also exclude the evidence of the approver from consideration, and this was the course adopted in that case by the Supreme Court itself; but in spite of doing so the appeal was dismissed on the ground that the conviction of the appellant could be maintained even after excluding the evidence of the approver on the circumstantial evidence. It was, however, at the same time observed that a re-trial or exclusion of a witness's testimony was not the necessary result of the refusal to supply the copy of the police statement of the witness to the accused, as the irregularity contemplated was within the kind of irregularities mentioned in section 537, Cr. P.C. This statement was clarified by observing that where no copy was, ever supplied at the trial and the contents of the statement were never disclosed to the accused, the irregularity might be a strong point in appeal against conviction and raise an irresistible inference of prejudice, though the inference was not irrefutable; and where a copy was applied to the accused in appeal and its contents are known to the Court and the accused and the counsel for the accused was unable to suggest that cross-examination of the witness as to the alleged omission or contradiction might have led to the breakdown of the witness or a material part of his testimony, the Court could not set aside the conviction. In this connection the observations of the Privy Council in *Pulukuri Kotayya v. King-Emperor* were also taken note of.

258. The above analysis of *Faiz Ahmad's case* reveals that the failure by the prosecution to supply a copy of the statement of a witness made before the police does not necessarily imply that the Court should exclude the evidence of such witnesses. In fact, according to the said judgment, it is open to the Court to follow any of the following courses;

- (a) Order a re-trial if it finds that the irregularity has occasioned a failure of justice.
- (b) Exclude the testimony given by the witness at the trial.
- (c) Recall the witness, supply a copy of his statement to the defence counsel and direct him to cross-examine him.
- (d) Apprise the defence counsel of the contents of the statement and supply a copy of it to him and if he is unable to suggest that the cross-examination of the witness, as to an alleged omission or contradiction in the statement, might lead to a breakdown of the witness or a material part of his testimony, ignore the irregularity in not supplying a copy of the statement to the accused at the trial on the principle that the irregularity not having prejudiced the accused or occasioned any failure of justice is of the kind of irregularities mentioned in section 537, Cr. P.C.



259. In *Muhammad Ashraf's case* a learned Single Judge of the Lahore High Court, relying on one observation in *Faiz Ahmad's case*, viz. "where no copy was ever supplied at the trial and the contents of the statement were never disclosed to the accused, the irregularity may be strong point in the appeal and raise an irresistible inference of prejudice", excluded from consideration the evidence of the witness whose statement made before the police was not supplied to the defence. But this decision purporting as it does to follow *Faiz Ahmad's case* does not carry the matter any further. However, on the basis of the above judgments it is contended on behalf of the appellants that the evidence of Masood Mahmood (P.W. 2), Ghulam Hussain (P.W. 31) and Abdul Hayee Niazi (P.W. 34) should be excluded from consideration.

260. Mr. Ejaz Hussain Batalvi has submitted a two-fold reply: Firstly, that statements of the witnesses in question were embodied in the case diaries maintained under section 172, Cr. P.C. by the Investigating Officers and these statements were not synonymous with the statements required to be separately recorded under section 161, Cr. P.C., and consequently the prosecution was not obliged to supply the copies of these statements to the accused under section 265-C, Cr. P.C. And, secondly, even if it was obligatory to supply the copies of the said statements, no prejudice, as a matter of fact, has been caused to the accused by not supplying the statements in question.

#### **Section 161, 162, 172, 265 C. Cr P.**

261. In order to properly appreciate the legal position the relevant portions of the provisions of sections 161, 162, 172, 265-C and 537, Cr. P.C. and section 145 of the Evidence Act are reproduced below;

"(a) *Section 161, Cr. P.C.* provides:

(1) Any Police Officer making an investigation under this Chapter ..... may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2)-----

(3) The Police Officer may reduce into writing any statement made to him in the course of an examination, under this section, and if he does so he shall make a separate record of the statement of each such person whose statement he records.

(b) *Section 162, Cr. P.C. Statements to Police not to be signed - Use of such statements in evidence.* - (1) No statement made by any person to a Police Officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise or any part of such statement or

record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made: Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Evidence Act.

(2)-----

(c) Section 172, Cr. P.C. *Diary of proceedings in Investigation.* - (1) Every Police Officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

(2) Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the Police Officer who made them, to refresh his memory, or if the Court uses them for the purpose of contradicting such Police Officer, the provisions of the Evidence Act, 1872, section 161 or section 145, as the case may be, shall apply.

(3) Section 145 of the Evidence Act. *Cross-examination as to previous statement in writing.* - A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved, but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

(e) 265, C, Cr. P.C. *Supply of statements and documents to the accused.-*

(1) In all cases instituted upon police report, copies of the following documents shall be supplied free of cost to the accused not later than seven days before the commencement of the trial, namely:

(a) .....

(b) .....

(c) the statements of all witnesses recorded under sections 161 and 164."

262. The first question, therefore, that arises is whether the statements of Masood Mahmood (P.W. 2), Ghulam Hussain (P.W. 31) and Abdul Hayee Niazi (P.W. 34) which were embodied in the case diaries can be treated as statements under section 161, Cr. P.C., which the prosecution was bound to supply to the defence, even without their asking for them.

263. On the question whether the statements recorded in the case diaries by the police could not be construed as statements recorded under section 161, Cr. P.C., the history of legislation in relation to section 162, Cr. P.C. would be useful. The Code of Criminal Procedure was enforced in the sub-continent for the first time in 1861. It was substituted by the Code of Criminal Procedure of 1872. The relevant sections 145 and 147 of the Code of 1861 were substantially reframed as sections 119 and 121 in the Code of 1872. The relevant provisions of these two sections were as under:

"119 -----No statement so reduced into writing shall be signed by the person making it, nor shall it be treated as part of the record or used as evidence.

121. No Police Officer shall record any statement or any admission or confession of guilt, which may be made before him by a person accused of any offence: Provided that nothing in this section precludes a Police Officer from reducing any such statement or admission or confession into writing for his own information or guidance, or from giving evidence of any dying declaration."

264. The Code of 1872 was repealed and substituted by the Code of 1882. In this Code, the subject-matter of the aforementioned sections 119 and 121 of the Code of 1872 were consolidated in one section bearing No. 162, which reads as under:-

"162. No statement, other than a dying declaration, made by any person to a Police Officer in the course of an investigation under this Chapter, shall if reduced to writing, be signed by the person making it or be used as evidence against the accused."

**Section 145 of the Evidence Act had provided for the confrontation of a witness with his previous statement.**

265. The language of section 162 of the Code of 1882 was so interpreted as to allow an accused person to see the statement of a person appearing as a witness for the persecution and recorded by the Police Officer during the course of the investigation for the purpose of confrontation under section 145 of the Evidence Act, but he was not

entitled to see the statement of a witness appearing in the case diary maintained under section 172, Cr. P.C. and not separately prepared under section 161 of the Code of Criminal Procedure. A question arose before the Allahabad High Court in *Queen v. Mannu*<sup>171</sup> whether statements of prosecution witnesses could be seen by the accused when they were incorporated in the case diary.

266. The case was heard by a Full Bench of six Judges. Four learned Judges were of the opinion that the statements recorded under section 172 were privileged and could not be seen by the accused or his agent, while the remaining two Judges were of the contrary view. While explaining the majority view, the learned Chief Justice Mr. Justice Edge observed as follows:-

"There is no provision in section 172 of the Code of Criminal Procedure, enabling the Court, the prosecution or the accused to use the special diary for the purpose of contradicting any witness other than the Police Officer who made it, and the necessary implication is that the special diary cannot be used to contradict any witness other than the Police Officer who made it. Section 145 of the Indian Evidence Act, 1872, does not either extend or control the provisions of section 172 of the Code of Criminal Procedure. It is only if the Court uses the special diary for the purpose of contradicting the Police Officer who made it that section 145 of the Indian Evidence Act, 1872, applies, and in such case it applies for that purpose only, and not for the purpose of enabling the Court or a party to contradict any other witness in the case, or to show it or part of its contents to any other witness .... It is not enacted in section 172 of the Code of Criminal Procedure by reference to section 145 of the Indian Evidence Act, 1872, or otherwise that if the special diary is used by the Court to contradict the Police Officer who made it, it may thereupon or thereafter be used to contradict any other witness in the case."

267. It was further observed:-

"Neither the accused nor his agent is entitled under section 172 of the Code of Criminal Procedure to see the special diary for any purpose unless it has been used by the Court for enabling the Police Officer who made it to refresh his memory or for the purpose of contradicting him .... In my opinion the plain meaning of section 172 is that the special diary, no matter what it may contain, is absolutely privileged, unless it is used to enable the Police Officer who made it to refresh his memory or is used for the purpose of contradicting him .... It is a privilege which cannot depend upon the question as to whether the Police Officer who made the special diary did or did not insert in the special diary extraneous matter, nor can it depend upon the question as to whether or not the

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<sup>171</sup> ILR 19 All. 390

Police Officer made the special diary in the particular form which is approved by the Court."

268. The two Judges, who were in a minority, took the view that statements under section 161 reduced into writing could not be withheld from the accused only because instead of being kept separate they were incorporated in the diary. However, the majority judgment which prevailed was that if a statement of a witness was recorded in the diary it acquired privilege conferred by section 172 of the Code of Criminal Procedure, and, could be used only for the limited purpose specified therein and it could not be seen by the accused or his agent.

269. The Code of Criminal Procedure 1882 was repealed and was substituted by the Code of Criminal Procedure of 1893 ( Act V of 1898), which received the assent of the Governor-General on the 22nd March, 1898.

270. Section 162 of the Code of 1882 was reframed in the Code of 1898 and read as under:-

"162. - (1) No statement made by any person to a Police Officer in the course of an investigation under this Chapter shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence:

Provided that, when any witness is called for the prosecution whose statement has been taken down in writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and may then, if the Court thinks it expedient in the interests of justice, direct that the accused be furnished with a copy thereof; and such statement may be used to impeach the credit of such witness in the manner provided by the Indian Evidence Act, 1872.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of section 32, clause (1) of the Indian Evidence Act, 1872."

271. It may be pointed out that judicial divergence continued to prevail as to the use which could be made of notes recorded in police diaries of statements made by witnesses to Investigating Officers. In a series of cases, namely, *Bikao Khan v. The Queen-Empress*,<sup>172</sup> *Sheru Sha and others v. The Queen-Empress*<sup>173</sup> and *Dadan Gazi v. Emperor*<sup>174</sup> it was held by the Calcutta High Court that the statements of witnesses taken by a Police Officer under section 161, Cr. P.C. were not a legitimate portion of the diary and were

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<sup>172</sup> ILR 16 Cal. 610

<sup>173</sup> ILR 20 Cal. 643

<sup>174</sup> ILR 33 Cal. 1023

not, therefore, privileged and that the accused had a right to call for and inspect them; that their incorporation in a police diary was an evasion of the law, intended to deprive be accused of such right.

272. The Legislature, therefore, further amended subsection (1) of section 162 as incorporated in the 1898 Code by the Code of Criminal Procedure (Amendment) Act of 1923 (Act XVIII). It reads thus:-

"162. - (1) No statement made by any person to a Police Officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof; whether in a police Diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made;

Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall on the request of the accused refer to such writing and direct that the accused be furnished with a copy thereof, and order that any part of such a statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act 1872. When any part of such statement is so used, any part thereof may also be used to the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

Provided further-----

273. As a result of the amendment carried out in 1923, statements recorded in the Police Diaries were expressly included in subsection (1) of section 162 and if any statement of a witness was recorded in a police diary under section 172, Cr. P.C. the police could not claim privilege. Thus whatever opinion might be held as to whether a diary is a proper place for statements, the police cannot by entering the statements in the case diaries under section 172, Cr. P.C. protect them from the provisions of section 162, and thus were liable to be produced under conditions laid down in the latter section i.e. *inter alia* the supply of the copies was made subject to the accused asking for them at the time when the witness is called by the prosecution.

274. This was the state of the law in 1972 when section 265-C was added in the Code of Criminal Procedure through the Law Reforms Ordinance, 1972.

275. The submission of Mr. Batalvi was that even though the newly-added section 265-C, Cr. P.C. casts an obligation upon the prosecution to supply copies of the statements separately recorded under section 161, Cr. P.C., the law regarding the statements incorporated in the Police Diary remains unaltered, that is, that the accused must ask for them, as laid down by section 162 itself, and if the accused does not ask for them, the prosecution, even under the amended law, is not obliged to supply them to the accused.

276. Section 265-C, Cr. P.C. has brought significant changes in the law consequent upon the abolition of commitment proceedings in the trial of serious offences. For instance, in all cases instituted upon a police report; copies of statements under section 161, Cr. P.C. shall be supplied free of cost to the accused, not later than seven days before the commencement of the trial. This provision impliedly repeals the provisions of section 162, Cr. P.C. to the extent that copies of the statements must now be supplied ray the State seven days before the commencement of the trial, and it is not necessary to wait till the witness is called by the prosecution, or the accused asks for them. The question, therefore, only is whether, as contended for by Mr. Batalvi, this obligation extends to supplying copies of the statements separately recorded under section 161, Cr. P.C. and not to statements recorded in the police diaries, which the accused must ask for as hithertofore, in accordance with the provisions of section 162, Cr. P.C.?

277. It is to be noted that under the provisions of section 161, Cr. P.C. wherever the police officer reduces into writing the statement of any person during the investigation of the case, he must make a separate record of such a statement, i.e. it should not be incorporated in the case diary but kept separately. This requirement is reiterated in rule 25.18 of the Punjab Police Rules (which rules were adopted in the relevant regard by the F.I.A. which investigated this case), wherein it is laid down that the statements recorded by an investigating officer under section 161 of the Code of Criminal Procedure shall not form part of the case diary prescribed by section 172, but shall be recorded separately and attached to the case diary. Under the newly-added section 265-C the prosecution is under an obligation to supply to the accused copies of the statements recorded under sections 161 and 164 Cr. P.C. but no mention is made of statements recorded in the case diaries under section 172, Cr. P.C. The difficulty arises where the Police Office does not separately record the statement of a witness as required by section 161, Cr. P.C., but embodies it in the diary maintained under section 172, Cr. P.C., presumably as a statement of the circumstances ascertained through the investigation.

278. After having heard the learned counsel for the parties at length, I am inclined to agree with the learned counsel for the appellant that where a statement has been made to the police by a person during the investigation, the Police Officer should record it separately in terms of section 161(3), Cr. P.C. Where, however, he does not do so but proceeds to incorporate it in the case diary, the said statement should be construed as a statement under section 161, Cr. P.C., provided of course it is in substance and essence a

statement of the witness and not merely a statement of the circumstances ascertained through investigation. Thus it is the nature of the statement and not the label given to it which will determine its real character. The 3 provisions of section 265-C are salutary and enacted for the benefit of the accused, conferring as they do a valuable right in his favor of being apprised of the case set up against him. This right cannot be taken away or evaded by allowing the Investigating Officer of misusing his authority by incorporating in the case diary the statements recorded by him during the investigation which, though in spirit and essence fall within the purview of section 161, Cr. P.C. but are erroneously or mischievously embodied by him in the case diaries. This safeguard has become all the more necessary as commitment proceedings have been abolished and the accused deprived of the opportunity of becoming cognizant of the evidence being led against him before the commencement of the trial. Similarly, the warrant procedure has also been done away with, and a provision analogous to section 265-C has been embodied in section 241-A of the Code dealing with the trial of summons cases, with the result that statements to the police are the only material available to him before he enters upon his trial. Hence it is necessary to construe the provisions of section 265-C (and of 241-A) liberally and in the spirit in which they have been enacted. The interpretation contended for by the learned counsel for the prosecution overlooks the history and background of this legislation. The obligation created by these provisions cannot be evaded by merely incorporating the statements, which really fall under section 161, Cr. P.C., in his case diaries by the Investigating Officer.

279. Mr. Batalvi pointed out that witnesses Masood Mahmood and Ghulam Hussain were initially accused persons; and as the Courts have deprecated the practice of obtaining statements from the accused by the police *Queen-Empress v. Jadub Das*<sup>175</sup>, a common practice exists among the police officers not to prepare a separate record of the statements of accused persons during the course of an investigation. Hence their statements were not recorded under section 161, Cr. P.C. Similarly, Abdul Hayee Niazi, was initially himself investigating the case, and therefore, his statement under section 161, Cr. P.C. was also not recorded. However, the substance of the interrogation of these witnesses was rightly incorporated in the case diaries and copies thereof need not have been supplied consistent with the rule laid down in *Queen v. Mannu*.

280. I have no doubt that the copies of the statements were not supplied under the *bona fide* belief that it was not necessary to do so on the assumption that they were not statements recorded under section 161, Cr. P.C., but notes recorded under section 172, Cr. P.C. Be that as it may, on examining the case diaries we find that the statements of Ghulam Hussain anti Masood Mahmood, recorded on 27-7-1974 and 23-8-1974 respectively, though incorporated in the diary, are in essence and substance statements falling under section 161(3), Cr. P.C., as they contain a detailed narrative of the events touching the present murder. After the above two persons were granted pardon and

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<sup>175</sup> ILR 27 Cal. 295



made witnesses in the case, the statements made by them ought to have been supplied to the accused under section 265-C, Cr. P.C.

281. Similarly, although the substance of the examination of Abdul Hayee Niazi P.W. incorporated in the case diaries appears to be a condensed note of his statement and could conceivably be regarded as a statement falling under section 172, Cr. P.C. its close perusal reveals that reference has been made therein to some important acts done by him. This statement too, on the test laid down by us, must accordingly be construed as a statement falling under section 161, and not merely a record of the circumstances ascertained through investigation so as to fall within the scope of section 172, Cr. P.C.

282. I may observe that consistently with the changed law making it obligatory for the statements of all witnesses recorded under section 161, Cr. P.C. to be supplied to the accused seven days before the commencement of the trial, it is the duty of the prosecution counsel and the trial Court to see that all such copies are indeed supplied to the accused. They must ensure compliance with this requirement not only in relation to the statements recorded separately under section 161, Cr. P.C., but also a regards statements recorded in the police diaries, which in essence and spirit can be construed to be statements under section 161, Cr. P.C. This is an important right conferred by the law on the accused and must not be defeated by any colorable device.

283. Having reached the conclusion that the statements in question must be construed as being statements under section 161 of the Criminal Procedure Code, the question now is what course of action should be adopted. As already stated, the learned Special Public Prosecutor contended that, in the circumstances of this case, no prejudice had been caused to the accused on account of this omission, and therefore, this irregularity could safely be ignored as observed by this Court in *Faiz Ahmad's case*. However, Mr. Yahya Bakhtiar submitted that the evidence of these three witnesses should be excluded altogether from consideration as the accused had been seriously prejudiced in not being able to question these witnesses in respect of several omissions and contradictions, etc.

284. I consider that the situation that has arisen in this case is in many ways similar to that which arose in *Faiz Ahmad's case* and therefore, the precedent case can usefully be followed. As, however, some observations occurring therein are susceptible of different interpretations, we consider that in practice the following procedure should be followed in such cases:

- (a) Copies of the statement under section 161, Cr. P.C. ref the witness, which has not been supplied to the accused, should be supplied to him and the said statement considered in juxtaposition with any other previous statement of the witness which had been supplied, along with the statements made by him in Court including his cross-examination, to ascertain whether any prejudice has in fact been caused to the accused. If after such comparison it appear that no

prejudice has been caused the irregularity in not supplying the copies of the statement in question to the accused, as required under the law, would stand cured under section 537, Cr. P.C. and no further action shall be called for.

(b) If on making the comparison, referred to above, it transpires that the non-supply of the copies has resulted in prejudice then any of the following courses may be followed, depending on the facts of each case;

(i) the statement of the witness at the trial can be excluded; or

(ii) the witness recalled and allowed to be cross-examined on the basis of the statement supplied; or

(iii) a re-trial ordered.

285. In the light of the above principles the position in the instant case may now be examined.

286. So far as Masood Mahmood is concerned, it may be pointed out that although his statement under section 161, Cr. P.C. was not supplied, the accused were supplied copies of the statement made by him under section 164, Cr. P.C. record an 24th August 1974, as well as a copy of his statement recorded under section 337, Cr. P.C. after he was tendered pardon (which may be described as approver's statement). With reference to his statement under section 161, Cr. P.C. now supplied, seven alleged contradictions between his statement under section 161, Cr. P.C. and his previous two statements have been pointed out. Besides the aforesaid alleged contradictions certain omissions allegedly amounting to contradictions are also said to exist. It is also submitted that he made five improvements in his statement under section 161, Cr. P.C. over his statement under section 164, Cr. P.C. and his approver's statement.

287. I have carefully gone through all the alleged contradictions, omissions and improvements and am satisfied that this witness was w thoroughly cross-examined on all aspects of the matter and no prejudice has been caused to the appellant by the failure to supply a copy of his statement made on 23-8-1977 under section 161, Cr. P.C.

288. So far as Ghulam Hussain (P.W. 31) is concerned his statement under section 161, Cr. P.C. was recorded on 27-7-1977, copy whereof was not supplied to the accused. However, he confessed his guilt and made a confession on 11-8-1977. Thereafter, he submitted an application for being made an approver which was granted and his approver's statement was recorded on 21-8-1977. In the written note presented to us by Mr. Yahya Bakhtiar on the question of the use that could have been made at the trial of the statements under section 161, Cr. P.C. of the two approvers and Abdul Hayee Niazi, nineteen alleged contradictions between his statement under section 161, Cr. P.C.

(now supplied) and his two other previous statements have been pointed out. Although most of the instances which are described as major contradictions are not really so, some contradictions do, indeed exist between them, for instance the manner in which the incident at Islamabad occurred is different from that described in his other two statements. In the statement under section 161, Cr. P.C. he does not refer to any telephonic talk with Ahmad Raza Kasuri to the effect he wanted an appointment on the pretext that he was an employee of the Cantonment Board and needed his assistance for redress of his grievance and on getting a favorable answer went to Islamabad in order to kill him. Herein, he merely states that he found Ahmad Raza Kasuri in his car one day by chance talking to a person. Again in his statement under section 161, Cr. P, C. he stated that he remained in Lahore for a month or a month and a half during which period he did nothing. He was accordingly reprimanded by Mian Abbas, and the attack was launched a few days thereafter; whereas, in his other previous statement he says that he went to Lahore in the beginning of November where the stay could not have been for more than a week or ten days. Again, according to his statement under section 161, Cr. P.C., only two bursts were fired in the Lahore incident while according to the other two previous statements there were three bursts. Furthermore, according to his statement under section 161, Cr. P.C. Ghulam Mustafa told him that he had taken possession of some empties from the spot. This has not been mentioned by him in his other previous statements and that this omission was very significant. In view of these discrepancies we were inclined to recall this witness and allow him to be cross-examined on the basis of the statement under section 161, Cr. P.C. supplied subsequently, but decided not to do so as we found that a considerable time had elapsed since this witness was examined, and to summon him at this stage would be to open the door to perjury. We further observed that this witness had already been thoroughly cross-examined at the trial, and having examined his previous statement and the statement made by him in the Court, including the cross-examination to which he was subjected, we are of the opinion that the matters mentioned by Mr. Yahya Bakhtiar have been touched upon in one form or the other in the cross-examination. Consequently, taking all the circumstances into consideration we feel That no useful purpose would be served by recalling the witness at this stage.

289. As far as Abdul Hayee Niazi (P.W. 34) is concerned, it was contended by Mr. Yahya Bakhtiar that his statement under section 161, Cr. P.C. alleged to have been recorded in the case diary on 5-8-1977 is an interpolation and fabrication, because it sums up the prosecution case as concocted later, in that this statement laid the foundation of the substitution theory of the empties. He pointed out that this theory was not reflected in the interim challan dated 11-9-1977, but found mention in the final challan on the basis of the statement of the A. S. I. Abdul Ikram. We gathered from the oral submissions of Mr. Yahya Bakhtiar that the main point on which the defence would like to cross-examine this witness is with regard to the theory of substitution of empties, set up in his statement under section 161, Cr. P.C. However, Mr. Batalvi the learned Public Prosecutor has not relied upon this theory but has relied upon the totality of the

evidence in order to establish the unreliability of the empties and the high probability that they have been substituted. In these circumstances, it is not necessary to recall Abdul Hayee Niazi (P.W. 34) as the appellant has not suffered any prejudice by the failure to supply the copy of the statement made to the Police under section 161, Cr. P.C.

290. We may now turn to the contention that the High Court failed to apply the correct legal procedure in the matter of permitting the defence to cross-examine important prosecution witnesses as to significant omissions from their previous statements, as it erroneously took the view that omissions or lapses of memory did not amount to contradiction within the meaning of section 145 of the Evidence Act, thus causing great prejudice to the appellant by denying him the opportunity to show that the witnesses were not reliable.

291. The High Court has observed on this question that it is true that sometime an omission may have the force of an inconsistent or contradictory statement and may be used for the purpose of impeaching the credit of the witness but such cases are rare. A witness may omit to furnish details in his previous statement or the previous statement may be absolutely devoid of details. The omissions of details do not amount to contradiction. They may have the force of contradiction only if the witness omits to refer to anything in the previous statement which he must have mentioned in the circumstances of a particular case. In this connection the case of *Ponnusami v. Emperor*<sup>176</sup>, was considered wherein it was observed that an omission in a statement may sometimes amount to a contradiction e. g. when to the police three persons are stated to have been criminals and later at the trial, four are mentioned. According to the impugned judgment, this statement of law was based upon the principle that in order to amount to an inconsistency, the omission should be of such material fact which the witness would not have omitted to state. Reference was also made to the case of *Queen-Empress v. Naziruddin*<sup>177</sup>, where it was pointed out that the statements recorded by the police officers are in most haphazard manner, only such parts are recorded which seem in the opinion of the Investigation Officer to be material, and there is no guarantee that they do not contain much more or much less than what the witnesses had said, and also to *Deo Lal Mohnton v. Emperor*<sup>178</sup>, wherein it was observed that such statements are very notoriously condensed and the omission of some detail in the note of the statement is not always a sure indication that such detail was absent from the statement.

292. The learned Judges then went on to observe that the witness himself may not consider a fact as material, and that fact may be brought on the record on specific questions by the prosecution. The omission of such fact cannot be considered to verge on inconsistency. Applying this principle to the omissions pointed out to them, the

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<sup>176</sup> AIR 1933 Mad. 372(2)

<sup>177</sup> ILR 16 All. 207

<sup>178</sup> AIR 1933 Pat. 440

Court came to the conclusion that the omissions put to the witnesses in the present case did not amount to contradictions and were not sufficient to discredit them.

293. Mr. Yahya Bakhtiar contended that although the High Court laid down a substantially correct rule to the effect that "in order to amount to inconsistency the omission must be of such material fact which the witness would not have omitted to state", a rule which has the support of the preponderance of judicial authorities both in India and Pakistan. See *Hazara Singh v. Emperor*<sup>179</sup>, *Ram Bali v. State*<sup>180</sup>, *Madhabananda v. Rabindranath*<sup>181</sup>, *Abdul Hashem v. The State*<sup>182</sup>, *Ekabbar Ali v. The State*<sup>183</sup>, and Monir on page 152 of the Law of Evidence, yet when the time came for the actual application of this rule to test the evidence of the principal witnesses produced by the prosecution, the learned Judges fell into a serious error by stating, in paragraph No. 378 of the judgment, that:-

"These authorities are distinguishable since the dictum laid down therein would apply only to a case where a witness has specifically made a statement in his earlier statement which is said to be contradictory to the statement made during his examination at the trial. It cannot be applied to a case where the statement made at the trial was not made at the earlier stages and is a mere omission or distinguished from a contradiction."

The learned counsel for the appellant submitted that it was the duty of the High Court to examine the effect of the omissions occurring in the earlier statements of the prosecution witnesses so as to determine their credibility.

294. Mr. Ijaz Hussain Batalvi, the learned Special Public Prosecutor, submitted that the law, as contained in section 145 of the Evidence Act, contemplates a real inconsistency or contradiction between the two assertions of a witness, but if a witness did not say anything in the previous statement about a fact in issue or a relevant fact, but later deposed to the same at the trial, then it would be a mere omission and not a contradiction. Nevertheless he conceded that in some cases an omission in a previous statement may amount to a contradiction where what is actually stated by the witness in Court was not reconcilable with its omission from the previous statement. In support of these submissions he referred us to *Balmokand v. Emperor*<sup>184</sup>, *Badri Chaudhry v. King-Emperor*<sup>185</sup>, *In re; Guruva Vannan*<sup>186</sup> and *Abul Monsur Ahmed v. The State*<sup>187</sup>. Mr. Batalvi

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<sup>179</sup> AIR 1928 Lah. 257

<sup>180</sup> AIR 1962 All. 289

<sup>181</sup> AIR 1954 Orissa 31

<sup>182</sup> 1969 P Cr. L J 491

<sup>183</sup> 1971 P Cr. L J 275

<sup>184</sup> AIR 1915 Lah. 16

<sup>185</sup> AIR 1926 Pat. 20

<sup>186</sup> AIR 1944 Mad. 385

<sup>187</sup> PLD 1961 Dacca 753

also relied on the majority judgment of the Indian Supreme Court in the case of *Tahsildar Singh and another v. State of U. P.*<sup>188</sup>

295. I find that in the last case relied upon by Mr. Batalvi, the main question before the Court was the scope of section 162 of the Code of Criminal Procedure read with section 145 of the Evidence Act, and there was a difference of opinion between the learned Judges on the question whether a statement made admissible under section 162 of the Criminal Procedure Code could be used for contradicting as well as for cross-examining the witness under section 145 of the Evidence Act, or whether its use was only restricted to contradicting the witness. It seems to me, with respect, that the very elaborate and scholarly discussion in this case is not of direct assistance in resolving the controversy raised before us. I am of the view that the law in this regard has been correctly summed up by the learned author on page 1523 of Monir's Law of Evidence, namely, that:

"A failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact. But it is wrong to suppose that all omissions are contradictions. It must be left to the Court in each particular case to decide whether the omission in question amounts to a contradiction or not .... An omission in order to amount to a contradiction must be material. Thus where a prosecution witness deposes in Court that the accused gave a blow on the head or implicates the accused in his deposition before the Court but did not mention such fact before the police, the omission would amount to contradiction.

As a general principle the inconsistency is to be determined not by taking words or phrases alone, but by the whole expression or effect of what has been said or done."

296. I consider that the question of the effect of the alleged omissions and contradictions pointed out by the defence in relation to the evidence of the main prosecution witnesses produced in this case ought to be examined in the light of these principles and observations, which have been generally adopted by the Courts in Pakistan.

**Question of admissibility of Log Book of the Jeep involved in the crime under section 35 of the Evidence Act.**

297. It was submitted by Mr. Yahya Bakhtiar that the learned Judges in the High Court were in error in holding that each individual entry in the Log Book Exh. P.W. 19/1-D of the jeep driven by Muhammad Amir (P.W. 19) had to be proved, in case the

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<sup>188</sup> AIR 1959 SC 1012

defence wanted to rely thereon for the purpose of showing that these entries contradicted the assertions made by approver Ghulam Hussain (P.W. 31) or by accused Ghulam Mustafa in regard to the use of the said jeep on certain dates in the month of November preceding the incident, and also on the date of the incident itself. He contended that the illiteracy of the driver of the jeep was irrelevant in this connection, as the entries in the Log Book were admissible in evidence under section 35 of the Evidence Act, once it had been shown that the Log Book was being maintained by the driver of the jeep in the discharge of his official duty. He added that under illustration (e) to section 114 of the Evidence Act there was a presumption that judicial and official acts had been regularly performed. In support of these submissions Mr. Yahya Bakhtiar referred us to *Tamiz-ud-Din Sarkar v. Taju and others*<sup>189</sup>, *Mian Ghulam Rasul Khan v. The Secretary of State for India*<sup>190</sup> and *The Chairman, East Pakistan Railway Board, Chittagong and another v. Abdul Majid Sardar*.<sup>191</sup>

298. On behalf of the State, Mr. Iiaz Hussain Batalvi submitted that section 35 of the Evidence Act only declared the relevancy of entries appearing in official books or registers etc., but it did not dispense with their proof, and the entries in the Log Book in question could be read in evidence only if the Log Book itself satisfied the requirements contained in section 35 of the Act. He submitted that the driver of the jeep Muhammad Amir was an illiterate person and was not able to decipher any of the entries appearing in the Log Book; on the contrary he had informed the Court that the accused Ghulam Mustafa did not make the entries regularly or correctly, and that very often he made the entries even when the journeys had actually been performed by Ghulam Hussain approver; and that not infrequently fake number plates were used on the jeep. The learned Special Public Prosecutor contended that in these circumstances the Log Book in question did not qualify at all in terms of section 35 of the Evidence Act. In support of his submissions he placed reliance on *Mohammad Jajar and others v. Emperor*<sup>192</sup>, a *Thakar Singh v. Ghanaya Singh*<sup>193</sup>, *Mahtab Din v. Kusar Singh and others*<sup>194</sup>, *Ghulam Muhammad Khan and others v. Sumundar Khan sand others*<sup>195</sup>, *Biseswar Misra v. The King*<sup>196</sup>, *Samar Dosadh v. Juggul Kishore Singh*<sup>197</sup> and *Messrs Bengal Friends & Co., Dacca v. Messrs Gour Benode Saba & Co., Calcutta*.<sup>198</sup>

299. Section 35 of the Evidence Act contemplates that;

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<sup>189</sup> AIR 1919 Cal. 721

<sup>190</sup> AIR 1925 PC 170

<sup>191</sup> PLD 1966 SC 725

<sup>192</sup> AIR 1919 Oudh 75

<sup>193</sup> AIR 1926 Lab. 452

<sup>194</sup> AIR 1928 Lah. 640

<sup>195</sup> AIR 1936 Lab. 37

<sup>196</sup> AIR 1949 Orissa 22

<sup>197</sup> ILR 23 Cal. 367

<sup>198</sup> PLD 1969 S C 477

"An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact."

300. As observed by their Lordships of the Privy Council in the case of Ghulam Rasul Khan:

"Statements in public documents are receivable to prove the facts stated on the general grounds that they were made by the authorized agents of the Public in the course of official duty and respecting facts which were of public interest or required to be recorded for the benefit of the community. In many cases, indeed, in nearly all cases, after a lapse of years it would be impossible to give evidence that the statements contained in such documents were in fact true, and it is for this reason that such an exception is made to the rule of hearsay evidence."

301. In the case of *Tamizuddin Sarkar*, referred to by Mr. Yahya Bakhtiar, it was held that the register of deaths kept at a Thana was a public document within the meaning of section 74 of the Evidence Act, and was admissible under section 35 thereof as it was a register kept by police officers under a rule made by the local Government and to be found in the Bengal Police Manual. It was added that it was immaterial as to which police officer had made the entries in the register, as the rule in question cast the duty upon some police officer to be appointed for the performance of that duty by the officer in charge of the Thana. In other words, the learned Judges took the view that the entries in the register had been made by a duly authorized police officer appointed for the purpose by the officer in charge of the police station concerned. However, in *Muhammad Jafar and others v. Emperor*, it was held that under section 35 of the Evidence Act it is not enough to prove that the Chaukidar's register is an official book, but it is also necessary to prove that any entry relied on in it was either made by a public servant in the discharge of his official duty or made by some other person in performance of a duty specially enjoined by the law of the country. The same opinion was expressed in different words in *Sheu Balak and another v. Gaya Prasad and others*<sup>199</sup>, when it was observed that an entry in a register of births and deaths by a village Chaukidar was not admissible in evidence under section 35 after the death of the Chaukidar when it had not been shown that the entry was made by him.

302. A somewhat similar view was adopted in *Sanatan Senapati v. Emperor*<sup>200</sup>, when it was held that in the absence of reliable evidence as to who made the entry as to the death of a particular person in the register kept by a Chaukidar and in what

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<sup>199</sup> AIR 1922 All. 510

<sup>200</sup> AIR 1945 Pat. 489



circumstances, it could not be said that the conditions laid down in section 35 had been fulfilled. The learned Judges of the Division Bench emphasized the fact that it was not enough to prove that the Chaukidar's register was an official book, but it was also necessary to prove that the entry relied on was either made by a public servant in the discharge of his official duty, or made by some other person in performance of a duty specifically enjoined by the law of the country; and, accordingly, for the application of section 35, Evidence Act, one must know who has made the entry, and in what circumstances.

303. The requirements of section 35 of the Evidence Act were also brought out in State Government, *Madhya Pradesh v. Kamruddin Imamuddin*<sup>201</sup>, in relation to the admissibility of entries appearing in births and deaths register. It was stated that while such a register was no doubt a document within the meaning of this section, yet it did not mean that each and every entry made in that register was admissible in evidence; only such entries as were made therein by persons in the discharge of their official duty were admissible. In the case of the Chairman, East Pakistan Railway Board, Chittagong, cited at the Bar by Mr. Yahya Bakhtiar, the Court was dealing with an entry in a service book made by a public servant in the discharge of his official duty, and it was held that such an entry clearly fell within the ambit of section 35 of the Evidence Act read with illustration (e) to section 114 thereof.

304. It is not necessary to refer at any length to the observations appearing in the other cases cited by Mr. Batalvi, except to say that they draw pointed attention to the requirements as spelt out in section 35 of the Evidence Act. In the case of Messrs Bengal Friends & Co, this Court has pointed out that there is a difference between the relevancy of a matter and its proof in accordance with the provisions of the Evidence Act.

305. It will be seen, therefore, that in order to render a document admissible under section 35 of the Evidence Act three conditions must be satisfied:

- (a) The entry that is relied upon must be one in any public or other official book, register or record;
- (b) it must be an entry stating the facts in issue or a relevant fact; and
- (c) it must be made by a public servant in the discharge of his official duty, or any other person in performance of a duty specially enjoined by the law.

The section imports the idea that the entry will be of a permanent nature, and the person making the entry should be such as is invested with authority to make the same.

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<sup>201</sup> AIR 1956 Nag. 74

306. Applying these principles to the Log Book in question, it appears that it has to be treated as a book or register maintained by the driver of the Government jeep in the discharge of his official duty, although no specific rule or departmental order was brought on the record in this behalf. It seems to me that we can take judicial notice of the fact that for every Government vehicle a Log book is generally maintained to show the journeys performed by it, and the purpose for which they are undertaken. The question, however, is whether this particular Log Book has, indeed, been regularly maintained by the official concerned, namely, the driver of the jeep so as to fulfill the other conditions mentioned in the section. If the Log Book was not being written up by the driver owing to his illiteracy, then it must be shown that the entries were being regularly made by some other person officially authorized in this behalf.

307. It appears from the evidence of driver Muhammad Amir (P.W. 19) that as he was illiterate, the entries in the Log Book were being made by various persons who used the jeep from time to time, and on certain occasions they were made by the Motor Transport Officer. A glance at the Log Book shows that at least one other driver by the name of Muhammad Ashraf also occasionally drove this jeep, but he was not examined at the trial. In other words, the evidence of the driver, who was in charge of the jeep and in whose custody the Log Book was ostensibly kept, shows that all the entries were not being uniformly made by a public servant whose duty it was to make those entries, as the Motor Transport Officer could not have certified the journeys made by other persons using the jeep. In these circumstances it has to be held that an essential ingredient of section 35 of the Evidence Act, namely, that the entries must be shown to have been made by a public servant in the discharge of his official duty, is not satisfied in this case. Further, in the state of affairs disclosed by driver Muhammad Amir, the presumption mentioned in illustration (e) to section 114 of the Evidence Act regarding the regularity of judicial and official acts can hardly be invoked in respect of this particular Log Book.

308. On this view of the matter the High Court appears to me to be right in holding that the individual entries sought to be relied upon by the defence had to be proved, and were not covered by the general provision contained in section 35 of the Evidence Act. As the defence did not take any steps to have the relevant entries proved, it is not entitled to refer to them for any purpose.

#### **Effect of Non production of Certain Witnesses by the Prosecution.**

309. It was next contended by Mr. Yahya Bakhtiar that the defence was seriously prejudiced by the failure of the prosecution to examine certain material witnesses, and it was, accordingly, necessary that these witnesses should now be called in the appellate Court as Court-witnesses, or an adverse inference be drawn against the prosecution. He particularly mentioned the following witnesses in this connection;

(i) Mr. Hanif Ramay who was the Chief Minister of the Punjab on the date of the incident, and had promptly appointed an Inquiry Tribunal, comprising Mr. Justice Shafi-ur-Rehman of the Lahore High Court, to enquire into the incident; particularly because he was given up by the prosecution on an allegation to the effect that he had been won over;

(ii) two witnesses of the recovery memorandum relating to the crime empties, namely, Abdullah and Abdul Ghaffar;

(iii) Rao Abdul Rashid, then Inspector-General of Police, Punjab, who had filed an affidavit in this Court to the effect that there was no interference by or at the instance of the then Prime Minister in the investigation of this case;

(iv) Mr. Malhi, Director, Federal Security Force, Lahore, who was supposed to have been contacted by D.I.G. Abdul Wakil Khan (P.W. 14) when he had found some personnel of the Federal Security Force roaming at night in Lahore on a jeep without any number plate;

(v) two constables of the Federal Security Force, namely, Liaquat and Zaheer, who had earlier participated in the Islamabad incident and had also been sent to Lahore in advance to prepare for the present incident resulting in the death of Nawab Muhammad Ahmed Khan;

(vi) Ch. Nazeer Ahmed, Assistant Director of the Federal Security Force, who had taunted approver Ghulam Hussain on his failure to kill Ahmad Raza Kasuri during the firing incident at Islamabad in August 1974;

(vii) Ch. Muhammad Abdullah, Deputy Director of the Federal Security Force, who was allegedly deputed by accused Muhammad Abbas to persuade approver Ghulam Hussain to undertake this mission;

(viii) Ballistics Expert Major Fayyaz Haider, who had prepared reports Exh. P.W. 32/1 and Exh. P.W. 32/2 with regard to the caliber and nature of the crime empties and the bullet head recovered from the skull of the deceased, and also report Exh. P.W. 32/2 relating to the crime empties of the Islamabad incident;

(ix) Mian Khan, driver of the Federal Security Force's jeep used for the Islamabad incident;

(x) Mulazim Hussain of the Federal Security Force who had actually fired at Ahmad Raza Kasuri during the Islamabad incident;

(xii) Allah Bakhsh, Head Constable of the Federal Security Force who was also concerned in the Islamabad incident;

(xii) Head Constable Muhammad Yousuf of Battalion No. 3, who was cited in the calendar of witnesses, and was incharge of the Federal Security Force Armoury at Lahore, and had actually supplied ammunition to accused Ghulam Mustafa under the instructions of Amir Badshah (P.W. 20); and

(xiii) Col. Wazir Ahmad Khan, Commandant of the Havelian Central Ammunition Depot, who had signed reports Exh. P.W. 38/1, Exh. P.W. 38/2, Exh. P.W. 38/3 and Exh. P.W. 39/2 as regards the description of the ammunition supplied to the Federal Security Force Units.

310. The learned counsel contended that it was the duty of the prosecution to produce all the available evidence, or in the alternative to make these witnesses available for cross-examination by the defence, even if the prosecution did not intend to examine them for any reason. He submitted that Mr. Hanif Ramay had at any rate publicly denied that he had been won over by appellant Zulfikar Ali Bhutto, and this public denial falsified the statement made by the Special Public Prosecutor in the trial Court in this behalf. In support of his submissions Mr. Yahya Bakhtiar placed reliance on: *Stephen Seneviratne v. The King*<sup>202</sup>, *Adel Muhammad El Dabbah v. Attorney-General of Palestine*<sup>203</sup>, *Malak Khan v. Emperor*<sup>204</sup>, *Nazar Hussain and others v. The Crown*<sup>205</sup>, *Khairdi Khan and others v. The Crown*<sup>206</sup>, *Rafique v. The Crown*<sup>207</sup>, *Ghulam Rasul v. The State*<sup>208</sup>, *Nazir Jat and others v. The State*<sup>209</sup> and *Shaukat Ali v. The State*.<sup>210</sup>

311. In reply Mr. Ijaz Husain Batalvi, the learned Special Public Prosecutor, submitted that in law there was no obligation on the prosecution to produce all the witnesses cited in the calendar; nor to call any other witnesses whom the accused may consider to be necessary, as it was in the discretion of the Public Prosecutor to determine under section 265-F of the Criminal Procedure Code, what evidence should be produced before the Court to prove his case. He contended that no adverse inference was normally to be drawn against the prosecution on account of its omission to summon any witness, as it was open to the accused to examine such a witness in defence; and that an adverse inference could be drawn only if it was shown that the prosecution had deliberately dropped a material witness for some improper motive, so that prejudice was caused to

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<sup>202</sup> AIR 1936 PC 289

<sup>203</sup> AIR 1945 PC 42

<sup>204</sup> AIR 1946 PC 16

<sup>205</sup> PLD 1951 Lah. 222

<sup>206</sup> PLD 1953 FC 223

<sup>207</sup> PLD 1955 FC 70

<sup>208</sup> PLD 1960 Lah. 48

<sup>209</sup> PLD 1961 Lah. 585

<sup>210</sup> 1976 P Cr. L J 214

the accused in his defence by such omission. He further submitted that it was also an erroneous impression that a witness not called by the prosecution, but mentioned in the calendar, could just be tendered for cross-examination by the defence, as there could be no cross-examination unless there was examination-in-chief in terms of sections 137 and 138 of the Evidence Act. In support of these submissions he also placed reliance on some of the cases mentioned by Mr. Yahya Bakhtiar, and in addition drew our attention to: *Mahant Narain Das v. The Crown*<sup>211</sup>, *Abdul Latif v. Emperor*<sup>212</sup>, *Emperor v. Kasamalli Mirzalli*<sup>213</sup>, *Allah Yar v. Crown*<sup>214</sup>, *Kesar Singh and another v. The State*<sup>215</sup>, *Habib Muhammad v. State of Hyderabad*,<sup>216</sup> *Bakhshish Singh v. The State of Punjab*,<sup>217</sup> *The State v. Mushtaq Ahmad*,<sup>218</sup> and *Nur Begum v. Muhammad Husain and another*,<sup>219</sup> besides certain passages appearing on page 1095 of Monir's Law of Evidence.

312. The cases relied upon by the learned counsel for the parties may briefly be noticed with advantage.

313. It will be instructive, at the very outset, to refer to the three Privy Council cases relied upon by both the parties in support of their respective contentions. In the case of *Stephen Senevratne*, which came before their Lordships of the Privy Council from Ceylon, it was observed that:-

"It is a wrong idea that the prosecution must call all witnesses irrespective of considerations of number and reliability or that it should discharge the functions both of prosecution and defence, If it does so, confusion is very apt to result, more specially so when the prosecution calls witnesses and proceeds automatically to discredit them by cross-examination. Witnesses essential to the unfolding of the narrative, on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution,"

While making these observations, their Lordships also stated that they did not desire to lay down any rules to fetter discretion in a matter such as this which was so dependent on the particular circumstances of each case, nor did they desire to discourage the utmost candor and fairness on the part of those conducting prosecution.

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<sup>211</sup> ILR 3 Lah. 144

<sup>212</sup> AIR 1941 Cal. 533

<sup>213</sup> AIR 1942 Bom. 71

<sup>214</sup> PLD 1952 FC 148

<sup>215</sup> AIR 1954 Pb. 286

<sup>216</sup> AIR 1954 SC 51

<sup>217</sup> PLD 1958 SC (Ind.163)

<sup>218</sup> PLD 1973 SC 418

<sup>219</sup> 1974 SC MR 215

314. While considering the same question again in the case of *Adel Muhammad El Dabbah*, which had arisen from Palestine, the Judicial Committee stated that:-

"The last contention of the appellant is that the accused, had a right to have the witnesses whose names were upon the information, but were not called to give evidence for the prosecution, tendered by the Crown for cross-examination by the defence, as was asked for by counsel for the defence, at the close of the case for the prosecution. The learned Chief Justice ruled that there was no obligation on the prosecution to call them. The Court of Criminal Appeal held that the strict position in law was that it was not necessary legally for the prosecution to put forward these witnesses, and they could not say that the learned Chief Justice erred in point of law, but they pointed out that, in their opinion, the better practice is that the witnesses should be so tendered at the close of the case for the prosecution so that the defence may cross-examine them if they so wish, and they desired to lay down as a rule of practice that in future this practice of tendering witnesses should be generally followed in all Courts. While their Lordships agree that there was no obligation on the prosecution to tender these witnesses and therefore this contention of the present appellant fails, their Lordships doubt whether the rule of practice as expressed by the Court of Criminal Appeal sufficiently recognizes that the prosecutor has a discretion as to what witnesses should be called for the prosecution, and the Court will not interfere with the exercise of that discretion, unless perhaps, it can be shown that the prosecutor has been influenced by some oblique motive; no such suggestion is made in the present case."

315. Relying on this case the Judicial Committee again reiterated in the case of *Malak Khan*, a case from Lahore, that:

"Ultimately it is a matter for the discretion of counsel for the prosecution, and though a Court ought, and no doubt will, take into consideration the absence of witnesses whose testimony would be expected, it must judge the evidence as a whole and arrive at its conclusion accordingly taking into consideration the persuasiveness of the testimony given in the light of such criticism as may be leveled at the absence of possible witnesses."

316. We may now turn to the cases cited from the Indian jurisdiction. In AIR 1942 Bom. 71, it was observed that:

"The prosecution must always be perfectly fair. It is not the function of the Crown to procure the conviction of an innocent person. But the Crown is not bound to call before the Court a witness who, it believes, is not going to speak the truth. If the Crown informs the accused of the name of the witness and produces him in Court, it can then leave it to the accused to call him or not, as he

thinks fit. If the witness is called, Crown can cross-examine him. He should not be tendered for cross-examination. The practice of tendering witnesses for cross-examination leads to confusion and does not induce to the discovery of the truth."

In making this last observation, the learned Judges relied upon an earlier decision of their Court reported in the same volume, namely, AIR 1942 Bom. 37.

317. The question was examined at some length by the Indian Supreme Court in the case reported as AIR 1954 SC 51. The learned Judges, while dealing with the effect of non-production of a material eye-witness, observed that the true rule applicable in India on the question whether it was the duty of the prosecution to produce a material witness had been laid down by the Privy Council in the case of *Stephen Seneviratne*, already referred to. On the facts of the case before them they came to the conclusion that the witness in question was a material witness and the object of not producing him clearly was to shield him as he might possibly have been a co-accused in the case, and also to shield the other police officers and men who formed the raiding party. In these circumstances their Lordships considered that an adverse inference did arise against the prosecution in terms of clause (g) to section 114 of the Evidence Act, especially when during the trial an application had been made by the accused to summon the witness concerned, which application was erroneously refused by the trial Court without proper application of mind.

318. This question was again considered by the Indian Supreme Court in the case of *Bakhshish Singh v. The State of Punjab*, and, relying upon its own judgment in the case referred to above, as well as the Privy Council cases of *Abe Muhammad and Stephen Seneviratne*, the Court held that no adverse inference could be drawn against the State under section 114 of the Evidence Act owing to the non-production of a prosecution witness mentioned in the dying declaration to have witnessed the occurrence, as the Public Prosecutor had stated at the trial that he was giving up this witness as having been won over, and no oblique reason for his non-production was alleged, least of all proved, by the defence. The learned Judges also observed that if produced he would have been no better than a suborned witness, and thus he was not a witness essential to the unfolding of the narrative on which the prosecution was based, and if examined the result would have been confusion, because the prosecution would have automatically proceeded to discredit him by cross-examination.

319. The view taken by the Lahore High Court on this question, in the cases cited at the Bar, is more or less in consonance with the dicta of the Privy Council, except that a somewhat different note was struck in the cases of *Nazar Hussain and others v. The Crown and Ghulam Rasul v. The State*. In the first case it was observed that:-

"The course adopted by the Public Prosecutor in giving up a witness on the ground that he had been won over and thus withholding evidence which was likely to affect the result of the case is to be strongly disapproved. It is no part of the duty of the Public Prosecutor to secure convictions at any cost. On the other hand, he is expected to assist the Courts in coming to correct conclusions by placing all the material evidence before them."

320. And in the case of *Ghulam Rasul* it was laid down that:-

"As a general rule the prosecutor is bound to call all eye-witnesses, who are mentioned in the First Information Report, unless he had reasons to believe that the witness if called would not speak the truth, or is, unnecessary, or is an accomplice himself. The mere statement of the Public Prosecutor not supported by any material upon the record that the witnesses were won over by the accused, would not absolve the prosecution from producing material witnesses mentioned in the First Information Report. If, however, the Public Prosecutor refuses to examine such witnesses, then a duty is cast upon the Court to call those witnesses as Court-witnesses and afford opportunity to both the accused and the prosecution to cross-examine them. Failure to examine such witness or witnesses who were able to give important information in the case, or had some connection with the transaction in question might very well lead to miscarriage of justice which should be avoided at all costs."

It is interesting to observe that while making these observations the learned Judges purported to rely on the dictum of the Privy Council in the case of *Stephen Seneviratne*, to which I have already referred. A reference to that case shows that their Lordships of the Privy Council had not laid down any such rule; on the contrary they had observed that "it is a wrong idea that the prosecution must call witnesses irrespective of considerations of number and of reliability or that it should discharge the functions both of prosecution and defence". Of course, they added that "witnesses essential to the unfolding of the narrative, on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution". It seems to me that it is difficult to hold that the learned Judges of the High Court had correctly appreciated the observations of the Privy Council on which they had placed reliance, as the Privy Council had not purported to lay down any general rule requiring the prosecution to produce, as a matter of obligation, all witnesses mentioned in the First Information Report irrespective of considerations of number and of reliability.

321. However, this view was not adopted by another Division Bench of the same High Court in a case decided in the following year namely, that of *Nazir Jat and others*. Shabir Ahmad, J. delivering the judgment of the Court, stated that:-



"The prosecution is not bound to produce as witnesses all persons who can give evidence regarding the point in issue or a relevant fact, and a case has to be judged on the evidence that is produced in Court. The omission on the part of the prosecution to produce some persons who admittedly had some knowledge of a fact in issue or a relevant fact, may in certain cases, attract the provisions of law contained in illustration (g) of section 114 of the Evidence Act, 1872 It is, however, not in all cases of withholding of evidence that this presumption is to be drawn by the Court, and discretion is left to the Court to raise the presumption or not."

Having made these observations the learned Judge proceeded to hold that the non-production of some of the neighbors, who had admittedly seen the occurrence, would not adversely affect the prosecution. This view was followed by another Division Bench of the same High Court in the case of *Shaukat Ali v. The State*, and no adverse inference was drawn against the prosecution on account of non-production of certain witnesses cited in the calendar.

322. This brings us to a consideration of the views of our own Court in this matter. In *Allah Yar v. The Crown*, special leave to appeal had been granted for the purpose of examining whether the course of justice had not been deflected by the failure of the prosecution to produce two witnesses by the name of Muhammad Nawaz and Saadullah, the first one being an eye-witness of the main occurrence, and the second of an earlier altercation which apparently provided or explained the motive. At the trial the Public Prosecutor had given up both these witnesses on the ground that they had been won over. The learned Judges observed that as Saadullah's evidence related to an incident prior to the murder affecting the relations between the parties, it could not be contended that by failure to examine him at the trial any prejudice was caused or was likely to be caused to the accused persons or to the due course of justice. As to the non-production of Muhammad Nawaz, who had presumably witnessed the main occurrence, the learned Judges, referred with approval to the dicta of the Privy Council in the cases of Stephen Seneviratne and *Malik Khan v. Emperor*, as well as to the observations of a Full Bench of six Judges of the Allahabad High Court in the case of *Queen-Empress v. Durga*<sup>220</sup> and the judgment of a Division Bench of the Lahore High Court in *Mahant Narain Das v. The Crown*, and concluded that:-

"The circumstances already mentioned concerning the witness Muhammad Nawaz combined to raise the strong probability that in the committing Court he had not adhered to the truth, and in any case, his showing in those proceedings furnished reasonable ground for the Crown Prosecutor to believe that he was not a truthful witness. On the principles laid down in the authorities cited above, the Crown Prosecutor exercised a right discretion in declining to call Muhammad Nawaz as a witness for the Crown. All possibility of prejudice to the accused or

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<sup>220</sup> ILR 16 All. 84

to the due course of justice is excluded by the fact that, having been cited in the prosecution calendar, Muhammad Nawaz was available at the trial to be called and examined by the defence, if they thought it necessary."

323. In the next case of *Khairdi Khan and others*, the same rule was reaffirmed by observing that:

"It is hardly necessary to stress the great importance which attaches to the non-production of an important witness by the prosecution in a criminal case, where no satisfactory reason for non-production is established. It is true that the prosecutor is not bound to produce before the Court a witness who is not expected to give true evidence, but he cannot escape the duty of causing such a witness, if his evidence be of importance, to be present at the trial in case the opposite-party should wish to examine him."

324. The learned Judges also referred with approval to the Privy Council case from Palestine to which I have already referred earlier. They proceeded to draw a presumption against the prosecution under section 114, illustration (g) of the Evidence Act on the ground that the female witness in question was a material eye-witness of the incident, and the reasons given for dropping her were not at all satisfactory.

325. In the case *Rafique v. The Crown*, relied upon by Mr. Yahya Bakhtiar, it was not a question of not producing a material prosecution witness; but on the contrary the witness in question had been produced at the trial by the prosecution, but the learned Judges of the Chief Court of Sindh had criticized the Prosecutor in rather strong terms for doing so on the ground that the evidence of this witness had disclosed mitigating circumstances in favor of the accused, and it appeared to the learned Judges that this duty should have been discharged by the accused under section 105 of the Evidence Act. It was in the context of these circumstances that the Federal Court observed that:

"It is the duty of the Crown Counsel to bring all the relevant facts to the notice of the Court, even though that might tend to mitigate the offence; and this duty cannot be shirked by the Crown Counsel on the ground that the burden of proving the exceptions rests on the accused."

The learned Chief Justice pointedly referred to his judgment in this behalf in *Safdar Ali's case*. It seems to me that this particular case clearly proceeds on its own peculiar facts, and does not deal with the question we are considering here on the basis of considerations of principles and practice as have been brought out in the other cases discussed above.

326. In the next case brought to our notice, namely, *The State v. Mushtaq Ahmad*, in dealing with the question of the effect of non-production of certain witnesses by the

prosecution, out of those who had been cited in the F.I.R., the learned Judges reiterated the view expressed by the Privy Council in *Malik Khan v. The Emperor* and the earlier judgment of the Federal Court in the case of *Allah Yar v. The Crown*. It was added that:-

"However that may be, in our opinion; nothing turns on the failure to examine the above three witnesses if on the evidence actually produced in the case the offence with which the accused was charged is brought home to him beyond any reasonable doubt."

Before concluding the judgment, their Lordships also pointed out, with reference to the decision in *Ghulam Safdar v. The Crown*, that it is no part of the duty of the prosecution to prove all incidental matters that might be mentioned by a witness in his deposition.

327. In the last case, namely, *Nur Begum v. Muhammad Hussain and another*, the view expressed earlier as to the proof of all incidental matters by the prosecution was rearmend.

#### **CORRECT LEGAL POSITION REGARDING PRODUCTION OF WITNESSES BY THE PROSECUTION**

328. From this somewhat lengthy review of the cases cited at the Bar it appears, if I may say so with respect, that the correct position is the one as consistently enunciated by their Lordships of the Privy Council in three successive cases coming before them from Ceylon, Palestine and Lahore; and adopted by this Court as well as by the Indian Supreme Court, namely, that the prosecution is not bound to call all the witnesses cited in the challan or the calendar of witnesses, irrespective of considerations of number and of reliability; nor is it obliged to call any witness not so cited, but considered to be necessary by the accused; as ultimately it is a matter for the discretion of the counsel for the prosecution. At the same time it is the duty of the prosecution to call all those witnesses who are essential to the unfolding of the narrative, on which the prosecution is based, whether their testimony is for or against the case for the prosecution; but it is not its duty to lead evidence to prove even incidental matters which do not concern the essential fundamentals of its case. It is not in every case that an adverse inference must be drawn against the prosecution in terms of illustration (g) to section 114 of the Evidence Act owing to non production of certain witnesses, whether mentioned in the indictment or not. It will depend upon the facts and circumstances of cacti case, and an adverse inference can be drawn only if it is shown that material witnesses have been withheld owing to some oblique motive and for considerations not supported on the record. Here again, a caveat must be entered to the effect that it does not mean that the Court will embark upon an inquiry for the purpose of determining whether a witness has, indeed, been won over or that he was, in fact, unnecessary. Ordinarily a statement made in this behalf by the counsel for the prosecution should suffice, but the defence may show that the statement is not correct, or is otherwise not acceptable. The case

must, however, be judged on the evidence as a whole, and the Court must arrive at its conclusions accordingly, taking into consideration the persuasiveness of the testimony given at the trial in the light of such criticism as may be leveled at the absence of possible witnesses.

329. The prosecution must, of course, be prepared to make available for purposes of examination by the defence such of the given up witnesses as the accused may specify in this behalf. I am in respectful agreement with the view expressed in *Abdul Latif v. Emperor, Sadeppa Gireppa Mutgi and others v. Emperor*<sup>221</sup>, *Emperor v. Kasamalli Mirzalli and Kesar Singh and another v. The State* to the effect that a witness cannot be tendered for cross-examination without his being examined-in-chief. The law in regard to examination of witnesses is contained in sections 137 and 138 of the A Evidence Act. There is no provision in that Act for permitting a witness to be tendered for cross-examination without his being examined-in-chief, and this practice is opposed to section 138 of the Act. The correct procedure, therefore, appears to be that if the prosecution gives up any witness either as being unnecessary or as having been won over, then he should be made available at the trial for examination as a defence witness, should the accused so desire. In that case the prosecution will clearly have the right to cross-examine him.

#### APPLICATION OF THESE PRINCIPLES TO THE PRESENT CASE

330. The factual position may now be examined in the light of the conclusions reached above. Out of 15 persons mentioned by Mr. Yahya Bakhtiar, only four were cited in the list of witnesses filed by the prosecution. Mr. Hanif Ramay was given up on the ground that he had been won over. It was contended by Mr. Yahya Bakhtiar that Mr. Ramay had issued a statement denying any such thing, but the learned Special Public Prosecutor maintained his stand during the trial. He stated before us that certain events had happened during the course of the trial, as a result of which the prosecution had reached this conclusion. As I have already stated, it is hardly possible for the trial Court, much less for this Court, to embark upon a factual inquiry into the correct position, and it is enough to take notice of the controversy on this point. It was stated at the Bar by Mr. M. A. Rehman, the learned Advocate-on-Record for the State, that the Public Prosecutor was prepared to face any legal proceedings which Mr. Hanif Ramay might be contemplating against him in this regard. In the circumstances, we are of the view that there is no material for us to reject the statement made at the trial by the Public Prosecutor with regard to the position of Mr. Hanif Ramay, and accordingly no adverse inference can be drawn against the prosecution owing to his non-production.

331. The two recovery witnesses, Abdullah and Abdul Ghaffar were apparently given up as the prosecution came to the conclusion that it could not rely on the contents of the

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<sup>221</sup> AIR 1942 Bom. 37

recovery memo. supposed to have been prepared by Investigating Officer Abdul Hayee Niazi at the spot, as its case was that the empties were not sealed at the spot. It would have been, therefore, futile for the prosecution to produce these witnesses and then proceed to denounce them for the purpose of showing that the recovery memo. could not be relied upon as to the correctness of its contents.

332. Head Constable Muhammad Yousuf of the Federal Security Force was given up as unnecessary on the ground that the Investigating Officer Abdul Khaliq (P.W. 41) had found that the *Roznamcha* maintained by this witness contained interpolations and over-writings and the possibility of its having been tampered with could not be excluded. The prosecution, therefore, chose to rely upon the evidence of Muhammad Yousuf's superior, namely, Assistant Director Amir Badshah Khan (P.W. 20). This was clearly a matter within the discretion of the prosecution and no exception could be taken to the course adopted by it.

333. It may be stated that there is no averment by the defence that any of the accused expressed a desire to examine all or any of these four witnesses who had been cited in the challan but given up at the trial by the prosecution. If such a request had been made, it was the duty of the prosecution to make them available for examination by the defence.

334. The remaining 11 witnesses mentioned by Mr. Yahya Bakhtiar were not included in the calendar of witnesses, and no duty was cast upon the prosecution to produce all or any of them simply for the reason that the defence considered them to be necessary, unless it could be shown that their evidence was material for the unfolding of the narration of the case relied upon by the prosecution. This does not appear to be so. The names of the Federal Security Force employees Liaquat, Zaheer, Ch. Nazir Ahmad, Ch. Abdullah, driver Mian Khan, Allah Bakhsh and Mulazim Hussain were disclosed by various accused persons during the course of investigation of this case, and some of them are accused in the case relating to the attack on Ahmad Raza Kasuri in Islamabad on the 24th of August, 1974. There is substance in Mr. Batalvi's submission that as such the status of these persons was hardly better than that of accomplices and no useful purpose would have been served by producing them as witnesses in the present case.

335. The name of Mr. Irfan Malhi, Director, Federal Security Force at Lahore was only incidentally mentioned by prosecution witness Sardar Abdul Wakil Khan while narrating an incident prior to the date of the present murder during which he had intercepted a jeep belonging to the Federal Security Force which was being driven without a number plate, and Abdul Wakil Khan had contacted Mr. Irfan Malhi in that connection. This was, indeed, an incidental matter and it was not necessary for the prosecution to prove the same by producing Mr. Irfan Malhi.

336. As to Rao A. Rashid, it was stated by the learned Special Public Prosecutor that the investigation had revealed that this gentleman was too deeply involved and was not willing to tell the truth. In the peculiar circumstances of this case, which was filed as untraced when Rao A. Rashid was the Inspector-General of Police in the Punjab Province, there is hardly any material for us to hold that the statement made by the Special Public Prosecutor is not acceptable.

337. As to Major Fayyaz Haider of the Inspectorate of Armaments, G.H.Q., Rawalpindi, the explanation given by the prosecution is that his report was admissible in evidence under section 510 of the Code of Criminal Procedure without the necessity of big personal appearance before the Court, and that, in any case, on the advice of the Inspectorate of Armaments, two other officers of the organization, namely, Lt. Col. Yawar Hussain and Major Sarfraz Naeem were cited as witnesses in the incomplete challan dated the 11th of September, 1977, and both these gentlemen appeared as P. Ws. 32 and 33 respectively. A reference to the amended section 510 of the Criminal Procedure Code does support the prosecution on the point that the report of the Arms Expert could be admitted in evidence without the examination of the expert himself. However, this point will need to be discussed further at a later stage.

338. Lastly, as regards Col. Wazir Ahmad Khan, Officer Incharge of the Central Ammunition Depot at Havelian, from where various lots of ammunition were supplied to the Federal Security Force, Mr. Batalvi stated that his name had been inadvertently omitted from the list of witnesses filed by the prosecution, and on detecting this error an application had been filed by the Special Public Prosecutor before the trial Court seeking permission to produce him as a witness, but this application was rejected. Mr. Batalvi rightly submitted that no adverse inference could be drawn against the prosecution on account of an order made by the High Court.

### CONCLUSIONS AS TO NON-PRODUCTION OF WITNESSES

339. Taking an overall view of the entire situation, I am of the view that nothing turns on the non-production of the 15 witnesses mentioned by Mr. Yahya Bakhtiar at the commencement of his submissions in this behalf. It is to be noted that no request was made in the trial Court for summoning any of these witnesses as defence witnesses, or even as Court witnesses; and in the application filed in this behalf during the hearing of these appeals the request relates only to two persons, namely, Col. Wazir Ahmad, Ballistics Expert, and Agha Muhammad Safdar, Deputy Superintendent of Police, Islamabad. The last mentioned gentleman is not included in the list of 15 witnesses now under discussion. The prosecution has chosen to be judged without the evidence of these 15 witnesses, and it was within its rights in doing so. No compelling reason appears to have been made out on the record for drawing any adverse inference against the prosecution in terms of illustration (g) to section 114 of the Evidence Act, as none of

the witnesses in question were essential to the unfolding of the main narrative of the case, and have not been withheld owing to any improper or oblique motive.

### IMPLICATIONS OF CAMERA PROCEEDINGS

340. The learned counsel for appellant Zulfikar Ali Bhutto next argued that the whole trial stood vitiated for the reason that some parts of the proceedings at the trial were held *in camera* in violation of the provisions of section 352 of the Criminal Procedure Code, and the established principles of holding criminal trials in the open. Mr. Yahya Bakhtiar contended that it is elementary that justice must not only be done but it should also be seen to be done; and that in the circumstances there was no warrant at all for holding part of the trial of the appellant *in camera*, as he has been seriously prejudiced thereby on account of publicity having been given to the evidence led against him, but a similar opportunity having been denied to him when he wanted to present his defence.

341. The learned Special Public Prosecutor, in reply, repudiated these contentions, and submitted that it is unfortunate that appellant Zulfikar Ali Bhutto had all along acted on the mistaken notion that he was to be tried by the public and not by the High Court, and for this reason he was more after publicity than for presenting his defence to the criminal charges brought against him. Mr. Batalvi further submitted that, in any case the orders made by the High Court for holding the proceedings in chambers *in camera* were perfectly legal and justified in accordance with the practice of the Court relate to hearing of miscellaneous applications in motion, and also wholly covered by the proviso to section 352 of the Code of the Criminal Procedure. Finally, he contended that in any case no prejudice whatsoever had in fact been caused to the appellant by the adoption of this mode of trial during certain parts of the proceedings in the High Court.

342. The grievance relates to two stages of the proceedings, namely;

(a) On 9-1-1978 the trial Bench heard *in camera*, and dismissed *in limine*, a miscellaneous application (Cr. Misc. No. 7-M of 1978) filed by appellant Zulfikar Ali Bhutto praying for the transfer of the case for trial to another Bench or Judge, preferably the Sessions Judge, Lahore;

(b) the examination of the appellant under section 342, Cr. P.C. held, *in camera* on 25th and 28th January, 1978, after it had been commenced in the open Court on the 24th of January, 1978.

343. Taking up the question of the hearing of the miscellaneous applications in chambers, the relevant facts are that on 18-12-1977 Zulfikar Ali Bhutto appellant had made the application (Cr. Misc. No. 7-M of 1977) before the trial Bench under section 561, Cr. P.C. with the prayer for transfer of the case for trial by another Bench or Judge, preferably by the Sessions Judge, Lahore. There was no sitting of the Bench on 19-12-

1977 which was the last working day of the Court before the winter vacation commencing on 20-12-1977. On 22-12-1977 the appellant sent in another application from jail requesting that his transfer application might be taken up for disposal during the winter vacation. However, as it was, the two applications were put up in motion before the trial Bench immediately on the reopening of the High Court on 9-1-1978 and were dismissed *in limine* after having heard the petitioner and his two learned counsel in chambers. Thereafter, on the same day, on 9-1-1978, when the trial of the case was actually resumed in open Court in the presence of the parties and their learned counsel, Mr. D. M. Awan learned counsel for Zulfikar Ali Bhutto appellant rose and submitted that his client had informed him in writing that he had cancelled the powers-of-attorney of all his counsel. But the Court thereupon appointed two of his learned counsel namely Messrs D. M. Awan and Ehsan Qadir Shah to defend him at State expense and called upon Mr. Ehsan Qadir Shah to resume the cross-examination of P.W. 31 Ghulam Hussain approver. On this Mr. Ehsan Qadir Shah stated that he had no further questions to ask of the witness as he had been so instructed by the accused Zulfikar Ali Bhutto. He further submitted that the said accused had informed him that he was disassociating from the proceedings. Afterwards Mr. Ehsan Qadir Shah was relieved of his assignment as the State Counsel at his request. On the next day, on 10-1-1978, Mr. D. M. Awan submitted at the hearing that Zulfikar Ali Bhutto accused had declined to give him any instructions in the case. Accordingly, the Court at his request also rescinded his appointment as the State Counsel for the accused. In these circumstances Zulfikar Ali Bhutto accused remained un-represented in the further proceedings of the case.

344. Now at this stage, let us have a closer look into the relevant facts on this part of the case. The record shows that in the transfers application (Cr. Misc. No. 7-M of 1978) running into 53, typed pages, scurrilous allegations were leveled almost entirely against the learned Acting Chief Justice, heading the trial Bench. Some of the allegations, if not most of them, were made in repetition of those contained in the previously moved applications. The order dated 9-1-1978 passed on this application shows that the learned trial bench had decided to hear the application in motion *in camera* and dismissed it *in limine* by a short order announced at the hearing. It was followed by a detailed order covering 33 typed pages containing the reasons for it.

345. In the detailed order dated 9-1-1978 passed on the transfer application (Cr. Misc. 7-M of 1978), it is mentioned, that it was decided to be taken up in chambers since not only it is the usual practice of the Court to hear motion cases in chambers but also because "the intention of the, accused in repeating petitions based on allegations of bias appeared only to give publicity to the baseless allegations of a scandalous character and thus undermine the confidence of the public in the Courts of the country". On appearing before the Bench the appellant expressed his surprise and made a request for the petition to be heard in open Court. This request, according to the learned trial Bench, confirmed their views that the object of the accused petitioner was clearly to give



publicity to the highly scandalous, scurrilous and baseless allegations in the petition and the arguments that might be addressed in that connection. Therefore the Bench did not agree to the request of the appellant. In these circumstances the learned trial Bench heard the arguments in chambers on the transfer application in the presence of the appellant and his two learned counsel. It appears that in the course of the arguments by Mr. D. M. Awan, his learned senior counsel, the appellant intervened to make certain submissions of his own despite the fact that it was brought to his notice that he was interfering with the proceedings. After the conclusion of the arguments by his learned counsel the petitioner was also allowed an opportunity to supplement the arguments, on facts as a special case. However, according to the impugned order, the appellant started apolitical speech in Court. He was asked several times to confine himself to the petition and refrain from making a political speech. Ultimately he took his seat saying that if he was not allowed to say what he liked he would not make his submissions.

346. I shall separately deal with the merits of the allegations contained in the transfer application and the order passed thereon, at a suitable place in this judgment. But for the present suffice it to mention here that the appellant had taken exception against the hearing of his application "in chambers" on wholly untenable grounds, and had thereafter on the same day voluntarily chosen to disassociate himself from the proceedings at his trial held in open.

347. According to the *Concise Law Dictionary* (5th Edn.), by P. C. Osborn the term "Chambers" is defined to mean rooms attached to the Courts in which sit the Judges, the masters and registrars for the transaction of legal business which does not require to be done in Court. A Judge sitting in chambers can exercise the full jurisdiction vested in the High Courts (Judicature Act, 1925). Similarly in *Bouvier's Law Dictionary*, it is stated that the chambers is the private room of the Judge. Any hearing before a Judge which does not take place during a term of Court or while the Judge is sitting in Court, or an order issued under such circumstances, is said to be in chambers. In *Mozley's Law Dictionary* (6th Edn.), the term is defined to mean the offices of a Judge in which a large part of the business of the superior Courts is transacted by a Judge or a master. Applications by way of summons, and inquiries incidental to a suit, are made in chambers. According to *Wharton's Law Lexicon* (4th Edn.) chambers are quasi-private rooms, in which the Judges or masters dispose of points of practice and other matters not sufficiently important to be heard and argued, in Court. According to *Black's Law Dictionary* "chambers" is the private room or office of a Judge; any place in which a Judge hears "motions", signs papers, when he is not holding a Session of Court. Business so transacted is said to be done "in chambers". In the *Oxford English Dictionary* the term is defined to mean the room in which a Judge sits to hear cases and transact business not of sufficient importance to be brought into Court.

348. In this connection here it may be mentioned that the cases relied upon by the learned counsel for the appellant are not in point inasmuch as they do not directly relate

to the matters heard "in chambers". But in *Cora Lillian McPherson v. Oran Lillian McPherson*, cited on behalf of the appellant, the Privy Council while emphasizing that every Court of Justice is open to every subject and that publicity is the authentic hallmark of judicial procedure, at the same time observed that it need hardly be stated that to this rule; there are certain strictly defined exceptions, and has in particular referred to the applications properly made "in chambers" and infant cases as the two exceptions. In *Alliance Perpetual Building society v. Belrum Investment Ltd. and others*<sup>222</sup> a motion was put up for hearing before Harman, J. in Chancery Division to commit Arthur George Wareham, Editor of the "*Daily Mail*" for contempt of Court by the publication in that paper of what purported to be an account of proceedings on action pending in Chambers and never yet heard in open Court. In that connection the learned Judge observed:

"The gravamen of the charge made is that the article is an account of matters proceeding in chambers. In my judgment, if this charge be true, a contempt of Court has been committed. Interlocutory matters before the master proceed in private; the public has no right to attend them, nor has anyone, as I conceive, any right to give any account of them while the action is pending and has not been adjourned into Court.

It is not easy to find authority for this proposition, but it is assumed in the speech of Lord Loreburn, L. C. in *Scott v. Scott*, and is, I think, well established."

And in conclusion he recorded the finding in the matter in these words:

"I regard it as important that this kind of intrusion on matters pending in chambers should be strongly discouraged and I feel bound to mark the Court's displeasure by fining the respondent £100."

349. Although the reported case of the House of Lords in *Scott v. Scott*<sup>223</sup> is not directly in point, yet the observations by Lord Loreburn on page 445 and Lord Atkinson on page 467 do go to lend support, to the view that the hearing of causes in chambers is normally held in private, as another exception to the general rule.

### **HEARING OF MISCELLANEOUS APPLICATION IN CHAMBERS NOT OPEN TO OBJECTION**

350. I may pause here to mention that according to section 352, Cr. P.C. the place in which any Criminal Court is held for the purpose of "inquiring into or trying any offence" shall be deemed to be an open Court. Strictly speaking therefore, the Court is

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<sup>222</sup> (1957) 1 WLR 720

<sup>223</sup> 1913 AC 417

open only for the purpose of "inquiring into or trying any offence" and not for any collateral purpose, or while dealing with something which is strictly speaking outside the cause itself. In this category would fall a transfer application which is not germane to the proper trial as such. In this view of the matter also section 353 of the Code did not debar the learned trial Bench from hearing the transfer application *in limine* "in chambers" and not in Court open to the public. Indeed the Bench in its impugned order has itself specifically observed that it was decided by them to take up the transfer application "in chambers" in accordance with the usual practice of the Court. The objection as to the hearing of the transfer application in chambers is, therefore, without merit.

351. Turning now to the second phase of the *camera* proceedings, we find that after the close of the case by the prosecution, the statement of Zulfikar Ali Bhutto accused under section 342, Cr. P.C. was partly recorded in open Court on 24-1-1978. In answer to the very first question put to, him he replied as under:

"Since I am boycotting the proceedings of the trial, I will not be offering any defence. I have withdrawn as you know the *Wakalatnama* of all my counsel. This was done on the 10th of January, after my applications dated 18th of December, 1977, and 22nd December, 1977, were dismissed by this Hon'ble Bench in chambers. Since I am not offering my defence, I will confine my statement mainly to two issues (1) Why this trial is taking place, why this case has been fabricated against me and (2) on my lack of confidence in getting a fair trial and justice. As for the other questions if they do not directly pertain to my own defence, I would be willing to give the answers."

352. In this manner, out of a total of sixty-seven questions, he was asked fifty-three questions and the answers given were recorded on 24-1-1978 in open Court. But on and from 25-1-1978 the learned trial Bench decided to hold the further proceedings *in camera*. The relevant portion of the order passed by the Court in that connection is reproduced below:-

"2. More than one application has been presented by the accused before this Court so far in which scurrilous, scandalous and baseless attacks have been made against the impartiality of this Bench. More than one application, as stated by him, was also moved before the Supreme Court for transfer of the case on the ground of bias, the first of which was dismissed and the second was withdrawn. It is clear that the same process is sought to be repeated to defame this Court without any foundation to take advantage of the tradition that this Court does not defend itself in the Press.

3. We, therefore, find that it is in the interest of justice as well as in the interest of a just and proper determination of the issues involved in this case that the

proceedings be now held *in camera*. We consequently order accordingly and direct that no part of the proceedings to be held *in camera* shall in any manner be publicized in any form whatsoever."

353. In the same connection the Bench also appears to have passed a further order dated 25-1-1978 as under:-

"This morning, a few supporters of the principal accused were found shouting and yelling in the corridor outside the Chief Justice's Chamber. From what they were saying, it is evident that they want to create a disturbance in the Court Room during the trial of the accused in this case.

In the circumstances, and since all the evidence in the case has already been recorded in open Court, we direct that to obviate the possibility of such disturbance being created, the proceedings of this Court in this case shall be *in camera*."

In these circumstances the rest of the examination of the appellant and the subsequent proceedings were held *in camera*.

354. In this case the entire prosecution evidence was recorded in open Court. Even most of the examination of Zulfikar Ali Bhutto as an accused under section 342, Cr. P.C. was completed in open Court on 24-1-1978. His remaining examination on 25-1-1978 and 28-1-1978 was held *in camera*. He corrected his statement recorded by the Court *in camera* on 25-1-1978 in his hand and appended a note to it saying that: "I have corrected the statement but I cannot say if everything stated on 25-1-1978 has come on record unless I can verify it with the tape". Similarly he corrected his, statement recorded by the Court *in camera* on 28-1-1978 and also added a note more or less to the same effect to it in his own hand and under his signature.

355. After the accused had closed their defence, on 7-2-1978 Zulfikar Ali Bhutto made another lengthy statement mostly in the nature of a tirade against the Court for holding the proceedings *in camera*. This statement was also recorded *in camera* but this time the appellant refused to correct and sign the same. Instead of this he annexed a separate note to it which is reproduced below *in extenso*;

"On the previous occasion when the Court directed me to correct my statements, I made only typographical and grammatical corrections of the incomplete statements. There were vital gaps and omissions in the statements but since I had been denied my legal right to state why this false and fabricated case was concocted against me and since I was denied the opportunity to speak on the bias and prejudice of the Chief Justice and as I was not offering my defence, I merely verified and signed the corrections of the incomplete statements. I have again

been directed to correct the statement I made today. I have neither seen the statement nor I am correcting it as I have been advised that the object is to prejudice my case. Hence I am returning the statement without looking at it. (I am not signing this covering note either). My position remains the same. I have not signed the previous statements and nor this one 7th February, 1978."

356. In this connection I am constrained to observe that in adding the remarks perhaps the appellant's attitude was unnecessarily provocative toward the Court. To say the least, the insinuation that "there were vital gaps and omissions" in his statements recorded by the Court *in camera* on 25-1-1978 and 28-1-1978 appears to be an afterthought, otherwise there was nothing to prevent him from explicitly saying so in his notes on his two previous statements when they were comparatively fresh in his mind. Above all the proceedings in the trial Court were tape-recorded, and in this Court before us at the hearing his learned counsel did not even raise this issue to enable us to verify his gratuitous remarks with the help of the tape record. Even the appellant who personally appeared before us in Court and addressed us for four days, did not remotely advert to it, None of the other co-accused nor even their learned counsel including Mr. Qurban Sadiq Ikram, Advocate for Mian Muhammad Abbas appellant have at any stage supported him in this behalf. I have, therefore, no hesitation in repelling these insinuations against the trial Bench.

357. Zulfikar Ali Bhutto appellant did not produce any evidence in defence. Mian Muhammad Abbas accused produced three witnesses, the first one was examined without oath. The evidence of the remaining two witnesses was recorded *in camera* but they were not cross-examined by Zulfikar Ali Bhutto in spite of the opportunity allowed to him. These witnesses produced by Mian Abbas were mostly formal and related to his own defence. Ghulam Mustafa, Rana Iftikhar and Arshad Iqbal co-accused jointly produced one witness in their defence. He too was not cross-examined by Zulfikar Ali, Bhutto. The evidence of none of the defence witnesses, who were examined *in camera*, has any material effect on the case for or against Zulfikar Ali Bhutto. So drat he was in no way prejudiced by the examination of these witnesses *in camera*. The other accused did not raise any objection to the recording of the evidence of their witnesses *in camera*.

358. Indeed this is a peculiar case of its kind, and the stance adopted by Zulfikar Ali Bhutto appellant during the course of the trial in a murder case is all the more surprising. On 24-1-1978 in answer to the very first question put to him in his examination under section 342 as an accused, he stated that he had already boycotted the proceedings after his transfer application had been dismissed by the Court, and added that he had decided not to offer his defence and would, therefore, confine his statement in Court as an accused mainly on two issues - "(1) why this trial is taking place, why this case has been fabricated against me and (2) on my lack of confidence in

getting a fair trial and justice". In actual fact he did not in substance answer any of the questions put to him in his examination as an accused.

359. In this manner he has deliberately failed to avail of the very valuable opportunity which the law afforded him in order to enable him personally to explain the circumstances appearing against him in the prosecution evidence, under section 342 of the Code so that he may not be condemned unheard. Whether thereby, in adopting this obdurate attitude, he has in fact done any service to himself, it is for him to fathom.

360. Let me now advert to the propriety of the orders passed by the learned trial Bench in holding this part of the proceedings *in camera*, The matter is governed by section 352 of the Criminal Procedure Code, 1898, which lays down that:-

"The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them;

Provided that the Presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be, or remain in the room or building used by the Court."

361. The operative part of this section embodies the general rule that ordinarily criminal trials should be open to the public, as publicity is the authentic hallmark of judicial proceedings. In cases decided under the Common Law of England as well as in the United State of America, there is a traditional distrust of secret trials and the right to public trial of a person accused of a crime is generally recognized. As stated by Black, J. *In re William Oliver*:<sup>224</sup>

"Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our Courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."

362. However, as stated in *Corpus Juris Secundum*, Volume 23, section 963<sup>225</sup> pages 849 to 853, the public trial concept has never been viewed as imposing a rigid, inflexible straight jacket on the Courts, and it is generally conceded that the right to have the general public present at A trial is subject to some limitations. The trial Judge has

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<sup>224</sup> (1947) 333 US 257

<sup>225</sup> (1947) 333 US 257

discretion to close to the public, even without the consent of accused where there is good cause for such action. In exercising control over the trial proceedings, the Judge may exclude those whose conduct is of disturbing nature, or whose presence is likely to interfere with the administration of justice. It is usually held that unless accused is thereby prejudiced for want of aid, or counsel of any person whose presence might be of advantage to him, it is within the discretion of the Court to exclude persons from the Court room where it deems necessary so to do in order to preserve decorum, to secure the administration of justice, or to facilitate the proper conduct of the trial.

363. These principles underlie the judgments cited as *Scott and another v. Scott*<sup>226</sup>, *King v. Governor of Lewes Prison*<sup>227</sup>, *Cora Lillian McPherson v. Cora Lillian McPherson*<sup>228</sup>, *Naresh Shridhar Mirajkar and others v. State of Maharashtra and others*<sup>229</sup>, *W. E. Gardner v. U. Khan*,<sup>230</sup> *In re: M. R. Venkataraman*<sup>231</sup>, *Mst. Shirin Nazir v. Badruddin Karamah Nazir and another*<sup>232</sup>, *Mairaj Muhammad Khan v. The State*<sup>233</sup>, *Abdul Rashid Chaudhry and others v. The State*<sup>234</sup> and *The Province of West Punjab v. Khan Iftikhar Hussain Khan of Mamdot*<sup>235</sup>.

364. According to Halsbury's Laws of England (4th Edn.), Volume II, para. 280, in general all persons, except children have a right to be present in Court, provided there is sufficient accommodation and no disturbance of the proceedings. There is, however, an inherent jurisdiction in the Court to exclude the public if it becomes necessary so as to do so for the due administration of justice:

"In general, all cases, both civil and criminal, must be heard in open Court, but in certain exceptional cases, where the administration of justice would be rendered impracticable by the presence of the public, the Court may sit *in camera*. Thus the Court may sit *in camera*, either throughout the whole or part of the hearing, where it is necessary for the public safety, or where the subject-matter of the suit would otherwise be destroyed, for example by the disclosure of a secret process or of a secret document, or where the Court is of opinion that witnesses are hindered in, or prevented from, giving evidence by the presence of the public. In addition the Court is directed or has been given power by statute or statutory rules to exclude the public in particular proceedings and is empowered to do so in any proceedings for an offence against morality or decency when evidence is given by children or young persons."

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<sup>226</sup> 1913 AC 417

<sup>227</sup> (1917) 2 KBD 254

<sup>228</sup> AIR 1936 PC 246

<sup>229</sup> AIR 1967 SC 1 (1966) 3 SCR 744

<sup>230</sup> AIR 1936 Rang. 471

<sup>231</sup> AIR 1950 Mad. 441

<sup>232</sup> PLD 1963 Kar. 440

<sup>233</sup> PLD 1978 Kar. 308

<sup>234</sup> PLD 1966 Lab. 562

<sup>235</sup> PLD 1949 Lab. 572

## CONCLUSIONS AS TO JUSTIFICATION FOR CAMERA PROCEEDINGS

365. It will thus be seen that it is an essential and salutary principle of administration of justice that it must not only be done but should also appear to be done. This necessarily carries with it the right to an open trial in the full gaze of the public, including the Press. This in turn leads to a healthy, fair and objective administration of justice calculated to promote public confidence in the Court and is conducive to dispel all misgivings about it. There can be no two opinions about it. But this rule, on all accounts, is not a rigid and inflexible one, and must not be pressed to its breaking point in defeating the very ends of justice. It admits of exceptions and cases may arise whereby following this rule for an open trial justice may itself be defeated. A Court of law exists for the administration of justice. The primary function and the ultimate goal before a Court is to do justice between the parties. However, as seen, above, there is no dearth of cases in which the very requirement of the administration of justice in itself demands that a trial may be held in private or *in camera* and an open public trial is likely to result in the stultification of justice. In this category are included cases within the parental jurisdiction of the Court for the safeguard of the interests of the ward or lunatics. But it is, nonetheless, not possible to prepare an exhaustive list of all such cases. In fact each case must be judged on its own facts in this respect. Indeed even the Legislature has also, in its wisdom, expressly provided for the holding of trials *in camera* under some of the statutes in force in this country.

366. In this connection section 14 of the Official Secrets Act (XIX of 1923) lays down that in addition and without prejudice to any powers which a Court may possess to order the exclusion of the public from any proceedings if, in the course of proceedings before a Court against any person for an offence under this Act or the proceedings on appeal, or in the course of the trial of a person under this Act, application is made by the prosecution, on the ground that the publication of any evidence to be given or of any statement to be made in the course of the proceedings would be prejudicial to the safety of the State, that all or any portion of the public should be excluded during any part of the hearing the Court may make an order to that effect, but the passing of sentence shall in any case take place in public. Similarly in section 53 of the Divorce Act (IV of 1969) it is expressly provided that the whole or any part of any proceedings under the Act may be heard, if the Court thinks fit, within closed doors. Also section 11 of the Defence of Pakistan Ordinance (XXX of 1971) lays down that in addition, and without prejudice, to any powers which a Special Tribunal may possess by virtue of any law for the time being in force to order the exclusion of the public from any proceedings, if at any stage in the course of the trial of any person before a Special Tribunal, application is made by the prosecution on the ground that the publication of any evidence to be given or of any statement to be made in the course of the trial would be prejudicial to the public safety, and that, for that reason, all or any portion of the public should be excluded during any part of the hearing, the Special Tribunal may



make an order to that effect. These are some of the statutory exceptions to the general rule for an open trial found in the *corpus juris* of this country.

367. While the operative part of the section embodies the general rule to ensure that the criminal inquiries and trials are held in open Court; under the Proviso to the section, the Legislature in its wisdom has, however, grafted the exception to the general rule. Under the Proviso the discretion is vested in the Presiding Judge or Magistrate and he may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person shall not have access to, or remain in the Court. This discretion thus conferred on the Judge or the Magistrate under the Proviso is ostensibly very wide and is not hedged in by other considerations. This, however, does not mean that thereby he is armed with the license to act on mere humor and caprices, or that he is free to act arbitrarily and without reason. In all circumstances, even in exercising the discretion, he must act in aid of the administration of justice and with that end in view and only on sound judicial principles, bearing in mind the facts of each case.

368. It cannot be denied that in the trial Court a number of applications were filed from time to time in which unfortunately scandalous and scurrilous allegations were made mostly against the present Chief Justice, who headed the trial Bench constituted for the trial of this case in the Lahore High Court. In the course of the hearing in this appeal before us also those allegations were repeated on behalf of the appellant to contend that the entire trial stood vitiated because of bias in the learned Chief Justice. At another place in this judgment I have dealt with this plea of bias raised on behalf of the appellant, which has been overruled by me as baseless. The blasphemous allegations attributing bias and motive, made in the face of the Judge of a superior Court constitute one of the worst forms of contempt, and these were repeated with impunity in this case to defame the Judge and the Court, with scant regard for the dignity of the law and its enforcing agency, *viz.* the Court. In the course of this trial the appellant, who was no less a person than the former President and Prime Minister of the country, appears to have adopted an openly hostile attitude in Court and became defiant towards the end, and it became all the more arduous for the Court to conduct the trial. He appears to have further developed a strategy, and started indulging in vilification and insults towards the Court and wanted publicity for it, without caring for his own defence in the case. Indeed the unfortunate situation thus created became all the more embarrassing to control at the trial.

369. It appears, therefore, that from 25th of January 1978, onward the Court had a genuine and reasonable apprehension that the appellant was out to further indulge in scurrilous and scandalous allegations against it and wanted publicity for it. This was likely to result in undermining the dignity of the High Court and shake the confidence of the people in it. In these circumstances, the Court was left with no alternative but to hold further proceedings *in camera* in the larger interest of the administration of justice;

and this it had power to do, in the exercise of the discretion vested in it under the Proviso to section 352 of the Code.

370. On 25th of January 1978, the Court also observed that a few of the supporters of Zulfikar Ali Bhutto appellant were found shouting and yelling in the corridor outside the Chief Justice's Chamber. This raised a further apprehension in the mind of the Court about a likely disturbance in the proceedings of the Court, if held in open; and for this additional reason as well the Court was justified in holding the further proceedings in the case *in camera*. Before us the learned counsel vaguely expressed his doubt about the genuineness of this last mentioned order passed on 25-1-1978, but this appears to be a wholly unjustified allegation, and does not deserve any serious consideration.

371. Before concluding discussion of this matter, it would not be out of place to repeat that the entire prosecution evidence in this case was recorded in open Court. Appellant Zulfikar Ali Bhutto did not produce any evidence in defence. Most of his own examination as an accused under section 342, Cr. P.C. was also conducted in open Court. In these circumstances, I am satisfied that the alleged irregularity, if any, in the mode of the trial by holding it partly *in camera* has not in fact occasioned any failure of justice or prejudice to the appellant in his trial or defence. The objection is thus without any force and is hereby repelled.

372. One last point may also be noticed. While commencing the discussion of the validity of camera proceedings held by the trial Court, it has been stated that one of the grievances of the appellant has all along been that while publicity was given to wild statements and allegations made by the prosecution witnesses and the confessing accused against him, but similar publicity was denied when the time came for him to state the reasons for his false implication in the case, and to expose the biased attitude of the Court. For detailed reasons already stated in the preceding paragraphs, I have come to the conclusion that, in the circumstances, the High Court was justified in holding this part of the trial *in camera*, and also in hearing Zulfikar Ali Bhutto 's miscellaneous application in chambers, as this was necessary in the interest of the administration of justice itself, so that High Court was not subjected to scurrilous scandalisation.

373. As far as the proceedings conducted in open Court are concerned, the appellant can have no grievance if they were reported in the Press or otherwise. It seems to me, however, that publicity ought not to have been given to the statements made by the other co-accused during the time when the proceedings were being held *in camera*. It is possible, as suggested by the learned Special Public Prosecutor, that those statements were allowed to be published for the reason that the camera proceedings had not been necessitated on account of anything done or intended to be done by the co-accused. Whatever the reason, it would have been better to avoid even the publication of these statements, which were also recorded *in camera*. The fact, however, remains that the publication of the statements made by the co-accused during camera proceedings does

not, in any manner, detract from the necessity which was clearly made out for excluding the public from this stage of the trial, once appellant Zulfikar Ali Bhutto had notified the Court of his intention to repeat the allegations he had already made and publicized in successive petitions against the presiding Judge of the trial Bench.

### **Examination of Evidence**

374. Having disposed of the several contentions raised by Mr. Yahya Bakhtiar as to the admissibility of certain pieces of evidence, exclusion by the High Court of relevant and admissible evidence, as well as the alleged illegalities committed by the High Court in the conduct of the trial, and other connected matters, I now proceed to examine the evidence brought on the record in the light of the principles and considerations as brought out in the preceding paragraphs. As the mainstay of the prosecution is the evidence of the two approvers, namely, Masood Mahmood (P.W. 2) and Ghulam Hussain (P.W. 31), it will be useful to give a brief resume of their depositions at this stage, so as to bring out their salient points.

### **APPROVER MASOOD MAHMOOD'S VERSION**

375. After giving a history of his career in the police service of Pakistan since 1948, Masood Mahmood stated that, while serving as Managing Director of the Board of Trustees of the Group Insurance and Benevolent Funds in the Establishment Division, in Grade 21, he was asked one day by the Establishment Secretary, Mr. Vaqar Ahmad, to call on the then Prime Minister Zulfikar Ali Bhutto on the morning of the 12th of April 1974, and to see him first before meeting the Prime Minister. Mr. Vaqar Ahmad told the witness that the Prime Minister was going to make an offer of appointment to him which he must accept, in view of the state of his health and family circumstances, and the fact that the officers of Grade 21 and above could be retired from service at anytime by the Government. During his interview with the Prime Minister, the latter offered him the post of Director-General of the Federal Security Force, which had fallen vacant on the retirement of the previous incumbent Malik Haq Nawaz Tiwana. The Prime Minister advised Masood Mahmood to keep on the right side of the Establishment Secretary. He also discussed the nature of the new assignment, saying that he wanted the witness to make the Federal Security Force into a deterrent force so that the people of Pakistan, Government Ministers and Members of the National and Provincial Assemblies would fear it. He further informed the witness that he should not seek instructions from the then Minister of the Interior (although the Federal Security Force was technically under the Ministry of Interior); and advised him not to terminate the services of re-employed officers without his prior permission. In this connection he particularly mentioned appellant Mian Muhammad Abbas, who was then serving as a Director in the Federal Security Force.

376. Masood Mahmood assumed charge of the office of Director-General of the Federal Security Force on the 23rd of April 1974, but before that date he was visited several times by the Prime Minister's Chief Security Officer, Saeed Ahmad Khan (P.W. 3), and his Assistant, the late Abdul Hamid Bajwa, for the purpose of ensuring that he would not refuse the offer. According to Masood Mahmood, both these gentlemen made it clear to him, in their own way, that a refusal on his part might endanger his life and career. The witness stated that the Prime Minister gave to him an oral charter of his duties to the effect that he wanted the force to be available to him for political purposes, that is, for breaking up of political meetings; harassment of personages both in his own party and in the opposition; and induction of plain clothed persons in public meetings addressed by him to swell the crowd. He was also directed to brief the Prime Minister about the law and order and the political situation in the country, and also to keep him informed about the activities of members of his own party, including some of his ministers, and those in the opposition. He was further asked to be present in the National Assembly whenever the Prime Minister was attending its session or was otherwise in his chambers in the National Assembly; and also at places where the Prime Minister went on tour.

377. Masood Mahmood had been in his new office for about a month or so, when he witnessed the unpleasant exchange of words in the National Assembly between the Prime Minister and Ahmad Raza Kasuri (P.W. 1) on the 3rd of June 1974, during the course of which the Prime Minister had asked Kasuri to keep quiet, adding that he had had enough of him and would not tolerate his nuisance any more. A day or two later the Prime Minister sent for Masood Mahmood and told him that he was fed up with the obnoxious behavior of Ahmad Raza Kasuri, and that Mian Muhammad Abbas accused knew all about his activities. He also told him that Mian Muhammad Abbas had already been given directions through the witness's predecessor to get rid of Ahmad Raza Kasuri. The Prime Minister went on to instruct the witness that he should ask Mian Muhammad Abbas to get on with the job and to produce the dead body of Ahmad Raza Kasuri or his body bandaged all over. He further told Masood Mahmood that he would hold the latter personally responsible for the execution of this order.

378. According to Masood Mahmood, he protested against this order saying that it was against his conscience and also against the dictates of God, but the Prime Minister lost his temper and shouted that he would have no nonsense from him or Mian Muhammad Abbas, and added "you don't want Vaqar chasing you again, do you?".

379. After this interview, the witness called Mian Muhammad Abbas to his office, and repeated to him the orders given by the Prime Minister. Mian Muhammad Abbas was not the least disturbed, and told the witness that he need not worry about it, and he would see that the orders were duly executed. He also said that he had been reminded of this operation by the witness's predecessor more than once. Masood Mahmood stated that he was reminded and goaded again and again about the execution of this order by

the former Prime Minister, both personally as well as on the green telephone, and also through Saeed Ahmad Khan (P.W. 3).

380. Continuing, Masood Mahmood stated that in July, 1974, during his visit to Quetta, the Prime Minister had asked him to take care of Ahmad Raza Kasuri who was likely to visit Quetta, and, accordingly, the witness had told M. R. Welch (P.W. 4), then Director, Federal Security Force at Quetta, that some anti-State elements, including Ahmad Raza Kasuri, were likely to be in Quetta, and they should be got rid of. He told Welch that Kasuri was delivering anti-State speeches and was doing damage to the interests of Pakistan. Kasuri did visit Quetta in September, 1974, and a day or two before that Masood Mahmood telephoned Welch in that connection asking the latter to take care of Kasuri in Quetta; but M. R. Welch did not take any effective steps to get rid of Kasuri. Masood Mahmood mentioned certain correspondence which passed between him and M. R. Welch on this subject, to which a detailed reference will be made later.

381. In August, 1974, Ahmad Raza Kasuri's car was fired at in Islamabad, apparently as part of the plan formulated by Mian Muhammad Abbas in execution of the mission given to him by Masood Mahmood. However, Ahmad Raza Kasuri escaped this attempt on his life. Details of this incident will also be mentioned later.

382. Coming to the present incident, Masood Mahmood stated that he was in Multan, along with the Prime Minister, when he was informed by Zulfikar Ali Bhutto on the morning of 11th November, 1974, on the telephone that "Mian Muhammad Abbas has made complete balls of the situation. Instead of Ahmad Raza he has got his father killed". On his return to his headquarters in Islamabad, the witness was informed by his Director Mian Muhammad Abbas that his operation had been successful, but instead of the intended victim his father Nawab Muhammad Ahmad Khan had been murdered at Lahore. The witness was summoned by the Prime Minister, who told him that the actual task had yet to be accomplished. The witness, however, declined to carry out such orders any more, with the result that thereafter threats were held out to him and attempts were made on his life as well as to kidnap his children from the Atchison College, Lahore. Several times his food at the Chamba House Lahore, where he used to stay during his visits to that city, was poisoned, and he discovered that some of his own subordinates seemed to have been won over, since he had seen them lurking at places where they should not have been when he was around.

383. Masood Mahmood asserted at the trial that he or his family had no grudge or motive against the deceased Nawab Muhammad Ahmad Khan or his son Ahmad Raza Kasuri, and that, in fact, his father and the deceased had been great friends, since the witness himself hailed from Kasur.

384. After narrating these and other details of the conspiracy resulting in the murder of Nawab Muhammad Ahmad Khan, Masood Mahmood explained the circumstances

leading to his confessional statement, the correctness of which he re-affirmed at the trial. He stated that he was taken into protective custody in the early hours of the 5th of July, 1977, on the proclamation of Martial Law in Pakistan; that he addressed a letter to the Chief Martial Law Administrator on the 14th of August, 1977, in which he made a clean breast of the misdeeds of the Federal Security Force conducted by him under the orders of the former Prime Minister; that after his interrogation by the Federal Investigation Agency he made a confessional statement before a Magistrate at Islamabad on the 24th of August, 1977; that he was granted pardon by the District Magistrate of Lahore on his application dated the 7th September, 1977; and after the grant of pardon he made a detailed statement under section 164 of the Criminal Procedure Code.

### APPROVER GHULAM HUSSAIN'S TESTIMONY

385. Approver Ghulam Hussain (P.W. 31) deposed at the trial that after his retirement as Naib Subedar from the Army, where he served for 14 years as a commando, he joined the Federal Security Force on the 3rd of December, 1973, in the rank of a Sub-Inspector, from which post he was later promoted to the rank of an Inspector. His paper posting was in Battalion No. 5 stationed at Rawalpindi but an oral order was given by appellant Mian Muhammad Abbas that he would work under him at the Headquarters. In April, 1974, he was directed by Mian Muhammad Abbas to start a Commando Course, and he set up his camp near the barracks of the 4th Battalion in Islamabad. The trainees used to bring their own weapons from their respective battalions, but the ammunition was drawn from the Federal Security Force Armoury at the Headquarters; which was under the charge of Sub-Inspector Fazal Ali (P.W. 24). He accordingly, drew 1500 cartridges of light machine-guns (L. I. G.) sub-machine guns (S. I. G.), besides other ammunition, on the basis of Road Certificate Exh. P.W. 24/7.

386. Ghulam Hussain stated further that in the end of May, 1974, he was summoned by Mian Muhammad Abbas to his office and asked about the methods that he would adopt for kidnapping or murdering a person. He was directed to reduce his answer into writing. He complied with the orders, and Mian Muhammad Abbas kept the paper with him. Two or three weeks later he was again summoned by Mian Muhammad Abbas and asked whether he knew Ahmad Raza Kasuri. On his replying in the negative, Mian Muhammad Abbas ordered him to find out, and for this purpose gave him several addresses where he could possibly contact Ahmad Raza Kasuri; and Head Constable Zaheer was deputed to assist him in this behalf. Mian Muhammad Abbas also placed a jeep and a driver at the disposal of the witness and asked him to use the jeep after changing the number plates. The witness was once again called by Mian Muhammad Abbas in the beginning of August, 1974, and asked about the result of his efforts in identifying and locating Ahmad Raza Kasuri. On hearing from Ghulam Hussain that he had identified Ahmad Raza Kasuri and also located his residence in Islamabad, Mian Muhammad Abbas told him that it would be his duty to remove

Ahmad Raza Kasuri from the path of the Prime Minister, and that it was an order given by Masood Mahmood. The witness understood that by the expression "removal of Mr. Kasuri" Mian Muhammad Abbas meant that he should kill Ahmad Raza Kasuri. The witness expressed his unwillingness to carry out this order, but Mian Muhammad Abbas told him that this murder had to be committed since "Mr. Kasuri was an enemy of Mr. Zulfikar Ali Bhutto". He promised full protection to the witness. He emphasized upon him that it was a secret mission, and since he had been taken into confidence he would have to perform it, otherwise his service as well as his life would be in danger. Ghulam Hussain thereupon agreed to implement the orders.

387. Giving further details, Ghulam Hussain stated that his Director Mian Muhammad Abbas gave him a chit and directed him to obtain a sten-gun, a pistol, two magazines and ammunition from Fazal Ali (P.W. 24), but the latter refused to honor the chit without making an entry in the relevant register. Thereupon the witness reported the matter to Mian Muhammad Abbas, under whose orders Fazal Ali was called to his office and told to issue the arms and ammunition without making any entry in the register, and warned that disobedience of the order would land him in trouble. Thereupon Fazal Ali handed over to the witness a sten-gun with two magazines, a pistol with two magazines and ammunition for both the weapons. The witness gave a receipt to him and took these things to the Commando Camp, but Fazal Ali did not make any entry in the register kept at the Armoury.

388. Ghulam Hussain was again called by Mian Muhammad Abbas to his office on the 10th of August, 1974 and reprimanded for not performing the task assigned to him, although Mian Muhammad Abbas was getting him promoted as Inspector. He told witness that the Director-General Masood Mahmood was unhappy as the Prime Minister had started abusing him because of this procrastination. Mian Muhammad Abbas threatened him that any further inaction on his part might endanger his own life. Ghulam Hussain noticed that during those days Mian Muhammad Abbas had also detailed another team with instructions to do away with the witness in case he failed to perform the task assigned to him, and then proceed to perform it.

389. On the morning of the 24th of August, 1974, Ghulam Hussain established telephonic contact with Ahmad Raza Kasuri at his residence in Islamabad, the telephone number having been supplied to him by Mian Muhammad Abbas. Ghulam Hussain told Ahmad Raza Kasuri that he was a clerk in the office of the Cantonment Board and wanted to see him for redress of his grievances. Ahmad Raza Kasuri advised the witness to meet him at 1-00 p. m. at the gate of the M.N.A. Hostel in Islamabad. The witness reached the M.N.A. Hostel in his blue jeep, accompanied by Head Constable Allah Bakhsh and F. C. Mulazim Hussain, and he saw Ahmad Raza Kasuri sitting in his car and talking to another person standing outside. The witness parked the jeep under a tree and kept watch on Ahmad Raza Kasuri, and found himself in a fix as he did not want to kill a man who had been so sympathetic to him on the telephone. By about 3-00

p. m. he came to a decision not to commit the offence but to save the life of Ahmad Raza Kasuri.

390. He then saw the car of Ahmad Raza Kasuri emerging from the M.N.A. Hostel, and heading towards his residence. Ghulam Hussain directed. Mian Khan driver of the jeep to follow, and ordered Mulazim Hussain who was armed with a sten-gun and two fully loaded magazines, to fire in the air when directed. The witness was himself armed with a pistol. On reaching an intersection in the road he asked the driver to take the jeep to the left and ordered Mulazim Hussain to open fire through the rear window of the jeep. Mulazim Hussain complied with the orders, and when he fired the first burst, Ahmad Raza Kasuri glanced towards the jeep, and sped on. On returning to the Headquarters of the Federal Security Force he was met by Assistant Director Ch. Nazir Ahmad, who taunted him on having failed to hit Ahmad Raza Kasuri from a distance of 30 yards despite his being a Commando. Mian Muhammad Abbas also questioned him about the details of the incident, and reprimanded him in the same terms. He told the witness that his failure to complete the mission had exposed the whole thing, and this had made the Prime Minister very angry. He directed Ghulam Hussain to remain on the job, but to be cautious.

391. A day or two after this incident Ghulam Hussain found out that Ahmad Raza Kasuri had gone out of Rawalpindi, and it was not known when he would return. He conveyed this information to Mian Muhammad Abbas, who directed the witness to return the weapons to the Armoury, and to carry out reconnaissance in order to trace the whereabouts of Ahmad Raza Kasuri, and then to obtain arms from the nearest Battalion after he was able to locate Kasuri. The witness, accordingly, replaced the empties of the seven rounds, which had been fired in the Islamabad incident, with live cartridges from the Commando Camp, and returned the sten-gun and the ammunition to Fazal Ali (P.W. 24), who returned his receipt to him. Thus ended the Islamabad episode.

392. Sometimes later Mian Muhammad Abbas ordered the witness to depute Head Constables Zaheer and Liaquat from the Commando Camp to go to Lahore and locate Ahmad Raza Kasuri. The witness complied with this order. Then in October, 1974, Mian Muhammad Abbas ordered the witness to proceed to Lahore immediately before the Eid, as the Eid was the best occasion to deal with Ahmad Raza Kasuri since on that day he would be meeting his friends and relations. Mian Muhammad Abbas impressed upon the witness that the Prime Minister was abusing Mian Muhammad Abbas as no progress had been made. The witness consequently left for Lahore on the 16th of October, 1974, after having entered his departure in the daily diary of Battalion No. 4 at Rawalpindi. He stayed in Lahore for about 10 days, and after locating the whereabouts of Ahmad Raza he returned to Rawalpindi on the 26th of October, 1974, and again made an entry of his arrival in the daily diary of his Battalion.



393. At Rawalpindi Ghulam Hussain reported to Mian Muhammad Abbas that he had located the whereabouts of Ahmad Raza Kasuri and that his men were watching him. He asked for further orders, whereupon Mian Muhammad Abbas directed him to take the ammunition from the Commando Camp and proceed to Lahore with one of the Commandos, namely, Rana Iftikhar Ahmad appellant. Mian Muhammad Abbas further told the witness that appellant Ghulam Mustafa would provide him a jeep and the necessary arms. He further directed the witness to try to exchange the ammunition of the Commando Camp with some similar ammunition from some other source, so that the ammunition used in the attack could not be connected with the Federal Security Force. In pursuance of these directions Ghulam Hussain took the ammunition from the Commando Camp, and proceeded to Lahore along with appellant Iftikhar Ahmad, after entering their departure in the daily diary of Battalion No. 5. but without showing their destination

394. Ghulam Hussain then deposed that on reaching Lahore he contacted Ghulam Mustafa appellant at the Federal Security Force Headquarters in Shah Jamal, and apprised him that he had been sent by Mian Muhammad Abbas for killing Ahmad Raza Kasuri. Ghulam Mustafa confirmed to the witness that he had already been apprised of his mission by Mian Muhammad Abbas, and that he had received instructions to help the witness. Ghulam Mustafa further told the witness that he had been informed that the mission was to be accomplished by appellant Rana Iftikhar and Arshad Iqbal, After three or four days of his arrival in Lahore, Ghulam Mustafa informed the witness that he had received a telephone call from Mian Muhammad Abbas who was annoyed that no positive steps had been taken by the witness to accomplish the mission, adding that Mian Muhammad Abbas had asked him to push the witness out of the Federal Security Force Headquarters and asked Mini to go and live with Ahmad Raza Kasuri if he could not comply with the orders, as the Prime Minister had been grossly insulting Mian Abbas on that account. Ghulam Mustafa further told the witness that Mian Muhammad Abbas had threatened to have the witness murdered along with Ahmad Raza Kasuri, if the witness did not accomplish the mission. Ghulam Mustafa also told the witness that he had tried to pacify Mian Muhammad Abbas by informing him that Ghulam Hussain was putting in a lot of effort and that he would be able to report compliance of the order very shortly. Finally, Ghulam Mustafa informed the witness that he had already obtained a sten-gun, and that another one would be procured shortly. The following day he informed the witness that he had brought another sten-gun from the Battalion of Amir Badshah Khan (P.W. 20) which was stationed at Walton.

395. The witness then stated that two or three days before the occurrence, while they were going towards Model Town in a jeep without number plates at about 10-00 p.m. they were checked between the canal bridge on the Forozepur Road and the Atomic Energy Centre, by Sardar Abdul Vakil Khan (P.W. 14), who was then Deputy Inspector-General of Police, Lahore. This officer objected to their travelling in the jeep without number plates, and on inquiry was informed by the witness that he was an Inspector in

the Federal Security Force and was proceeding towards Walton to one of its Units. The Deputy Inspector-General then spoke to Mr. Irfan Ahmad Malhi, Director, Federal Security Force on the wireless and then allowed the witness to go. Ghulam Hussain stated that he and appellant Ghulam Mustafa were summoned by Mr. Malhi to his house and apprised about the conversation that had taken place between him and the Deputy Inspector-General, who had ordered him not to permit his men to roam about in a jeep without number plates.

396. Having made all these arrangements with the help of appellant Ghulam Mustafa, the witness, accompanied by appellants Ghulam Mustafa, Iftikhar Abroad and Arshad Iqbal, proceeded in a jeep towards the Model Town residence of Ahmad Raza Kasuri at about 7 or 8 p. m. on the 10th of November, 1974. They spotted the car of Ahmad Raza Kasuri at the junction of Model Town and Ferozepur Road, when it was proceeding towards Ferozepur Road. By the time the witness and the appellants reversed their jeep on the Ferozepur Road, they lost track of Ahmad Raza Kasuri's car. They, accordingly, returned to the Federal Security Force Headquarters in Shah Jamal, from where Ghulam Mustafa rang up telephone No. 353535 installed at the residence of Ahmad Raza Kasuri, and was informed that Kasuri had gone to attend a wedding dinner in Shadman Colony. The witness and his three companions thereupon drove towards Shadman Colony to locate the place where the wedding dinner was being held. At this time the jeep was driven by driver Muhammad Amir (P.W. 19). They saw illuminations in a house situated at about 80 to 90 yards from the roundabout at the junction of Shah Jamal and Shadman Colonies, and they also found a number of cars parked by the side of the road, including the car of Ahmad Raza Kasuri. They then returned to their office in Shah Jamal, held a conference to settle the plan for firing at Kasuri's car. Ghulam Hussain took a pistol with two magazines containing 16 rounds, whereas appellants Arshad Iqbal and Iftikhar Ahmad were given a sten-gun each, fully loaded with two magazines. Arshad Iqbal and Iftikhar Ahmad put on overcoats to hide the sten-guns, and the party then moved towards the chosen spot, that is, the roundabout of Shah Jamal-Shadman intersection which had a shoulder-high hedge around it. The witness posted Arshad Iqbal on the roundabout at a place from where Ahmad Raza Kasuri's car was visible, and he posted Rana Iftikhar Ahmad at another place 7 to 10 feet away so as to face the road branching towards the left of the on-coming traffic from the wedding place.

397. Ghulam Hussain further deposed at the trial that he directed appellant Arshad Iqbal to open fire in the air the moment he saw Ahmad Raza Kasuri's car coming towards the roundabout, and he ordered appellant Iftikhar Ahmad to open fire at the first car which came before him after Arshad Iqbal had fired in the air. He explained that as Arshad Iqbal was facing the wedding place, people assembled under the Shamianas might be hit if Arshad Iqbal fired at the car. He added that the firing in the air would be warning to appellant Iftikhar Ahmad since he himself could not see the car arriving from the side where the wedding was taking place. Having thus posted

appellants Arshad Iqbal and Rana Iftikhar Ahmad at the roundabout, Ghulam Hussain himself started pacing the road which branches off from the road in front of the spot where appellant Iftikhar Ahmad was stationed. He heard the sound of firing at about midnight, followed by two more bursts at short intervals. On hurriedly reaching the intersection he saw a car speeding away towards the canal without headlights, and he realized that this must be the car of Ahmad Raza Kasuri, as it was the first car which had passed by him after the first burst was fired. He presumed that the car had not been hit and that Ahmad Raza Kasuri had switched off the lights in order to save his life. The witness proceeded towards the Tomb of Shah Jamal and was soon joined by appellants Arshad Iqbal and Rana Iftikhar Ahmad. He expressed the opinion that the person driving the car did not appear to have been injured. Arshad Iqbal, however, told him that he had fired in the air after correctly identifying the car, and Rana Iftikhar Ahmad informed him that he had fired at the first car which came before him after Arshad Iqbal had fired in the air, and that he had correctly aimed at the car before opening fire. On reaching the Headquarters of the Federal Security Force They met appellant Ghulam Mustafa and informed him of the occurrence. They also returned the arms to him. On checking the ammunition, it was found that 30 rounds had been fired during the incident. The witness put the remaining rounds of ammunition in a cupboard, and handed over the arms to appellant Ghulam Mustafa with instructions to clean them and return them to the Battalion concerned.

398. Next morning, according to Ghulam Hussain, appellant Ghulam Mustafa rang up the Ichhra Police Station and learnt that Ahmad Raza Kasuri had been fired at, as a result of which his father had been hit and killed. Appellant Ghulam Mustafa tried to contact appellant Mian Muhammad Abbas on telephone at Rawalpindi, but learnt that the latter was away to Peshawar. Thereupon Ghulam Mustafa spoke to Mian Muhammad Abbas at Peshawar in the presence of the witness and gave him the news of the death of the deceased. Mian Muhammad Abbas directed Ghulam Mustafa to ask the witness to return to Rawalpindi.

399. The witness then allowed the other accused persons to go to their homes, with instructions that they should return to Rawalpindi after 8 or 10 days. He himself travelled to Rawalpindi on the 12th of November, 1974, in the car of the Director-General Masood Mahmood which had arrived at the Federal Security Force Headquarters from Multan on its way to Rawalpindi. The car was driven by Manzoor Hussain (P.W. 21). On reaching Rawalpindi the witness contacted Mian Muhammad Abbas at his house, and narrated to him all that had happened, Ghulam Hussain stated that he made it clear to Mian Muhammad Abbas that what he and his companions had done was a result of coercion and undue influence, and that he was not prepared to repeat the attack, On a query from Mian Muhammad Abbas as to whether the witness had left anything incriminating at the spot which might disclose that it was an FSF exploit, the witness informed his Director that the spent ammunition had been left there since it could not be collected because of darkness and standing grass. Mian

Muhammad Abbas told the witness not to bother about the empties, adding that he would himself take care of them. He then directed the witness to go back to the Commando Camp to complete the training and disband the camp.

400. After winding up the Commando Camp, the witness Ghulam Hussain returned to Fazal Ali (P.W. 24) the remaining ammunition, lice as well as spent, on the basis of the road certificate Exh. P.W. 24/9. As the number of rounds were short by 51 empties including the 30 cartridges fired at Lahore and 7 at Islamabad, besides 14 lost during the practice-firing by the Commando trainees, Fazal Ali declined to accept the consignment unless the deficiency was made good. The witness thereupon reported the matter to Mian Muhammad Abbas who asked him to come back to him after three or four days during which period he would be able to make some arrangements. The witness complied with this order, and when he reported to Mian Muhammad Abbas, three or four days later, the latter gave him a brown envelope containing 51 empty cartridges of sten-gun ammunition, after which the witness returned all the rounds of ammunition to Fazal Ali.

401. Ghulam Hussain then stated that he did not get the entry of his return from Lahore to Rawalpindi incorporated in the daily diary of the Battalion concerned for 8 or 10 days, as he had been so ordered by Mian Muhammad Abbas. In accordance with these directions he also had an entry recorded showing his departure for Peshawar on the 22nd of November 1974, and a return entry on the 29th of November 1974, although he never made tar journey to Peshawar and remained throughout in Rawalpindi. Similarly, on instructions from Mian Muhammad Abbas the witness claimed his travelling and daily allowance for Karachi for the months of October and November 1974, and submitted his TA/DA Bill accordingly, and the same was scrutinized by Mian Muhammad Abbas to ensure that the witness had not shown his presence at Lahore during the days of the occurrence, and the bill was then passed on by Mian Muhammad Abbas to the Accountant for finalization.

402. It appears that the approver Ghulam Hussain was arrested by the Federal Investigation Agency on the 27th of July 1977, and made a confessional statement before a Magistrate on the 11th of August 1977. He applied for the grant of pardon on the 13th of August 1977, which request was allowed by the District Magistrate of Lahore on the 21st of August 1977, and Ghulam Hussain's statement as an approver was recorded on that very day. The witness concluded his statement in the High Court by asserting that the firing at Islamabad and at Lahore at Ahmad Raza Kasuri had been made due to pressure and coercion exercised by Mian Muhammad Abbas, and that he himself had no animosity with Ahmad Raza Kasuri nor did he know him.

#### **TEST FOR APPRECIATING EVIDENCE OF AN APPROVER/ACCOMPLICE**

403. Before embarking upon a detailed appraisal of the evidence of these two witnesses, it would be useful to state the test which ought to be applied for determining whether a witness is an accomplice, and the principles governing the appraisal of the evidence of such witnesses.

### WHO IS AN ACCOMPLICE?

404. First, as to who is an accomplice. Mr. Yahya Bakhtiar submitted that the term is wide enough to include all persons who fall in the categories of "accessories before the fact" and "accessories after the fact", as they were in one way or the other connected with the commission of the crime along with the main offender. He next submitted that, in any case, in the offence of conspiracy an accessory after the fact was very much an accomplice. If subsequent conduct of the main offender is to be "taken into account so as to virtually form a part of the offence itself. Finally, he submitted that in law there was no bar to the trial under section 201 of the Pakistan Penal Code that an accessory after the fact along with main offender, and for this reason a person falling in this category would clearly be an accomplice.

405. On behalf of the prosecution, Mr. Batalvi submitted that there was authority for the view that an accessory after the fact may or may not be an accomplice and that the true test for determining whether a person was an accomplice or not was to ascertain whether he was directly or indirectly concerned with, or privy to, the offence which was under trial; and that he must be so placed that he could be tried jointly along with the accused, for the same offence. He contended that ordinarily the main offender was not tried under section 201 of the Pakistan Penal Code for concealment or destruction of the evidence of the crime, and, therefore, there could hardly be any question of the joint trial of the main offender along with an accomplice, who could be described only as an accessory after the fact.

406. The learned counsel on both sides have cited at the Bar an exceptionally large number of cases in order to bring out the true meaning of the term "accomplice", namely: *Bagu and others v. Emperor*<sup>236</sup>, *Mahadeo v. The King*<sup>237</sup>, *Phullu and another v. Emperor*<sup>238</sup>, *Govinda Balaji Sonar v. Emperor*<sup>239</sup>, *Narain Chandra Biswas and others v. Emperor*<sup>240</sup>, *Nga Pauk v. The King*<sup>241</sup>, *In re: Addanki Venkadu*<sup>242</sup>, *In re: S. A. Sattar Khan and others*<sup>243</sup>, *Kr. Shyam Kumar Singh and another v. Emperor*<sup>244</sup>, *Jagannath v. Emperor*<sup>245</sup>,

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<sup>236</sup> AIR 1925 P C 130

<sup>237</sup> AIR 1936 P C 242

<sup>238</sup> AIR 1936 Lah, 731

<sup>239</sup> AIR 1936 Nag. 245

<sup>240</sup> AIR 1936 Cal. 101

<sup>241</sup> AIR 1937 Rang. 513

<sup>242</sup> AIR 1939 Mad. 266

<sup>243</sup> AIR 1939 Mad. 283

<sup>244</sup> AIR 1941 Oudh 130

*Emperor v. Percy Henry Burn*<sup>246</sup>, *Chudo son of Ramadhar and another v. Emperor*,<sup>247</sup> *Ismail Hassan Ali v. Emperor*<sup>248</sup>, *Nehti Marulal and others v. Emperor*<sup>249</sup>, *Narayan and others v. State*<sup>250</sup>, *Anna and others v. State of Hyderabad*<sup>251</sup>, *Bihari Mandal v. State*<sup>252</sup>, *Crown v. Ghulam Rasul and others*<sup>253</sup>, *The State v. Jamalana and others*<sup>254</sup>, *Vemireddy Satyanarayan Reddy and others v. State of Hyderabad*<sup>255</sup>, *Ashutosh Roy v. The State*<sup>256</sup>, *Balbir Singh v. The State*<sup>257</sup>, *State v. Bashmber Dayal*<sup>258</sup>, *Sykes and Director of Public Prosecutions*<sup>259</sup>, *Abdul Monsur Ahmad and another v. The State*<sup>260</sup>, *Musafar v. The Crown*<sup>261</sup>, *Ramaswami Gounden v. Emperor*<sup>262</sup>, *The King v. Levy*<sup>263</sup> and *Baloo Singh v. Emperor*.<sup>264</sup>

407. A perusal of these judgments makes it clear that the basic definition of the term "accomplice" in all these cases is essentially the same. No doubt in some of the cases the expressions "accessory before the fact", and "accessory after the fact" have been used, and opinions have been expressed whether the persons falling in these categories are to be regarded as accomplices or not; and although these expressions are occasionally used by Judges and lawyers and text book writers in this part of the world, yet the fact remains that they have not been used and defined in our law. Our Penal Code has attempted to define an abettor in a way so as to include an accessory before the fact; and similarly section 201 of the Code deals with the category of accessories after the fact, without using this expression as such. I would, therefore, prefer to avoid using these terms.

408. The position which emerges from an examination of the cases cited at the Bar, and with which I respectfully agree, is that the term "accomplice" has not been defined in the Evidence Act, and should, therefore, be presumed to have been used in its ordinary sense. However, some indication of the sense in which our criminal law uses this term is available in section 337 of the Criminal Procedure Code, which bears the

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<sup>245</sup> AIR 1942 Oudh 221

<sup>246</sup> 41 C 268

<sup>247</sup> AIR 1945 Nag. 143

<sup>248</sup> AIR 1947 Lab. 220

<sup>249</sup> AIR 1940 Pat. 289

<sup>250</sup> AIR 1953 Hyd. 161

<sup>251</sup> AIR 1956 Hyd. 99

<sup>252</sup> AIR 1957 Orissa 260

<sup>253</sup> PLD 1950 Lab. 129

<sup>254</sup> PLD 1959 Lab, 442

<sup>255</sup> PLD 1956 SC (Ind.) 280

<sup>256</sup> AIR 1959 Orissa 159

<sup>257</sup> AIR 1959 Pb. 332

<sup>258</sup> AIR 1953 Pepsu 82

<sup>259</sup> 1962 AC 528

<sup>260</sup> PLD 1961 Dacca 753

<sup>261</sup> PLD 1956 F C 140

<sup>262</sup> ILR 27 Mad. 271

<sup>263</sup> I KB 158

<sup>264</sup> AIR 1936 Oudh 156

marginal head "tender of pardon to accomplice" The body of the section lays down that a pardon may be tendered 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 a 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". It will be seen that, without attempting to give a formal definition of the term "accomplice", this section has spelt out the elements necessary for treating a person as an accomplice for the purpose of tendering a pardon to him on condition of his making a full and true disclosure of all the circumstances within his knowledge relative to the offence and the offenders involved therein. The section clearly indicates that an accomplice must be a conscious participator in the crime, about which he is required to give evidence.

409. A further indication as to the meaning of the term "accomplice" may be gleaned from the provisions contained in section 201 of the Pakistan Penal Code; which prescribes punishment for persons generally described as "accessories after the fact". This section lays down that:-

"Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believe to be false ....."

This section also makes it an essential ingredient of the offence that the person concerned should either have knowledge or reason to believe that an offence has been committed, and then he takes any steps to do away with the evidence with the intention of screening the offender from legal punishment or with that intention gives information which he knows or believes to be false. In other words, the presence of guilty intention and knowledge has been made an essential ingredient of the offence made punishable under section 201 of the Pakistan Penal Code.

410. An accomplice, therefore, means a guilty associate or partner in crime, or, who in some way or the other, whether before, during or after the commission of the offence, is consciously connected with the offence question, or who makes admissions of facts showing that he had a conscious hand in the offence. Where a witness is not concerned with the commission of the crime for which the accused is charged, he cannot be said to be an accomplice in the crime. In other words, an accomplice is a *pariceps criminis*, who is consciously so connected with the criminal act done by hi confederate, that he on account of the presence of the necessary *mens rea*, and his participation in the crime in some way or the other, can be tried along with that confederate actually perpetrating

the crime. A witness who could not be so indicted on account of the absence of *mens rea* cannot be held to be an accomplice.

411. Whether a person is or is not an accomplice depends on the facts of each particular case, considered in connection with the nature of the crime. The burden of showing that a witness is an accomplice lies ordinarily upon the party alleging it, namely, the accused, though it is certainly the duty of the prosecution to bring all relevant facts having a bearing on this aspect of the matter to the notice of the Court.

412. Under section 133 of the Evidence Act an accomplice is a competent witness, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. However, this section is to be read along with illustration (b) to section 114 of the same Act, both being parts of the same subject. In view of the presumption mentioned in this illustration, namely, that the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars, the Courts have adopted a rule of caution, which has almost acquired the status of a rule of law, that as the evidence of an accomplice is tainted, it generally requires corroboration. The rule being essentially a rule of caution, the meaning of the term "accomplice" must not be unnecessarily enlarged so as to exclude, or discredit, the evidence of persons who may be in the best position to disclose facts relevant to the crime, and yet not be consciously concerned in the crime in such a manner that they could be indicted jointly with the main accused. Section 114 of the Evidence Act itself also contemplates a situation where evidence of accomplices can be accepted without insisting on corroboration, as, for instance, where their accounts tally without there being the possibility of a previous concert between them as to their statements.

413. In these circumstances, I consider that it leads to confusion of thought to treat a witness as "practically an accomplice", or "no better than an accomplice", even though he could not be indicted jointly with the main accused, on account of his not being consciously concerned in the crime perpetrated by the actual culprits. If a witness is not an accomplice in the sense indicated above, namely, on account of the absence of *mens rea* then the real question is not of requiring corroboration of his evidence, but of the degree of credit to be attached to his testimony, depending on all the facts and circumstances of the particular case. In other words, he has then to be judged as any other witness, without introducing an artificial requirement of corroboration of his evidence by applying the rule contained in illustration (b) to section 114 of the Evidence Act.

414. It is also to be noticed that where a witness was not an accomplice in the crime for which the accused was charged, inasmuch as he had not been concerned in the perpetration of the conspiracy and murder itself, but had consciously done some acts which could bring him within the mischief of section 201 of the Pakistan Penal Code by way of concealment of evidence, etc. to shield the offender, he could not be tried for



offences of conspiracy and murder, as the offence falling under section 201 is independent of the, offence of murder. There is no doubt a difference of opinion between the various High Courts in the Sub-Continent on the question whether a person charged only under section 201 of the Penal Code could be tried jointly along with the offenders charged for the main offences of conspiracy and murder; but assuming that a joint trial could be held the question would always remain whether the person charged under section 201 of the Penal Code had the necessary mens rea, as specified in that section.

### PRINCIPLES GOVERNING THE APPRAISAL OF APPROVER'S EVIDENCE

415. Now I turn to the principles governing the appraisal of the evidence of witnesses falling in the category of accomplices or approvers. It has already been stated that although under section 133 of the Evidence Act an accomplice is a competent witness, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, yet in view of the presumption mentioned in illustration (b) to section 114 of the same Act, namely, that the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars the Courts have adopted a rule of caution which has almost acquired the status of a rule of law, that as the evidence of an accomplice is tainted, it generally requires corroboration. Both sides are agreed on this proposition, as well as on the further propositions that the corroborative evidence, need not by itself be sufficient for conviction; nor it need concern each and every detail of the approver's evidence; yet it must be corroboration in respect of material particulars of the crime, and should connect, or tend to connect, the accused with the crime. There is also no difference between them on the point that corroborative evidence is some additional evidence rendering it probable that the story of the approver is true, and it is reasonably safe to act upon it.

### THE PRINCIPLE OF DOUBLE TEST

416. However, Mr. Yahya Bakhtiar and Mr. Batalvi are in violent disagreement as to the application of what has been described in some reported judgments as the "double test" for a proper assessment of the evidence of an accomplice. Relying upon the observations of the Indian Supreme Court in the case of *Sarwan Singh Rattan Singh v. State of Punjab*<sup>265</sup>, Mr. Yahya Bakhtiar submitted that an approver's evidence has to satisfy a double test. In the first place, his evidence must show that he is a reliable witness, and that is a test which is common to all witnesses; and if this test is satisfied the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration. The learned counsel submitted that this rule was reiterated by the same Court in *Lachhi Ram v. State of Punjab*<sup>266</sup>, and also adopted by the

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<sup>265</sup> AIR 1957 SC 637

<sup>266</sup> AIR 1967 SC 792

Pakistan Supreme Court in *Dr. Muhammad Bashir v. The State*<sup>267</sup>. Mr. Yahya Bakhtiar also sought support for this proposition from several other cases reported as *Balmokand v. Emperor*<sup>268</sup>, *Chatru Malik v. Emperor*<sup>269</sup>, *State of Bihar v. Srilal Keirlwal*<sup>270</sup>, *Sharaf Shah Khan v. State of Andhra Pradesh*<sup>271</sup>, *Prananath v. Banamali*<sup>272</sup>, *Piara Singh v. State of Punjab*<sup>273</sup> and *Babali v. State of Orissa*<sup>274</sup>.

417. Mr. Ijaz Hussain Batalvi, on the other hand, submitted that the theory of double test in relation to the appreciation of an approver's evidence was misleading, as all that the law required was that such evidence should not be believed unless corroborated in material particulars, but there was no requirement for the application of a so-called double test, as in the very nature of things, an accomplice was a self-confessed criminal and a man of depraved character, and it would, therefore, be unrealistic to try to ascertain that he was, indeed, a reliable witness. In support of these submissions Mr. Batalvi referred us to *Major E. G. Barsay v. State of Bombay*<sup>275</sup>. in which, according to him, the theory of double test previously propounded by the Indian Supreme Court was sought to be explained away.

418. It is true that the phrase "double test" appears to have been used for the first time by the learned Judges of the Indian Supreme Court in the case of Sarwan Singh Rattan Singh. While discussing the principles applying to the appraisal of the evidence of an accomplice, the learned Judges observed that;

"But it must never be forgotten that before the Court reaches the stage of considering the question of corroboration and its adequacy or otherwise, the first initial and essential question to consider is whether even as an accomplice the approver is a reliable witness. If the answer to this question is against the approver then there is an end of the matter, and no question as to whether his evidence is corroborated or not falls to be considered. In other words, the appreciation of an approver's evidence has to satisfy a double test. His evidence must show that he is a reliable witness and that is a test which is common to all witnesses. If this test is satisfied the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration. This test is special to the cases of weak or tainted evidence like that of the approver."

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<sup>267</sup> PLD 1967 SC 447

<sup>268</sup> AIR 1915 Lah. 16

<sup>269</sup> AIR 1928 Lah. 681

<sup>270</sup> AIR 1960 Pat. 459

<sup>271</sup> AIR 1963 Andh. Pra. 314

<sup>272</sup> AIR 1958 Orissa 228

<sup>273</sup> AIR 1969 SC 961

<sup>274</sup> AIR 1974 SC 775

<sup>275</sup> AIR 1961 SC 1762

419. In the case relied upon by Mr. Ijaz Hussain Batalvi, namely, that of Major E. G. Barsay a Division Bench of the Supreme Court, while referring to the earlier cast observed that:-

"This Court could not have intended to lay down that the evidence of an approver and the corroborative pieces of evidence should be treated in two different compartments, that is to say, the Court shall have first to consider the evidence of the approver de hors the corroborative pieces of evidence and reject it if it comes to the conclusion that his evidence is unreliable; but if it comes to the conclusion that it is reliable then it will have to consider whether that evidence is corroborated by any other evidence. This Court did not lay down any such proposition. In that case it happened that the evidence of the approver was so thoroughly discrepant that the Court thought that he was a wholly unreliable witness. But in most of the cases they said two aspects would be so interconnected that it would not be possible to give a separate treatment, for as often as not the reliability of an approver's evidence, though not exclusively, would mostly depend upon the corroborative support it derives from. other unimpeachable pieces of evidence."

420. This matter again came up before that Court in the case of Lachhi Ram, and, without referring to the case of Major E. G. Barsay, the learned Judges reiterated the theory of double test propounded in the case of Sarwan Singh Rattan Singh. The same rule was applied in the subsequent cases of Piara Singh and Babuli Narain. In several cases decided by the Indian High Courts, this rule was naturally followed.

421. It is, however, interesting to observe that although the specific expression "double test" seems to have been used for the first time in the case of Sarwan Singh Rattan Singh mentioned above, yet in essence the rule was enunciated, more than 60 years ago, by the learned Judges of the Lahore High Court in the case of *Balmokand v. Emperor*, when they observed that in regard to an approver the questions that arise are: "Is his story substantially true and is it materially corroborated? Apart from corroboration by independent evidence, does it contain in itself intrinsic indication of its truth". Again in *Chatru Malak v. Emperor* it was observed that in regard to an approver the questions for decision are: firstly whether the approver's story is acceptable as substantially true as a whole; and secondly, whether there is other sound evidence corroborating it in respect of each of the accused.

422. More recently in the case of Dr. Muhammad Bashir, this Court has expressed the rule as under;

"As a rule of prudence, which has almost hardened into a rule of law, it is dangerous to act on the uncorroborated testimony of an approver, who is a self-confessed criminal, having betrayed his former associates tunder the temptation

of saving his own skin. Suffering from this stigma and marked depravity of character, an approver's evidence cannot be viewed without natural reaction of distrust and incredulity. His evidence must first be tested on its basic probabilities or improbabilities like the evidence of any other witness, and must be tested strictly so to his case, because it is the statement of a person of suspicious credentials. His evidence needs corroboration for the simple reason that it cannot be accepted without mental reservation and distrust, and it must, therefore, gather support from other sources to induce faith in its veracity. The corroboration, which is, thus, needed, must confirm in material particulars not only that the crime has been, committed, as alleged by the approver, but also that the accused concerned has, or have, committed it. The type of corroboration needed must differ with different cases, but such corroboration, although it is not required to be adequate and sufficient by itself to prove the charge, must tend to show a strong link between the crime and its perpetrators, as alleged by the approver. It often happens that an approver, who has polluted his own hands in the crime, is ready with an imaginative or tutored story to explain the crime owned by him, and substitutes an innocent person to shield the really guilty for his own ulterior interest. Basically, therefore, the intrinsic worth of the approver's testimony must first be judged. Before the Court reaches the stage of considering the question of corroboration the first and essential question to consider is whether even as an accomplice the approver is a reliable witness. If the answer to this question is against the approver, then there is an end of the matter. An approver's evidence has to satisfy a double test. His evidence must first show that he is a reliable witness. If this test is satisfied, then the second test has to be applied, namely, as to whether it has received sufficient corroboration. The latter is a special test, which has to be applied in the case of tainted evidence like that of an approver."

423. Having stated the rule thus, the learned Judges proceeded to examine the evidence of the approver as well as the corroborative evidence relied upon by the prosecution, and came to the conclusion that "The evidence of the approver is wholly unworthy of credit, not only because of its legal infirmity as the accomplice's testimony, but also because of its inherent improbabilities. The corroborative pieces of evidence, which have been used in support of it, as described above, individually or collectively, do not at all, to my mind, serve to advance the approver's testimony and to strengthen the prosecution case in any manner."

424. I am in respectful agreement with the rule laid down in *Dr. Muhammad Bashir's case* by four learned Judges of this Court, and only wish to add that when the qualifying phrase "a reliable witness" is used in relation to an accomplice, the reference obviously is not to his moral character and dependability, as the Courts are well aware that he is a self-confessed criminal, having betrayed his former associates under the temptation of saving his own skin; and it is precisely for this reason that special care has

to be taken in the matter of the appraisal of his evidence. The intention, therefore, underlying the first test is to determine Whether his evidence is probable and natural, in the circumstances of the case, with the result that he can be treated as a reliable witness, and his evidence safely acted upon, if the requisite corroboration is forthcoming; or whether it suffers from such infirmities and improbabilities that it can be said to be lacking in intrinsic worth. In the latter case, the question of seeking corroboration would hardly arise.

#### APPRAISAL OF MASOOD MAHMOOD'S EVIDENCE

425. In the light of the principles stated above, and the detailed. submissions made in this behalf by the learned counsel for both sides I now proceed to consider whether the evidence of Masood Mahmood, former Director-General of the Federal Security Force, is such as can be accepted and safely acted upon, provided the requisite corroboration is available on the record; or is it of such an unreliable and improbable nature lacking intrinsic worth, that the question of seeking corroboration could hardly arise.

426. Even though Masood Mahmood, in his capacity as an approver, is a self-confessed criminal, having betrayed his former associates under the temptation of saving his own skin, and can thus be said to be suffering from a marked depravity of character, yet certain essential facts about his service career and the special position he held under appellant Zulfikar Ali Bhutto need to be stated, so that the value to be attached to his testimony can be assessed in its proper perspective. He joined the Police Service of Pakistan (P. S. P.) in September 1948, and after completing his training he served both in East and West Pakistan as Superintendent of Police and later as Deputy Inspector-General. In 1969 he was selected as Deputy Secretary-General of CENTO with Headquarters at Ankara. On returning to Pakistan in September 1970, he was posted as Deputy Secretary to the Federal Government in the Ministry of Defence, and was later promoted to the post of Joint Secretary and Additional Secretary in the same Ministry. From this last post he was transferred to the post of Managing Director of the Board of Trustees of Group Insurance and Benevolent Funds in the Establishment Division of the Government of Pakistan. He regarded this as a "punishment post", even though it was in Grade 21, that is, equivalent to the post of an Additional Secretary to the Government of Pakistan. The reasons why he regarded it as a punishment post were stated by him to be the past history of the post and the amount of work required to be done by its incumbent; but one can perhaps take judicial notice also of the fact that an officer of Grade 21 would regard this appointment as a punishment post for the reason that it lacked power and patronage. Masood Mahmood has further asserted that the then Establishment Secretary Mr. Vaqar Ahmad was not kindly disposed towards him, apparently because of his friendship with another senior officer, namely, Mr. Qamar-ul-Islam. Whatever be the reasons for Masood Mahmood's transfer to this post, and his reasons for regarding it as a punishment post, it does appear that he was unhappy at his transfer from the post of Additional Secretary in the Ministry of Defence.

427. It was at this juncture in his career that he was selected by the then Prime Minister Zulfikar Ali Bhutto to head the Federal Security Force as its Director-General. There has been considerable cross-examination of Masood Mahmood, on behalf of appellant Zulfikar Ali Bhutto, to establish that Masood Mahmood had tried very hard to obtain this coveted job by approaching the Prime Minister through Mr. Qamar-ul-Islam (at present serving as Ambassador abroad), Mr. Aziz Ahmad (then Minister of State for Defence), Abdul Hafeez Pirzada (then a Federal Minister), and perhaps also through Begum Nusrat Bhutto with whom contact was supposed to have been established by Mrs. Masood Mahmood. It appears that this line of cross-examination was adopted to negative an assertion made by Masood Mahmood in his examination-in-chief that he was advised by the Establishment Secretary as well as by the Prime Minister's Chief Security Officer (Saeed Ahmad Khan P.W. 3) and the latter's Assistant (the late Abdul Hameed Bajwa), not to refuse this appointment, as such refusal might be harmful for his service career and might also endanger his life. During the course of his oral address in this Court appellant Zulfikar Ali Bhutto asserted that he had selected Masood Mahmood for the post of Director-General of the Federal Security Force in view of his good service record as an efficient and competent police officer. This assertion was made by the appellant in spite, of the fact that on his behalf questions had been asked in cross-examination to discredit Masood Mahmood by alleging that he was responsible for firing on students during the language riots in Dacca (in East Pakistan) when he was Additional Superintendent of Police; that he was responsible for maltreating the wife of one Commander Ebrat of the Pakistan Navy when he was Superintendent of Police in Karachi; and that he had acquired the reputation of being a conspirator and an instigator. It seems to me that this kind of acrimonious cross-examination cannot derogate from the fact that Masood Mahmood was selected by appellant Zulfikar Ali Bhutto for an important assignment, and that he continued to enjoy the confidence of the former Prime Minister from the date he took over this assignment on the 23rd April 1974, to the date of the proclamation of Martial Law, namely, the 5th of July 1977. Whether the selection was made by the Prime Minister on the basis of the good service record of Masood Mahmood, or on the basis of recommendations made by any of the persons mentioned above, Masood Mahmood did, indeed, become an important official in the Federal Government enjoying full confidence of the Prime Minister, and being in constant and direct touch with him. It is not denied by the defence that he was, indeed, present at most places in Pakistan wherever the Prime Minister went on tour; and that he also remained present in the premises of the National Assembly whenever the Prime Minister was attending one of the sessions or was otherwise working in his chambers there. It is also established on the record that Masood Mahmood had been provided with a green line telephone meant for senior officials of the Federal Government, to enable direct contact with each other as well as with the Prime Minister.

428. The defence also brought out several facts to show that Masood Mahmood was given a favorable treatment by the Prime Minister, throughout his tenure of office as Director-General of the Federal Security Force. He was allowed to go abroad several times on official business as well as for medical treatment, and the expenses of his wife were also paid by the Government. The Government also paid for the purchase of very expensive equipment containing a combination of eye glasses and a hearing aid, consequent upon a mild stroke which he suffered in 1976 while being present in Ziarat, in the Baluchistan Province, during one of the tours of the Prime Minister. It was also brought out that he frequently stayed in Five Stars Luxury Hotels during his tours in Pakistan and abroad, and that in Pakistan he did not pay the full hotel charges, but apparently no notice of this dereliction was taken by the Government.

429. All these facts go to show that up to the time of the overthrow of the former Prime Minister by the Martial Law regime, Masood Mahmood continued to enjoy a special position in the Federal Government, in spite of the assertions made by him at the trial that he suspected that after the escape of Ahmad Raza Kasuri from assassination at Lahore on the 11th of November 1974, attempts were made to poison his food during his stay at Chamba House, Lahore or to kidnap his children from the Aitcheson College, Lahore. The question, therefore, is whether Masood Mahmood has now concocted the whole story about the alleged conspiracy to kill Ahmad Raza Kasuri under some extraneous pressure brought to bear upon him since the proclamation of Martial Law in Pakistan.

### **CRITICISM OF MASOOD MAHMOOD AND HIS EVIDENCE**

430. It was submitted by Mr. Yahya Bakhtiar, learned counsel for Zulfikar Ali Bhutto, that Masood Mahmood had deposed falsely against the former Prime Minister on account of pressure brought to bear upon him by the Martial Law authorities, who had taken Masood Mahmood into protective custody, even though he was neither a Government Minister nor a political leader of the Opposition; that Masood Mahmood was the only civilian official taken into such custody during which he was interrogated by several teams of military officers appointed by the Martial Law regime to inquire into the affairs of the Federal Security Force; and that he was obliged to implicate Zulfikar Ali Bhutto falsely when he was brought under pressure on disclosure of allegations made by certain officials of the Federal Security Force, including appellant Ghulam Mustafa, that the Federal Security Force had arranged through a paid agent, named Riaz, to explode a bomb at the Lahore Railway Station in March 1975, on the occasion of the arrival of the Chief of the Tehrik-e-Istaqlal Party, namely, Air Marshal (Retd.) Asghar Khan, and that Masood Mahmood had been instrumental in saving the aforesaid Riaz from prosecution even though he had been caught red-handed at the spot. The learned counsel further contended that this particular case was still pending, and there might be other cases as well regarding alleged misdeeds of the Federal Security Force, involving its Director-General Masood Mahmood, who was, therefore,

under compulsion to save himself in those cases as well. Mr. Yahya Bakhtiar next submitted that there was evidence to show that a cousin and brother-in-law of Masood Mahmood, known by the name of Seth Abid, had absconded from Pakistan during the time of appellant Zulfikar Ali Bhutto, as certain serious cases of smuggling etc., had been registered against him, but he reappeared in Pakistan in September 1977, and had re-established himself in business, thus showing that the Martial Law authorities had offered Seth Abid's freedom as an inducement to Masood Mahmood. He finally contended, in this behalf, that Masood Mahmood had yet not been released from custody even though he had already given evidence during the trial of this case as an approver, and this circumstance tended to show that Masood Mahmood continued to be under the influence and pressure of the Martial Law authorities even to this day. The learned counsel also made a grievance of the fact that Masood Mahmood had not yet been dismissed from service, in spite of being a self-confessed conspirator and a murderer, and still continued to be in service although under suspension, with prospects of full re-instatement.

431. It is true that Masood Mahmood was, indeed, taken into custody by the Martial Law authorities on the 5th of July, 1977, but it is not correct to say that he was the only civilian official who was detained in this manner. It has come out in evidence, and I think the Court can also take judicial notice of the fact, that certain other police officers like Rao Abdul Rashid, former Inspector-General of the Punjab and later a Special Security Assistant or Secretary to the former Prime Minister, as well as the former Director of Intelligence Bureau (Mr. Muhammad Akram Shaikh), Saeed Ahmad Khan, Chief Security Officer to the Prime Minister, and possibly the former Establishment Secretary Mr. Vaqar Ahmad were also similarly detained. There may be some other officials also in this category, but the names I have just mentioned, frequently cropped up during the arguments in this Court. It, therefore, appears to me that no special inference can be drawn from the mere fact that Masood Mahmood was taken into custody on the proclamation of Martial Law.

432. From the testimony of Masood Mahmood, as well as the questions asked from him in cross-examination on behalf of Zulfikar Ali Bhutto and the confessions and statements made during the trial by the confessing accused before and during the trial, and a previous statement made by appellant Mian Muhammad Abbas before an inquiry team set up by the Martial Law authorities, and brought by him on the record as Exh. D. W. 1/1 through Muhammad Amin (D. W. 1), it does appear that the Federal.

Security Force, operating under Masood Mahmood, was suspected of being involved in various illegal episodes; and accordingly it is possible that the Martial Law authorities may have set up teams to interrogate Masood Mahmood and other officials of the Federal Security Force in this connection. In fact, the submissions made by Mr. Yahya Bakhtiar himself go to show that there were, indeed, allegations of illegal activities on the part of the Federal Security Force, one such incident being the explosion of a bomb



at Lahore Railway Station as mentioned above. In these circumstances I am not persuaded that the detention and interrogation of Masood Mahmood in connection with these allegations would necessarily lead to the inference that he had been pressurized to give false evidence in the present case so as to implicate the former Prime Minister.

433. Masood Mahmood admitted that Seth Abid was, indeed, his cousin and also his brother-in-law, being married to his step-sister, but he denied the suggestion that this man had been permitted by the Martial Law authorities to return to Pakistan and saved from prosecution for offences of smuggling etc. on Masood Mahmood agreeing to give false evidence against Zulfikar Ali Bhutto. In fact, Masood Mahmood asserted that he had not at all met Seth Abid since his return to Pakistan, and that he had learnt of his return only from the Press. I do not find any material on the record to show that Seth Abid had any meeting with Masood Mahmood during the latter's detention, nor am I persuaded that Masood Mahmood, who was so closely associated with Zulfikar Ali Bhutto during his tenure of office, would falsely implicate the former Prime Minister in the offence of conspiracy to murder on the consideration that his cousin and brother in law way be saved from prosecution for offences of smuggling etc. Mr. Ijaz Hussain Batalvi was perhaps right in saying that if one is looking for any inducement having been offered to Masood Mahmood, it was the pardon itself granted to Masood Mahmood from prosecution as a co-conspirator in this case.

434. The reasons for the continued detention of Masood Mahmood do not appear on the record, but from the facts elicited by the defence, and, in fact, made use of by Mr. Yahya Bakhtiar himself, it would appear that Masood Mahmood may yet be facing interrogation, and possible prosecution, in other matters pertaining to the Federal Security Force. In the circumstances I do not think that any conclusion can be drawn as to the falsity of his evidence in this trial simply for the reason that he continues to be in detention.

#### **SPECIAL POSITION ENJOYED BY MASOOD MAHMOOD UNDER ZULFIKAR ALI BHUTTO**

435. Considering the fact that Masood Mahmood enjoyed a special position under Zulfikar Ali Bhutto, that he was in close and constant touch with him throughout his tenure as Director-General of the Federal Security Force from 1974 to 1977, that he was shown all kinds of favors and considerations by being sent abroad for official visits and medical treatment, that he was not the only civilian official taken into custody on the proclamation of Martial Law, and that during his long career in the police service of Pakistan he had held important positions involving assumption of responsibility and exercise of authority, I find it difficult to hold that Masood Mahmood has become an instrument in the hands of the Martial Law authorities to deliberately and falsely concoct the story he has narrated a such length at the trial. A further significant fact

which strengthens me in this conclusion is that even if he had any reason to falsely implicate the former Prime Minister, there was no reason for the Martial Law authorities, or for Masood Mahmood himself, to falsely assign an important operational role in this conspiracy to Mian Muhammad Abbas, who was then functioning as one of the Directors of the Federal Security Force, in charge of Operations and Intelligence. Although an attempt was made on behalf of Mian Muhammad Abbas to show that there was some friction between him and Masood Mahmood over certain official matters concerning the administration of the Federal Security Force, yet nothing tangible emerged; and on the contrary it transpired that, although re-employed after superannuation by Masood Mahmood's predecessor Malik Haq Nawaz Khan Tiwana, Mian Muhammad Abbas was continued in service, and, in fact, promoted to the rank of Director on a recommendation made by Masood Mahmood, and at one stage even a special cash award was given to him for his good work. Mian Muhammad Abbas himself has complained that Masood Mahmood refused to accept his resignation from the Force, which could not have been the case if Masood Mahmood was ill disposed towards him.

#### SECTION OF INTRINSIC WORTH OF MASOOD MAHAOOD'S EVIDENCE

436. Let me now examine whether the story narrated by Masood Mahmood as to the mission assigned to him by appellant Zulfikar Ali Bhutto regarding Ahmad Raza Kasuri is inherently improbable and unnatural, and thus devoid of intrinsic worth. Mr. Yahya Bakhtiar contended that, in fact, the prosecution had given to Masood Mahmood "a role without a role", as the only thing he was supposed to do was to convey a message of the Prime Minister to Mian Muhammad Abbas that he wanted the dead body of Ahmad Raza Kasuri or his body bandaged all over, and to tell Mian Muhammad Abbas to get on with the job which had already been assigned to him by Masood Mahmood's predecessor Malik Haq Nawaz Tiwana. He submitted that such a message could easily have been conveyed directly by the Prime Minister to Mian Muhammad Abbas. The learned counsel further submitted that Masood Mahmood's assertion about the circumstances in which he was compelled or pressurized to accept the post of Director-General of the Federal Security Force was not at all plausible, as it was, in fact, a case of mere transfer from one post to another under the Federal Government, and there was hardly any need for the Establishment Secretary or the Chief Security Officer to the Prime Minister to use the kind of pressure tactics attributed to them by Masood Mahmood; that, in any case, up to June, 1974, the Prime Minister did not ask him to do anything unlawful; that it is also unnatural that while at the time the appellant talked to him about the assassination of Ahmad Raza Kasuri, Masood Mahmood was shocked and protested in the name of God and conscience, but later at Quetta, in the month of July, 1974, he adopted an altogether different tone when giving directions to M. R. Welch to take care of Ahmad Raza Kasuri during the latter's visit to Quetta; that it cannot be believed that after the incident resulting in the present murder, Masood Mahmood picked up courage to tell the Prime Minister that he would not carry

out any such mission in future, and yet he continued as Director-General of the Federal Security Force for nearly three years thereafter; that if, indeed, Masood Mahmood's conscience had revolted against these kinds of assignments, then how did he indulge in the various other illegal activities which were allegedly committed by the Federal Security Force in the years 1975 and 1976, including the bomb blast at Lahore Railway Station, the illegal detentions of certain persons in the Dulai Camp in Azad Kashmir area, and throwing snakes at an election meeting addressed by Mr. Ghulam Mustafa Khar, who was at that time estranged with the former Prime Minister and had stood as an independent candidate in a bye-election to oppose the official candidate of the Pakistan People's Party; that it is also strange and unnatural that he only had a hunch about the attack launched by approver Ghulam Hussain and his men at Ahmad Raza Kasuri in Islamabad on the 24th of August, 1971, and did not know at that time that it was a part of the same conspiracy; that he cannot be believed when he says that he never made inquiries about the details of the Lahore incident after he heard of it at Multan; that he had tried to be clever and evasive in admitting about his interrogation by the Martial Law authorities during the earlier period of his detention at Abbotabad; and that he never tendered his resignation or asked for premature retirement but only for transfer which was refused by the then Prime Minister. The learned counsel also commented adversely on Masood Mahmood's statement that attempts were made to poison his food during his stay at Chamba House, Lahore, and to kidnap his children from the Aitchison College, Lahore, while, in fact the Prime Minister had entrusted the protection of his own children to Masood Mahmood, who had deputed some personnel of the Federal Security Force for this purpose.

437. Mr. Yahya Bakhtiar's contention that the prosecution has assigned to Masood Mahmood "a role without a role", is obviously untenable. It is clear that if Masood Mahmood is telling the truth, then the mission of doing away with Ahmad Raza Kasuri was being entrusted to him by the former Prime Minister as Director-General of the Federal Security Force, and he was being made responsible for its execution, in the same manner as earlier his predecessor Malik Haq Nawaz Khan Tiwana had been entrusted with it. The mention of the name of Mian Muhammad Abbas was in that context, and Masood Mahmood was not being asked to simply convey a message to Mian Muhammad Abbas without being given any responsibility for the mission itself. In fact, Masood Mahmood has made it further clear, in cross-examination, by saying that the earlier conspiracy was between the Prime Minister, Malik Haq Nawaz Khan Tiwana and Mian Muhammad Abbas, and after his relevant interview with the Prime Minister he had also been inducted into the conspiracy. Such a statement by the witness would be completely irrelevant and meaningless if he had only been assigned the task of conveying the Prime Minister's message to Mian Muhammad Abbas to get on with the job. In any case, the evidence of Masood Mahmood about what he did in Quetta by way of giving the necessary directions to Director M. R. Welch, effectively negates this contention, as on this occasion Masood Mahmood was clearly taking an initiative and not merely conveying the Prime Minister's message to Welch. It does not need much

reasoning to see that if the mission was to be accomplished through the agency of the Federal Security Force, and by the use of its trained manpower and sophisticated weapons, then the Director-General could not be a mere messenger, having "a role without a role".

438. As to the circumstances in which Masood Mahmood came to accept the offer of appointment as Director-General of the Federal Security Force, one thing is clear, namely, that he was laboring under the impression at that time that Establishment Secretary, Mr. Vaqar Ahmad was not treating him fairly, and, therefore, he was surprised where he was granted an interview by Mr. Vaqar Ahmad himself and was also directed to call on the Prime Minister. It is not easy to understand as to why Masood Mahmood has brought in the names of the Prime Minister's Chief Security Officer (Saeed Ahmad Khan) and his Assistant (Abdul Hameed Bajwa), as exerting pressure upon him not to refuse the appointment unless, of course, something of the kind did, indeed, happen. I consider, however, that it is not necessary for the Court to dilate upon the matter any further, as the appointment in question was, indeed, an important one, and had to be given to someone whom the Prime Minister could trust, both by reason of his efficiency and loyalty. It is, therefore, possible that the Chief Security Officer to the Prime Minister may have played a role in advising the Prime Minister on these points and in the process he or his Assistant may have met Masood Mahmood before he finally assumed charge of his new job. I am, therefore, unable to agree with Mr. Yahya Bakhtiar that the account given by Masood Mahmood in this behalf must be rejected as false and fanciful.

439. As to the other points made in this behalf by Mr. Yahya Bakhtiar, suffice it to say that in the ordinary course of human conduct it is neither improbable nor unnatural for a person to lodge a protest at, or resist, an improper demand when it is initially made; but once he has fallen in line, for any reason whatsoever, then to assume his normal manner of approach or behavior in the matter. It is also not improbable for such a person to be jolted into a realization at some later stage that he should not have succumbed to the improper demand, pressure or temptation, as the case may be, and to make a resolve to resist such things in the future. Whether one can stand by such a resolve or not will again depend upon his strength of character and the circumstances in which he is placed. Taking all these things into Consideration, and the fact that a close association of confidence and personal dealings had admittedly come into existence between the Prime Minister and Masood Mahmood, I am of the view that the story narrated by him at the trial cannot be rejected as being improbable or unnatural, and lacking in intrinsic worth. The nature of the relationship which subsequently continued or developed between Masood Mahmood and the former Prime Minister after the present incident is not the fundamental issue under inquiry in this case, and it is relevant only in so far as it tends to throw some light on the events described by him. It is well established that any inaccuracies or exaggerations in peripheral or ancillary

matters of this kind cannot be allowed to negative the substance of an approver's testimony.

#### ALLEGED FALSEHOOD UTTERED BY MASOOD MAHMOOD

440. Mr. Yahya Bakhtiar then submitted that Masood Mahmood had deliberately given false answers on several points put to him in cross-examination, thus showing that he was, not a truthful witness on whom reliance could be placed by the Court. The learned counsel listed the following items in this connection;

(i) Masood Mahmood gave wrong answers to questions regarding certain information which he supplied to the former Federal Minister Abdul Hafeez Pirzada in December, 1971, soon after the downfall of the former President General Yahya Khan, regarding the possible destruction of some important files by the General or his staff, but later admitted the suggestion put to him;

(ii) He falsely denied knowledge of the sect to which a retired officer by the name of Mr. N. A. Farooqui belonged, although their wives were cousins and the matter was within his personal knowledge;

(iii) He also falsely denied personal acquaintance with the second approver Ghulam Hussain who had been working in the National Assembly and had been closeted with him once for 45 minutes according to the evidence of Assistant Director Ashiq Hussain Lodhi (P.W. 28);

(iv) He has wrongly stated that he met Mian Muhammad Abbas at Rawalpindi soon after his return from Multan on the day of the murder, that is, the 11th November, 1974, as on that day Mian Muhammad Abbas was on tour at Peshawar and returned to Rawalpindi the next day;

(v) He has denied knowledge about the properties held by his cousin and brother-in-law Seth Abid, and also about the favors done to this man by the Martial Law regime;

(vi) He lied before the Lahore High Court regarding the illegal activities of the Federal Security Force in contempt proceedings taken against him regarding the illegal detention of certain persons in the custody of the Federal Security Force in Dulai Camp in Azad Kashmir; and

(vii) He wrongly stated that he had a meeting with the then Federal Minister Mr. Rafi Raza on the 5th of January, 1977, at Islamabad for discussions on the deployment of the Federal Security Force in the forthcoming elections of March,

1977, as on that date Mr. Rafi Raza was at Larkana in connection with celebrating the birth day of appellant Zulfikar Ali Bhutto.

441. The points mentioned by Mr. Yahya Bakhtiar as instances of deliberate falsehoods stated by Masood Mahmood at the trial do, indeed, show a painstaking scrutiny of the record by the learned defence counsel, but hardly any of them is of material consequence for a proper appraisal of Masood Mahmood's story regarding the conspiracy, especially when the full replies given by this intelligent and experienced Police Officer to the relevant questions are taken into consideration. A perusal of Masood Mahmood's evidence shows that it is not possible to brand his replies to the defence questions as established falsehoods. Ordinarily I would have been inclined to dispose of the defence submissions by this broad statement, but in view of the repeated stress laid on these matter by Mr. Yahya Bakhtiar, it would be proper to offer brief comments on each of these points.

442. (i) On pages 93-94 of the record Masood Mahmood has stated that he did not meet Mr. Abdul Hafiz Pirzada in December 1971, in connection with the alleged destruction of files by General Yahya Khan and his associates, but he went on to explain that he had first telephoned to Mr. Pirzada to say that he had reliable information in this behalf, and that it was Mr. Pirzada who had invited him to come to the Guest House adjoining the Prime Minister House late at night. I find it difficult to describe this reply as a falsehood, as this is indeed, what the defence was itself suggesting to the witness.

443. (ii) It was next argued that even though Masood Mahmud was related to N. A. Farooqi (inasmuch as their relations were cousins *inter se*), but he pretended ignorance about the fact as to whether the said N. A. Farooqi was an "Ahmadi" of Lahore Sect or not. For this reason, it was argued, that Masood Mahmud should be held and declared to be an unscrupulous liar, because he could not in the very nature of things have been unaware of so important a matter of his relation or relations. At this stage it is necessary to reproduce a question which Mian Qurban Sadiq Ikram, learned Advocate for Mian Muhammad Abbas, accused, put to Masood Mahmud, and the answer given by the witness.

*Question.* - Is it a fact that you, Mr. N. A. Farooqi and Ch. Abdullah, Deputy Director, are Ahmadis of Lahore Sect?

*Ans.* - I do not belong to the said sect and I am in no position to answer on behalf of the other two.

It is well known that Ahmadis under the Constitution had been declared as non-Muslims. In that background, if a question is asked from a witness the effect of which is to exclude any person from the pale of Islam, it is but discreet on the part of the witness to rather leave it for being asked from the man about whom the question is being asked.

Mr. Yahya Bakhtiar laid repeated stress on the allegedly improper answer given by the witness, but, I think, that is the circumstances, above explained, the criticism leveled against the witnesses, on this count is not justified. And here I may mention that it was the plea of Mr. Yahya Bakhtiar and Zulfikar Ali Bhutto that no one has a right to pronounce upon or make any declaration about the religion or religious faith of any person as to whether he is a Muslim or not or whether he is a Muslim just in name, which according to them, was a question between the person concerned and his God. This plea had been raised by them when they were meeting that part of the judgment of the High Court where it had been observed that Zulfikar Ali Bhutto did not fulfill the merits of an ideal or a perfect Muslim. It is strange that Mr. Yahya Bakhtiar is expecting that Masood Mahmood should have performed that very role, or given a "*fatwa*" in expressing upon the faith of a person, which he is the same breath says should not have been performed or given by the High Court qua his client.

444. (iii) The third point regarding the personal acquaintance of Masood Mahmud with the second approver Ghulam Hussain arose at the trial during the cross-examination of this witness on behalf of appellant Mian Muhammad Abbas whose counsel Mian Qurban Sadiq adopted the line that Masood Mahmood may have given direct orders to Ghulam Hussain to do away with Ahmad Raza Kasuri. In support of this assertion reliance was placed on a statement made in cross-examination by Assistant Director Ashiq Muhammad Lodhi (P.W. 28) to the effect that approver Ghulam Hussain was posted on duty during the Ahmadi agitation outside the National Assembly, that he was given a special award of Rs. 500 by Director-General Masood Mahmood for his good work in June 1974, in the National Assembly, and that once or twice Ghulam Hussain had been sent for by Masood Mahmood through this witness, and the two were closeted together while the red light outside the office door of Masood Mahmood remained glowing.

445. Masood Mahmood denied any personal acquaintance or direct contact with Ghulam Hussain, stating that the award was made to Ghulam Hussain approver on the recommendation of the Deputy Director concerned, and as Director-General he acted on the notes put up before him by his subordinate officers, and he did not have to see or know the official concerned to whom the award or certificate was being given. It also transpired from document Exh. D. W. 4/4 that Ghulam Hussain was promoted as Sub-Inspector on 15-1-1974 by Mian Muhammad Abbas, and was also given an award of Rs. 75 by him along with a commendation certificate for running a Commando Course with great pain and efficiency (vide order Exh. D. W. 4/5). It was further brought out in evidence that Ghulam Hussain was, indeed, interviewed by the Director-General Masood Mahmood on the 20th of July, 1974, for promotion to the rank of Inspector, but Ghulam Hussain stated that he was interviewed along with other officers of his rank.

446. Taking all these facts into account, and basing itself on the observations of this Court in *Baghu v. The State*<sup>276</sup>, to the effect that "the obliging concession made by formal witnesses in cross-examination cannot be considered to be of any avail", the High Court as held (in paragraphs 447 and 449 of its judgment) that the concessions made by Assistant Director Ashiq Muhammad Lodhi, who had appeared only as a formal witness to produce a report (Exh. P.W. 22/1) submitted by him along with his covering letter Exh. P.W. 2/2-T to the late Abdul Hamid Bajwa, could not prevail against the direct testimony of Masood Mahmood and Ghulam Hussain, and supported by the documents which showed that promotion and award to Ghulam Hussain had been granted by Mian Muhammad Abbas, and not directly by approver Masood Mahmood.

447. I am inclined to agree with the conclusion reached by the learned Judges in the High Court. In view of the difference in rank between the Director-General and, an Inspector of the Federal Security Force, as well as the fact that there is documentary evidence to show that Ghulam Hussain was acting under the directions of Mian Muhammad Abbas, who was the Director in charge of Operations and Intelligence, it is, indeed, not possible to hold that Masood Mahmood was in direct touch with approver Ghulam Hussain and that he has falsely denied his personal acquaintance and involvement with this subordinate officer of the Force.

448. (iv) The next point as regards the inaccuracy as to the date and time at which Masood Mahmood met appellant Mian Muhammad Abbas at Rawalpindi on returning there from Multan after the present murder, rests on the statement made by Masood Mahmood in his examination-in-chief that "soon after,that when I returned to the Headquarters, Mian Abbas informed me and reported to me that his operation had been successful, but instead of the intended victim his father Nawab Muhammad Ahmad Khan had been murdered at Lahore". It was submitted by Mr. Yahya Bakhtiar that there was documentary evidence, in the shape of the T. A. Bill of Mian Muhammad Abbas (Exh. D. W. 4/10), to show that Mian Muhammad Abbas returned to Rawalpindi from Peshawar on the 12th of November 1974, and not on the day of the murder i.e. the 11th of November 1974, and, therefore, Masood Mahmood was obviously lying as to his meeting with Mian Muhammad Abbas on the 11th of November 1974.

449. A perusal of the record shows that Masood Mahmood was cross-examined at some length on this point, and ultimately he stated that "I do not recall the exact time when I contacted Mian Muhammad Abbas in this connection after my return from Multan to Rawalpindi. I do not remember if I went straight to my office flow the Islamabad Airport or I had gone to my house. I do not remember if I. had met Mian Muhammad Abbas on the 11th or 12th of November 1974".

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<sup>276</sup> PLD 1972 SC 77



450. Now, one thing is clear, namely, that after hearing of the murder of Ahmad Raza Kasuri's father during his stay at Multan, Masood Mahmood returned to Rawalpindi the same day, and it would only be natural for him to talk to his Director in charge of Operations and Intelligence about the incident. Giving evidence more than three years after the event, Masood Mahmood when pressed by the defence, is not able to give the exact date, namely, whether it was the 11th or the 12th of November 1974, when he had his meeting with Mian Muhammad Abbas. The T. A. Bill of Mian Muhammad Abbas does, indeed, show that he returned to Rawalpindi from Peshawar on the 12th of November 1974. It is, therefore, possible that the meeting spoken of by Masood Mahmood may have taken place on the 12th of November 1974 and not on the 11th of November 1974. But it is clear that this disparity as to the exact date of the meeting, as the witness is deposing about the event three years later from memory and not from any documentary record, cannot be described as a deliberate lie does it in any manner affect the main tenor of Masood Mahmood's evidence.

451. (v) The next point mentioned by Mr. Yahya Bakhtiar concerns Masood Mahmood's brother-in-law Seth Abid, who was said to be a fugitive from justice under the old regime, and had returned to Pakistan after the promulgation of Martial Law. Several questions were put to Masood Mahmood in cross-examination to elicit facts about the pending prosecutions against this man, and also the extent of the properties held by him and his brothers etc., but Masood Mahmood denied any personal knowledge of these matters, and asserted that his information on the point was derived from the newspapers reports only. The only basis for Mr. Yahya Bakhtiar's contention that Masood Mahmood is lying on this point is that he ought to know about all the affairs of his brother-in-law. I do not think that there is any such presumption either in law or in the normal course of human conduct, particularly if the said brother-in-law is alleged to be engaged in clandestine illegal activities.

452. (vi) It was next contended by Mr. Yahya Bakhtiar that Masood Mahmood was a liar because he did not mention the illegal activities of the Federal Security Force in contempt proceedings taken against him by the Lahore High Court regarding the illegal detention of certain persons in the custody of the Federal Security Force in Dulai Camp in Azad Kashmir. It appears from questions put to Masood Mahmood in cross-examination that he was brought before two Judges of the Lahore High Court in two separate contempt cases concerning different detenus, and that in both these proceedings he pleaded guilty and was convicted for contempt of the High Court. It further appears that in the statements made by him before these two learned Judges, namely, Mr. Justice Shafi-ur-Rehman and Mr. Justice Zakiuddin Pal details of all the alleged illegal activities of the Federal Security Force were not recounted by Masood Mahmood, but he is right in asserting, in his answers, that "the very fact that I pleaded guilty to the contempt of Court charge is a proof of the fact that I had made admission about illegal activities of the Federal Security Force. I had also earlier pleaded before his

Lordship Mr. Justice Shafi-ur-Rehman". In the face of this reply the point raised by Mr. Yahya Bakhtiar loses all force.

453. (vii) While describing the activities of the Federal Security Force and its deployment in the four Provinces of Pakistan, Masood Mahmood referred to a meeting held under the chairmanship of the former Federal Minister Rafi Raza, on the 5th of January, 1977, and stated that the Minister had direct instructions from the then Prime Minister, and as a result of these discussions the Federal Security Force was redeployed in the four Provinces. In further cross-examination it was suggested to the witness that the meeting could not have been held on the 5th of January, 1977, as on that day Mr. Rafi Raza was in Larkana for the celebration of the then Prime Minister's birthday. To this suggestion Masood Mahmood replied that "I have already submitted that perhaps it was the 5th and so many meetings were taking place those days, that the date may be a day earlier, but the word Perhaps is there on the record". The contention of Mr. Yahya Bakhtiar is that while giving his initial answer about this meeting the witness had not used the word 'perhaps' and, therefore, he is a liar. I regret no such consequence follows. In the first place there is, in fact, no evidence on the record to establish that Mr. Rafi Raza was, indeed, at Larkana on the 5th of January, 1977, and not at Rawalpindi; and in the second place the fact of the meeting itself for the purpose of discussion of the redeployment of the Federal Security Force in anticipation of the forthcoming elections of March, 1977, was not questioned by the defence. It seems to me, therefore, that as the witness was speaking from memory, it is hardly possible to hold that he is a liar if there is a mistake to the exact date of the aforesaid meeting.

454. As a result of the detailed examination of the seven points listed by Mr. Yahya Bakhtiar, I have come to the conclusion that they do not, in any manner, lead to the inference that Masood Mahmood is a liar, and, therefore, his testimony should be rejected altogether.

#### **ALLEGED OMISSIONS AND CONTRADICTIONS IN MASOOD MAHMOOD'S EVIDENCE**

455. Mr. Yahya Bakhtiar finally argued that the evidence of Masood Mahmood suffered from vital omissions and improvements amounting to contradictions, which showed that he was not a reliable witness, and that his testimony should be rejected straightaway on this simple ground. In this respect he filed a chart and took us through the aforesaid infirmities one by one in minute details. Mr. Ejaz Hussain Batalvi in reply filed a counter chart explaining each item of objection. I have attended to these matters in detail and my views on the relevant points are as follows:-

(i) Mr. Yahya Bakhtiar has submitted that while giving evidence in Court Masood Mahmood deposed that "on the 11th of November, 1974, I was at Multan, So was Mr. Zulfikar Ali Bhutto. Very early in the morning he rang me

up. He said to me "your Mian Muhammad Abbas as made complete balls of the situation. Instead of Mr. Ahmad Raza Kasuri he has got his father killed". I was taken by surprise. The Prime Minister hung up after telling me that he would summon me later". Continuing the narration the witness deposed that "his A. D. C. then called me at the residence of Mr. Sadiq Hussain Qureshi in Multan, where I was ushered into the presence of Mr. Zulfikar Ali Bhutto who had Mr. Sadiq Hussain Qureshi sitting with him. Most non-chalantly Mr. Bhutto said to me, as if he had not talked with me before. "I hear Mr. Ahmad Raza Kasuri's father has been killed last night at some place in Lahore". I replied that "I had also heard about that". Mr. Yahya Bakhtiar pointed out that no doubt Zulfikar Ali Bhutto and Masood Mahmood were present in Multan on the night between 10/11-11-1974 and also on 11-11-1974, but the fact that Zulfikar Ali Bhutto had any such talk with Masood Mahmood on the telephone is not correct because there is no mention of the same in the earlier to statements of Masood Mahmood (Exh. P.W. 214 and Exh. P.W. 2/6).

This aspect of the matter was put to the witness and his reply on page 118 was "I gave this information in answer to a question here before this Hon'ble Court. I have not said this in the earlier statements". This is a frank answer, and sufficiently explains the omission. Even otherwise when liaison between Zulfikar Ali Bhutto and Masood Mahmood stands well established on the record, it seems quite natural that Zulfikar Ali Bhutto, who had entrusted this assignment to Masood Mahmood, must have had a talk with him on the subject when the whole plan misfired.

Same is the position about the talk which Zulfikar Ali Bhutto had with the witness when he was called through the A. D. C. There is nothing inherently improbable in the tenor of the talk, and it rather quite fits in with the company in which it was made, *viz.*, in the presence of Mr. Sadiq Hussain Qureshi, who was not involved in the conspiracy, and in whose presence only such type of casual observations could be made by the two. Mr. Yahya Bakhtiar submitted that there was no proof that Masood Mahmood went to see the Prime Minister because Manzoor Hussain (P.W. 21) driver had deposed that he did not take Masood Mahmood to any place in his car on that day. The argument is irrelevant because Masood Mahmood had not stated that he went there in his own car and he was not asked as to in which car or conveyance he went to that place.

(ii) It was next submitted that Masood Mahmood has deposed about his meeting with the Prime, Minister in Rawalpindi after both of them came back from Multan, and in which meeting the witness repented and disassociated himself from doing tiny further murders in pursuance of the earlier ear any future similar orders of Zulfikar Ali Bhutto. Mr. Yahya Bakhtiar submitted that this talk of the witness with Zulfikar Ali Bhutto was not contained in any of his previous statements and therefore this was a clear omission amounting to contradiction.

The objection has no force. The answer about this matter was elicited by the defence counsel himself in cross-examination on 25-10-1977. It may, however, be pointed out that the fundamentals of this matter do exist in both of his earlier statements. As for example in Exh. P.W. 2/4 dated 24-8-1974 in paragraph 16 he stated that "the fact remains that under the specific directions of Mr. Zulfikar Ali Bhutto, personally, I have been instrumental in defying God. (May He forgive me for taking a valuable human life of Late Nawab Muhammad Ahmad Khan and for the earlier murderous assault on the life of Mr. Ahmad Raza Kasuri through the operations conducted by Mian Muhammad Abbas and his sub-ordinates)". Similarly in Exh. P.W. 2/6 (also marked as Exh. P, W. 10/12 page 260 and page 271), he stated that "after the murder of Nawab Muhammad Ahmad Khan, Mian Muhammad Abbas reported to me that his plan had worked, although instead of Ahmad Raza Kasuri, the latter's father had been killed. It is, however, a fact that under the specific orders of Mr. Zulfikar Ali Bhutto, then Prime Minister of Pakistan, I have been instrumental in defying God Almighty (may He forgive me for taking the valuable life of Nawab Muhammad Ahmad Khan and for the earlier murderous assault on the life of Mr. Ahmad Raza Kasuri, through the operations conducted by Mian Muhammad Abbas and his subordinates)". In the face of the portions mentioned above, the point, raised by Mr. Yahya Bakhtiar cannot be accepted, especially when the statement made by him at the trial is also borne out by the fact that there is no evidence at all to show that after this murder he took any steps against Kasuri.

(iii) The next omission pointed out is that Masood Mahmood at page 104 of his statement stated that "Immediately after the murder of Nawab Muhammad Ahmad Khan, when I returned to Headquarters from Multan, Mian Abbas had reported to me that his operation had been successful, but instead of Mr. Ahmad Raza Kasuri, his father had been killed by subordinates of F.S.F. used by Mian Abbas in this operation, but he did not mention any names. He had added that he had arranged the weapons himself used by his subordinates as mentioned earlier. He further told me that the incident of murder of Nawab Muhammad Ahmad Khan had taken place somewhere in Gulberg in Lahore". It was argued that the witness had not said any such thing in his earlier two statements therefore the aforesaid portion of his statement was a clear omission amounting to contradiction.

The contention has no merit, inasmuch as the substance of this information was contained in the earlier statements as is evident from the portions reproduced in the preceding paragraph.

Mr. Yahya Bakhtiar then argued that Mian Muhammad Abbas was not in Rawalpindi on 11th of November, 1974, and returned from Peshawar only on the 12th of November, 1974, and as such the question of his having met Masood Mahmood on the 11th of November did not arise. The contention has no force because the witness had not pin-

point any exact date of the meeting, and the word "immediately" really qualifies his departure from Multan, and not the talk with Mian Abbas. Even otherwise, Mian Muhammad Abbas had, according to T. A. Bill Exh. P.W. 4/ 10, come back from Peshawar on 12-11-1974 at 6 p.m. by air which shows that there was nothing inherently improbable of the aforesaid meeting materializing, as stated by the witness.

(iv) It was argued that while appearing as a witness Masood Mahmood had deposed that after he had disassociated himself from any further pursuit of similar heinous murders, attempts were made on his life and threats were held out to him; that attempts were also made to kidnap his children from the Aitcheson College, Lahore, and there were repeated attempts at poisoning his food at Chamba House, Lahore; and that his own subordinates seemed to him to have been bought over or won over as he had seen them lurking around, but these complaints were not detailed by Masood Mahmood in any of his two previous statements.

It will be appreciated that these are all matters pertaining to the period after the conspiracy had ended, and after the murder of Nawab Muhammad Ahmad Khan had taken place; and strictly speaking did not relate to the conspiracy and the aforesaid murder; and, therefore, Mr. Yahya Bakhtiar was asked as to what was the importance and necessity of going into such minute details. He submitted that his effort was to show to the Court, that the witness simply lacked in veracity inasmuch as he was making improvements and contradictions in his statement. The reply of the witness was that answers on the above points had been given by him because he was put specific questions on the subject concerned in the High Court, whereas when he made statements before the two Magistrates earlier no such specific and direct questions were put to or asked from him, and hence the said matters did not find any mention in the earlier statements. The explanation seems to be satisfactory and the criticism leveled against the witness in the circumstances is not justified.

(v) It was submitted that Masood Mahmood has deposed that after the August 1974, incident of attack on Mr. Ahmad Raza Kasuri in Islamabad, Mr. Zulfikar Ali Bhutto reminded me that nothing tangible had taken place (*Kuchh Bhi Nahin Huwa*). His inference was understood. I reminded Mian Abbas and he said the orders will be carried out (*Hukam ki Tameel hogi*) Mr. Yahya Bakhtiar submitted that this was not stated by the witness in any of his previous statements, therefore, he had made improvements which amounted to contradiction. The reply as given by Mr. Ejaz Hussain Batalvi is very simple and proper and that is this statement was not made by P.W. 2 in examination-in-chief, but was elicited from him by the learned counsel for Mr. Bhutto in cross-examination on 25-10-1977. It cannot, therefore, be treated as an improvement. It is anyhow not a contradiction.

(vi) While narrating a talk which Zulfikar Ali Bhutto had with Masood Mahmood the latter had stated at the trial that "the Prime Minister spelt out what he meant by making force a deterrent one by telling me that he wanted the people of Pakistan, his Ministers, MNA. and MPAs. to fear it". It was submitted that no such thing existed in his previous two statements and hence this amounted to an improvement/contradiction.

The objection is not well-founded. Reference to reorganizing the force has been made in both of his earlier statements, though not in identical terms. In paragraph 8 of his statement recorded on 24-8-1977 (Exh. P.W. 2/41, page 82), while referring to these instructions he has stated that the Prime Minister during this meeting had told him that "the image of the FSF created by my predecessor, late Haq Nawaz Tiwana, had become extremely poor due to the mutiny in its ranks in Hyderabad and the FSF had come to be known as the 'Budha Force' and gave me directions to re-organize and revitalize it". The same statement was made by him in his statement recorded on 14-9-1977 after the grant of pardon (Exh. P.W. 2/6-Exh. P.W. 10/12, at page 265 of the Volume of Documents). In his later statement, P.W. 2 had further stated, "it is unfortunate that F.S.F. has been used under the orders and directions of the "P.M." for political purposes, including harassment to political personages, attempt,at breakings up public meetings as well as putting plain clothes men of the F.S.F. in the front ranks of some of the public meetings addressed by him" (page 273 of Volume of Documents). In the face of the aforesaid the objection of Mr. Yahya Bakhtiar cannot be accepted inasmuch as in Court, the witness merely amplified what he had earlier stated. It is neither a contradiction nor an improvement.

(vii) Referring to the incident of the 3rd June 1974, in the National Assembly, the witness had stated at the trial that it was a day or two later that he was sent for by the Prime Minister, and given the assignment to get rid of Ahmad Raza Kasuri, but in the two previous statements the witness had only said that the aforesaid talk took place a month or so after his taking over as D. G., FSF Mr. Yahya Bakhtiar argued that the witness had changed the timing of this talk to fit in with the prosecution case.

The objection is not well-founded. The previous statements made by this witness namely Exh. P.W. 2/4 and Exh. P.W. 2/6-Exh. P.W. 10/12 at pages 70 and 270 respectively of Volume of Documents do refer to the matters stated in the objection under consideration. The only point which the witness has clarified is about the exact date when the conversation in question took place. In his earlier statement the witness stated that "it was a month or so after he took over as the D.G. FSF", that the said conversation took place. He assumed charge as D.G., FSF on 23rd April 1974. It is to be noticed that the witness in his earlier statements did not give a specific date, but used the general expression of 'a month or so', which obviously did not mean strict 30 days, In his statement in the Court, the witness who had earlier used the expression 'month or

so' clarified the position and fixed the date as a day or two after 3rd of June 1974. In the circumstances, it is neither an improvement nor a contradiction.

(viii) Referring to the Quetta episode, he stated that "I told Mr. Welch that some anti-State elements had to be got rid of and that Mr. Ahmad Raza Kasuri was one of them. I had also told him that he was delivering anti-State speeches and was doing damage to the interest of the country. I communicated to Mr. Welch on the telephone and I also had an occasion to remind him personally when I visited Quetta". It, was argued that he had not said so in his previous two statements therefore, it was an improvement and contradiction.

The objection is not correct. The witness in his statement under section 164, Cr. P.C. (Exh. P.W. 2/4, page 91 of Volume of Documents) in paragraph 14, while referring to this incident had stated: " ..... and even when the then P. M. was camping at Quetta, there were rumors that Mr. Ahmad Raza Kasuri may visit Quetta. He then, the Prime Minister, asked me to take care of him, if possible, while Mr. Kasuri was in Quetta, I remember having instructed Mr. M. R. Welch, Director, FSF, Quetta, accordingly". He repeated this in his second statement Exh. P.W. 2/6-Exh. P.W. 10/12 at page 269 of Volume of Documents. The fact of instructing Mr. Welch to eliminate Mr. Ahmad Raza Kasuri is available in both of his earlier statements. The statement made by him in the Court carries details of his conversation with Mr. Welch on the subject. The objection seems to be based on misreading or omission to take proper note of the earlier two statements. The time sequence of initially instructing Welch to eliminate Ahmad Raza Kasuri and subsequently reminding him over the telephone was very considerably got clarified by the learned counsel for the appellant in cross-examination. Having thus clarified the ambiguous statement no grievance can be made by the appellant on this account. It is neither a contradiction nor an improvement.

(ix) Reference was then made to certain portions of the statement of Masood Mahmood with regard to the Quetta incident, and his talks and correspondence with Mr. M. R. Welch (P.W. 4), and it was argued that certain documents which had been proved by M. R. Welch while giving evidence in Court, had not been referred to by Masood Mahmood in his earlier two statements. According to Mr. Yahya Bakhtiar all this amounted to omission and as such "contradiction."

The contention has no merit. As a matter of fact this aspect of the matter was put to the witness in the form of specific questions, to which he gave specific answers, adding that as these documents were not made available to him in the Magistrate's Courts, he could not refer to them. However, it may be mentioned that the main point regarding giving of instructions by Masood Mahmood to Welch pertaining to Ahmad Raza Kasuri is available in substance in his earlier statements. The authenticity of these documents has not been questioned, and in these circumstances a grievance merely on the ground that precise reference to the relevant documents was not made earlier when the witness was

not confronted with them is not justified. This part of the witness's statement is thus neither an improvement nor a contradiction.

(x) Attention was next drawn to that portion of the statement of the witness where he had deposed that "after the two hours or so of the interview with the Prime Minister the direction that I carried home was that the F S F was going to be used as an instrument by the Prime Minister for his political purposes, etc.", and it was argued that no such things were mentioned in the confessional statement dated 24-8-1977. It was further submitted that even though improvement was made in the approver's statement dated 14-9-1977 yet there too he did not state this as being "the direction that he carried home" after his very first interview with the Prime Minister on 12-4-1974. According to Mr. Yahya Bakhtiar, this amounted to an omission and improvement and contradiction.

The objection is misconceived. There is a clear reference by the witness in his statement dated 14-9-1977 (Exh. P.W. 2/6-Exh. P.W. 10/12), to the unlawful use of the FSF under the specific directions of the appellant. In Court, the witness has referred to the same subject in a different language with more clarity. This is neither an improvement nor a contradiction.

(xi) Learned counsel then referred to a passage in the statement of Masood Mahmood at page 102 where he deposed in Court that "At the time when Mian Muhammad Abbas told me about the murder of Nawab Muhammad Ahmad Khan, he informed me that the attempt on the life of Mr. Ahmad Raza Kasuri at Islamabad was not successful". It was argued that no such thing existed in the earlier statements of the witness and therefore, this was an improvement and contradiction. It may be pointed out that this information was; elicited from him by the learned counsel for the appellant in cross-examination and as such no grievance can be made by the appellant for the answer which he himself obtained from the witness, It is neither an improvement, nor a contradiction.

(xii) At page 123 of his testimony Masood Mahmood had deposed that "I was directed by the then Prime Minister not to accept instructions of the then Minister of Interior, Mr. Abdul Qayyum Khan". It was argued that no such statement existed in the previous two statements, and therefore this was an improvement and contradiction. It may be pointed out that this information was provided by the witness in answer to a question put to him in the Court. It is clear from Exh. P.W. 2/4 and Exh. P.W. 2/6 - Exh. P.W. 10/12, that for revitalizing the Federal Security Force he was under the direct command of the appellant. The statement pointed out above is merely a detail in that connection.

#### **CONCLUSIONS AS TO MASOOD MAHMOOD'S EVIDENCE**



456. After detailed and anxious consideration of criticism leveled by Mr. Yahya Bakhtiar against approver Masood Mahmood, and the evidence given by him at the trial, I have reached the conclusion that the statement made by him is not such as can be said to be lacking in intrinsic worth by reason of any inherent weakness, or suffering from infirmities like omissions, contradictions, improvements and lies etc., on the contrary it is highly probable considering the peculiar position occupied by Masood Mahmood under appellant Zulfikar Ali Bhutto; and can be safely acted upon provided the requisite corroboration is available on the record. I will be useful to state here, that, on an exhaustive review of the general circumstances pertaining to Masood Mahmood, I have already found that considering the fact that Masood Mahmood enjoyed a special position under Zulfikar Ali Bhutto, that he was in close and constant touch with him throughout his tenure as Director-General of the Federal Security Force from 1974 to 1977, that he was shown all kinds of favors and considerations by being sent abroad for official visits and medical treatment, that he was not the only civilian official taken into custody on the, proclamation of Martial Law, and that during his long career in the Police service of Pakistan he had held important positions involving assumption of responsibility and exercise of authority, and it was, therefore difficult to hold that Masood Mahmood had become an instrument in the hands of the Martial Law authorities to deliberately and falsely concoct the story had narrated at such length at the trial. A further significant fact strengthening me in this conclusion was that even if he was pressurized to falsely implicate the former Prime Minister, there was no reason for the Martial Law authorities, or for Masood Mahmood himself to falsely assign an important operational role in the conspiracy to appellant Mian Muhammad Abbas, who was then functioning as one of the Directors of the Federal Security Force, incharge of Operations and Intelligence. For all these reasons, I consider that the real and important question is whether the prosecution has succeeded in bringing on the record the necessary corroboration in support of the testimony of Masood Mahmood.

#### **EVIDENCE IN CORROBORATION OF MASOOD MAHMOOD**

457. The items relied upon by the prosecution in this behalf are;

(i) Evidence of motive;

(ii) Statement of Saeed Ahmad Khan (P.W. 3) regarding conveying a message of the Prime Minister to Masood Mahmood about Ahmad Raza Kasuri;

(iii) Documentary evidence showing Masood Mahmood's presence at Quetta in July 1974, and his audience with the Prime Minister;

(iv) Evidence of M. R. Welch (P.W. 4), both oral and documentary, regarding instructions given to him by Masood Mahmood to "take care of" Kasuri at Quetta;

(v) The Islamabad incident of the 24th of August 1974;

(vi) The nature of the incident of the 11th of November 1974, at Lahore resulting in the present murder; and

(vii) Subsequent conduct of Zulfikar Ali Bhutto at Multan on hearing of this murder on the morning of the 11th of November 1974; interference of his Chief Security Officer and his Assistant Abdul Hamid Bajwa with the proper investigation of the case in 1974; and his efforts at winning over Kasuri and bringing him back to the Pakistan People's Party after the present murder.

### RELEVANCE OF MOTIVE IN CONSPIRACY CASES

458. Before considering the evidence of motive, as furnished by Ahmad Raza Kasuri, himself appearing as P.W. 1 at the trial, I may dispose of Mr. Yahya Bakhtiar's contention that motive is not relevant in a case of conspiracy; or at any rate, it is evidence of a very weak nature and cannot be regarded as substantive evidence for proving a charge of conspiracy. In support of these submissions he referred us to *Jit Singh v. Emperor*<sup>277</sup>, *Kartar Singh v. Emperor*<sup>278</sup> and *Qabil Shah and others v. The State*<sup>279</sup>.

459. The cases relied upon by the learned counsel do not appear to lay down any rule as to the irrelevance of motive in cases of conspiracy. In all the three cases relied upon by Mr. Yahya Bakhtiar the evidence as to motive was specifically considered by the learned Judges, but they proceeded to observe that motive alone could not provide the requisite corroboration of the testimony of an approver, when no other corroboration was available on the record. There is no indication in these judgments that the Court considered the motive to be irrelevant cases of conspiracy and approvers.

460. On the other hand Mr. Ijaz Hussain Batalvi, for the prosecution, drew our attention to the observations appearing on page 1452 of Dr. Nand Lal's commentary on the Indian Penal Code, 1929 Edition, as well to the comments on section 8 of the Evidence Act on page 57 of the Law of Evidence by Monir, besides two recent cases decided by this Court, namely, *Abdur Rashid v. Umid Ali and 2 others*<sup>280</sup>, *Mst. Razia Begum v. Hurayat Ali and 3 others*<sup>281</sup> and *Dost Muhammad v. The State*<sup>282</sup>.

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<sup>277</sup> AIR 1925 Lah. 526

<sup>278</sup> AIR 1936 Lah. 400

<sup>279</sup> PLD 1960 Kar. 697

<sup>280</sup> PLD 1975 SC 227

<sup>281</sup> PLD 1976 SC 44

461. It is not necessary to discuss these authorities at any length, for the reason that this question was considered by this Court as recently as April 1975, in the case of Abdur Rashid mentioned above, and it was observed as follows:-

"Evidence of motive is not only relevant but also often helpful to the Investigating Agency as well as the Court. Its importance, however, depends on the facts and circumstances of each case. For the police it steers and determines the course of investigation. Its established existence and strong nature proved by reliable evidence when put in the scales along with the ocular and other evidence does quite often tend to set at rest some lurking suspicions and satisfy the Judicial conscience. Of course there may be cases where even the strongest motive may be wholly inapt owing to absence or weakness of direct evidence. Conversely the weakness of motive or even its conspicuous absence might not be helpful to the accused against whom unimpeachable ocular evidence is available."

462. Nothing was said at the Bar in derogation of this view of the law as to the relevance of motive as an aid in the appreciation of evidence in criminal cases. I would, therefore, respectfully follow and apply this principle in the present case, only adding that the evidence of motive has been specifically made relevant by section 8 of the Evidence Act which, inter alia, lays down that:-

"Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact."

#### **FACTUAL POSITION REGARDING MOTIVE THE F.I.R.**

463. In the light of this legal position, we may now turn to an examination of the testimony of Ahmad Raza Kasuri (P.W. 1). In the First Information Report (Exh. P.W. 34/13) lodged by him within minutes of the death of his father at the United Christian Hospital, Lahore. Kasuri had asserted that the firing on him had been made due to political reasons, as he was a member of the Opposition and also the Information Secretary of the Tehrik-e-Istaqlal, which was strongly critical of Government policies and that he himself used to severely criticize the Government. As already stated, he added that in June, 1974, Zulfikar Ali Bhutto had addressed him in a meeting of the National Assembly of Pakistan saying that he was fed up with the complainant, and it was not possible for him to tolerate the complainant any more. Ahmad Raza Kasuri stated in the First Information Report that these words formed part of the record of the National Assembly and had also been published in the newspapers.

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<sup>282</sup> 1974 P Cr. LJ 275

## ORAL EVIDENCE OF KASURI

464. At the trial he gave details of his political differences with Zulfikar Ali Bhutto. He deposed that he was a founder member of the Pakistan People's Party which was formed on 1-12-1967, and was elected to the National Assembly in 1971 on the ticket of that party. As he considered Zulfikar Ali Bhutto as power hungry, therefore, his relations with him became cool and then got really strained. The witness in this respect referred to a speech of Zulfikar Ali Bhutto in Peshawar, in February, 1971, when he allegedly declared that his party namely, the Pakistan People's Party, would not be attending the Dacca Session of the National Assembly on 3-3-1971, as they would be treated as double hostages and virtually going to a slaughterhouse. This was allegedly followed by a speech dated 23-2-1971 in Iqbal Park, Lahore, where Zulfikar Ali Bhutto threatened that whosoever will go to Dacca his legs would be broken, and whosoever went there would go on a single fare. The third speech was allegedly made on 14-3-1971 in Karachi in which Zulfikar Ali Bhutto announced his decision of breaking the country by publicly addressing the East Pakistan leader Sh. Mujib-ur-Rehman and saying: (i.e. you on that side, and we on this). Kasuri said that he did not approve of the aforesaid role of Zulfikar Ali Bhutto, therefore, he used to criticize him strongly. The witness further deposed that he went on hunger strike unto death over liberty of the press (The Progressive Papers Ltd strike). The witness stated that he was the only member of the National Assembly who went to Dacca to attend the Session of the Assembly scheduled to be held there on the 3rd March, 1971.

465. He further deposed that he and his family had to face certain political attacks in Kasur. In this respect he referred to two incidents. One of those incidents was reported in an F.I.R. lodged at Police Station Kasur City on 2-5-1971, when according to him certain pro-Bhutto elements attacked him at the premises of Habib Mahal Cinema, Kasur, where Zulfikar Ali Bhutto was to address his party workers meeting and which attack resulted in the fracture of his hand. The witness then organized his own group known as the Raza Progressive Group (in the Pakistan People's Party). The second incident also occurred at Kasur, which was reported in F.I.R. No. 19, dated 17-1-1972 Exh. P.W. 1 /13-D, in which three pellets hit his legs and various injuries to his brother Khizar Hayat were also caused. Kasuri stated that in these circumstances, as a matter of strategy, he adopted a policy of peace, because, Zulfikar Ali Bhutto during those days was also the then Martial Law Administrator. After the lifting of the then Martial Law in April 1972, the witness again opened up and started criticizing Zulfikar Ali Bhutto, with the result that he was formally expelled from the Pakistan People's Party in October, 1972. He joined another political party, namely, Tehrik-i-Istiqlal, in June, 1973 and continued his criticism of Zulfikar Ali Bhutto.

## THE INCIDENT OF 3RD JUNE, 1974

466. The climax, it appears, came on 3-6-1974 when Zulfikar Ali Bhutto was making a speech in the National Assembly on the 1973 Constitution and was proclaiming that it was a unanimous Constitution, endorsed and adopted by all sections of the House. During the course of that speech, Ahmad Raza Kasuri interrupted and said that the Constitution was not unanimous, inasmuch as nine members of the National Assembly had not signed it. (See Exh. P.W. 1/11). On this Zulfikar Ali Bhutto said "you keep quiet. I have had enough of you absolute poison. I will not tolerate your nuisance any more". Ahmad Raza Kasuri retorted in the same manner and said "I cannot tolerate your style also". Zulfikar Ali Bhutto then said "I have had enough of this man. What does he think of himself".

467. On 4-6-1974 Kasuri moved a privilege motion (Exh. P.W. 22/4) complaining that he was "receiving threatening calls to face dire consequences after yesterday's altercation with Mr. Zulfikar Ali Bhutto on the floor of the house". This motion was placed on the record.

#### **DOCUMENTARY EVIDENCE OF KASURI'S CRITICISM OF BHUTTO**

468. The statement of Ahmad Raza Kasuri stands materially corroborated by authentic documentary evidence on the record to prove the strained and hostile relations between Ahmad Raza Kasuri and Zulfikar Ali Bhutto. In this respect it will be instructive to reproduce here the speech delivered by Ahmad Raza Kasuri on 19-2-1973 in the National Assembly which has been proved and filed in this case as Exh. P.W. 1/9. It reads as follows:-

"Mr. President, Sir, it is my proud privilege to open up discussion in this august House which has assembled here to deliberate on the constitutional draft. It is a very historic occasion that we are meeting to give a Constitution as Mr. Pirzada in his inaugural speech has mentioned, but it is also a very unfortunate occasion that we are meeting today as a "half Pakistan". We are meeting today when 167 members from East Pakistan are not present and when I sit here, my mind goes to those great members of this Assembly who were originally elected under the L.F.O. to be the members of the Constituent Assembly and members of the Central Legislature. But unfortunately they are not present here and why they are not present here? We have to probe into this aspect also. They are not present here because a Leader of the minority party decided to overthrow the majority party. When in any country the minority party leader tries to overthrow the majority party, there is always a chaos; there is always a crisis and we have seen the crisis in this country because that leader was obsessed with power - nothing but power - and he destroyed this country for the sake of power. Mr. President, it was that leader who on the 15th February, 1971; in Peshawar, said that the P.P.P. would not be attending the forthcoming Session of the National Assembly because we would be treated as "double hostages", that we would be going to the

"slaughterhouse". Again, the same leader on the 28th of February, 1971, in Lahore said that "whosoever would go to Dacca, his legs would be broken" and whosoever would be going to Dacca, he would be going on a "single fare". I am coming to the point. I was saying that that leader said whosoever shall go on a single fare and then the same Leader on the 14th of March, 1971, in Patel Park, Karachi, said "*Udhar Tum Idher Hum*" I am the majority party in West Pakistan; you are the majority party of East Pakistan, therefore, separate transfer of power in East Pakistan, and separate transfer of power in West Pakistan". He knew that the majority party was not willing to agree to his single point. Then, was an agreement on five points. The only point where there was no agreement was the point of "sharing power". It was not my fault if the majority party leader was not prepared to share power. It was not the fault of the people of the Punjab if the majority party leader was not prepared to share power. It was not the fault of the toiling teeming millions of Pakistan if the majority leader was not prepared to share power, but then why my country suffered, why my country was made to face the humiliation? It was done by no other man except one who was obsessed with power, and the history will catch that man, history will bring him to the bar of public opinion and that man will have to answer. He will not go scot-free." .....

"There you are. So, Sir, in Article 1 of the Draft Constitution, the word "East Pakistan" has been totally eliminated. There is no mention of the word "East Pakistan" when they spell out the Federation. This is very strange. That means, through an indirect way we are trying, to give recognition to Bengla Desh, an illegitimate child of Indian aggression, a child of foreign power conspiracy and certain political elements and personality in this country. We are giving *de jure* recognition, a constitutional recognition. This is wrong. People of Pakistan will not accept this posture ..... Just that which has taken integral part of my country, let me destroy his band. The people of Pakistan will not tolerate what is happening in the closed door conspiracies. East Pakistan is an integral part of Pakistan. I do not believe in the term 'NEW' Pakistan. I only believe in the Quaid-e-Azam's Pakistan. For me there is only one Pakistan and that is Quaid-e-Azam's Pakistan. These new phrases are being coined, "the Muslim Bengal", "New Pakistan"; what new Pakistan. Because you should be the Quaid-i-Awam of a new Pakistan. This is not good. Don't play with the destiny of the people. Don't take people of Pakistan as toys. Don't think that only you are the oracle of wisdom. Don't think that only you know politics. There are much brighter people on the other side of the fence also who can understand every gesture of yours, who can give meaning to your every antic. Now it is being said that Himalayas will weep. If the Pakistan Army is purposely to be defeated by the Indian Army then of course Himalya will weep."

469. This speech was continued on 20-2-1973 (See Exh. P.W. 1/8) wherein Ahmad Raza Kasuri vehemently criticized the Government while dealing with the fundamental rights guaranteeing protection and privacy of home, he stated that:-

" ..... Our telephones are being tapped. Our talk is being checked. We are being chased by the C.I.D. agencies, and in the lobbies and in the Cafeteria less visitors, more C.I.D. people. Now is this right of privacy being given to us? There are particular gadgets which are being fixed on our telephones through which, even if the telephone is just lying they can hear our talks in their cozy intelligence headquarters."

470. He said that the regime was talking of *Roti, Kapra* and *Makan*, and although the country's economy is virtually in shambles and the country is dying of poverty, Jashans were being held in Larkana and Bahawalpur. After citing Lord Acton "that power corrupts and absolute power corrupts absolutely", he stated "if a dishonest man becomes a Prime Minister in this country, surely under these powers he can ruin the country and can become virtually the 'civilian dictator'. Ha hit mercilessly at the provisions in the draft Constitution for a vote of No-confidence in the Prime Minister by a two-thirds majority, and said:-

"He wants this particular Article to be inserted in the body of the Constitution for fifteen years in order to continue in office. This is their argument for their own personal interests. A man invariably cannot go beyond 15 years in power. So this particular argument is not for the stability of the country; if stability is needed then we must create stable institutions. You cannot give stability to a country by giving protection to the personalities."

471. At another place he said that the Prime Minister had become the strongest Dictator in the world and will be so powerful that he will not go out of the House as a living person. He opposed the provision about giving commissions in the Armed Forces of Pakistan in the name of the Prime Minister (and not in the name of the Head of the State). He said that this was being done to make it the Army of the Prime Minister.

472. On 26-5-1973 he tabled a privilege motion (Exh. P.W. 22/1) in the National Assembly complaining that he had received threats for criticizing the Pakistan People's Party regime and its politics. In this motion he made mention of various previous attacks on him and his family which he attributed to "their regime". It reads as follows:-

"This morning I received a telephonic call from Mr. Iftikhar Ahmad Tari, Minister of Works and Communication, Government of the Punjab, in which he used threatening language, that I would be meeting the same fate as that of late Mr. Muhammad Rafique, if I do not stop criticizing their regime and its policies forthwith. This is a clear breach of the privilege of a member to express his point of view on the floor of the House in accordance with his conscience and wishes of the people of his constituency. "It may be recalled that in the past I have been the victim of their aggression on the following occasions;

(1) On 2nd May 1971 when Mr. Z. A. Bhutto visited Kasur a gang of P.P.P. men including Mr. Iftikhar Ahmad Tari attacked me and my followers. In this attack my hand was fractured and my followers received injuries. A case is registered in Police Station, Kasur City in this regard.

(2) On 19th June, 1971 P.P.P. workers attacked me at Karachi Railway Station, over dozen men were arrested by the police in this regard.

(3) On 4th August, 1971, my elder brother, Sahibzada Khizar Hayat Khan was attacked while he was fast asleep in his house in Kasur at midnight by some unknown assailants.

Lego-medical report recorded over 100 injuries on his person. A case is registered with Police Station, Kasur.

(4) On 30th August 1971 in Peshawar a gang of P.P.P. workers attacked me and disturbed my press conference in Habib Hotel. Some arrests were made and a case is registered with the police.

(5) On 9th October 1971 in Karachi my press conference was disturbed because of the attack arranged by P.P.P. workers at a private residence in PECHS, Karachi. A case is registered with Police Station Ferozeabad, Karachi.

(6) On 20th December, 1971, in Lahore while I was addressing a public meeting I was attacked with daggers and lathis by the P.P.P. workers. Members of the public saved my life on this occasion.

(7) On 17th January 1972, Mr. Yaqub Maan, a P.P.P. M.N.A. opened pistol fire on me and my brother, Khizar Hayat. I received three bullet injuries whereas my brother received one bullet injury. A case against the said Yaqub Maan and his party is registered with Police Station, Kasur City.

(8) On 8th April, 1972, in Khudian Town, Teshil Kasur one Akbar Toor, a Chairman of P.P.P., Khudian opened fire at my public meeting. Mr. Muhammad Khan M.N.A. was also on the dais at that time. Akbar Toor and his accomplice were arrested by the police on the spot. A revolver was recovered from their possession and a case was registered with Police Station Khudian.

(9) On 20th December, 1972 when along with Air Marshal Asghar Khan I led the black day demonstration on the Mall, Lahore, P.P.P. workers attacked me with a dagger. Photographs about this incident were published in the Press. At the end of this demonstration near Assembly Chamber late Kh. Rafique was brutally



murdered right under the nose of the district administration. No action has been taken so far in the above-mentioned.

These facts I am placing on the record of the National Assembly of Pakistan to establish that this particular telephonic message of Mr. Iftikhar Ahmad Tari should not be taken in a light manner. These facts prove beyond doubt that way is being prepared to establish fascism and dictatorship in the country. In the end I seek the protection of the chair so that I, as a member of the National Assembly, can perform my public duty without fear and intimidation and request that the Iftikhar Ahmad Tari be brought to book before the privilege committee."

473. Exh. P.W. 1/10 contains the speech of Ahmad Raza Kasuri dated 1-6-1973 which he made on the draft bill of the F.S.F. (Federal Security Force). In that speech he *inter alia*, stated:

"For instance, if I spell out, one of the Charters of duty of this special a force is to quell disturbances, Sir, to check the smuggling, to stop the highway robbery, But, Sir, the people of Pakistan feel that the charter of duty which is assigned to them by the special law is to disturb the public meetings, to commit the political murders, to plant bombs into the places of political leaders, to fire at their houses, to abduct their children. These are the duties which have been assigned to this force. This force has been established to create terror in the minds of the opponents of the regime. This force has been created to check the process of democracy in Pakistan. This force has been created to dislodge the opponents of the Government."

#### CONCLUSIONS AS TO HOSTILITY BETWEEN KASURI AND BHUTTO

474. It thus stands established on the record that relations between Ahmad Raza Kasuri and appellant Zulfikar Ali Bhutto had been continuously deteriorating, and becoming more and more strained since political differences arose between them in early 1971 over Bhutto's stance on the question of attending the Dacca Session of the National Assembly scheduled for the first of March, 1971; Ahmad Raza Kasuri had formed a Progressive Group in the Pakistan People's Party; that he was expelled from the Party in October, 1972; that he joined an opposition party, *viz.*, Tehrik-i-Istiqlal; that he lost no opportunity of bitterly criticizing Bhutto in the National Assembly, holding him responsible for the separation of East Pakistan; that he considered Zulfikar Ali Bhutto to be power hungry and accused him of being a dictator, and of trying to perpetuate his personal rule through unusual constitutional provisions and setting up of the Federal Security Force; that an extremely unpleasant altercation did take place between the two in the National Assembly on the 3rd June, 1974 during the course of which Zulfikar Ali Bhutto expressed his extreme annoyance with Kasuri and virtually threatened him; and that Kasuri had been tabling various privilege motions in the

National Assembly accusing the partisans of Zulfikar Ali Bhutto as being responsible for the various violent physical attacks made on him from time to time.

475. Mr. Yahya Bakhtiar's contention that the allegations leveled by Kasuri against Bhutto were false, does not detract from the fact that Kasuri yeas indeed indulging in bitter criticism of Bhutto and his policies; and this criticism would be all the more infuriating to Bhutto if it was not correct or justified.

476. It appears that the bitter attacks launched by Ahmad Raza Kasuri on Zulfikar Ali Bhutto did not end with the altercation between them on the floor of the National Assembly on the 3rd of June, 1974. In the Intelligence Report signed and sent by M. R. Welch (P.W. 4), as Director of the Federal Security Force at Quetta to the Director-General on the 14th of September, 1974, it is stated that Ahmad Raza Kasuri, along with other politicians arrived at Quetta on the 13th of September, and the same day he made a speech to about 200 persons including students invited to a tea party in Cafe China. In the words of the report "Ahmad Raza Kasuri spoke first. He referred to the oppression of Government on the public in Baluchistan. He told his audience that when he last spoke in the Assembly the Prime Minister started sweating He told those present that the new generation would shed their blood for the leaders in jail. He claimed that the Prime Minister was splitting up the country and Punjab had arisen against the Government. He stated that the Prime Minister had taken thirty lacs rupees from Ghulam Ahmad in the Qadiani issue. The surrender of hostiles claimed by the Government was incorrect. The Federal Security Force was all over and the Prime Minister's favorites carry out *lathi* charge and shoot the people. Women have been disgraced and the Army has been used against the people."

This kind of speech could hardly be to the liking of the then Prime Minister.

#### CORROBORATIVE EVIDENCE AS TO MOTIVE

477. The existence of hostility between Zulfikar Ali Bhutto and Ahmad Raza Kasuri is also proved by Saeed Ahmad Khan (P.W. 3) who had served for several years as Bhutto's Chief Security Officer. He deposed at the trial that in December, 1973, he opened a file in respect of Ahmad Raza Kasuri under the orders of the Prime Minister, which also included practically all Opposition leaders, P.P.P. renegades and legislators. He added that Ahmad Raza Kasuri had become very bitter and critical, and, in fact, virulent against the Prime Minister, and, therefore, orders were issued that he should be kept under strict surveillance, and this was done by the provincial special branches of the Police and Kasuri's telephone was tapped by the Intelligence Bureau. The files opened and maintained by Saeed Ahmad Khan on Ahmad Raza Kasuri were brought on the record as Exh. P.W. 3/1, Exh. P.W. 3/2 and Exh. P.W. 313.

478. The personal interest takers by Zulfikar Ali Bhutto in Ahmad Raza Kasuri is further evidenced by the fact that a number of reports were sent to him from time to time by his Chief Security Officer Saeed Ahmad Khan and the latter's Assistant the late Abdul Hamid Bajwa, and the notes made thereon show that they were perused by him, and occasionally also commented upon. For instance on a report sent to Zulfikar Ali Bhutto about the tapping of a telephone conversation between Ahmad Raza Kasuri and an unknown lady Zulfikar Ali Bhutto made the following remarks;

"This is very interesting but who is the lady. Surely if we were efficient, we would know by now. What is the use of half baked information coming to us with the tapping of telephones which requires no effort. It is effort we want."

479. This note and the appellant's signature thereon were proved by Saeed Ahmad Khan as Exh. P.W. 3/1-A, which is dated the 13th of December, 1973.

480. Similarly other reports were also brought on the record through Saeed Ahmad Khan as Exhs. P.W. 3/1-B, P.W. 3/1-C and P.W. 3/1-D. The report or note marked as Exh. P.W. 31-C bears a remark by Zulfikar Ali Bhutto to the following effect:

"How stupid can you get?"

This is dated 15-12-1973. Similarly the report marked Exh. P.W. 3/1-D bears the signatures of the appellant in token of his having seen this report and is dated 30-12-1973.

### EVIDENTIARY VALUE OF SECRET INTELLIGENCE REPORTS

481. Mr. Yahya Bakhtiar contended that High Court had erred in treating secure reports on Ahmad Raza Kasuri as admissible in evidence, and placing reliance thereupon, and in support of this proposition he relied upon *Islamic Republic of Pakistan v. Abdul Wall Khan*<sup>283</sup>. In that case it was observed that;

"The material contained in such source or intelligence reports may well be of great value so far as executive decisions are concerned, but for the purposes of a judicial inquiry, they cannot be of any assistance at all unless the authorities concerned are prepared to produce the sources themselves for giving evidence before the Court."

482. The objection raised by Mr. Yahya Bakhtiar has, indeed, the support of a recent decision of this Court, but I find that the particular reports to which reference has been made in the preceding paragraphs have not been relied upon by the High Court as to

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<sup>283</sup> PLD 1976 SC 75

their contents, but simply to show the fact that such reports were submitted to the Prime Minister in respect of Ahmad Raza Kasuri and that on a perusal of these reports he made certain comments. It seems to me that this limited use of the source or secure reports, as they have been variously described during the arguments x and evidence in this case, is not hit by the fact that the makers of those reports were not produced at the trial. For the limited purpose of showing Zulfikar Ali Bhutto's interest in the activities and movements of Ahmad Raza Kasuri, what was relevant was the fact that such reports were being sent to him from time to time and were also being perused by him. The correctness of their contents is neither relevant nor in question.

### DEFENCE SUGGESTIONS AS TO OTHER POSSIBLE MOTIVES

483. Mr. Yahya Bakhtiar contended that from the list of cases of physical assault on Ahmad Raza Kasuri, as given in one of the privilege motions (Exh. P.W. 22/1) tabled by him in the National Assembly, and reproduced earlier in these pages, it would appear that there could be several other motives on the part of persons other than the appellant Zulfikar Ali Bhutto. The learned counsel listed these other motives as follows:-

- (a) Ahmad Raza Kasuri's enmity with a local political rival, named Mohammad Yaqoob Maan, who was also a member of the Punjab Provincial Assembly, having been elected on the ticket of the Pakistan People's Party;
- (b) Rivalry with another political group in Kasur, which the learned counsel broadly described as a pro-Bhutto group;
- (c) Enmity with still another group of persons who had attacked Kasuri at a place called Khudian, apparently under the inspiration of Mian Iftikhar Ahmad Tari, a P.P.P. Provincial Minister in the Punjab;
- (d) Enmity with certain enemies in Peshawar and Azad Kashmir; and
- (e) Enmity arising out of Ahmad Raza Kasuri's stand in respect of declaring the Ahmadis as non-Muslims in Pakistan.

484. Mr. Yahya Bakhtiar submitted that, in the face of this widespread enmity against Ahmad Raza Kasuri on the part of various individual and political groups in various parts of the country, emphasis mainly on hostility with appellant Zulfikar Ali Bhutto was not justified, especially when in a parliamentary form of a Government bitter speeches and remarks by members of Parliament against one another are matters of routine, and should not be given any undue importance so as to make them a motive for murderous assault on political opponents. The learned counsel submitted that the High Court had not adverted at all to the possibility of the existence of these other motives to do away with Kasuri. He contended that in a statement made under section

161 of the Criminal Procedure Code before D.S.P. Agha Muhammad Safdar during the investigation of Islamabad incident on the 24th August, 1974, and also in another statement made before the Shafi-ur-Rehman Tribunal after the present murder, Ahmad Raza Kasuri had clearly conceded the existence and possibility of other enemies and motives, but the High Court had erroneously excluded both these statements from consideration.

485. Taking up first the question of the exclusion of the statement said to have been made by Ahmad Raza Kasuri under section 161 of the Criminal Procedure Code before Deputy Superintendent of Police Agha Muhammad Safdar during the course of investigation of the Islamabad incident on the 24th of August, 1974, the relevant facts are that Ahmad Raza Kasuri had stated at the trial that after he had been fired upon from a deep while proceeding to his residence in Islamabad on the 24th of August, 1974, he had registered a case at Police Station, Islamabad, but no Police Officer contacted him after that. He repeated this assertion in cross-examination, when it was sought by the defence to confront and contradict him by a statement purporting to have been made by him on that very day as a supplementary statement before Agha Muhammad Safdar, Deputy Superintendent of Police, Islamabad. A copy of this statement had been supplied to the defence by the prosecution out of the police record pertaining the investigation of the Islamabad incident. As the prosecution did not produce Agha Muhammad Safdar, D.S.P. as its own witness an application was made on behalf of appellant Mian Muhammad Abbas to summon Agha Muhammad Safdar as a Court-witness, but this request was disallowed by the High Court on the ground that if the accused wanted to make use of this statement, then he could have duly proved by summoning Agha Muhammad Safdar as a defence witness. As far as appellant Zulfikar Ali Bhutto was concerned, no request was made at all for summoning Agha Muhammad Safdar, who was supposed to have recorded the statement in question, but instead a photostat copy of the statement was put to Inspector Nasir Nawaz (P.W. 23), who had recorded the First Information Report in the Islamabad case, but the Court did not allow this to be done on the ground that Inspector Nasir Nawaz was not the D.S.P. concerned.

486. The grievance on behalf of the appellant is that as a copy of the statement in question had been supplied to the defence by the prosecution itself, it was incumbent upon the prosecution to call Agha Muhammad Safdar, D.S.P., as a prosecution witness; or the Court should have called this officer as a Court-witness; or, as a last resort, to have allowed the statement to be proved by Inspector Nasir Nawaz on the ground that he was familiar with the handwriting and signatures of the D.S.P., who was his superior.

487. I do not see any merit in these submissions, for tile reason that although the prosecution acted correctly in supplying a copy of the statement to the defence as it was found in the police record of the investigation of the Islamabad incident, yet the

statement had to be duly proved, a required by section 162 of the Criminal Procedure Code, before it could be used to contradict and cross-examine Ahmad Raza Kasuri. He had emphatically denied making any such statement, and had, in fact, asserted both in examination-in-chief as well as in cross-examination, that no police officer had contacted him after he had lodged the First Information Report at the Islamabad Police Station. His denial finds support from the fact that in the privilege motion, which he moved on the same afternoon, in the National Assembly, which was then sitting as a Committee of the full House to consider the Qadiani issue, he stated that he was not attributing motive to any one at that stage. In these circumstances the statement had obviously to be proved by the officer who had recorded the same, and the mere identification of signatures of the D.S.P. by his subordinate, namely, Inspector Nasir Nawaz could not have proved the contents of the statement.

438. As the statement in question was not a statement recorded under section 161 of the Criminal Procedure Code during the investigation of the present murder, but in a different criminal case under section 307 of the Pakistan Penal Code alleged to have been taken place on the 24th of August 1974, it was not one of the statements which had to be supplied to the defence under the provisions of section 265-C of the Code. It was, therefore, clearly the duty of the defence to summon the officer concerned as its own witness to prove the statement if it wanted to make use thereof under section 162 of the Code.

489. There has been considerable argument at the Bar that the High Court should have called this officer as a Court witness in the interest of justice, and that its failure to do so has caused prejudice to the defence. I regret I am not impressed by this argument for the reason that the power granted by section 540 of the Code to summon Court witnesses is entirely a matter in the discretion of the Court, and it is not for the accused to insist, especially when he has an opportunity of calling the witness concerned as a defence witness, in case, he considers his evidence to be necessary. The proper use of section 540 is in a situation where neither of the parties before the Court is in a position, or is willing, to call a witness whose evidence is material for doing justice in the cause. Such was not the case here, as the D.S.P. concerned could easily have been summoned as a defence witness by any of the accused persons to prove the statement in question.

490. Coming now to the controversy relating to the contents of paragraph 15 of the report submitted to the Government in this case by Mr. Justice Shafi-ur-Rehman of the Lahore High Court as an Inquiry. Tribunal, I find that the High Court has taken the view that the report as such was not admissible in evidence under any of the relevant sections of the Evidence Act. This view of the High Court was conceded by both sides to be correct; but it was contended by Mr. Yahya Bakhtiar that as this paragraph contained a gist or reproduction of a statement presumably made before the Tribunal by Ahmad Raza Kasuri giving four possible motives for the assault on him, resulting in the death of his father, the High Court should have allowed this paragraph to be used for the

purpose of confronting and contradicting Ahmad Raza Kasuri in terms of section 145 of the Evidence Act for the reason that no other record of this statement was available in the records of the Tribunal. In support of this submission the learned counsel placed reliance on *V. E. R. Subbaraya Chettiar and others v. Sellamuthus Asari*<sup>284</sup>, *Mt. Kundan Bibi and others v. Magan Lal and others*<sup>285</sup>, *Medavaropu Narasayya v. Medavarapu Veerayya and others*<sup>286</sup>, and *S.K. Ramaswami Goundan v. S.N.P. Subbaraya Goundan and others*<sup>287</sup>. In all these cases the rule laid down is that if the original statement is not available and the recitals in the judgment were the only official record, thereof, then confrontation with such recitals could be permitted.

491. On behalf of the State, it was pointed out by Mr. Ijaz Hussain Batalvi that the entire record of the Tribunal, as available with the Punjab Government, was scrutinized by a Deputy Secretary in the presence of Mr. D. M. Awan, and the only statements found on the record were one oral statement of Ahmad Raza Kasuri recorded by the Tribunal, one written statement filed in the first instance, and another supplementary written statement, in all on which Ahmad Raza Kasuri, had blamed appellant Zulfikar Ali Bhutto for the attack on his car, and had, in fact, gone to the extent of asserting that he did not expect to get justice as long as Zulfikar Ali Bhutto was in power. In order to satisfy ourselves further the record of the Tribunal was scrutinized, in the presence of the counsel for both sides by our learned brother Muhammad Haleem, J. and there was no indication at all of the presence of any such statement on the record, nor was there any suspicion that such a statement had been removed after the Tribunal had concluded its proceedings. Mr. Batalvi also seems to be right in submitting that a perusal of paragraph 14 of the Report shows that Ahmad Raza Kasuri had made only one oral statement and two written statements as mentioned in the preceding paragraphs. Such being the case, the contents of paragraph 15 of Mr. Justice Shafi-ur-Rehman's report cannot be treated to be secondary evidence of the disputed statement of Ahmad Raza Kasuri, as no such statement appears to have been made at all by him during the inquiry proceedings. It seems to me that while describing the possible motives for the assault Mr. Justice Shafi-ur-Rehman may have been inadvertently influenced by some other documents placed before him, may be the statement said to have been made by Ahmad Raza Kasuri during the Islamabad incident before D.S.P. Agha Muhammad Safdar. Considering all these surrounding circumstances, I am of the view that this was not at all a case in which the principle enunciated in the precedent cases relied upon by Mr. Yahya Bakhtiar could have been applied. A scrutiny of the record of the proceedings of the Tribunal has made it amply clear that no such statement was ever recorded, and, therefore, no question of its having been lost arises.

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<sup>284</sup> AIR 1933 Mad. 184

<sup>285</sup> AIR 1932 All. 710

<sup>286</sup> AIR 105 Mad. 268

<sup>287</sup> AIR 1948 Mad. 388

492. There is, however, yet another aspect of the matter, namely, that even if in August 1974, Ahmad Raza Kasuri might have thought that the attack launched on him at Islamabad could have been the work of any of the four groups of his enemies, yet in the First Information Report lodged by him in the middle of the night, immediately after the death of his father, on the 11th of November 1974, he clearly laid stress only on his political differences with appellant Zulfikar Ali Bhutto who was then in power as the Prime Minister of Pakistan. It is in evidence that the police officers who had reached the United Christian Hospital on being informed of this incident, hesitated to record an F.I.R. mentioning the name of the Prime Minister, and, accordingly, a compromise formula was devised to the effect that the F.I.R. would not be recorded on the basis of the oral statement made by Ahmad Raza Kasuri, but on the basis of a writing to be prepared by him.

493. It is also in evidence that the Prime Minister's Chief Security Officer Saeed Ahmad Khan, and his Assistant the late Abdul Hamid Bajwa, had given directions to the Investigating Officers to examine every possible motive, but from the fact that the case was filed as untraced on the 1st of October 1975, it can safely, be inferred that nothing tangible came to light in these directions. A further fact may also be noticed at this stage, namely, that nothing was brought out in the lengthy cross-examination of Masood Mahmood and other prosecution witnesses to show that any of them, or any of the confessing accused or appellant Mian Muhammad Abbas could have any motive of their own to assassinate Ahmad Raza Kasuri or his father. In fact, Masood Mahmood asserted at the trial that his father and the deceased were family friends from Kasur.

494. Before concluding the discussion on the question of motive, it may be stated that in the High Court it was suggested that if appellant Zulfikar Ali Bhutto had any motive to do away with Ahmad Raza Kasuri, he could have easily brought some persons from Larkana to do so instead of involving the Federal Security Force. This argument was disposed of by the High Court (in paragraph 580 of the judgment) by saying that:

"These arguments presume that a criminal must act in a particular manner in given circumstances. The reaction may differ from man to man. The planning may also differ. These arguments cannot cast any doubt regarding the correctness of the evidence."

These observations seem to me to be unexceptionable.

### **WAS KASURI A POLITICAL NON-ENTITY?**

495. Both Mr. Yahya Bakhtiar and appellant Zulfikar Ali Bhutto contended that Ahmad Raza Kasuri was a political non-entity, and, therefore, there could hardly be any reason or occasion for the appellant to take Kasuri's utterance seriously. Whatever the status and stature of Ahmad Raza Kasuri as a politician in Pakistan, the evidence



brought on the record seems to suggest that he was certainly not a non-entity in so far as the Pakistan People's Party was concerned. Kasuri himself claims to be a founder Member of the Pakistan People's Party from 1-12-1967, and it was conceded by Mr. Yahya Bakhtiar that he may have been present when the party was founded. In any case, he became Chairman of the Pakistan People's Party in his home town, Kasur from the date the party, was founded, and remained as such until 2-5-1971. He had first met Zulfikar Ali Bhutto in June 1966, after having passed his law examination, and they appeared to have developed a relationship of mutual admiration, as would appear from letters dated the 13th of September 1967 and the 8th of October 1968 respectively (Exh. P.W. 1 / 15 and Exh. P.W. 1 /16) written by Zulfikar Ali Bhutto to Ahmad Raza Kasuri, stating that the "Party needs men of crises and Kasuri has making of such a man". For this time Kasuri had become the organizer of the Pakistan People's Party in Kasur Sub-Division, and was awarded the Party ticket for the National Assembly seat from Kasur in the elections of 1970. It was only in March 1971, that differences arose between them over the question of attending the Dacca session of the National Assembly scheduled to be held on the 3rd of March 1971. As has already been stated, he soon formed the Raza Progressive Group inside the People's Party, and it has also been brought out earlier in this judgment that he was most vocal in criticizing his erstwhile leader. The incident of the 3rd of June 1974, itself shows that Kasuri was capable of hitting back at the Prime Minister on the floor of the Parliament. These are some of the facts which, negative the contention that Ahmad Raza Kasuri was a mere political non-entity, whose utterances could be easily ignored by the Prime Minister in power.

496. As to Mr. Yahya Bakhtiar's plea that bitter speeches in Parliament cannot, however, give rise to thoughts or plans of murder, we may observe that it is not possible to make any such generalization, as there are instances, where political bickering have actually led to murders or murderous assaults, even on the floor of the house. It has also to be remembered that Kasuri's outbursts must have caused special annoyance and anguish to Zulfikar Ali Bhutto, as Kasuri had started his political career as a young admirer and camp-follower of Bhutto, and his critical and violent utterances, in Parliament and outside, could not, therefore, be easily accepted as those of an ordinary parliamentary opponent.

### **MOTIVE PROVED**

497. As a result, I have reached the conclusion that the learned Judges in the High Court were right in holding that the appellant Zulfikar Ali Bhutto had a strong motive to do away with Ahmad Raza Kasuri owing to their violent political differences, and the manner and the language in which Ahmad Raza Kasuri gave vent to his views against the former Prime Minister and his polices.

### **CORROBORATION OF MASOOD MAHMUD BY SAEED AHMAD KHAN, CHIEF SECURITY OFFICER TO THE FORMER PRIME MINISTER**

498. Masood Mahmood's statement as to the task assigned to him by the former Prime Minister to do away with Ahmad Raza Kasuri, and his assertion that the Prime Minister kept on reminding and goading him on the green telephone as well as through his Chief Security Officer Saeed Ahmad Khan find corroboration from the testimony of the later. Appearing as prosecution witness No. 3 at the trial, he stated that while serving as Additional Inspector-General of Police in West Pakistan he was dismissed from service under Martial Law Regulation No. 58 on the 23rd of May 1970. He stated that he had met the appellant Zulfikar Ali Bhutto for the first time at Larkana in December 1955, when he was serving as a Deputy Inspector-General of Police in the Sindh Province, and had also subsequently met him during the appellant's tenure as a member of the Central Cabinet. During his visit to Rawalpindi in August 1972, When appellant Zulfikar Ali Bhutto was the President of Pakistan, he entered his name in the Visitors' Book kept at the President's House, and was called by the appellant for an interview on the 11th of August 1972. It was during this interview that Zulfikar Ali Bhutto persuaded the witness to work for him and for the country, and as he could not be employed on a regular basis on account of his being a dismissed civil servant, a device was found by the appellant for payment of salary to the witness as Legal and Administrative Consultant to the All Pakistan Research Organization under the aegis of the Cabinet Division. Although he never worked for this Organization even for a single day, he was paid by this Organization with effect from the 8th of December 1972, and for services rendered prior to this date he was paid from the secret fund of the President through big Additional Secretary Mr. Afzal Saeed Khan. Later he was designated as Chief Security Officer to the Prime Minister, when the appellant assumed that office under the 1973 Constitution, and continued to function as such until the 15th of June 1976, and was then appointed by the appellant as Special Officer for assisting in the Hyderabad trial of certain N. A. P. leaders including Khan Abdul Wall Khan etc. He continued in that capacity until the promulgation of Martial Law on the 5th of July 1977, and was taken into protective custody by the Martial Law authorities along with some other civilian officers.

499. Saeed Ahmad Khan deposed that his duties were to advise the appellant on political issues in the country and to keep him abreast of the activities of various political parties. Important and daily intelligence reports from the various Intelligence Agencies like the Federal Intelligence Bureau, Inter-Services Intelligence Directorate, and the provincial special branches, began to be supplied to him at the end of 1972. After assessing these reports he used to send his own appraisal to the appellant. In 1973, he requested the appellant for an Assistant in view of the increase in his work load, and the late Abdul Hamid Bajwa was then appointed as an Officer-on-Special Duty with him on the ground that being a specialist on Punjab affairs he would be useful in that behalf. Saeed Ahmad Khan asserted at the trial that he discovered in due course that Abdul Hamid Bajwa had direct access to the appellant personally as well as on the

telephone and was being given direct assignments and would also send his reports directly to the Prime Minister.

500. It has already been mentioned earlier that in December, 1973, Saeed Ahmad Khan was asked by the appellant to open files on a number of persons including Ahmad Raza Kasuri. The witness proved these files at the trial and went on to add that during an interview with the appellant in the middle of 1974, he was suddenly asked by the appellant whether he knew Ahmad Raza Kasuri. On his reply that he did not know Kasuri personally, the appellant told him that he had assigned some work to Masood Mahmood about Ahmad Raza Kasuri, and that the witness should remind Masood Mahmood. On returning to his office the witness passed this message to Masood Mahmood on the green line, and the latter replied "alright". It was brought out in cross-examination that the witness did not know at that time the import of the message given to him by the then Prime Minister I that he, in fact, thought that it must be for the purpose of effecting a reconciliation between the Prime Minister and Ahmad Raza Kasuri as Masood Mahmood also hailed from Kasur, and he had earlier played some part in trying to bring about a rapprochement between the appellant and the former Federal Minister Mr. J. A. Rahim who had been dismissed from the Cabinet by the appellant on the 2nd of July, 1974.

501. The rest of the evidence of Saeed Ahmad Khan deals with events subsequent to the present incident, and it is, therefore, not necessary to give its details at this stage. It is sufficient to say that he described the efforts made by him and his Assistant Abdul Hamid Bajwa to direct the investigation of the case into certain channels for the purpose of keeping out the Federal Security Force and the Prime Minister. He also gave evidence as to the efforts made by him and his Assistant, at the instance of the appellant, to win over Ahmad Raza Kasuri back to the fold of the Pakistan People's Party. On both these matters, he referred to several documents, which will be examined at their proper place.

### **CREDIBILITY OF SAEED AHMAD KHAN**

502. Leaving aside for the time being, Mr. Yahya Bakhtiar's analysis and criticism of Saeed Ahmad Khan's evidence relating to the conduct of the investigation and winning over of Ahmad Raza Kasuri, and his contention that Saeed Ahmad Khan is an accomplice, or at any rate no better than an accomplice, it may be stated that the veracity of this witness was also attacked on the same general grounds as were urged in respect of Masood Mahmood, namely, that he had been brought under pressure by the Martial Law authorities after having been taken into custody on the 5th of July, 1977, and he consented to falsely support the prosecution case when confronted with an inquiry, and possible prosecution, for allegations arising out of more than a thousand files taken into possession by the Federal Investigation Agency from his office. The learned counsel submitted that, like Masood Mahmood, Saeed Ahmad Khan had also voluntarily written a letter to the Chief Martial Law Administrator, and it was only

subsequently that his statements under sections 161 and 164 of the Criminal Procedure Code were recorded in connection with the present case. Mr. Yahya Bakhtiar contended that in these circumstances the High Court was in error in treating Saeed Ahmad Khan as an independent witness.

503. After giving my anxious consideration to the submissions made by Mr. Yahya Bakhtiar, I am of the view that it is not possible to agree that Saeed Ahmad Khan has deliberately chosen to falsely implicate Zulfikar Ali Bhutto in this case owing to pressure exerted on him by the Martial Law authorities. While dealing with the case of Masood Mahmood, I have already stated that several civilian officials appeared to have been taken into custody on the proclamation of Martial Law in Pakistan on the 5th of July, 1977, specially those who were closely associated with the former Prime Minister; and, therefore, the simple fact that Saeed Ahmad Khan was also taken into such custody would not necessarily lead to the inference that he would be persuaded to falsely implicate his erstwhile superior and benefactor. According to Saeed Ahmad Khan, he first met the appellant in December, 1955 when he was Deputy Inspector-General of Police; but in cross-examination it was suggested to him that, in fact, he and his brothers owed their present jobs to appellant's father, Sir Shah Nawaz Bhutto. Even if that be not correct, the fact remains that there was a fairly long association between Saeed Ahmad Khan and the appellant, and it was for this reason that he was appointed by the appellant to a position of great personal confidence and trust as his Chief Security Officer, even though he was a dismissed civil servant. The device adopted to pay him his salary as a legal consultant to an organization under the Cabinet Division, for which he never worked, shows the anxiety of the appellant to secure the advice and services of Saeed Ahmad Khan for exercising political control over the members of his own party and that of the Opposition. His evidence leaves no doubt that he had access to confidential documents from almost all the ministries of the Government including the Foreign Office, and he was also in constant touch with the Provincial Governments. He was given lucrative terms for his employment, and even though he ceased to be the Chief Security Officer to the appellant with effect from the 15th of June, 1976, yet he continued in service, apparently on the same terms, until the 5th of July, 1977. In these circumstances there had, indeed, to be some extraordinary pressure on him to fabricate a false story against the appellant.

504. Now, the pressure alleged by the learned counsel of the appellant is that he was threatened with the registration of a number of cases against him, arising out of the large number of files seized from his office by an Assistant Director of the Federal Investigation Agency, namely, Khizar Hayat (P.W. 29). On page 282 of the record the answer given by Saeed Ahmad Khan is "I have been detained because of the sins of commission and omission of Mr. Bhutto. It was a blessing in disguise for me because I had time to seek mercy from my Allah and I volunteered as I have said earlier to the Chief Martial Law Administrator that I was making a clean breast of which I know of

my association with Mr. Bhutto. The question, therefore, of any threat or any undue influence does not arise, and my files maintained in my office speak for themselves".

505. Earlier in cross-examination Saeed Ahmad Khan had stated that he was interrogated in this case on the 2nd of September, 1977, by the Federal Investigation Agency, but before that he had written two petitions to the Chief Martial Law Administrator from his detention at Sihala that he had saved the country from civil war which was imminent, and that "an officer or a team be sent to take down my voluntary statement as to what I had to say of my associations with Mr. Bhutto as I am now free from his shackles" He went on to state that a team consisting of a Major-General, a Colonel and an F.I.A. Officer came to him and he narrated the whole story that he knew, and after that they asked him certain questions, including those relating to the present murder. He denied that he had been interrogated on the allegations of corruption and misuse of official position.

506. Considering Saeed Ahmad Khan's age, experience and standing as a Police Officer, his replies to the suggestions made to him by the defence, and the long and intimate association existing between him and the appellant, as well as the obvious benefits by way of emoluments, power and patronage enjoyed by Saeed Ahmad Khan during the appellant's tenure of office, I am of the view that it is not possible to hold that Saeed Ahmad Khan is deliberately giving false evidence against the appellant under pressure from the Martial Law authorities.

507. It was next submitted by Mr. Yahya Bakhtiar that Saeed Ahmad Khan is not at all certain as to when he was asked by the appellant to convey a message to Masood Mahmood about Ahmad Raza Kasuri, as he had earlier stated that it was in mid 1974, and in his previous statement under sections 161 and 164, Cc. P.C. he had mentioned that it was in August 1974. In cross-examination Saeed Ahmad Khan clarified that although he did not remember the exact date, the interview with the Prime Minister, at which the latter gave him this message for Masood Mahmood, had taken place a few days after the dismissal of the Federal Minister Mr. J. A. Rahim on the 2nd of July, 1974. As the dismissal of Mr. Rahim was an event of considerable significance at the time, it appears to be only natural that Saeed Ahmad Khan should be able to correlate the interview with this event. Such being the case there does not appear to be any such uncertainty as to the timing of this interview as contended by Mr. Yahya Bakhtiar.

508. The learned counsel further submitted that as the Prime Minister was in direct touch with Masood Mahmood, where was the need for him to ask Saeed Ahmad Khan to convey such a message to Masood Mahmood; and it would, therefore, appear that the prosecution has deliberately introduced Saeed Ahmad Khan as a false witness to lend support to Masood Mahmood's testimony. The learned counsel is undoubtedly right in saying that the appellant was, indeed, in direct and constant touch with Masood Mahmood, but the question now posed should have been put both to Masood

Mahmood and Saeed Ahmad Khan. I find, however, that no such question was asked from either of them, and the emphasis in the cross-examination of Saeed Ahmad Khan was only on the timing of the interview in question. However, from the evidence of Masood Mahmood it does appear that the appellant was reminding and goading him to get on with the job, apparently because of the delay that had taken place in the execution of the mission entrusted to him regarding Ahmad Raza Kasuri. It is, therefore, possible that the message sent through Saeed Ahmad Khan was intended to expedite the matter.

### **CONCLUSIONS AS TO SAEED AHMAD KHANS CORROBORATION OF MASOOD MAHMOOD**

509. For the foregoing reasons I am of the view that this part of the evidence of Saeed Ahmad Khan does lend corroboration to the testimony of Masood Mahmood that the former Prime Minister had specially assigned to him the task of doing away with Ahmad Raza Kasuri. The message was given to Saeed Ahmad Khan when several weeks had already passed since the task had been assigned to Masood Mahmood by the appellant, and, therefore, there does not appear to be anything improbable or unnatural if the appellant decided to remind Masood Mahmood about the matter through a high-powered emissary, who was none other than his own Chief Security Officer.

### **CORROBORATION REGARDING QUETTA VISIT OF Z. A. BHUTTO AND MASOOD MAHMOOD IN JULY, 1974**

510. It will be convenient now to turn to the corroborative evidence offered by the prosecution regarding the visit of appellant Zulfikar Ali Bhutto as Prime Minister to Quetta in July, 1974, and Masood Mahmood's presence there in connection with that visit, his audience with the Prime Minister and instructions to his Director M. R. Welch to take care of Kasuri during the latter's expected visit to Quetta.

511. The visit of the appellant to Quetta in July, 1974, has not been disputed by the defence, nor, in fact, has the presence of Masood Mahmood at Quetta been questioned during those days. The only point made in this behalf by Mr. Yahya Bakhtiar is that Masood Mahmood did not have any meeting with the Prime Minister on the 29th of July, 1974, as alleged by the prosecution, and, therefore, there could be no question of the appellant having given any instructions to Masood Mahmood on that day in connection with the expected arrival of Ahmad Raza Kasuri in Quetta.

512. In this behalf we have in the first place the T. A. bill of Masood Mahmood (Exh. P.W. 2/9) which shows that Masood Mahmood travelled to Quetta from Karachi on the 23rd of July, 1974, and departed from there at 6-40 p.m. on the 29th of July, 1974. In the remarks column the object of the visit to Quetta is stated to be to attend to the visit of

the Prime Minister to Baluchistan. While this document mention Masood Mahmood being received in audience by the Prime Minister at Larkana, it does not mention any such meeting with the Prime Minister at Quetta. However, there is another document, namely, Exh. P.W. 5/1, which contains the tour details of Masood Mahmood, and it shows that he had an audience with the Prime Minister at Quetta in the forenoon of the 24th of July before leaving Quetta at 6-40 p.m. for Lahore. This document was brought on the record through Ahmad Nawaz Qureshi (P.W. 5), Private Secretary to the Director-General, Federal Security Force, and it appears that its genuineness was not challenged in cross-examination. It contains details. of Masood Mahmood's tour programme from the 18th of July, 1974 to the 4th of August, 1974 and purports to have been prepared by the Private Secretary concerned on the 5th of August; 1974, and sent to the Assistant Director for Budget and Accounts, obviously for the preparation of the formal T. A. Bill. It is, therefore, difficult to accept Mr. Yahya Bakhtiar's contention that this document must have been maneuvered at some subsequent date to suit the prosecution. This argument is also negated by the fact that Ahmad Nawaz Qureshi was cited by the prosecution in the calendar of witnesses and the documents containing the tour details were also mentioned, In these circumstances the omission of the audience with the Prime Minister at Quetta in the formal T. A. Bill does not negative the tour details prepared by Masood Mahmood's Private Secretary and sent to the Assistant Director for Budget and Accounts. It is true that in some of the other T. A. Bills the details given in the remarks column tally with those contained in the tour details, but for that reason alone the document Exh. P.W. 5/1 cannot be dubbed as a fabrication. I am, therefore, of the view that it does stand proved by the documentary evidence that Masood Mahmood had an audience with the then Prime Minister at Quetta on the 29th of July, 1974, before leaving Quetta that evening.

#### **MASOOD MAHMOOD'S INSTRUCTIONS TO DIRECTOR M. R. WELCH TO TAKE CARE OF KASURI AT QUETTA**

513. Now, Masood Mahmood has stated that during Ibis meeting, appellant Zulfikar Ali Bhutto told him that Ahmad Raza Kasuri was likely to visit Quetta, and that he should be taken care of during his stay there. Masood Mahmood has asserted that on receiving these orders, he gave the necessary instructions to his local Director, namely, M. R. Welch (P.W. 4) saying that some anti-State elements, including Ahmad Raza Kasuri, were likely to be in Quetta and they should be got rid of. He told Welch that Kasuri was delivering anti-State speeches and was doing damage to the interests of Pakistan. M. R. Welch has fully corroborated this part of Masood Mahmood's testimony by stating that Masood Mahmood visited Quetta in the month of July, 1974, in connection with the tour of the then Prime Minister to Baluchistan; that he stayed in Room No. 5 in Lourdes Hotel, Quetta; and that one evening he sent for the witness to the hotel, and after asking him about the next day's programme of the Prime Minister and commitments of the Federal Security Force in connection with his security, he remarked to the witness that the enemies of Pakistan had to be eliminated, and this was

expected from every loyal citizen of Pakistan. He mentioned the name of Ahmad Raza Kasuri, M.N.A., and stated that he had been obnoxious in his speeches against Mr. Bhutto the then Prime Minister, and he should be eliminated. The witness explained that by "elimination" was meant assassination of Ahmad Raza Kasuri.

514. M. R. Welch has further deposed that Ahmad Raza Kasuri arrived at Quetta on the 13th of September, 1974, and one or two days prior to his arrival, the witness had a telephone call late in the evening from Masood Mahmood asking him whether he knew of the arrival of Ahmad Raza Kasuri, and he would like that the witness should have this information. Masood Mahmood further told him that Ahmad Raza Kasuri should be taken care of and then closed the telephone. According to M. R. Welch "in the context of the personal talk with Mr. Masood Mahmood in July, 1974, when he referred to take care of Mr. Kasuri, it meant his elimination, and elimination meant assassination".

515. Giving details of Ahmad Raza Kasuri's arrival in Quetta, M. R. Welch has deposed that Kasuri had a room reserved in Imdad Hotel, Quetta, but he did not actually reside in this hotel; that the party workers of the Tehrik-e-Istaqlal had been detailed to watch the room in Imdad Hotel occupied by the members of the party; that persons who wanted to see the political leaders were usually searched by the workers, who were cautious regarding the movements of their leaders; that, in other words, they did not even disclose their programme; and that Kasuri left Quetta suddenly on the 16th of September, 1974. M. R. Welch has then proved certain documents by way of correspondence which passed between him and the Director-General of the Federal Security Force at Rawalpindi in connection with this visit of Ahmad Raza Kasuri. The contents of these documents make instructive reading.

#### **DOCUMENTARY EVIDENCE IN SUPPORT OF M. R. WELCH**

516. In the first place there is the report (Exh. P.W. 2/1) bearing No. 9505 dated the 14th of September, 1974, sent by Welch to the Director General of the Federal Security Force, to which a reference has already been made in connection with the contents of the speech made by Ahmad Raza Kasuri on the very first day of his arrival in Quetta, namely, 13th of September, 1974, in which he severely criticized the appellant Zulfikar Ali Bhutto. In this report Welch had informed the Director-General about the arrival of Ahmad Raza Kasuri and two other gentlemen, namely, Malik Ghulam Jilani and Feroze Islam in Quetta, adding that a room had been reserved for Ahmad Raza Kasuri in Imdad Hotel but he was, however, not residing in the reserved room.

517. Although this letter was addressed to the Director-General of the Federal Security Force, it was acknowledged by Mian Muhammad Abbas by his D.O. letter dated the 25th of September, 1974 (Exh. P.W. 2/2) asking Welch "if Ahmad Raza Kasuri did not stay at the Imdad Hotel which was reserved for him, where else did he stay during his sojourn at Quetta." This letter remained unanswered by Welch until the 17th



of November, 1974, i.e. until after the murder of Kasuri's father. In his reply Welch informed Mian Muhammad Abbas that "the gentleman in question had reserved a room in the Imdad Hotel but seldom stayed in his reserved room during the night. He occupied some other room reserved for members of the party in the Hotel".

518. After his initial report to the Director-General on the 14th of September; 1974, Welch sent another report to Masood Mahmood by name on the 18th of September, 1974, which would bear a reproduction here in full;

"Top secret immediate

### INTELLIGENCE REPORT

(1) Ahmad Raza Kasuri and Feroz Islam left Quetta suddenly on the 16th September 1974 by P. I. A. at 11-30 a.m. for Lahore.

(2) Asghar Khan, Muhammad Saeed, Mahmood Ali Kasuri and Mr. A. B. Awan left Quetta by P. I. A. for Rawalpindi on the 17th September, at 12-15 hours.

(3) Throughout their stay at Quetta the party were protected by ten selected men by Khudai Noor, six persons selected by Mansoor of Kharan and four students provided by Iqbal. The party were exceptionally cautious and persons wishing to see them were usually searched by the persons detailed for their security.

The time of their movements were not disclosed and they spent little or no time in the hotel rooms reserved for them.

The source who had infiltrated into their ranks and claimed to be a relative of Sattar Khan of Mardan was detected on the 15th September when Sattar Khan himself arrived in Quetta. He was removed from the inner circle.

The party was at all times under the surveillance of the Police Special Branch, Military Intelligence and the Intelligence Bureau. During their journeys to Kuchlaq and Pishin they were followed by the above Agencies."

519. Masood Mahmood perused this report on the 21st of September, 1974, and underlined and side-lined certain portions thereof, and made the following comments in the margin;

"To discuss at Quetta. Please see and return."

This minute was marked to Director, Operations and Administration, which apparently meant appellant Mian Muhammad Abbas who had described himself as Director,

Operations and Administration in the D. O. letter addressed by him to Welch on the 25th of September, 1974.

520. After referring to these documents, which had already been brought on the record at the trial during the evidence of Masood Mahmood, Welch made the following significant statement;

"The reason for sending this report (i.e. the one dated the 18th of September, 1974) to Mr. Masood Mahmood by name was that it contained information of a very confidential nature which he could only understand.

I had no intention of committing heinous murder and had to find a plausible excuse for not executing the orders of Mr. Masood Mahmood I took refuge in the fact that Mr. Ahmad Raza Kasuri was well protected and made this my excuse. I had hoped that Mr. Masood Mahmood would read between the lines and find the reason why I had not complied with his orders."

521. The two reports sent by M. R. Welch to his Director-General, one by designation and the other by name, and the query posed by Mian Muhammad Abbas in his letter of the 25th of September, 1974, on the question of the residence of Ahmad Raza Kasuri during his visit to Quetta, unmistakably bring out the special interest which was being taken at that time by approver Masood Mahmood and his Director Mian Muhammad Abbas in the whereabouts of Ahmad Raza Kasuri during his stay in Quetta. Although several leaders of the Tehrik-e-Istaqlal Party had visited Quetta, and there was a mention of their activities and speeches as well in the reports sent by M. R. Welch, yet the question about the place or places where these leaders resided was neither adverted to by Welch, nor raised by Masood Mahmood or Mian Muhammad Abbas; attention in this behalf was focused only on Ahmad Raza Kasuri. The contents of these documents, therefore, clearly support the oral testimony of M. R. Welch that he had been told by Masood Mahmood during the latter's visit to Quetta to eliminate Ahmad Raza Kasuri when he arrives in Quetta. These documents also support the declaration made by M. R. Welch at the trial that he had no intention to carry out this mission, and, therefore, he took shelter behind the fact that Ahmad Raza Kasuri did not reside in the room reserved for him in Imdad Hotel, and that the party were well protected by workers of the Tehrik-e-Istaqlal.

522. The oral testimony of M. R. Welch as to the telephone call which he received from Masood Mahmood a day or two before the arrival of Ahmad Raza Kasuri in Quetta on the 13th of September, 1974, also puts in proper perspective the sequence of events as they took place in Quetta, namely, that the oral directions to eliminate Kasuri were given to him by Masood Mahmood, in the first instance, at Quetta on the 28th of July, 1974, shortly before his departure for Lahore; and that the telephone call made in September, 1974, was a equal to these directions, as otherwise the use of the laconic

phrase "Kasuri should be taken care of" would not make proper sense. It is true that in the oral testimony of Masood Mahmood there was a confusion as to the proper sequence of the personal talk at Quetta between him and M. R. Welch, and the telephone call made by him to Welch from Rawalpindi, but Masood Mahmood later clarified the position; and in any case, the evidence of M. R. Welch is consistent on this point. It is fully supported by the contents of the telephone call as reproduced by him, and as also narrated by Masood Mahmood.

### DEFENCE CRITICISM OF WELCH

523. Mr. Yahya Bakhtiar submitted that Welch could not be believed, as he had lied as to his religion when appearing as a witness at the trial, inasmuch as he declined to take an oath on the Bible and instead gave evidence on solemn affirmation, although he was a Christian by faith and therefore should have given evidence by taking an oath on the Bible. The learned counsel stated that this fact was not known to the defence at that stage, and for this reason Welch was not questioned on the point, specially because on the day when he was examined, appellant Zulfikar Ali Bhutto was indisposed and the proceedings were conducted in his absence, although in the presence of his counsel. An application was made by the defence in this Court for recalling Welch so as to be questioned on the point of his religion. However, for reasons recorded in an earlier part of this judgment, we have disallowed this request. It seems to me that simply for the reason that Welch declined to give evidence at the trial by taking an oath on the Bible, it cannot be held that he was a liar, particularly when it was conceded at the Bar by Mr. Yahya Bakhtiar, who himself hails from Baluchistan, that at one stage Welch had embraced Islam to marry a Muslim lady. There is no material before us to come to the conclusion that he deliberately concealed his true religion for any ulterior motive at the time he appeared to give evidence in the High Court as the fourth witness for the prosecution.

524. It was next contended that it is impossible to believe Welch when he says that he met Masood Mahmood at his hotel in Quetta on the evening of the 29th of July, 1974, when Masood Mahmood's T. A. Bill shows that he left Quetta at 6-40 p.m. that day. I regret I see nothing improbable, leave alone impossible, in the statement made by Welch. He has stated that the talk between him and Masood Mahmood at the latter's hotel did not take more than a few minutes during which Masood Mahmood had first inquired as to the programme of the Prime Minister on the next day and the commitments of the Federal Security Force for his security, and then told Welch to eliminate anti-State elements including Ahmad Raza Kasuri, who was making obnoxious speeches against the Prime Minister. The contents of the talk as described by Welch do not indicate that it must have lasted for any appreciable length of time. It is to be remembered that Masood Mahmood has been described as a very strict superior by Welch, and it would appear, therefore, that he could not have dallied for any length of time before giving any necessary instructions to Welch. In any case, as Masood

Mahmood was leaving for Lahore late in the evening, there does not appear to be any improbability in his giving the necessary time to Welch, who was the senior most local officer of the Federal Security Force, and had to look after the arrangements for the Prime Minister's security after the departure of his Director-General.

525. Another point made in this behalf by Mr. Yahya Bakhtiar was that the evidence of Welch, even if believed, did not implicate appellant Zulfikar Ali Bhutto, for the reason that Masood Mahmood never told Welch that the Prime Minister wanted to get Ahmad Raza Kasuri eliminated. The learned counsel submitted that this was in contrast to what Masood Mahmood had told appellant Mian Muhammad Abbas when conveying to him the message or orders given by the appellant to Masood Mahmood in June, 1974.

526. It is correct that Masood Mahmood did not take Welch into confidence to the extent of telling him that the Prime Minister had ordered the elimination of Ahmad Raza Kasuri, as he had earlier told appellant Mian Muhammad Abbas. The reason for this different approach by Masood Mahmood while talking to Mian Mahmood Abbas and then to Welch is obvious, namely, that the Prime Minister had himself mentioned the name of Mian Muhammad Abbas to Masood Muhammad and had told Masood Mahmood to ask Mian Muhammad Abbas to get on with the job. In other words, Masood Mahmood was clearly told by appellant Zulfikar Ali Bhutto that this particular Director of the Federal Security Force was already in the know of this design since the time of Masood Mahmood's predecessor; but there was no such circumstance or indication in respect of M. R. Welch. In these circumstances it would, indeed, be very naive to expect Masood Mahmood to disclose to M. R. Welch that the Prime Minister wanted Ahmad Raza Kasuri to be eliminated. However, M. R. Welch has deposed at the trial that while mentioning Ahmad Raza Kasuri's name as being one of the anti-State elements. Masood Mahmood had told him that Kasuri was making obnoxious speeches against the Prime Minister. From this remark although it cannot be inferred that Masood Mahmood was acting under the express orders of the Prime Minister, yet it does become plain that one of the reasons for eliminating Ahmad Raza Kasuri was his obnoxious speeches against the Prime Minister. Viewed in this light, it would be seen that the evidence of M. R. Welch does provide valuable corroboration of the testimony of Masood Mahmood.

527. It was then contended that the correspondence between Welch and Masood Mahmood regarding Ahmad Raza Kasuri's visit to Quetta was nothing but in the nature of routine intelligence reports, to which no special significance could be attached. It is true that Welch stated that it was his routine to send intelligence reports, specially on political personalities etc, but a perusal of the reports in question and the query posed thereon by Mian Muhammad Abbas in his letter of the 25th of September, 1974, leave no doubt that while the reports may have been sent in routine, that is, in accordance with the prescribed procedure observed by the Directors of the Feral Security Force, yet

their contents were not routine as they focused particular attention on the place where Ahmad Raza Kasuri resided during his stay in Quetta. This kind of query does not appear to me to be a routine query, as the same has not been made about the other leaders of the Tehrik-e-Istaqlal accompanying Ahmad Raza Kasuri. Kasuri was specially singled out for this purpose.

528. Mr. Yahya Bakhtiar further submitted that there were several important omissions, contradictions and improvements in the evidence given by Welch at the trial as compared to his previous statements. Mr. Yahya Bakhtiar as a matter of fact filed a chart on the subject, but a perusal of the same, however, shows that it does not actually list any "omission", "contradiction" or "improvement" as against any "previous statement" of the witness; but simply advances a plea that the various reports sent by M. R. Welch and the surveillance carried out at the hotel-residence and on the movements of Ahmad Raza Kasuri during his visit to Quetta were merely of a normal and routine nature, and cannot give rise to any assumption that they were necessarily the result of any alleged direction by Masood Mahmood to "eliminate" Ahmad Raza Kasuri or "to take care of him". According to Mr. Yahya Bakhtiar, if the witness was now trying to reflect that these were certain peculiar and special measures, then in that respect he was trying to improve upon those normal and routine functions of the F.S.F. This point has already been attended to while dealing, with the evidence of this witness, and the value to be attached thereto, and it is not necessary to go over the same ground again. It can, therefore, be safely stated that the statement of M. R. Welch does not suffer from any such infirmity as is denoted by the terms "omissions, contradictions and improvements".

529. Mr. Yahya Bakhtiar also submitted that Welch, like the other witnesses in this case was pressurized by the Martial Law authorities and the Federal Investigation Agency, and that just as he was afraid of Masood Mahmood when the latter was Director-General of the Federal Security Force, he would now be afraid of the Martial Law authorities and thus agreed to give false evidence against the appellant. He further contended that the Federal Investigation Agency's officers had shown to Welch the statement which had already been made during investigation by Masood Mahmood, and that, in any case, Welch had read Masood Mahmood's evidence in the newspapers before he came to Lahore to give his evidence at the trial, and, accordingly, he fell in line with what was narrated by Masood Mahmood.

530. The argument is not only without substance but is also grossly unfair to the witness. It is correct that in cross-examination he did state that when Masood Mahmood talked to him on the 20th of July, 1974, at Quetta about doing away with Kasuri he did not oppose his suggestion, as he felt that this might have forced Masood Mahmood to take action against him for the reason that whatever he had told Welch might otherwise have leaked out, but at the same time he truthfully asserted that he had no intention to get Kasuri assassinated. From the reports sent by him and the fact that he did not take

any action against Kasuri it stands established that he had refused to become a patty to the commission of this offence, and handled the situation tactfully as far as Masood Mahmood was concerned. He has categorically asserted that although he had read Masood Mahmood's statement in the press, but he was not influenced by it, nor had he been shown any previous statement of Masood Mahmood by the Federal Investigation Agency. As the oral evidence given by Welch is supported by contemporaneous documents, I think it is clear that Welch has not spoken under any extraneous pressure, specially as he has not been shown to have any motive to falsely implicate any of the appellants or approver Masood Mahmood.

531. Finally, the learned counsel contended that Welch was no better than an accomplice as he did not report the matter to any authority once he had become aware of the design of the appellant or approver Masood Mahmood to eliminate Ahmad Raza Kasuri. According to Mr. Yahya Bakhtiar, as Director of the Federal Security Force he had the powers of a Station House Officer under subsection (3) of section 7 of the Federal Security Force Act of 1973, and under section 44 of the Criminal Procedure Code read with section 149 thereof it was his duty to prevent the commission of a cognizable offence, and by his failure to do so he became punishable under section 119 of the Pakistan Penal Code for concealment of the same. In support of these submissions he referred the Court to *Phullu and another v. Emperor*<sup>288</sup>, *In re: Addanki Venkadu*<sup>289</sup> and *The Crown v. Ghulam Rasul and others*<sup>290</sup>.

532. The question as to who is an accomplice in law has already been discussed earlier, and at this stage it will suffice to state that on a consideration of the three cases mentioned in the preceding paragraph, as well as a large number of other authorities cited at the Bar in this connection it is clear that an accomplice is a *particeps criminis*, who is consciously so connected with the criminal act done by his confederate, that he on account of the, presence of the necessary *mens rea*, and his participation in the crime in some way or the other, can be tried along with that confederate actually perpetrating the crime. A witness who could not be so indicted on account of the absence of *mens rea* cannot be held to be an accomplice.

533. Now, although Welch was asked by Masood Mahmood to do away with Kasuri during the latter's visit to Quetta, yet he has made it clear that he had no intention of falling in line; nor did he, in fact, take any steps. to cause any bodily harm to Ahmad Raza Kasuri. On the contrary he took shelter behind the fact that Kasuri was well-protected by his party workers. The evidence brought on the record shows that he refused to share the common intention with Masood Mahmood.

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<sup>288</sup> AIR 1936 Lah. 731

<sup>289</sup> AIR 1939 Mad. 266

<sup>290</sup> PLD 1950 Lah. 129

534. The contention that he failed to disclose Masood Mahmood's designs to somebody else is also unrealistic and besides the point. The fact remains that during Kasuri's visit to Quetta, Welch did not do anything which could show that he had any intention whatsoever to become a party to the conspiracy to kill Ahmad Raza Kasuri. In these circumstances it is misconceived to say that Welch was a party to the conspiracy, and should, therefore, be treated as an accomplice or no better than an accomplice. He remains an ordinary witness, and his evidence has to be judged accordingly.

### CONCLUSIONS AS TO EVIDENCE OF M. R. WELCH

535. On a consideration of all the aspects of the evidence given by M. R. Welch at the trial, supported as it is by contemporaneous documents, I am fully satisfied that Masood Mahmood did indeed give directions to M. R. Welch at Quetta to eliminate Ahmad Raza Kasuri during the latter's expected visit to Quetta. It also stands established that this was done by Masood Mahmood after he had had an audience with appellant Zulfikar Ali Bhutto who was also on tour at Quetta on that day (as evidenced by Masood Mahmood's tour details Exh. P.W. 5/1). Although Masood Mahmood did not specifically indicate to Welch that the directions about Ahmad Raza Kasuri had come from the Prime Minister, yet it becomes clear from the evidence of Welch that Masood Mahmood did mention that Kasuri was being obnoxious in his speeches against the Prime Minister. The evidence of Welch also establishes the fact that Mian Muhammad Abbas was fully in the picture, as otherwise his letter of the 25th of September, 1974, inquiring from Welch as to where else Ahmad Raza Kasuri had stayed in Quetta if not in his hotel groom would make no sense. It has already been noticed that even the marginal note made by Masood Mahmood on the report of M. R. Welch dated the 18th of September, 1974, was addressed to Mian Muhammad Abbas in his capacity as Director, Operations and Administration. In the circumstances I agree with the learned Judges in the High Court that the oral and documentary evidence provided by Welch, read with the tour details of Masood Mahmood as contained in Exh. P.W. 5/1, provides valuable corroboration of Masood Mahmood's testimony. It goes a long way in proving the conspiracy between Zulfikar Ali Bhutto, Masood Mahmood and Mian Muhammad Abbas, and shows their determined anxiety to eliminate Ahmad Raza Kasuri. Welch had no motive at all to falsely implicate any of them; nor had he any connection whatsoever with Kasuri.

### THE ISLAMABAD INCIDENT

536. The next piece of corroborative evidence relied upon by the prosecution is the fact that on the 24th of August, 1974 an attack was launched on Ahmad Raza Kasuri at Islamabad when he was travelling in his car from the M.N.A.'s Hostel to his residence. The details of this incident have been described by approver Ghulam Hussain, who mounted the attack, but leaving his evidence for discussion to a later stage, it may be stated here that in the First Information Report (Exh. P.W.23/1), recorded by Inspector

Nasir Nawaz (P.W. 23) at the instance of Ahmad Raza Kasuri, the details given were that there was rapid firing at his car from a blue jeep, and although he could not note down the number of the jeep, yet he saw that one man was sitting with the driver and the other man was on the rear seat of the jeep. In the statement made by Ahmad Raza Kasuri before the National Assembly that very afternoon, when it was sitting as the Special Committee of the whole House to consider the Qadiani issue, Ahmad Raza Kasuri stated that there was rapid sten-gun firing on hint from the blue jeep. This description of the attack by Ahmad Raza Kasuri both in the F.I.R. as well as in the statement made by him in the National Assembly, makes it clear that the attack was made from automatic weapons.

537. Inspector Nasir Nawaz was able to recover five empty cartridges from the spot indicated by Ahmad Raza Kasuri, and reference to the recovery memo. (Exh. P.W. 23/3) prepared on that very day by this Police Officer shows that the empties carried on them the marking 661/71. Only two days later the sealed parcel containing these empties was sent for expert examination to the Inspectorate of Armaments, G.H.Q., Rawalpindi, and the very next day its report (Exh. P.W. 23/4) was received to the effect that the fired cases were of 7-62 mm. bore and they were of Chinese origin.

538. As would appear later in this judgment from the detailed discussion of the evidence of approver Ghulam Hussain and the documentary evidence having a bearing on this point, Chinese ammunition of 7.62 mm. caliber was issued to the Federal Security Force, from the Central Ammunition Depot, Havelian, and one of the lots supplied bore the marking 661/71, and it was out of this ammunition that approver Ghulam Hussain was given 1500 rounds for training purposes at the Commando Camp started by him under directions of appellant Mian Abbas, and it was out of this quantity that several rounds were fired in the attack on Ahmad Raza Kasuri at Islamabad. On the basis of this evidence the Islamabad incident is clearly shown to be an attempt in the direction of the execution of the conspiracy intended to eliminate Ahmad Raza Kasuri through the agency of the Federal Security Force. The use of automatic weapons and of the ammunition just mentioned clearly points in this direction, and thus provides corroboration of the evidence of both the approvers, namely, Masood Mahmood and Ghulam Hussain. The fact that Masood Mahmood did not know the identity of the persons employed by Mian Abbas in the attack at Islamabad does not in any manner detract from this position, as in a case of conspiracy like the present it is not necessary that every conspirator should be familiar with all the details of the conspiracy or the role assigned to different participants therein.

### **THE PRESENT INCIDENT AT LAHORE**

539. Now I come to the nature of the incident of the 11th November, 1974, at Lahore, resulting in the present murder. It is in evidence of the then Investigating Officer Abdul Hayee Niazi (P.W. 34) that on 11-11-1974 he collected 24 empty cartridges from the spot



(i.e. Shadman-Shah Jamal Roundabout) as per recovery memo. Exh. P.W. 34/4. This document indicates that 22 empties bore the mark B. B. 1/71 (which in fact was 661.71 but was so misread) (The word 661.71 indicated the lot number of supply of ammunition) and 2 empties bore the mark 31/71. It appears that those empties were sent through the Senior Superintendent of Police, Lahore, to the Inspectorate of Armaments, Rawalpindi, on 23-11-1974. The report sent by, that Inspectorate is contained in Exh. P.W. 32/1 dated 27-11-1974, relevant portion whereof reads as follows:-

The information required vide your letter as under:

(a) Bore	7.62 M M. 38 M.M.
(b) Maker	Chinese
(c) Available in Pakistan	Yes. Service bore
(d) By which weapon the cartridges	Chinese 7,62 M.M. Rifle, L.M.G. & S.M.G are used.

540. It has already been mentioned earlier that during those days an Inquiry Tribunal, consisting of Mr. Justice Shafi-ur-Rehman of the Lahore High Court, had been set up by the then Provincial Government to enquire into this murder. It appears that certain information in elaboration of the above report was sought by the learned Judge and the Inspectorate of Armaments, Rawalpindi after giving the requisite information again confirmed the earlier report vide their letter Exh. P.W. 32/2 dated 7-1-1975. It is to be pointed out that a bullet-core for examination was received by the Directorate on 27-12-1974, and on examination that too was found to be of 7.62 mm x 38 mm. (It was the lead of bullet-core/metallic piece which was recovered from the head of the deceased in the United Christian (An Hospital). The word "service bore" as used in letter dated 27-11-1974 was explained to mean as that "caliber which is adopted by Army/Territorial elements", and was also called as "prohibited bore".

#### **THE IDENTITY OF CRIME EMPTIES RECOVERED IN ISLAMABAD AND LAHORE INCIDENTS**

541. The report with regard to empties recovered from the spot of Islamabad attack is Exh. P.W. 23/4 dated 27-8-1974 and is also to the same strain, pointing out that the ammunition was of 7.62 mm of Communist (Chinese origin). It may be stated that the prosecution has also led evidence to show that ammunition of 7.62 mm from lot No. 661.71 was supplied to and was in use of the relevant battalion of F.S.F. during those days. Reference in this respect may be made to Exh. P. W: 24/1 which is an issue voucher of C. A. D., Havelian, dated 9-6-1973. It is to be read along with Exh. P.W. 24/2 which is the Stock Register of F.S.F. where the receipt of this ammunition was entered. Similarly Exh. P.W. 24/5 voucher of C. A. D., Havelian, dated 29-5-1974 shows that F.S.F. received ammunition of 7.62 mm mark 661.71. All this may be read with evidence

of Fazal Ali (F. W. 24) who deposed that he issued to approver Ghulam Hussain (P.W. 31) 1500 rounds of ammunition of 7.62 caliber. Ghulam Hussain deposed at the trial that out of this ammunition he brought 500 rounds to Lahore. This evidence shows that the caliber of the aforesaid ammunition supplied to the F.S.F. was 7.62 mm, and the empties recovered from the spot as indicated in the expert's reports were also of the same caliber. The impact of this evidence is that it gives significant support to the prosecution, which claims that it was the personnel and the ammunition of F.S.F. who/which was involved in both the attacks *viz.*, in Lahore and Islamabad, and which from that point of view appear to be part of the same expedition.

542. When confronted with this situation, Mr. Yahya Bakhtiar argued that the ammunition of this caliber was in use with other agencies as well, and, therefore, the mere fact that the caliber of empties recovered from the spot was the same as that of the ammunition in use of the relevant F.S.F. Battalion, did not mean that it must be the F.S.F. personnel and ammunition, who or which alone could be said to be involved in this murder. The contention has no merit inasmuch as these facts are not to be looked at in isolation, but with reference to the facts, circumstances and the context of the whole case before us. Here the prosecution case is that it were the F.S.F. personnel who carried out this Operation with the F.S.F. ammunition. Examined in that context, when the lot number and bore of the ammunition recovered from the spot tally with the lot number and bore of the ammunition in use with the relevant battalion of the F.S.F., a probability of their participation is clearly made out, thus providing an item of corroboration to the prosecution case in the aforesaid relevant sphere, the implication of which will have to be put in scale along with the other evidence on record.

#### **QUESTION OF ADMISSIBILITY OF THE REPORTS OF THE FIRE-ARMS EXPERT**

543. At this stage Mr. Yahya Bakhtiar took exception to the admissibility of the reports of the fire-arms expert, namely, Exh. P.W. 32/1 pertaining to the Lahore occurrence, and Exh. P.W. 23/4 pertaining to the Islamabad incident. He drew attention of the Court to section 510 of the Cr. P.C. which is headed as "Report of Chemical Examiner, Serologist, etc." and lays down that "any document purporting to be a report, under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government or any Serologist, finger-print expert or fire-arm expert appointed by Government, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceedings under this Code, may, without calling him as a witness, be used as evidence in any inquiry, trial or other proceeding under this Code provided that the Court may, if it considers necessary in the interest of justice summon and examine the person by whom such report has been made." He argued that all the aforesaid reports were signed by "Major M. Fayyaz Haider for Chief Inspector", and as such were not admissible in evidence for two reasons *viz.*:-

(a) That a report which is signed by one expert "for" another expert is not a report under the hand of a "fire-arms expert" (concerned) as contemplated by the aforesaid section; and

(b) That it has not been shown on the record that the "Chief Inspector" whose report it purports to be or, as a matter of fact, Major M. Fayyaz Haider were appointed by Government as fire-arms experts. He submitted that for the aforesaid reasons, the reports in question do not formally and legally stand proved as being of any competent fire-arms expert.

544. As against the above, the reply, of Mr. Ijaz Hussain Batalvi was that the objection regarding admissibility of these documents for want of proof or otherwise was not raised before the trial Court, where the said documents were tendered by the relevant witnesses and were duly exhibited without any objection by or on behalf of any accused; that no such objection exists in the lengthy memorandum of appeal filed by Zulfikar Ali Bhutto, who was represented by a team of experienced lawyers, and no such point was taken by them during their main address extending over months before this Court; that it was only after the reply of the counsel for the State that for the first time this plea had been taken by Mr. Yahya Bakhtiar in his closing address; that had these points, which depend mostly on a factual controversy, been raised during the trial, the same could have been clarified, covered, or met, by the State; that allowing the documents to be exhibited without any objection really meant that the accused had waived all objections as to the mode of proof thereof, and now he cannot retract from that position at this late stage of the case.

545. He further submitted that the objections even otherwise were based on a misreading of the documents, inasmuch as the documents were really "under the hand of Major M. Fayyaz Haider", and bore his signatures though he had signed "for Chief Inspector". This "for" is only for showing that the document was emanating from the office of the "Inspectorate of Armaments", where all correspondence took place in the name of the "Chief Inspector", although the "Chief Inspector" was not the real author of the present reports which in fact were the reports of Major M. Fayyaz Haider himself; that Major M. Fayyaz Haider was duly in the employment of the Government as an arms-expert and was working in a Government Department of that nature (i.e. Inspectorate of Armaments) and as a matter of fact, had been appointed in that Department by the "Government" as this word is defined in section 17 of the Pakistan Penal Code read with section 5(2) of the Criminal Procedure Code, and was thus not a private individual but a Government Official; that under section 14(e) of the Evidence Act a presumption can be raised that official acts were done regularly and that this presumption should be invoked in this case both with regard to the regularity of appointment of Major M. Fayyaz Haider and also qua the authority and correctness of his report:

546. Mr. Batalvi next pointed out that whereas the defence counsel had filed applications for summoning various witnesses, but no such application was filed with regard to summoning Major M. Fayyaz Haider, which shows that the objections which were now being raised were not *bona fide* and well-founded, as at no stage during the trial any dispute or objection was raised in this behalf.

547. Finally, the learned Prosecutor submitted that even otherwise the evidence of Nasir Nawaz (P.W. 23), who had investigated the Islamabad incident and sent the empties for expert examination to the Inspectorate of Armaments, and had proved the recovery memo. (Exh. P.W. 23/3) as well as the report of Major Fayya Haider (Exh. P.W. 23/4), describing him as a Fire-Arms Expert, and stating the rob, It of his examination as to the bore of the ammunition being 7.62 min not at all questioned by the defence in cross-examination. Similarly the evidence of Lt. Col. Zawwar Hussain (P.W. 32) of the Inspectorate of Armaments, Rawalpindi, to the effect that 24 empty cartridges, vide S.S.P., Lahore, letter No. 57941-C dated 23-11-1974, were received in the Inspectorate of Armaments; that these cartridges were examined and a report to the S.S.P., Lahore was sent vide Exh. P.W. 32/1, and that the detailed report on the examination of the core of a bullet and two small metallic pieces was Exh. P.W. 32/2 was not questioned. On a question from Mr. Qurban Sadiq Ikram, learned Advocate for one of the accused, the witness deposed, that "I believe Major M. Fayyaz Haider is in Lahore, but I am not sure". Mr. Batalvi contended that as this matter was not pursued any further even by the learned counsel for appellant Muhammad Abbas, these two depositions on oath independently prove that the reports in question were, indeed, reports of an arms-expert, and if the defence had any objection they could have taken steps to question the same, or asked for summoning the signatory of those reports for cross-examination etc. which they did not do.

548. After giving my anxious consideration to the matter I have reached the conclusion that in the circumstances highlighted by Mr. Batalvi the two reports drawn up by Major Fayyaz Haider of the Inspectorate of Armaments, G.H.Q., Rawalpindi, cannot be ruled out of consideration at this late stage. Mr. Batalvi is right in submitting that if any objection had at all been raised on behalf of any of the accused persons as to the admissibility of these reports, without the production in Court of the Fire-Arm Expert who had examined the empties of both the incidents at Islamabad and Lahore, the matter could have been clarified during the trial. He is right in saying that the objection was not raised even in the memorandum of appeal filed in this Court, nor in the arguments addressed by Mr. Yahya Bakhtiar in support of the appeal; on the contrary it was raised during the, course of his closing address, when even this Court did not have an opportunity of clarifying the factual position.

549. It is true that the burden is all along on the prosecution to prove any document on which it wishes to rely, but in the present case the objection is not as to the relevancy and admissibility of the two reports) drawn up by Major Fayyaz Haider but only as to

the mode of proof. The prosecution tendered these documents in evidence in term of section 510 of the Criminal Procedure Code on the basis that being the reports of a Fire-Arm Expert they did not need to be formally proved by his evidence in Court. Now, this was a situation which could easily have been rectified by the production of Major Fayyaz Haider as a witness during the trial if an objection to his competence or status had been raised at the proper time. It has to be remembered that in two different incidents, occurring in two different districts, namely, Islamabad and Lahore, on two different dates, including 24th of August, 1974 and the 11th of November, 1974, the Superintendents of Police concerned automatically sent the empties for examination to the Inspectorate of Armaments, G.H.Q., Rawalpindi. It is also to be noticed that the examination was requested three years before the commencement of the trial, i.e. at a time when there was no controversy at all as to the competence of officers of the Inspectorate of Armaments to furnish reports under section 510 of the Criminal Procedure Code. It appears that the regular Fire-Arm Experts of the Provincial Government like Nadir Hussain Abidi (P.W. 36) were not in a position to give an expert opinion on the caliber of ammunition formally in use with units of the Army or other paramilitary forces, and it was for this reason that opinion of the G.H.Q. Inspectorate of Armaments was invited.

550. There is authority for the view that even in a criminal case an objection as to the mode of proof, as distinguished from the relevancy and admissibility of evidence, cannot be permitted to be raised where a party had not taken the objection at the time the document was tendered in y, evidence and placed on the record as proved. In coming to this conclusion the learned Judge had placed reliance on an earlier judgment of the Lahore High Court in *Dil Muhammad and another v. Sain Das*<sup>291</sup>. A similar view was taken by the Allahabad High Court in *Emperor v. Bachcha*<sup>292</sup>, and it was observed that the objection as to the mode of proof of the Chemical Examiner's report could not be allowed to be raised subsequently in appeal, when the accused had not objected to its proof without calling the Chemical Examiner in the witness-box, and nor was, in fact, the nature of the contents of the packet challenged otherwise. It was held that the report of the Chemical Examiner was, in the circumstances, admissible as evidence under section 510 of the Criminal Procedure Code. Finally, reference also be made to the observations of the Privy Council in *Gopal Das and another v. Sri Thakurji and others*<sup>293</sup> to the effect that where the objection taken is not that the document is in itself inadmissible, but that the mode of proof, put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted on the record. A party cannot lie by until the case comes before a Court of appeal and then complain for the first time as to the mode of proof.

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<sup>291</sup> AIR 1927 Lah. 396

<sup>292</sup> AIR 1934 All. 873

<sup>293</sup> AIR 1943 PC 83

551. Apart from the fact that the objection raised by Mr. Yahya Bakhtiar ought to be rejected on the ground that it is highly belated, I find that even otherwise it is not sustainable. I already stated that the Police in two different districts, and on two different dates, had regarded Major Fayyaz Haider of the Inspectorate of Armaments as the Arms Expert appointed by Government, and in view of the presumption of regular touching to official acts, I would be inclined to presume that this was, indeed, the correct position. Further, even though Major Fayyaz Haider had signed both the reports for Chief Inspector of Armament, it does not mean that they are not his reports, as he is the officer who had examined the ammunition and drawn up the reports, but signed them in the name of the Chief Inspector of Armament, who is the head of the Organization. It was laid down by this Court in *Piao Gul v. The State*<sup>294</sup>, that mere error in the description of the designation of a signatory is not fatal to the document so long as the official concerned possessed the necessary authority and power in that respect. Again in *Public Prosecutor v. Pamarti Venkata Chalamiah*<sup>295</sup>, it was held that the mere fact that the Chemical Analyst had appended his signature to the report of an Assistant Chemical Examiner did not detract from its value or legality. In that case a further objection was raised that the official concerned had not signed the report under section 510 of the Criminal Procedure Code as Assistant Chemical Examiner to the Government of Andhra, but it was held that a reasonable inference could be drawn that it was in his capacity as Chemical Examiner to Government of Andhra that he had submitted his report.

552. Similarly in A. I. R. Manual (Civil and Criminal (2nd Edition), Vol. 5 at page 5388 while dealing with section 510, Cr. P.C. the learned authors with reference to a case reported as Madh. B L J 1954 H C R 1190 state that where the person who examined the blood-stained article was a Chemical Analyzer to the Government, it was held that the report by him could not be held to be inadmissible in evidence on the ground that it was signed by him not as Chemical Analyzer but as "Secretary to the Analyzer".

553. Learned counsel for the appellant referred to *Muhammad Shafi v. The Crown*<sup>296</sup>, but the facts of that case are distinguishable from the facts of and questions arising in the present case. In that case neither the relevant notification appointing the Imperial Serologist nor the signature on the relevant report were covered by the earlier portion of section 510. The present case deals with the later portion of that section and even otherwise the factual position is also different.

554. If we examine the matter in this overall context it is manifest that the reports under consideration were being tendered by the prosecution witnesses above mentioned as expert reports of Major M. Fayyaz Haider. If the defence had any doubt about the authority of these documents or the status and the competency of the

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<sup>294</sup> PLD 1960 SC 307

<sup>295</sup> AIR 1957 Andh. Pra. 286

<sup>296</sup> AIR 1949 Lah 240

signatory of those documents, it could have objected to the same or requested for summoning Major M. Fayyaz M Haider for cross-examination. As no such thing was done it is too late at this fag end of the case to raise objections as to mode of their proof.

555. For the foregoing reasons I am of the view that there is no merit in this submission made by Mr. Yahya Bakhtiar that the two report of the Fire-Arms Expert Major M. Fayyaz Haider be ruled out of consideration on the ground that they had not been properly proved in evidence, a required by section 510 of the Criminal Procedure Code.

556. Before closing discussion of this subject, reference may be made to another document having a bearing on the question of identity of ammunition, used is the crime, *viz.* Exh. P.W. 19/2. This is a letter of Col. Wazir Ahmed Khan of the Central Ammunition Depot, Havelian, which, was obtained by Inspector Muhammad Boota (P.W. 39), and produced in Court. This document indicates that the lot number of ammunition supplied to the relevant F.S.F. Battalion was 661/71; but as the signatory of this document was not produced to give evidence, therefore, it was argued by Mr. Yahya Bakhtiar that its contents were not properly proved, and, accordingly not admissible in evidence. The relevant deposition of Muhammad Boota in this respect was "I visited the Central Ammunition Depot, Havelian, on 28-8-1977. Col. Wazir Ahmad Khan gave me report Exh. P.W. 39/2, addressed to the Deputy Director, F.I.A. which he wrote and signed in my presence".

557. However, later on, in the arguments and submissions appearing on page 14 of his written note No. 28, filed before us by Mr. Yahya Bakhtiar on 14-12-1978, towards the close of the case, it was stated that "in view of the admission made by the learned Prosecutor that ammunition of the caliber of 7.62 and bearing lot No. 661/71 was issued also to other units of Civil Armed Forces, the appellant does not press his submission as to the effect of non-examination of Colonel Wazir Ahmad". In the face of this statement in writing by Mr. Yahya Bakhtiar, the earlier objections as to the mode of proof of the reports prepared by Major Fayyaz Haider as to the caliber and marking of the empties lose all significance, because even according to the recovery memos relating to both the incidents the lot number of the empties recovered from the two spots tallies with each other as well as with the ammunition supplied to the units of the Federal Security Force. This identity of ammunition used in both the incidents provides significant corroboration to the story narrated by both the approvers regarding the use of F.S.F. personnel, weapons and ammunition, notwithstanding the fact that similar ammunition may also have been supplied to other units of the Civil Armed Forces. This identity is sought to be used by the prosecution not as the sole basis of conviction, but merely as a piece of corroborative evidence to be considered along with all other relevant circumstances.

#### **CORROBORATION BY SUBSEQUENT CONDUCT OF Z. A. BHUTTO**

558. The prosecution has relied heavily on the subsequent conduct of appellant Zulfikar Ali Bhutto for proving his involvement in this conspiracy. Four distinct phases of this conduct have been brought out in evidence, namely:-

(a) the appellant's reaction at hearing of this murder at Multan on the morning of 11th of November, 1974;

(b) interference of his Chief Security Officer Saeed Ahmad Khan and his Assistant Abdul Hamid Bajwa with the proper investigation of the case in 1974;

(c) surveillance over the movements and security arrangements of Kasuri after the murder; and

(d) his efforts, again through the two officers mentioned above, at winning over Ahmad Raza Kasuri and bringing him back to the Pakistan People's Party.

#### LEGAL POSITION REGARDING SUBSEQUENT CONDUCT

559. Before discussing the evidence led on these points, the legal position as to the effect and implications of the subsequent conduct of an accused person may briefly be noticed.

560. Section 8 of the Evidence Act provides, *inter alia* that "the conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto".

561. A number of cases were cited at the Bar on both sides to bring out the scope and application of this section. Mention may be made of *Emperor v. Percy Henry Burn*<sup>297</sup>, *Laijam Singh v. Emperor*<sup>298</sup>, *Muhammad v. Emperor*<sup>299</sup>, *Rajmal Marwadi v. Emperor*<sup>300</sup>, *Chatru Malik v. Emperor*<sup>301</sup>, *Shankarshet Ramshet Uravane v. Emperor*<sup>302</sup> and *Rangi Lall v. Emperor*<sup>303</sup>.

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<sup>297</sup> 4 IC 268

<sup>298</sup> AIR 1925 All. 405

<sup>299</sup> AIR 1934 Lah. 695

<sup>300</sup> AIR 1925 Nag. 372

<sup>301</sup> AIR 1928 Lah. 681

<sup>302</sup> AIR 1933 Bom. 482

<sup>303</sup> AIR 1930 Oudh 321



562. The principles emerging from these cases are that the subsequent conduct to be utilized against an accused person should be incompatible with his innocence and should not be capable of explanation on any other, hypothesis, and that if the prosecution attempts to utilize the conduct of person other than the accused, then it should be shown in the first instance that such conduct was with the knowledge and authority of the accused and the subsequent conduct may be utilized as furnishing corroboration of other substantive evidence, but by itself it does not furnish proof of the guilt of the accused.

### EVIDENCE AS TO SUBSEQUENT CONDUCT

563. Turning now to the evidence as to the subsequent conduct, Masood Mahmood has stated that he was on tour at Multan, in connection with the visit of the Prime Minister, when very early in the morning on the 11th of November, 1974, he received a telephone call from Zulfikar Ali Bhutto who said "your Mian Abbas has made complete balls of the situation. Instead of Ahmad Raza Kasuri he has got his father killed". On being summoned later to the residence of the then Governor of the Punjab, Mr. Sadiq Hussain Qureshi, where the appellant was staying, the witness met the appellant in the presence of Mr. Qureshi and the appellant most non-chalantly informed him of the news about the death of the deceased in this case as if there had been no talk between them earlier about this matter. Masood Mahmood said in reply that he had also heard about the murder.

564. The presence of the Prime Minister as well as of approver Masood Mahmood at Multan on the 11th of November, 1974, has not been disputed by the defence; but it has been vehemently contended by Mr. Yahya Bakhtiar that the story narrated by Masood Mahmood as to the timing and content of his telephonic conversation with the appellant, after the news of the murder reached him, is improbable and fabricated. He further contends that it is also incorrect that Masood Mahmood met the appellant at the house of Mr. Sadiq Hussain Qureshi at Multan before departing for Rawalpindi on that day.

565. From Masood Mahmood's T. A. Bill (Exh. P.W. 2/9) as well as the tour details embodied in Exh. P. W 2/8 as prepared by Ahmad Nawaz Qureshi, Private Secretary to Masood Mahmood on the 12th November, 1974, it appear that the purpose of his tour to Lahore, Multan, Bahawalpur and Rahimyar Khan was "meetings with the Prime Minister, Governor Punjab, and to look after the affairs of the Federal Security Force during the Prime Minister's tour of the Bahawalpur Division." From the very nature of duties assigned to Masood Mahmood and the director of the former Prime Minister that Masood Mahmood must be present at places visited by the Prime Minister on tour, it can safely be inferred that Masood Mahmood was bound to meet the Prime Minister during these tours, when the two were present in the same station. I consider, therefore, that there would be nothing improbable or unnatural in Masood Mahmood's meeting

the Prime Minister at Multan before his departure for Rawalpindi on the 11th of November, 1974, especially when news had reached both of them that the father of a very vocal member of the National Assembly had been murdered during the night at Lahore. It was contended by Mr. Yahya Bakhtiar that Exh. P.W. 2/7 being a carbon copy was not admissible in evidence. Even if it is excluded from consideration, the presence of Masood Mahmood at Multan is even otherwise not disputed.

566. It was contended by Mr. Yahya Bakhtiar that Masood Mahmood's assertion that he had visited the Prime Minister at Mr. Sadiq Hussain Qureshi's residence in Multan is negative by the evidence of Manzoor Hussain (P.W. 21), who was then working as driver on the personal staff car of Masood Mahmood. It was submitted that the driver has admitted in cross-examination that the Director-General had not visited any place in Multan on the morning of 11th November, 1974, and that he had driven the Director-General to the airport from the Canal Rest Home, Multan, on the 11th of November, 1974, and that the keys of the car always remained with him. On the basis of these statements made by the driver, Mr. Yahya Bakhtiar concluded that Masood Mahmood was telling a lie when he stated that he met the Prime Minister at Multan before departing for Rawalpindi on that day.

567. A perusal of the relevant portion of the evidence of the driver shows that there is no such categorical statement of the nature described by Mr. Yahya Bakhtiar. Manzoor Hussain stated that D.G. was staying in Canal Rest House, Multan, after he returned from Rahimyar Khan. I do not remember to which places in Multan I had taken the D.G. on 14-11-1974. I do not remember at what time I reached Multan from Rahimyar Khan, on 10th of November, 1974. So far as I know; D.G. had not visited any place at Multan on the morning of 11th November, 1974. I drove D.G. to the airport from Canal Rest house on 11th of November, 1974. The keys of the car were with me but the car used to be parked at his place. I drove the car whenever the D.G. wanted to go anywhere in Multan.

568. It will be seen that giving evidence after more than three years of the event, Manzoor Hussain did not remember the details of the places visited by the Director-General on the 10th of November, 1974, in Multan nor did he remember whether he had taken the D.G. to any place in Multan before driving him to the airport. This statement cannot be construed as meaning a positive contradiction of Masood Mahmood's testimony regarding his visit to the Prime Minister before his departure for Rawalpindi. In any case, the replies given by Manzoor Hussain Driver, cannot be considered as indicating that Masood Mahmood did not stir out of the Rest House at all before leaving for the airport on that morning. It is significant that Masood Mahmood was not questioned on this point at all and for a very good reason, namely, that before departing from Multan it would have been the obvious thing for Masood Mahmood to pay a call on the Prime Minister and specially, as already stated above, when the news of a very important tragic event had reached Multan. I consider, therefore, that the evidence of

the driver of Masood Mahmood's staff car does not negative the assertion of Masood Mahmood that he met the Prime Minister at Multan before departing for Rawalpindi.

569. The next question now is whether the telephonic conversation described by Masood Mahmood between him and appellant Zulfikar Ali Bhutto early in the morning of 11th of November 1974, took place or not. In this connection it was contended by Mr. Yahya Bakhtiar that Masood Mahmood had not mentioned the early morning telephone call in his previous statements, and that, in any case, it was highly unlikely that without the aid of his personal staff like Military Secretary or A.D.C. the Prime Minister would have begin in a position to ring up Masood Mahmood at such an early hour in the morning. While dealing with the question of omissions and contradictions etc. it has already been stated that Masood Mahmood has explained the omission in his previous statements by saying that he had given the contents of the telephonic conversation only on being questioned at the trial. The explanation appears to be reasonable, as in the previous statements he was not giving such minute details but only the broad events, and he did mention that he was present at Multan along with the Prime Minister on the morning of the 11th of November 1974, when news of the murder of Kasuri's father reached there.

570. As to the submission that the Prime Minister could not contact any body without the assistance of his personal staff at all times of the day and night, all I can say is that no foundation was laid for such a submission in the cross-examination of Masood Mahmood. It is not possible to accept the proposition that tree Prime Minister of a country could not contact any of his subordinates on the telephone at an early hour in the morning simply because his personal staff had not come on duty by that time. Surely the telephone operators, who are on duty round the clock, would be able to put the Prime Minister through to any other telephone number in Pakistan at whatever time he desire to do so. I consider, therefore, that there is no cogent reason for doubting the statement made by Masood Mahmood in the trial Court that he received an early morning call from the then Prime Minister telling him that "your Mian Abbas has made complete balls of the situation. Instead of Ahmad Raza Kasuri he has got his father killed". Such a remark was, indeed, very meaningful and significant, showing the involvement of all the three, namely, appellant Zulfiqar Ali Bhutto, approver Masood Mahmood and appellant Mian Muhammad Abbas, in the incident which led to the death of Kasuri's father. Such a remark is completely incompatible with the innocence of the person making it.

#### **INTERFERENCE WITH THE INVESTIGATION OF THE CASE**

571. The next piece of incriminating subsequent conduct relied upon by the prosecution is the alleged interference by appellant Zulfikar Ali Bhutto with the proper investigation of the case by the officers of the Punjab Police. The prosecution claims that the investigation commenced with the recording of the First Information Report, is

which Bhutto's name was specifically mentioned by Ahmad Raza Kasuri, was practically brought to a halt within twenty-four hours due to the interference of the Prime Minister through the agency of his Chief Security Officer Saeed Ahmad Khan and his Assistant the late Abdul Hamid Bajwa.

572. Whether it was by chance, or according to a pre-arranged plan, the late Abdul Hamid Bajwa was present in Lahore from the 8th of November 1974 to the 13th of November 1974, with a break of a few hours on the 12th of November 1974, from 7 a.m. to 4 p.m., when he visited Samundri in the Lyallpur District. These facts are proved by Bajwa's T. A. Bill marked as Exh. P.W. 3/5. Bajwa's presence in Lahore on the fateful day is also deposed to by Asghar Khan (P.W. 12), who was then the Senior Superintendent of Police, Lahore. This witness has stated that on the evening of 11th of November 1974, a meeting was held at the residence of the then Inspector-General of Police in connection with this murder and Abdul Hamid Bajwa participated in this meeting.

573. Senior Superintendent of Police Asghar Khan and his Deputy Inspector-General of Police Abdul Vakil Khan (P.W. 14) have both spoken of frequent visits of Abdul Hamid Bajwa to Lahore during the months of November and December 1974, and January and February 1975, and these movements are also proved by the relevant T. A. Bills of Bajwa, one of which, namely, Exh. P.W. 3/5 has already been mentioned. The other bills have been marked as Exh. P.W. 3/6 to Exh. P.W. 3/10. It appears that Bajwa was in direct contact with the subordinate police officers, as is evident from a note (Exh. P.W. 3/2-A) sent on the 22nd of November 1974, by Deputy Superintendent of Police Abdul Ahad to Abdul Hamid Bajwa enclosing a copy of the First Information Report registered by Kasuri soon after the incident. Below this note is a minute recorded by Abdul Hamid Bajwa on the 23rd of November 1974, stating as follows:-

"CSOPM wanted to see the F.I.R. The occurrence took place at about (00-30). The case was registered after (?) 3 a.m. (03-00 hrs.) on the statement of Mr. Ahmed Raza Kasuri.

(What prevented them to register case immediately it was known that attempt to murder was made! This statement would have formed part of the case diary in that case - and not F.I.R!.)"

574. Abdul Hamid Bajwa marked this note to the Chief Security Officer to the Prime Minister (i.e. Saeed Ahmad Khan), and then the latter added a note of his own, endorsing the comments of Abdul Hamid Bajwa and saying "such an incident, involving firing in the heart of the town not far away from the police station, could have been detected immediately by the local police, and a case registered *suo moto* by the police of the occurrence."

575. This note was marked to the Secretary to the Prime Minister, and the copy placed on the record of the trial shows that the words "I agree with you. (Sd.) P.M.", were copied thereon by Abdul Hamid Bajwa.

576. There was considerable argument at the Bar as to how these words "I agree with you. (Sd.) P. M." came to find place on this note, but it was brought out in evidence (by Saeed Ahmad Khan as well as by Muhammad Younis Qazi P.W. 26 an Assistant in Saeed Ahmad Khan's office), that it was the practice to copy out orders of the Prime Minister on the office copies of the notes sent to the Prime Minister's Secretariat by the Chief Security Officer, even when the original note or letter did not come back to him. The procedure observed in the Prime Minister's Secretariat at that time was further explained at the trial by Muhammad Yousaf (P.W. 27), who was a Superintendent in the Prime Minister's Secretariat, and it appears from his evidence that brief extracts of the orders made by the Prime Minister, and description of the papers concerned, were also endorsed in the Dispatch Register, so that subsequently the papers could be traced and it could also be easily ascertained as to what orders had been made by the Prime Minister thereon. In the light of these procedural explanations, it cannot be doubted that the words "I agree with you. (Sd. P.M.", correctly represent the observations made on this note by the appellant Zulfikar Ali Bhutto. This document establishes the fact that the Deputy Superintendent of Police, who was then in charge of the investigation of this case was in direct touch with Abdul Hamid Bajwa, and that Abdul Hamid Bajwa as well as his superior Saeed Ahmad Khan were taking full interest in the investigation of this case and keeping the then Prime Minister informed. Saeed Ahmad Khan's note to the Prime Minister contains a significant remark, namely, "although this F.I.R. has been sealed yet a good deal of publicity was released based on the press statement given by Kasuri".

577. D.I.G. Abdul Vakil Khan has deposed at the trial that Abdul Hamid Bajwa had also inquired from him as to why the Prime Minister's name could not have been kept out of the F.I.R., and he also made another inquiry about the empties recovered from the spot. It was further brought out in evidence that D.S.P. Abdul Ahmad proceeded to Rawalpindi on the 13th of November 1974, and that was the day on which Abdul Hamid Bajwa also returned to Rawalpindi. The visit of D.S.P. Abdul Ahmad to Rawalpindi is further supported by Abdul Hayee Niazi (P.W. 34) who was the Sub-Inspector in charge of the Police Station, Ichhra, in whose jurisdiction the offence had been committed, and also by Assistant Sub-Inspector Abdul Ikram (P.W. 18). D.S.P. Abdul Ahmad returned from Rawalpindi two or three days later. The statement made by Abdul Hayee Niazi shows that he received instructions from D.S.P. Abdul Ahmad as to the preparation of the recovery memo. of the empties, after the D.S.P. had returned from Rawalpindi, and even a draft memo. was supplied to him. The suggestion of the prosecution that the crimes empties were replaced or substituted by other empties during this period has already been dealt with at some length separately while dealing with the nature of the present incident and the weapons used therein. It is, therefore,

not necessary to advert to that aspect again, except to indicate at this stage that the evidence shows that the Investigating Officer was taking instructions from Abdul Hamid Bajwa, an officer of the Prime Minister's establishment.

578. Now, as to the role played by Saeed Ahmad Khan, in connection with the investigation of the case, we have, in the first place, the statement of Saeed Ahmad Khan himself. He has deposed at the trial that in December 1974, or January 1975, he was taken to task by the then Prime Minister for sitting in Rawalpindi when the Prime Minister's name was being mentioned in connection with the present incident before the Tribunal presided over by Mr. Justice Shafi-ur-Rehman of the Lahore High Court.

579. He, accordingly, proceeded to Lahore and contacted the senior Superintendent of Police, and held meetings with the Home Secretary to the Punjab Government, the Inspector-General of Police and the Deputy Inspector-General of Police. D.S.P. Abdul Ahad was replaced by D.S.P. Muhammad Waris (P.W. 15) to supervise the investigation of the case. Saeed Ahmad Khan learnt that the empties recovered from the scene of the offence were of 7.62 mm. caliber which indicated the use of Chinese weapons, which were in official use of the Federal Security Force. On returning to Rawalpindi Saeed Ahmad Khan met Masood Mahmood the Director-General of the Federal Security Force and also reported to the Prime Minister, both of whom told him that these weapons were also issued to other Army units and were being smuggled into the country. The Prime Minister directed him to find out from the Joint Army Detection Organization (JADO), a part of the Inter-Services Intelligence Directorate, whose main task was to find out and control illicit traffic in arms in the country. The Prime Minister further directed him to write to the Defence Secretary and find out as to which Army units were using Chinese weapons. The witness was also directed to make inquiries from Bara, a Tribal territory, as to the availability of these arms. The Prime Minister also talked to Saeed Ahmad Khan about the family disputes of Ahmad Raza Kasuri, his local political rivalries and previous litigation in the family and directed him to help the investigating Officer in collecting all the evidence on these lines and to see that this material was produced before the Inquiry Tribunal. Finally, the then Prime Minister told him, in so many words, "keep out the Federal Security Force".

580. Armed with these directions Saeed Ahmad Khan again visited Lahore, and had meetings with all concerned in the office of the Home Secretary and it was decided that Muhammad Waris (P.W. 15) and D.S.P. Abdul Ahad would come to meet him at Rawalpindi. When these officers met him at Rawalpindi on the 14th of January 1975, he rang up the officer-in-Charge of JADO and informed him that he was sending Muhammad Waris to him in order to find out whether the Chinese weapons in question were available elsewhere. He asked him to give his report in writing. It was in these circumstances that JADO's report Exh. P.W. 3/3-B was brought to him by the Investigating Officer. Saeed Ahmad Khan also directed Muhammad Waris to make

inquiries from Bara, and to collect material about the family disputes and about the local political rivalries of Ahmad Raza Kasuri and his family disputes.

581. Saeed Ahmad Khan also wrote a letter (Exh. P.W. 3/3-A) to the Defence Secretary to the Government of Pakistan on the 17th of January 1975, to which he received a reply on the 20th of January 1975, (Exh. P.W. 3/3-C), stating that Chinese weapons were in use with units of the Federal Security Force as well as the Frontier Corps. As Saeed Ahmad Khan had been given instructions to keep the Federal Security Force out, he got perplexed and went back to the Prime Minister and showed him the Defence Secretary's letter, and inquired as to, whether it should be produced before the Tribunal. On this appellant Zulfikar Ali Bhutto got annoyed and asked Saeed Ahmad Khan whether he had been sent to safeguard his interests or to incriminate him, and directed that this letter would not be produced before the Tribunal.

582. It was submitted by Mr. Yahya Bakhtiar that information as to the availability of the weapons in question with the units of the Federal Security Force had already been obtained directly by Mr. Justice Shafi-ur Rehman from the Headquarters of the Federal Security Force and, therefore, there was no point in Saeed Ahmad Khan's writing to the Defence Secretary on the 17th of January 1975, and obtaining a report from him within three days. The learned counsel contended that this shows that this was an unnecessary reference, and was made by Saeed Ahmad Khan on his own. It seems to me that in the present context the relevant point is not whether the information in question was already available with Inquiry Tribunal, but whether Saeed Ahmad Khan was trying to somehow intermeddle with the affair, in a apparent effort to see that the name of the Federal Security Force, as well as the Prime Minister, was kept out of the inquiry. If he had been acting on his own, there would have been no point in showing this letter to the Prime Minister. At this stage it should be mentioned that Senior Superintendent of police Muhammad Asghar his stated at the trial that Saeed Ahmad Khan had disclosed to the officers at Lahore that he had been deputed by the Prime Minister.

583. Another step taken by Saeed Ahmad Khan in this matter was the writing of a note (Exh. P.W. 3/3-D) on the 1st of February 1975, to Mr. S.M. Qutab, Director-General, Information and Broadcasting Division Government of Pakistan, asking him to give publicity to certain statements made before Mr. Justice Shafi-ur-Rehman, as those statements appeared to Saeed Ahmad Khan to be "favorable". A copy of this note was sent by Saeed Ahmad Khan the Prime Minister's Secretary Mr. Afzal Said Khan, and it was seen and signed by Zulfikar Ali Bhutto on the 2nd of February, and marked back to the Chief Security Officer.

584. The Director-General (News) sent a reply to this note (Exh. P.W. 3/3-F) on the 6th of February 1975, stating that the statement in question had already been reproduced in certain newspapers, but nevertheless further publicity was given in the newspapers on the 2nd and 3rd of February 1975. Here against the appellant was fully

in the picture as to the action taken by Saeed Ahmad Khan to publicize these favorable statements made by certain witnesses before the Inquiry Tribunal.

585. It appears from the evidence that during his visit to Lahore from the 3rd to the 5th of January 1975, Saeed Ahmad Khan tried to influence and direct the production of evidence before the Inquiry Tribunal. The time allowed to the inquiry Tribunal was *suo mote* extended by the Punjab Government and Saeed Ahmad Khan held meetings with high police officers as well as the Advocate-General, Punjab, during his stay in Lahore for this purpose.

586. Intermeddling of Saeed Ahmad Khan with the handling of the Report submitted by the Inquiry Tribunal to the Punjab Government is also established on the record. In the first place, the evidence of Saeed Ahmad Khan may be referred to in this behalf. He stated at the trial that:-

"As far as I remember the Tribunal gave its finding on 27th February 1975, and I put up a note to the Prime Minister on 28-2-1975 which is at page 114 in Exh. P.W. 3/3. It is marked as Exh. P.W 3/3-1. The note to the effect that the tribunal had criticised the lapses in the investigation at the initial stages but seemed to have been satisfied with the investigation carried on later by the D.S.P., C.I.A., Lahore. I, therefore, recommend that the relevant portions of the report may be published. This note is signed by me on 28-2-1976. There is a note in the Prime Minister's own hand to the effect, "I will decide when I see the report". I identify the handwriting and signatures of Mr. Bhutto on this note which are marked as Exh. P.W. 3/3-J. This note came back, to me and I retained it on the file, and as directed I made a note on it stating, 'keep it pending'."

587. Saeed Ahmad Khan then stated that he received a D.O. letter from the then Chief Secretary, Punjab, Mr. Masroor Hassan Khan, with which he sent him a copy of the report of the Tribunal. This is in line with the contents of the note recorded by the Chief Secretary on the 27th of February 1975 (namely Exh. P.W. 35/2), and sent to the Secretary to the Chief Minister, Punjab saying that he had discussed the matter of the Inquiry Report with Saeed Ahmad Khan, and he outlined certain steps in that behalf. Saeed Ahmad Khan proved the letter of the Punjab Chief Secretary as Exh. P.W. 3/3-K, and also proved a note recorded by him on the 14th of March 1975, on that letter directing, his office to make a brief draft of the report which could be recommended for publication.

588. At about the same time the Chief Minister of the Punjab Mr. Haneef Ramay, wrote a D.O. letter (office copy dated the 7th of March 1975, placed on the record as Exh. P.W. 35/3), to the then Prime Minister enclosing the Inquiry Report of the Tribunal in original, and giving a summary of the conclusions of the Report in the body of the letter itself. The letter stated that the Tribunal had expressed the opinion that the attack



was directed at the life of Ahmad Raza Khan Kasuri and it was incidentally that his father was injured and died; that in view of the identity and the type of the weapon used it appeared that the occurrence had taken place at Lahore and the one at Islamabad about three months earlier had a common inspiration, motive and organisation, even if the perpetrators were different; that the motive behind this occurrence was political, that is, the public utterances, and party affiliations of Ahmad Raza Khan, rather than any dispute with regard to property or personal dealing with individuals; and that the perpetrators of the crime were well organised, well equipped, resourceful and persistently after Ahmad Raza Khan's life and that yet another attack on his life was quite probable.

589. The Chief Minister further stated that the Tribunal had given certain directions for the guidance of the Investigation Agency, including expert examination of all the recovered articles together with a view to narrowing down the class of weapon used in the commission of the crime and a more purposive interrogation of the natural witnesses of the occurrence, that is, residents of the area, invitees at the house where the wedding was taking place and of the patrol parties, for ascertaining the number of shots fired, number of weapons used and the suspects. The Chief Minister informed the Prime Minister that he had discussed the report with the Prime Minister's Chief Security Officer and had asked the Chief Secretary to send him a copy thereof, and another copy was being sent to the Inspector-General of Police with the directions that he should obtain the explanations of Police Officers against whom aspersions had been made in the Report, and that he should take necessary steps to implement the directions given by the Tribunal to the Investigation Agency.

590. The letter concluded with the following sentence:-

"I seek your guidance, Sir, whether the report of the Tribunal should be made public."

591. This letter was marked by the Prime Minister to Saeed Ahmad Khan on the 18th of March 1975, with the remarks: "What was the point of discussing it with you? Please discuss" (vide the extract from the relevant register marked Exh. P.W. 27/2). Saeed Ahmad Khan says that after receiving these directions, he discussed the matter with the Prime Minister and he was told that the Report shall not be published as it was adverse; and Saeed Ahmad Khan was further told by appellant Zulfikar Ali Bhutto that he should have nothing to do with this case.

592. The original Report sent by the Chief Minister, Punjab to the Prime Minister has somehow not been found by the Federal Investigation Agency, although the relevant registers show that the Chief minister's letter along with the original Report was

received in the office of the Chief Security Officer by Abdul Hamid Bajwa. It is the case of the prosecution that the Inquiry Report was never published. This was not contradicted by the defence.

593. A few further facts may be stated to complete this part of the story. Not only that the Inquiry Report was not published, but there is no evidence whatsoever to show that the Investigation Agency took any steps to interrogate any official of the Federal Security Force, or of another unit to which the ammunition used in the attacks, and recovered from the spot in both cases, had been issued from time to time, in spite of the fact that the Tribunal had expressed the opinion that the perpetrators of the crime were well organized, well equipped and resourceful already stated the case was filed as "untraced" on the 1st of October 1975, even though Ahmad Raza Kasuri had been crying hoarse for justice, and had gone to the extent of publicly declaring that he would not get justice as long as Zulfikar Ali Bhutto was in power. It may be stated that the case relating to the attempt on his life at Islamabad on the 24th of August 1974, was also filed as untraced.

#### **CONCLUSIONS AS TO INTERFERENCE WITH THE INVESTIGATION.**

594. From the oral testimony of Saeed Ahmad Khan, D.I.G. Abdul Vakil Khan, S.S.P. Muhammad Asghar and D.S.P. Muhammad Waris, supported by the relevant documents as mentioned in the preceding paragraphs, it becomes abundantly clear that both Saeed Ahmad Khan and his Assistant the late Abdul Humid Bajwa, were in direct touch with Police Officers at Lahore; that they took various step, with a view to ensuring that the investigation did not connect the Federal Security Force, or the then Prime Minister, with this incident; and that, with the knowledge of the former Prime Minister, directions were given to the Information Department of the Government of Pakistan to give publicity to the statements of certain witnesses before the Inquiry Tribunal which were considered by Saeed Ahmad Khan to be favorable. The Police Officers concerned have made it absolutely clear that they did not have an independent hand in investigating this crime, and their local officers and, superiors had left them at the mercy of Saeed Ahmad Khan and Abdul Hamid Bajwa.

595. This evidence also proves that Saeed Ahmad Khan not only tried to influence the course of Inquiry before the Shah-ur-Rehman Tribunal but that he was subsequently fully associated with the decision of the question whether the Report should be published or not. He discussed this matter with the Chief Secretary and the Chief Minister of the Punjab, and later with appellant Zulfikar Ali Bhutto; and a copy of the Report was even sent directly to him by the Chief Secretary, at the same time that the Chief Minister wrote in this behalf to the former Prime Minister. It is significant that although the Chief Minister had himself appointed the Inquiry Tribunal, presided over

by a Judge of the Lahore High Court, as the administration of criminal justice was very much within his domain as Head of the Provincial Government, yet instead of deciding the question of publication himself, he respectfully sought guidance from the Prime Minister, who had been implicated in this crime in the First Information Report made by Ahmad Raza Kasuri. The Chief Minister had abdicated his own function in favor of the Prime Minister of Pakistan. The result of seeking this guidance has already been noticed.

#### **DEFENCE CRITICISM OF SAEED AHMAD KHAN AND ABDUL HAMID BAJWA**

596. It was contended by Mr. Yahya Bakhtiar that in the first place, Saeed Ahmad Khan and Abdul Hamid Bajwa were busy-bodies, who were acting on their own in this matter only to show their loyalty to the Prime Minister, and, therefore, any action taken by them to interfere with, or influence, the course of the investigation of the case cannot be used against the appellant; that even otherwise the steps alleged to have been taken by these two officers were simply intended to clear the name of the Prime Minister who had been falsely implicated in this case by Ahmad Raza Kasuri owing to political enmity.

597. The first part of the contention is clearly untenable. It has already been seen that the First Information Report lodged by Ahmad Raza Kasuri at Lahore was sent to the appellant by Abdul Hamid Bajwa after he had received it directly from the D.S.P. Abdul Ahad. The note recorded by J, Abdul Hamid Bajwa, and endorsed by Saeed Ahmad Khan, clearly showed that they were unhappy with the Lahore Police having permitted Ahmad Raza Kasuri to have lodged a written report mentioning the name of the appellant Zulfikar Ali Bhutto, and they suggested that this could have been avoided if the case had been registered Jun mote by the police, as in that case the statement made by Ahmad Raza Kasuri would have formed part only of the case diary, and not become public property as the First Information Report. It is also significant that it was mentioned by Saeed Ahmad Khan that the First Information Report had been sealed. The notes recorded by; these two officers were seen by the appellant, and he remarked thereon that he agreed with them. The subsequent visits of Abdul Hamid Bajwa to Lahore during the months of November-December 1974 and January-February 1975, could not have been without the knowledge of the Prime Minister, as this officer was in touch with the appellant directly as well as through his superior Saeed Ahmad Khan, as it will become clear from some other documents, which will be discussed presently in connection with the question of efforts made to win over Kasuri back to the fold of the Pakistan People's Party.

598. In any case, there can be no doubt at all that Saeed Ahmad Khan's movements and actions could not be without the knowledge and permission of his employer, namely, the appellant. He has asserted in his oral evidence at the trial that he was specifically directed by the prime Minister to proceed to Lahore in connection with the

inquiry which was being held by the Shafi-ur-Rehman Tribunal. That he, in fact, did so and had several meetings with the official of the Provincial Government is not open to doubt. In fact, it appears that he also had discussions with the then Chief Minister and the Chief Secretary, Punjab, which are evidenced by written notes to which reference has already been made. Even a copy of the Shafi-ur-Rehman report was sent to Saeed Ahmad Khan by the Chief Secretary. There is documentary evidence to show that Saeed Ahmad Khan was in touch with Zulfikar Ali Bhutto on the question of giving publicity to certain statements of witnesses made before the Inquiry Tribunal, and also on the question whether the final report should be published or not. It was Saeed Ahmad Khan who had directed his office to prepare a brief summary of the report which could be published if the Prime Minister approved of the same. The letter written by the Chief Minister to the Prime Minister further makes it clear that Prime Minister's personal instructions were being sought as to whether the Report of the Tribunal should be published or not. All these facts go to show that Saeed Ahmad Khan was acting with the full knowledge and authority of the then Prime Minister; otherwise there was absolutely no reason for the Chief Minister, Chief Secretary and the Home Secretary as well as the Advocate-General of the Punjab Province to have discussions with him relating to the investigation of this case and the inquiry being held into the matter by the Shafi-ur-Rehman Tribunal; nor would there be any occasion for the D.I.G., S.S.P., and the D.S.P. to take guidance from Saeed Ahmad Khan in regard to the future course of investigation. Even the letter written to a high dignitary of the Federal Government, namely, the Defence Secretary, clearly gives the impression that it was with authority of the Prime Minister, or otherwise Saeed Ahmad Khan could not have insisted that he should receive a reply to his letter within three days. In the face of this documentary evidence, it is idle to contend that Saeed Ahmad Khan and Abdul Hamid Bajwa were acting on their own in this matter.

599. Mr. Yahya Bakhtiar submitted that Saeed Ahmad Khan was in the habit of overstepping his authority, and interfering with the functions of other departments without the permission and knowledge of the then Prime Minister, and for that reason he had to be admonished on several occasions. The learned counsel referred to some instances which had been brought out in Saeed Ahmad Khan's cross-examination, and contended that it is probable that he was behaving in the same manner in connection with the investigation of the present murder case.

600. The first matter alluded to by Mr. Yahya Bakhtiar was a letter written by Saeed Ahmad Khan to the President (i.e. appellant Zulfikar Ali Bhutto) on 12-9-1972 in connection with re-instatement of certain Police Officers compulsorily retired in the Sindh Province. The letter itself was not formally proved on the record, but it was suggested in cross-examination that Saeed Ahmad Khan's brother, who was employed under the Sindh Government, was pulled up in this regard. This does not appear to be a good instance as admonition was not administered to Saeed Ahmad Khan, but for some reason to his brother.

601. The second occasion is said to have arisen in October 1972, when Saeed Ahmad Khan was snubbed by Zulfikar Ali Bhutto in the presence of certain Intelligence Chiefs, and he subsequently expressed his regrets in his letter of the 6th of October 1972 (Exh. P.W. 3/15-D). This letter makes interesting reading, as it shows his intense loyalty to Zulfikar Ali Bhutto. He stated, *inter alia*, that "I am devoted to you and your cause and I feel I have contributed at least to some extent, to your well-being in exposing the sinister and deep-rooted plans woven round you by interested parties in the short period I have worked for you." He added "I promise you, Sir, with all emphasis at my command that I can lay down my life for you, but I only need a little encouragement from you and a word of cheer in return. I certainly need your guidance at every step". He ended this letter by saying "I again apologise profoundly for any lapse on my part and can assure you that I will be extremely careful in future and will not give you a chance for annoyance. Believe me, Sir, I am yours and draw all my strength from you, in performance of my arduous duties, assigned to me from time to time".

602. While this document does show that some actions of Saeed Ahmad Khan may have been resented by the Intelligence Chiefs, and, therefore, brought to the notice of the then President, it also shows that the appellant was capable of taking Saeed Ahmad Khan to task, even in the presence of other high officials, if he felt that Saeed Ahmad Khan had over-stepped the authority given to him. The letter, of course, also furnishes documentary proof of Saeed Ahmad Khan's intense personal loyalty to Zulfikar Ali Bhutto. It nevertheless appears from another letter written by Saeed Ahmad Khan to the then President, on the 30th of August 1972, and brought on the record by the defence as Exh. P.W. 3/13-D that on certain occasions Saeed Ahmad Khan was entrusted with files belonging to other Intelligence Agencies, and, therefore, it would, perhaps, not be correct to say that he had not been given any authority to meddle with the work of these Agencies.

603. The third instance sought to be brought out in cross-examination was that he was reprimanded by Zulfikar Ali Bhutto for interfering in the affairs of the Pakistan Foreign Office, but Saeed Ahmad Khan repelled this suggestion, and asserted that he was looking into the matter in question under instructions from the Prime Minister, and to it he was reprimanded for having over-stayed abroad and not for interfering with foreign affairs. As there is no document having a bearing on this point, I see no reason to reject the assertions made by Saeed Ahmad Khan.

604. From the facts relied upon by Mr. Yahya Bakhtiar, the impression clearly emerges that if Saeed Ahmad Khan overstepped his authority or interfered with matters not entrusted to him by his employer, then the latter was certainly capable of pulling him up.

605. However, there is no such material on the record to show that appellant Zulfikar Ali Bhutto, at any stage, pulled up Saeed Ahmad Khan for interfering with the investigation of this case, or putting tip suggestions to him during the progress of the Inquiry before the Shafi-ur-Rehman Tribunal nor did the Prime Minister object to Saeed Ahmad Khan discussing matter with the Chief Minister and Chief Secretary and other officials of the Punjab Province. The documents already referred to in the preceding paragraph leave no doubt whatsoever that Saeed Ahmad Khan was keeping the appellant fully in the picture as to the progress of his efforts. There is therefore, no substance in the contention that all these steps were taken by Saeed Ahmad Khan, or his Assistant Abdul Hamid Bajwa, without the knowledge and authority of the appellant.

### **NATURE AND EFFECT OF INTERFERENCE WITH THE INVESTIGATION**

606. The question now is whether the actions taken by these two officers were intended merely to vindicate the honor and innocence of the appellant, or whether they display a guilty mind on the part of appellant Zulfikar Ali Bhutto and are incompatible with his innocence.

607. One can certainly agree with Mr. Yahya Bakhtiar that if Kasuri had brought a false accusation against the sitting Prime Minister in regard to the murder of his father, it would be a natural reaction on his part to take steps to protect his name and honor, and for this reason he could depute his Chief Security Officer and the latter's Assistant to try and ensure that the investigation was conducted on proper lines, and that all other motives and enmities were looked into for the purpose of tracing the real culprit. Unfortunately, however, the steps taken by Saeed Ahmad Khan and Abdul Hamid Bajwa were not confined to only this aspect of the matter. The information obtained by Saeed Ahmad Khan from the Defence Secretary was not placed before the Tribunal, and the importance of this fact is not diminished by saying that Mr. Justice Shafi-ur-Rehman had already made a similar inquiry from the Federal Security Force or JADO. There is no indication on the record that Saeed Ahmad Khan had been informed by the Tribunal or by any other officer that the information given by the Defence Secretary was already available with the Tribunal. There was thus a conscious suppression of information which might have implicated the Federal Security Force. It has also already been remarked that if an honest inquiry into the existence of other motives and family disputes involving Ahmad Raza Kasuri was desired, then people like Yaqoob Maan and others, who were his local political rivals in Kasur, should have been interrogated under the guidance given by Saeed Ahmad Khan, but the evidence of Muhammad Waris showed that this was not done. Further, once it became known that automatic weapons had been used, and even the Tribunal had indicated that the perpetrators of the crime were well-equipped and well organized, the investigation ought to have travelled in the direction of the Federal Security Force and other units using this kind of ammunition, but no such effort was made. Even the report of the Inquiry Tribunal was not allowed to be published. These facts clearly indicate that the appellant and his

officers were not acting simply to vindicate the appellant's name but also to prevent the investigation from travelling in the proper direction. Mr. Ijaz Hussain Batalvi rightly submitted that Saeed Ahmad Khan, acting on his own, had no special reason to try to protect the Federal Security Force from investigation, and this protection could come only from the appellant, who was the common boss of Saeed Ahmad Khan as well as the Federal Security Force. The cumulative effect of all these actions is that they are incompatible with the innocence of the appellant, for they all tended to shield the real culprits rather than to uncover their identity. It is not difficult to see that if the investigation had travelled in the direction of the Federal Security Force and Masood Mahmood in 1974, there was a danger of Masood Mahmood making a disclosure of the kind which he has made in 1977.

### **SURVEILLANCE OF KASURI AFTER THE MURDER OF HIS FATHER**

608. The prosecution has next alleged that after the present murder appellant Zulfiqar. Ali Bhutto's officers kept the movements and security arrangements of Ahmad Raza Kasuri under surveillance, and submitted regular reports in this behalf to the appellant, thus showing an unusual interest in Ahmad Raza Kasuri and also proving the fact that all this was being done with the knowledge and authority of the appellant.

609. The first in the series is a note (Exh. P.W. 3/2-K) dated the 28th of November, 1974, addressed by the late Abdul Hamid Bajwa to the Secretary to the Prime Minister, with a copy to Federal Minister Abdul Hafiz Pirzada for information. After narrating the remarks made by Ahmad Raza Kasuri on his arrival at the Government Hostel, Islamabad, on the 27th of November, 1974, this note states that Ahmad Raza claimed that four persons had been deputed to kill him, who fired from automatic weapons, while hiding near the Shadman Roundabout, and that plans were afoot by the Government to do away with the assailants so that no proof was left to trace the murder, and that a message was passed from Lahore to Rawalpindi after the mission was completed.

610. On the very next day i.e. 29th of November, 1974, Abdul Hamid Bajwa sent another note (Exh. P.W. 3/2-L) to the Secretary to the Prime Minister stating that Ahmad Raza Kasuri, M.N.A., may project certain demands in the National Assembly for his personal protection, investigation into the murder case by the Army Intelligence and the grant of licenses for the weapons held by his father, including a gun and a prohibited bore revolver. This note ends with the significant remark to the effect that "he is being conveyed, through a contact that such arms have to be deposited with Police or arm dealers, under the orders of the District Magistrate". Copies of this note were endorsed to the Speaker of the National Assembly of Pakistan and two Federal Ministers, Mr. Abdul Hafiz Pirzada and Malik Mairaj Khalid.

611. Abdul Hamid Bajwa sent another note (Exh. P.W. 3/2-N) to the Secretary to the Prime Minister on the 8th of December, 1971, endorsing its copy to the Speaker of the National Assembly, stating that according to a secure report Mr. Ahmad Raza Kasuri, M.N.A., told a friend that privilege motion was moved by him, about the assassination of his father, but most of his speech was expunged. He had stated on the floor of the house that Mr. Bhutto is the murderer of his father and he should be brought before the Court of law. This note was seen by the former Prime Minister on the 10th of December, 1974, as is evidenced by his signatures on the same, and marked to C. S. O. (P. M.).

612. On the same date Abdul Hamid Bajwa sent still another note (Exh. P.W. 3/2-O) to the Secretary to the Prime Minister, stating that according to a secure report Ahmad Raza Kasuri requested Mr. Nusrat Baig, Deputy Secretary, Ministry of Defence, to look into the case of Mr. Muhammad Sadiq Khokhar, Superintendent E. M. Grade I, M. E. S. at Risalpur, where his services were terminated on 8th June ... There is an endorsement at the bottom of this note in the following terms:-

"When did Kasuri's recommendations become necessary in the Ministry of Defence. (Sd.) P. M. 10-12."

This endorsement is marker to the Defence Secretary by name.

613. It appears that in pursuance of these observations made by the former Prime Minister, the matter was following up by the Ministry of Defence and an explanation was obtained from Mr. Nusrat Baig, and a copy thereof was transmitted by the Additional Secretary in the Ministry of Defence to Abdul Hamid Bajwa on the 27th of December 1974 (Exh. P.W. 3/2-P).

614. Abdul Hamid Bajwa seems to have been very active in submitting reports on Ahmad Raza Kasuri to the Prime Minister, as would appear from the fact that on the 9th of December, 1974, he sent another note to the Secretary to the Prime Minister which was seen by the then Prime Minister on the 10th of December, which is the date given under his signatures on this document placed on the record as Exh. P.W. 3/2-Q. This note contained a gist of a conversation between Ahmad Raza Kasuri and his brother Sher Ali about the appointment of Justice Shafi-ur-Rehman as an Inquiry Tribunal and other related matters.

615. The last communication in this series made by Abdul Hamid Bajwa is a note sent by him on the 11th of January, 1975 (Exh. P.W. 3/2-R) to the Speaker of the National Assembly, enclosing a report sent to Bajwa by Assistant Director Ashiq Muhammad Lodhi (P.W. 28) to the effect that Ahmad Raza Kasuri had engaged a gun-man by the name of Sher Baz Khan, who was seen carrying Kasuri's brief-case when Kasuri goes into the house of the National Assembly. A description of Sher Baz Khan was also given



in this report. A copy of this report was also endorsed by Bajwa to the D. I. G. Police, Rawalpindi Range.

616. It will be seen that most of these notes and reports had been submitted directly by the late Abdul Hamid Bajwa to the Secretary to the Prime Minister, and some of them then came back to Saeed Ahmad Khan after having been signed by the appellant Zulfikar Ali Bhutto. Mr. Yahya Bakhtiar was right in submitting that the contents of these source reports/intelligence reports cannot be said to have been properly proved, as the makers thereof were not examined at the trial. However, in the present context, the Court is not concerned with the correctness or otherwise of the contents of these notes, but simply with the fact that Abdul Hamid Bajwa was sending these successive notes or reports to the Prime Minister and some other authorities on the movements and fulminations of Ahmad Raza Kasuri during the early days of his return to Islamabad after the murder of his father. The number and quick succession in which these notes/reports were sent to the Prime Minister and others, clearly show that Ahmad Raza Kasuri was being kept under active surveillance by Abdul Hamid Bajwa and his men. Saeed Ahmad Khan was kept informed about these reports when they came back to his office after having been seen by the Prime Minister.

617. Saeed Ahmad Khan himself sent a note (Exh. P.W. 3/2-M) to the Secretary to the Prime Minister on the 7th of December, 1974, which was also seen and signed by appellant Zulfikar Ali Bhutto on the 10th December and returned to the C S O. (P. M.) Attached with this note was a cope of the privilege motion filed by Ahmad Raza Kasuri in the National Assembly on the 29th of November, 1974, stating that it was brought on the records of the proceedings of the National Assembly. Saeed Ahmad Khan added that:

"This note contains a pack of lies and incidents relate to 1971 before P.P.P. came in power. Copies of this note, however, were distributed by Ahmad Raza Kasuri, and his henchmen to foreign Embassies and to foreign Journalists, including Chinese News Agency.

Ahmad Raza Kasuri is in a desperate state and has been heard saying that he will take revenge, of the murder of his father personally."

After this note came back to Saeed Ahmad Khan, he marked it to his Stenographer with the remarks "I will take this to Lahore. Put up on 13/12". Then there is another endorsement on this document of Saeed Ahmad Khan under his initials bearing the date 16th of December to the effect "discussed with Chief Minister, Punjab on 15/12 at Lahore".

### CONCLUSIONS AS TO KASURI'S SURVEILLANCE

618. A perusal of the documents mentioned in the preceding paragraphs shows that at least four of them were seen by the former Prime Minister on the same day i.e. 10th of December, 1974. The notes/reports sent by Abdul Hamid Bajwa and Saeed Ahmad Khan to the Prime Minister are indicative of not only the interest taken by the Prime Minister and his staff in the movements of Ahmad Raza Kasuri, but they also show that Ahmad Raza Kasuri was suffering from intense anger and desperation at the time these reports were prepared. Mr. Yahya Bakhtiar submitted that no sinister meaning should be attached to the report sent by Ashiq Muhammad Lodhi giving the description of Ahmad Raza Kasuri's gun-man, as it had already been reported that Ahmad Raza Kasuri was desperate and thinking of taking personal revenge. This may be a plausible explanation, taken in isolation; but the cumulative effect of the large number of reports submitted in quick succession to the Prime Minister is unmistakably to show that Ahmad Raza Kasuri was, indeed, being kept under special surveillance as to his movements and security arrangements during the period following the attack on him and the assassination of his father. Such action is not compatible with the appellant's innocence, as it clearly shows an apprehension on his part arising as a consequence of the occurrence of 11th November, 1974.

#### **EFFORTS TO BRING KASURI BACK TO THE P.P.P.**

619. Finally, the prosecution has alleged that the appellant Zulfikar Ali Bhutto made strenuous efforts, through his Chief Security Officer Saeed Ahmad Khan and his Assistant Abdul Hamid Bajwa, to win over Kasuri and bring him back to the Pakistan People's Party after the assassination of his father, which efforts can be explained only on the hypothesis that Zulfikar Ali Bhutto had a guilty conscience, and wanted to somehow placate Ahmad Raza Kasuri. The evidence produced in this behalf consists of the oral testimony of Ahmad Raza Kasuri as well as that of Saeed Ahmad Khan., supported by a large number of documents.

#### **ORAL STATEMENT OF KASURI ON THIS SUBJECT**

620. According to Ahmad Raza Kasuri, Saeed Ahmad Khan and his assistant Abdul Hamid Bajwa started visiting him at his house in Lahore and also his room in the Government Hostel, Islamabad in September, 1975. Saeed Ahmad Khan told him that he was a marked man and danger to his life had not yet abated, that he was a young parliamentarian having a bright future in the politics of Pakistan, but by maintaining his present stance he had not only put his life in jeopardy but had put his entire family at stake. Saeed Ahmad Khan, accordingly, advised Kasuri to patch up with Zulfikar Ali Bhutto. These visits of Saeed Ahmad Khan and the late Abdul Hamid Bajwa continued for some time. The former Federal Minister Abdul Hafiz Pirzada also visited his house in October, 1975, and tried to persuade him to compromise with the then Prime Minister, and to rejoin the Pakistan People's Party. Kasuri stated that he ultimately patched up with Zulfikar Ali Bhutto and rejoined his party on the 6th April, 1976, he

continued to be a member of the Pakistan People's Party up to the 8th of April, 1977, explaining that he simply maintained a posture of affiliation with the party as a measure of expediency and self-preservation. He admitted that he had applied for the Pakistan People's Party ticket for election to the National Assembly in 1977, but it was not awarded to him. In 1976, he was sent by the Prime Minister to Mexico as a member of the Parliamentary delegation, and after his visit he submitted a report, praising Zulfikar Ali Bhutto as an emerging scholar statesman. He explained that he was trying to pamper the Prime Minister.

### **EVIDENCE OF SAEED AHMAD KHAN ON THE SAME SUBJECT**

621. On the same subject, Saeed Ahmad Khan deposed at the trial that in the middle of 1975 there was a rift growing between Ahmad Raza Kasuri and the Chief of the Tehrik-e-Istaqlal Party, namely, Air Marshal (Rtd.) Asghar Khan, and he was instructed by the Prime Minister to try to win over Ahmad Raza Kasuri and bring him back to the P.P.P. fold. Since the witness did not know Ahmad Raza Kasuri, he informed the Prime Minister that he would ask Abdul Hamid Bajwa to initiate the matter, whereupon the Prime Minister informed the witness that Bajwa had already been given instructions on the subject. It appears that in accordance with these instructions Abdul Hamid Bajwa initiated talks with Ahmad Raza Kasuri, and persuaded the latter to meet Saeed Ahmad Khan. During the first meeting, Saeed Ahmad Khan asked Ahmad Raza Kasuri to consider the rejoining of the Pakistan People's Party of which he claimed to be a founder member, since he had parted company with Air Marshal Asghar Khan. On this Ahmad Raza Kasuri retorted how could he rejoin a party headed by Zulfikar Ali Bhutto who had been responsible for the murder of his father and was also after his blood. The witness told him that it was all the more reason that he should make up with the appellant and not put his life in jeopardy as he knew that he was a marked man. He also told Kasuri that if he rejoins the People's Party he might even be rehabilitated. Ahmad Raza Kasuri requested for time to think over the matter, and later on he agreed with the soundness of this suggestion, and asked Saeed Ahmad Khan to inform the appellant that he was prepared to rejoin the Pakistan People's Party, and he would like to meet him (i.e. Zulfikar Ali Bhutto).

### **DOCUMENTARY EVIDENCE REGARDING WINING OVER OF KASURI**

622. Reference may now be made to the documentary evidence brought on the record in this behalf. The first in the series is a note (Exh. P.W. 3/2-C) written by the late Abdul Hamid Bajwa on the 3rd of June, 1975, to the Secretary to the Prime Minister stating that "Ahmad Raza Kasuri, M.N.A., had stated that he is out for a forward block in T. I. P. In fact, he is thinking of forming an independent political party. He has discussed this topic with his close associates and will decide of doing so this evening". The appellant Zulfikar Ali Bhutto saw this note on the 6th of June, 1975, as is evidenced by his signatures bearing that date, and returned the same to the Chief Security Officer. On the

very next day, i.e. the 4th of June, 1975, Saeed Ahmad Khan himself sent another note (Exh. P.W. 3/2-D) to the Secretary to the Prime Minister giving certain details of Kasuri's dissatisfaction with the Chief of the Tehrik-e-Istaqlal Party, and ending with the significant remark that "arrangements are in hand to widen the gulf between Asghar Khan and Raza Kasuri, through other sources also." An objection was taken by the defence to the admissibility of Exh. P.W. 3/2-D on the ground of its being a copy of the original. Even if it is excluded from consideration, it does not materially affect the position.

623. On the 29th of July, 1975, Saeed Ahmad Khan, sent another note (Exh. P.W. 3/2-E) to the Secretary to the Prime Minister, which would bear reproduction here in full:

"Mr. Ahmad Raza Kasuri, M.N.A., has had number of meetings with me, the last one being at Rawalpindi on 28th July, 1975. He has realized that his future lies with the Pakistan People's Party of which he claims to be a founder member. On the Qadiani issue he says that the attitude of Air Marshal Asghar Khan has been lukewarm and that there may be a secret understanding between him and the head of the Qadiani community at Rabwah.

Mr. Ahmad Raza Kasuri has requested for an audience with the Prime Minister at his convenience."

624. The contents of this note appear to lend support to the oral testimony of Ahmad Raza Kasuri to the effect that Saeed Ahmad Khan had told him that he was a marked man and that his future lay with the Pakistan People's Party. It is interesting to note that by the 29th of July, 1975, several meetings had taken place between Ahmad Raza Kasuri and the Chief Security Officer to the then Prime Minister, and it was as a result of these meetings that Ahmad Raza Kasuri requested for an audience with the Prime Minister.

625. Within a few days of this note Abdul Hamid Bajwa sent another note (Exh. P.W. 3/2-F) direct to the Secretary to the Prime Minister on the 4th of August, 1975. This note opens with the sentence "Ahmad called on Ahmad Raza Kasuri on Friday the first, at Government Hostel, Islamabad". Saeed Ahmad Khan explained at the trial that Ahmad was a pseudonym for Abdul Hamid Bajwa, and was used by the latter for describing meetings which he had with political personalities like Ahmad Raza Kasuri and others. In other words, Abdul Hamid Bajwa is informing the Prime Minister that he had called on Ahmad Raza Kasuri at the Government Hostel, Islamabad on the 1st of August, 1975. They discussed the possibility of Ahmad Raza Kasuri severing his connections with the Tehrik-e-Istaqlal Party and forming a new party possibly with the name Millat-e-Islam. The second paragraph of this note is interesting as it says:

"While discussing about his having audience with the Prime Minister, Ahmad suggested to him that, in his interest, he should first prepare ground, for such a

move. This ground, as suggested by Ahmad would be by issuing one or two statements, indicating Air Marshal (Rtd.) Asghar Khan's attitude towards Ahmadis. Ahmad Raza Kasuri promised to think over it and have more discussions on this issue."

626. It will be seen that when Abdul Hamid Bajwa met Kasuri at the Government Hostel, Islamabad on the 1st of August, 1975, Kasuri was still thinking of forming a new Party, and when it was suggested to him that he should prepare the ground for an interview with the then Prime Minister by issuing one or two statements against the Tehrir-e-Istaqlal's Chief in respect of his attitude towards the Ahmadis, Ahmad Raza Kasuri promised to think over it and have more discussions on this issue. This does not appear to be the natural reaction of a man who was himself keen to have audience with the Prime Minister. It is also significant that it is not Ahmad Raza Kasuri who had called on Abdul Hamid Bajwa, but it is the other way round, namely, that an officer of the Prime Minister's Secretariat had taken the trouble of calling on Ahmad Raza Kasuri at the latter's place of residence in Islamabad.

627. On the 11th of August, 1975, Saeed Ahmad Khan sent to the Secretary to the Prime Minister a cutting (Exh. P.W. 3/2-G) from the daily newspaper Jang of Rawalpindi of that date, containing a news item that Kasuri was thinking of capturing the Tehrik-e-Istaqlal Party. Saeed Ahmad Khan wrote below the cutting:

"Submitted for favor of information. His next move is being watched."

The cutting as well as Saeed Ahmad Khan's remarks were seen by the appellant on the 12th of August, 1975, and the paper returned to Saeed Ahmad Khan. This note again does not indicate any desire on the part of Ahmad Raza Kasuri to patch up with the Chairman of the People's Party and the then Prime Minister, namely, the appellant Zulfikar Ali Bhutto.

628. The next document brought on the record by the prosecution is a note (Exh. P.W. 3/2-H) dated the 15th of September, 1975, addressed by Saeed Ahmad Khan to the Secretary to the Prime Minister, stating that:

"A message was received, through a link, from Mr. Ahmad Raza Kasuri, M.N.A., that he desired to see me and discuss his future plans. I asked Mr. Abdul Hamid Bajwa to contact him and to remind him that he should prepare the ground to indicate his *bona fides* for rejoining the P.P.P."

The note then goes on to say that:

"Mr. Ahmad Raza Kasuri told Bajwa that his very silence over the past few months ought to indicate his *bona fides*, particularly when he seems to enjoy

reputation of the emotional political being .... He further said that he would be of immense use to the Chairman in the ensuing general elections, in view of the differences amongst the top leaders of the P.P.P. in the province of the Punjab .... He also said that he could ask for an interview with the Prime Minister in his capacity as M.N.A. directly. He has been told to do so."

629. The next document is again a note (Exh. P.W. 3/2-I) by Saeed Ahmad Khan dated the 29th of September 1975, addressed to the Secretary to the Prime Minister. Some of the observations and statements contained in this note are also interesting, namely:-

"Mr. Ahmad Raza Kasuri, M.N.A. now claims to have sobered down and become stable. His rough edges have been chiseled out, his political horizon has become clearer and is a progressive being .... Mr. Ahmad Raza has categorically stated that he wishes to return to the fold and would carry out Prime Minister's directives and can be used in any way desired by the Prime Minister. He is prepared to take a head on confrontation with Khar in the Punjab.....

When I met him two days ago at Lahore, he was of the view that Altaf Pervez, a Student Leader, one of the candidates for the bye-election at Lahore, can be advantageously utilized on anti-Khar campaign and may be unobtrusively utilized in the election campaign as an independent candidate....

He is still anxiously waiting for audience with the Prime Minister."

630. The statements contained in this note by Saeed Ahmad Khan are indicative of the success which he was having in persuading Ahmad Raza Kasuri to return to the fold of the Pakistan People's Party, and apparently his rough edges had been chiseled out under the guidance of Saeed Ahmad Khan and Abdul Hamid Bajwa, and he had become mentally prepared to return to the Pakistan People's Party, but he was keen that he should first meet the appellant. He also indicated that he could be used by Zulfikar Ali Bhutto for a head on confrontation with Ghulam Mustafa Khar, who was a leading member of the Pakistan People's Party and a Governor and Chief Minister of the Punjab under appellant Zulfikar Ali Bhutto, but was at that time estranged from him. This note also disclosed that Saeed Ahmad Khan had taken the trouble of calling on Ahmad Raza Kasuri at Lahore, which can be explained only on the basis that Saeed Ahmad Khan was obviously carrying out a mission assigned to him by his employer; otherwise he was not obliged to call on Ahmad Raza Kasuri who, according to Mr. Yahya Bakhtiar, was a political non-entity, and had accused the sitting Prime Minister of having got his father assassinated. In fact, the Prime Minister could have taken serious objection to his Chief Security Officer calling on a politician who had been so obnoxious in his speeches against the Prime Minister, but apparently the situation was otherwise, and Saeed

Ahmad Khan as well as Abdul Hamid Bajwa were keeping the Prime Minister constantly informed of their moves in respect of Kasuri.

631. The next document on the record is a note (Exh. P.W. 3/17-D) dated the 13th of November 1975, sent by Saeed Ahmad Khan to the Secretary to the Prime Minister. While referring to some other matters, with which we are not concerned the last paragraph of this note makes reference to a report submitted by Abdul Hamid Bajwa, apparently on Ahmad Raza Kasuri, and ends with the following remarks "It is requested that the Prime Minister may consider granting an audience to Ahmad Raza Kasuri at his convenience. He has behaved so far despite pressure from opposition groups. He has been repeating his request for an audience with the Prime Minister in view of his two written requests for the same, already submitted."

632. This note was seen by the Prime Minister on the 16th of November with the remarks "Please file". It appears that Ahmad Raza Kasuri was yet to be kept waiting for some time more before being granted an interview by the appellant.

633. We then have a note by Abdul Hamid Bajwa (Exh. P. W. 3/2-J) dated the 21st of November 1975, submitted by Abdul Hamid Bajwa to the Secretary to the Prime Minister through his Chief Security Officer. This was seen by Zulfikar Ali Bhutto on the 26th of November. This report opens with the sentence that "Ahmad (i.e. Abdul Hamid Bajwa) met Ahmad Raza Kasuri today (21-11-75) after the National Assembly session". After narrating the conversation which took place between them regarding an incident in the National Assembly when some members of the Opposition were thrown out of the house, the note recites that:

"Ahmad told, Raza Kasuri that he was an experienced parliamentarian now and others had respect for him and, therefore, he should keep it up rather than making the people feel that he was not very much responsible. Ahmad Raza Kasuri said he did feel that he is very much sobered now and wanted to cooperate with the Government, but he suspected that some third agency, which did not like these moves, wanted to create gulf ..... Ahmad told Kasuri that he should be much more cautious in his utterance and dealings.

Ahmad Raza Kasuri said that he may be given some guidance by the Prime Minister and he will act accordingly, but so far he has not been granted audience."

634. Now, it is true that even this note ends up with the remarks that Ahmad Raza Kasuri had not yet been granted audience by the Prime Minister, but it is again significant that it was Abdul Hamid Bajwa who had taken the trouble of meeting Ahmad Raza Kasuri after the National Assembly session, and it was Abdul Humid Bajwa who was advising Ahmad Raza Kasuri, as to how to behave so that no gulf was

created between him and the Prime Minister. This note also contains a remark that Ahmad Raza Kasuri said that Mr. Abdul Hafiz Pirzada was very kind to have talked to him and assured him that somebody had misrepresented to Raza Kasuri. This remark lends support to Ahmad Raza Kasuri's evidence at the trial that Mr. Abdul Hafiz Pirzada, who was then a Federal Minister, had also interceded so as to bring him back to the fold of the Pakistan People's Party.

635. Nearly two weeks later, on the 5th of December 1975, Saeed Ahmad Khan sent a note (Exh. P.W. 3/18-D) to the Prime Minister stating that:-

"As per instructions, I met Sardar Izzat Hayat, formerly of Tehrik-e-Istaqlal, on 4-12-1975. He was most anxious that Mr. Ahmad Raza Kasuri, M.N.A. may be given an audience by the Prime Minister, as soon as possible. Ahmad Raza has already asked for an interview in writing, and both of them are at a loss to understand as to why this request is not being acceded to. They are of the view that some interested P.P.P. leaders have been trying to stall this meeting for personal reasons, lest Mr. Ahmad Raza Kasuri, on his rejoining the P.P.P., may find an important place, being a dedicated worker, full of enthusiasm and a good public speaker ...."

636. In the second paragraph of this note Saeed Ahmad Khan stated that Sardar Izzat Hayat said that Ahmad Raza Kasuri had sobered down etc. In the third paragraph Saeed Ahmad Khan says that Ahmad Raza Kasuri and Sardar Izzat Hayat had fallen out with Air Marshal (Rtd.) Asghar Khan. After mentioning several other matters the note states that Ahmad Raza Kasuri "again begs that he may not be kept on tenter hooks any more but be brought to the fold of P.P.P. without further delay, and assures of complete loyalty to the Chairman. The irritants created by vested interests at the move of Ahmad Raza joining the Party be kindly set aside, since the negotiations with him have now been carried on for the past six months, with no results so far."

637. On this note the appellant Zulfikar Ali Bhutto recorded the following remarks on the 6th of December:

"I will see Ahmad Raza Kasuri in Pindi. Please return the file after you have noted."

638. This minute was marked to the Military Secretary, apparently for the purpose of fixing the time and date of the intended interview. It appears that the interview was finally granted by the appellant in March or April, 1976, whereafter Kasuri rejoined the Pakistan People's Party on the 6th of April, 1976, and was subsequently sent to Mexico as member of a Parliamentary delegation.



639. It will be noticed that although the note conveys an impression that both Abroad Raza Kasuri and his friend Sardar Izzat Hayat were anxious that Kasuri should be granted an audience by Zulfikar Ali Bhutto, yet it was the Prime Minister's Chief Security Officer, who had called on Sardar Izzat Hayat under instructions from the Prime Minister; and the last paragraph makes a significant statement that "the negotiations with him have now been carried on for the past six months, with no result so far". These are inherent indications that the initiative in the first instance had come from the side of Zulfikar Ali Bhutto, but his officers were working upon Ahmad Raza Kasuri in a subtle manner so as to make it appear that Kasuri was desperately begging for an interview with the Prime Minister.

640. It was contended by Mr. Yahya Bakhtiar that both Ahmad Raza Kasuri and Saeed Ahmad Khan had given false evidence as to the desire of the appellant to win over Kasuri and bring him back to the fold of the Pakistan People's Party, as such an assertion was belied by some of the documents which had already been referred to as well as by the remark made by the appellant on the 29th of July 1975, on the note Exh. P. W, 3/2-E submitted on that date to the Prime Minister by Saeed Ahmad Khan. Before advertng to the controversy between the parties as to the genuineness of these remarks having, in fact, been made by the appellant on the 29th of July 1975, it would be well to reproduce them here:-

"He must be kept on the rails, he must repent and he must crawl before he meets me. He has been a dirty dog. He has called me a mad man. He has gone to the extent of accusing me of killing his father. He is a lick. He is ungrateful. Let him stew in his juice for some time."

641. Saeed Ahmad Khan had proved the office copy of his note dated the 29th of July, 1975, as Exh. P.W. 3/2-E, whereas at the instance of the defence a photostat copy of this note bearing the remarks quoted above in the hand of the appellant was brought on the record as Exh. P.W. 3/16-D. The photostat copy shows two endorsements made below Saeed Ahmad Khan's note by Zulfikar Ali Bhutto on the same date, i.e. 19th of July. The first endorsement contains the remarks reproduced above, and begins at the extreme left of the paper, whereas the second endorsement says "please file", and is written considerably below the appellant's signature under the above remarks. The second endorsement is also dated 29/7 and it is marked to P. S. meaning the Private Secretary to the Prime Minister. Saeed Ahmad Khan stated at the trial that his original note did not come back to him with above-quoted remarks of the Prime Minister, nor did he otherwise become aware of these remarks. It was stated at the Bar by the learned Special Public Prosecutor that although the original had been marked by the then Prime Minister to his Private Secretary yet it could not be traced in the Prime Minister's Secretariat by the Federal Investigation Agency.

642. The question is whether the remarks quoted above were, in fact, made on Saeed Ahmad Khan's note by the appellant on the 29th of July, 1975, or whether they have been fabricated later, as alleged by the prosecution, so as to give an impression that up to this time appellant was in no mood to grant an interview to Ahmad Raza Kasuri, and was, in fact, condemning his conduct in very strong language.

643. It will be seen that as the original note of Saeed Ahmad Khan was marked by the then Prime Minister to his Private Secretary, whether with one or two endorsements, it should normally have been available in the Prime Minister's Secretariat. But the paper was not found there by the Investigation Agency. It was submitted by Mr. Yahya Bakhtiar, and also by the appellant when he appeared in person, that as the note of Saeed Ahmad Khan related to a party matter, the Private Secretary to the Prime Minister passed it on to the Secretariat of the Pakistan People's Party, and it was from there that photostat copy was obtained by the defence for presentation in the Court. There was, however, no explanation by the defence as to the absence of the original from which the photostat copy produced at the trial was made. It is interesting to note that while applications were made on behalf of the appellant on the 15th and 30th October, 1977, in the High Court for summoning certain documents for the purpose of cross-examining Ahmad Raza Kasuri, and the Court did ask the Special Public Prosecutor to supply the same, yet on the 17th of October, statement was made in the High Court that some of the documents mentioned in the earlier application had been found, and they were produced in original in the Court for the purpose of cross-examining Ahmad Raza Kasuri. Again on the 6th of November, 1977, seven other documents were produced in original by the defence from their own custody, but the document bearing the disputed remarks was the only one which was not produced in original. The other documents produced in original did not necessarily relate to Party matters, and their production by the defence from their own custody reflects against the correctness of the statement that documents relating to party matters were being kept in original in the Party Secretariat, but it is not necessary to enter into that controversy. The simple fact is that Saeed Ahmad Khan's note in original bearing the disputed remarks has not been brought on the record by either side.

644. Dealing with the question of admissibility of the photostat copy, the High Court has observed in paragraph 402 of its judgment that this document had been admitted in evidence subject to the objection of the Public Prosecutor, since it was stated at the time that the original was not forthcoming. The High Court had then proceeded to uphold the objection on the ground that no attempt was made by the accused concerned to prove the loss of the original nor did he summon the original.

645. Mr. Yahya Bakhtiar submitted that it was incorrect to say that the original was not summoned by the defence, as an application had been made earlier in this behalf. This is correct, but the defence also conceded that this and other documents were sent to the P.P.P. Secretariat. If so, the original was in the possession and power of the

defence, and that is why it produced a photostat thereof. In these circumstances the view taken by the High Court appears to me to be correct, in terms of section 65 of the Evidence Act. As a result, strictly speaking, the Court cannot look at the remarks relied upon by Mr. Yahya Bakhtiar in support of his argument.

646. Even otherwise, there seems to be substance in the submission made by Mr. Ijaz Hussain Batalvi, the learned Special Public Prosecutor, that the remarks appear to have been written on this note at some later date. It will be seen that in the last Paragraph of his note, Saeed Ahmad Khan had stated that "Mr. Ahmad Raza Kasuri has requested for an audience with the Prime Minister at his convenience" If, indeed, the Prime Minister was at that time was annoyed with Ahmad Raza Kasuri, as is indicated by the contents of the remarks in question, and was not willing to grant an interview, it is clear that these remarks had to be communicated to Saeed Ahmad Khan, whether by the return of the original note with these remarks, or through some other means, but apparently nothing of this kind was done. Not only was Saeed Ahmad Khan not informed of this reaction of the Prime Minister to the request of Ahmad Raza Kasuri for a personal interview, but even the other gentleman who had been so active in this connection, namely, Abdul Hamid Bajwa, was also not informed on these lines. Otherwise Abdul Hamid Bajwa could not have sent direct to the Prime Minister his note Exh. P.W. 3/2-F only six days later on the 4th of August, 1975, stating that he had called on Ahmad Raza Kasuri on Friday the 1st of August, 1975. If, indeed, the Prime Minister had expressed himself in such strong language against Ahmad Raza Kasuri, as is used in the remarks in question, it is difficult to understand how Abdul Hamid Bajwa could have called on Ahmad Raza Kasuri only two days later on the 1st of August, 1975, and discussed with him about having his audience with the Prime Minister. In the circumstances, the only thing for Abdul Hamid Bajwa would have been to avoid the subject, even if for some reason he had felt himself compelled to call on Ahmad Raza Kasuri only two days later after these strong observations were made by his employer. I find that, in fact, at this meeting on the 1st of August, 1975, Abdul Hamid Bajwa suggested to Ahmad Raza Kasuri to prepare the ground for such a move by issuing one or two statements unfavorable to Air Marshal (Rtd.) Asghar Khan, and Kasuri only promised to think over the suggestion and have more discussions over this issue. Frankly, this kind of a meeting between Abdul Hamid Bajwa and Ahmad Raza Kasuri only two days after the strong endorsement of the Prime Minister on the 29th of July, 1975, does not make any sense. I consider that the contents of the note submitted by Abdul Hamid Bajwa to the Prime Minister on the 4th of August, 1975, negative the existence of the remarks relied upon by the defence.

#### **CONCLUSIONS AS TO EFFORTS AT WINING OVER OF KASURI**

647. There is also another aspect of the matter, namely, that even if the appellant was of this frame of mind on the 29th of July, 1975, as would appear from the remarks in question, he must have changed his mind and tactics later, as his officers continued to

pursue Ahmad Raza Kasuri. Saeed Ahmad Khan had a meeting, under the Prime Minister's instructions, with Ahmad Raza Kasuri's friend Sardar Izzat Hayat, in this very connection. The cumulative effect of all the documents taken together is that the initiative to win back Kasuri to the Pakistan People's Party was undoubtedly taken by the appellant Zulfikar Ali Bhutto by entrusting this assignment to his Chief Security Officer and the latter's Assistant Abdul Hamid Bajwa, and for this purpose they had a large number of meetings with him both at Islamabad and at Lahore. This could not have been the case if only Ahmad Raza Kasuri had desired a reconciliation, for in that case Kasuri would have been seeking interviews with these two officers, and not vice versa. It has also been noted earlier that in one of the documents it was mentioned that the then Federal Minister Abdul Hafiz Pirzada also talked to Ahmad Raza Kasuri about the removal of misunderstanding. It also appears from the documents noticed above, that as experienced and mature police officers, working on the mind of a much younger man, who had suffered a tragedy in the shape of the assassination of his father, and still felt himself insecure from the ruling Prime Minister, they succeeded in persuading him that his future and the safety of his family lay in returning to the fold of Pakistan People's Party, and patching up with the appellant, and that for this purpose he should seek an interview with the Prime Minister. It is also possible that Ahmad Raza Kasuri may himself be wanting to meet the appellant before rejoining the Pakistan People's Party. At the same time, as narrated by Saeed Ahmad Khan at the trial, the appellant decided that he would meet Ahmad Raza Kasuri according to his own assessment as to when it would be proper to do so. Thus it was a subtle game being played by the appellant and his officers with Ahmad Raza Kasuri being at the receiving end.

648. I have already commented, in an earlier paragraph, that, in the last document placed on the record in this connection, namely (Exh. P.W. 3/18-D) dated the 5th of December, 1975, Saeed Ahmad Khan had stated "the irritants created by vested interests at the move of Ahmad Raza joining the Party be kindly set aside, since the *negotiations* with him have now been carried on for the past six months, with no results so far". I have italicized the word 'negotiations', appearing in this sentence, as it would be foolish for Saeed Ahmad Khan to use this word if; indeed, there had only been a unilateral request from Ahmad Raza Kasuri for returning to the Pakistan People's Party and begging for an interview in the face of a strong unfavorable reaction on the part of the appellant. As a result, I am of the view that this part of the Subsequent conduct of the appellant, as proved by oral and documentary evidence, is highly relevant in reaching a conclusion as to his guilt in this matter. It manifests a desire to silence the loud and repeated protests and demand which were being made by Ahmad Raza Kasuri for an impartial probe into the assassination of his father. Incidentally, the pains taken by Saeed Ahmad Khan and the late Abdul Hamid Bajwa in holding such a large number of meetings, with Ahmad Raza Kasuri and the perseverance shown by them in carrying on "negotiations" with him for several months, and the promptness with which their reports were seen and attended to by the appellant, all go to show that Ahmad Raza

Kasuri was certainly not a non-entity insofar as the appellant and his political Party were concerned.

### DEFENCE CRITICISM OF AHMAD RAZA KASURI AND HIS EVIDENCE

649. Mr. Yahya Bakhtiar strongly condemned Ahmad Raza Kasuri as being an ambitious opportunist, and a liar, who had deliberately involved appellant Zulfikar Ali Bhutto in the murder of his father for the purpose of blackmailing the former Prime Minister, as would appear from the demand made by him that the Prime Minister should resign so as to facilitate proper investigation of this murder. The learned counsel further submitted that Kasuri was always changing his political loyalties, and that he had often been thrown out from political and other organization on account of his obnoxious behavior. Mr. Yahya Hakhtiar listed several items on which, according to him, Kasuri had given deliberately false replies, with the result that his entire evidence became unreliable. Finally, the learned counsel posed the question as to how could a man rejoin a political party of which the Chairman was guilty of the assassination of his father, and how could he subsequently write reports and letters eulogizing the appellant, and then applying for a P.P.P. ticket for the March 1977 elections.

650. I first take up the points mentioned by Mr. Yahya Bakhtiar showing that Ahmad Raza Kasuri was a liar. The learned counsel submitted that:-

(i) Kasuri had deliberately denied having made a statement under section 161, Cr. P.C. before D.S.P, Islamabad, during the investigation of the Islamabad incident of 24th of August, 1974, in which he had mentioned other motives and enemies for the attack on him.

This point has already been dealt with at same length, and it is not necessary to go over the same ground, except to say that the statement relied upon by Mr. Yahya Bakhtiar was not proved at the trial, and that the denial of Ahmad Raza Kasuri was in conformity with the speech which he had made that very afternoon, soon after the incident, in the National Assembly, in which he had clearly stated that he was attributing no motives at that stage. it is, therefore, difficult to hold that Ahmad Raza Kasuri was indeed telling a lie when he denied having made the alleged statement before D.S P. Islamabad.

(ii) Kasuri gave incorrect information regarding the cause of his expulsion from the Pak-Turkish Friendship Association, as in fact, there was a fight, as a result of which he was expelled.

As no satisfactory evidence was brought on the record to establish the reasons of Kasuri's expulsion from the aforesaid Association, it is not possible to agree with Mr. Yahya Bakhtiar that Kasuri's denial of the reasons suggested to him was in

the nature of a lie. In any case this kind of incorrect statement as to the reasons of his expulsion from a certain organization will hardly operate to negative his evidence, which is borne out by the records of the National Assembly containing his speeches against the appellant.

(iii) He falsely asserted that the appellant had taken the initiative to win over and bring him back to the Pakistan People's Party; and he falsely denied having asked for interview with the appellant after rejoining the party in April, 1976.

The first part of the submission has already been dealt with by me at considerable length in the light of the documents brought on the record by both sides, and for the reasons given earlier, I have already concluded that the initiative for bringing Ahmad Raza Kasuri back to the Pakistan People's Party came from the side of the appellant. There is, therefore, no question of Ahmad Raza Kasuri's making false statement in this behalf.

As to the second pan of the argument, it is correct that he did ask for interview with the then Prime Minister by writing a letter (Exh. P.W. 1/19-D) on the 30th of January, 1977, and to this extent it can be said that he did not make a correct statement when he replied in cross-examination that he did not ask for any interview. When confronted with this letter, he stated that he wanted to meet the then Prune Minister for seeking a P.P.P. ticket, but he also said that the tickets had already been distributed by the 19th of January, 1977. In the presence of this letter containing a written request for an interview, I would certainly agree with Mr. Yahya Bakhtiar that the reply given to this question by Ahmad Raza Kasuri in cross-examination is not correct. However, this incorrect reply of any event taking place nearly more than two years after the murder cannot negative the basic assertion made by Ahmad Raza Kasuri that he was a vocal critic of the former Prime Minister before the present incident. It seems to me, therefore, that this is an inconsequential lie, having no bearing on the fundamentals of the case.

651. Turning now to the other criticism made by Mr. Yahya Bakhtiar, it seems to me that for the purposes of this case it is not necessary for the Court to record a finding as to whether Ahmad Raza Kasuri was, indeed, an opportunist, and whether he was being thrown out from various organizations on account of his being an obnoxious person. It is sufficient to say that he explained at the trial that having failed in ail his efforts to get justice, as long as appellant Zulfikar Ali Bhutto was in power, he thought it prudent to patch up with him and to start praising him. In view of the fact that his several privilege motions moved in the National Assembly had not borne any fruit having been ruled out of order by the Speaker of the Assembly, the murder case relating to the assassination of his father having been filed as "untraced" by the Punjab Police; and the general feeling of insecurity entertained by him with regard to his own safety and that of his family, it could be a plausible stance to adopt in the circumstances in which

Ahmad Raza Kasuri found himself after the murder of his father. The evidence of Saeed Ahmad Khan lends full support to this part of Kasuri's statement, and even the contents of the documents brought on the record sufficiently bring out this aspect of the matter. I consider, therefore, that the criticism made by Mr. Yahya Bakhtiar does not negative the cumulative effect of the documents noticed in the preceding paragraphs.

#### **ALLEGED OMISSIONS AND CONTRADICTIONS IN THE EVIDENCE IN THE SAEED AHMED KHAN**

652. Let me now examine Mr. Yahya Bakhtiar's contention that the oral testimony of Saeed Ahmad Khan at the trial suffers from a large number of omissions, contradictions and improvements, as compared to his previous statements under sections 161 and 164, Cr. P.C., so as to seriously detract from its credibility. The various items commented upon by Mr. Yahya Bakhtiar in this behalf were the following:-

(1) Saeed Ahmad Khan (Cad pot stated in his previous statements that, while giving him telephonic instructions to proceed to Lahore in connection with the proceedings going on there before the Shafi-ur-Rehman Tribunal, the Prime Minister had directed him to meet the Advocate-General, Chief Secretary, I.G. Police and the investigating Officers and look into the case.

The criticism does not appear to be correct as in his 161, Cr. P.C. statement (Exh. 41/3-H) Saeed Ahmad Khan had clearly stated that in mid-December the Prime Minister had *inter alia* told him to proceed to Lahore and discuss the case with the Provincial officers, and that accordingly he went to Lahore and held meetings with the Chief Secretary, Home Secretary, I.G. Police, D.I.G. Police, Advocate-General and D.S.P., Intelligence Malik Ahad. Similarly in his 164, Cr. P.C. statement (Exh. P.W. 10/16-D), Saeed Ahmad Khan has virtually repeated the same statement by saying "He directed me to proceed to Lahore and look into the whole matter; and thereafter I went to Lahore and discussed the case with several provincial officers including the Chief Secretary, Home Secretary, etc." In the presence of these statements it is not correct to say that there was any omission or improvement on the part of Saeed Ahmad Khan.

(2) & (3) At the trial Saeed Ahmad Khan had stated that the Prime Minister had snubbed him and said in so many words "keep out the FSF" and he further directed him to find out from JADO, but in the previous statements, these exact words had not been used.

Technically, the objection is correct, as these precise words had not been used by the witness in his previous statements but in substance these matters are clearly mentioned to the effect that Saeed Ahmad Khan was directed by the Prime Minister to make enquiries from Bara and Defence Secretary in order to find out as to wherefrom ammunition of 7.62 mm. could be had, and that when the witness spoke to Zulfikar Ali

Bhutto about this ammunition being in the use of F.S.F., he was put off by saying that the weapons and ammunition of that kind was also available with the Army Units. In his 164, Cr. P.C. statement more details are given that when he informed the Prime Minister that the empties found at the spot were of the bore which was in the use of the FSF., the Prime Minister told him that this ammunition was also being used by several Army Units and that it was being smuggled also and the witness was instructed to make enquiries from Bara as well as from the Defence Secretary, and in accordance with these instructions, he wrote to the Defence Secretary and sent D.S.P. Muhammad Waris to JADO. The previous statements clearly indicate that the intention of the instructions given to Saeed Ahmad Khan by the Prime Minister was to keep out the F.S.F, and, therefore, the omission to use these precise words in the previous statements is not material.

(4), (5) & (6). The three omissions mentioned at items (4), (5) & (6) in the chart furnished by Mr. Yahya Bakhtiar can be taken up together, as they relate to the reply which Saeed Ahmad Khan had received to his letter to the Defence Secretary regarding the use of 7.62 mm. weapons and ammunitions. At the trial Saeed Ahmad Khan stated that he got perplexed on receiving this reply as it mentioned the Chinese weapons which were in use of the FSF, that he showed this letter to the Prime Minister who directed him not to produce it before the Inquiry Tribunal. The objection, is that in his previous statements there is no mention as to whether the Defence Secretary's reply was shown to the Prime Minister Or not \$End if shown what was his reaction.

It is correct that in the previous statements it is only mentioned that the reply is on the record, but there is no indication that on seeing this reply the witness felt perplexed or that he showed the same to the Prime Minister who directed him not to produce it before the Tribunal. The omission is, however, not material in the sense that the previous statements do mention that he had written to the Defence Secretary under the instructions of the Prime Minister, and therefore, it would appear to be only natural if he apprised the Prime Minister of the reply sent by the Defence Secretary. It seems that the statements made by Saeed Ahmad Khan at the trial in regard to this letter were made when he was shown the reply of the Defence Secretary which was not before him when he made his two previous statements. However, the essential fact in the story is that on the instructions of the Prime Minister he had written to the Defence Secretary to make necessary enquiries about the use of 7.62 mm. ammunition and weapons and that the reply in question was not produced before the Inquiry Tribunal. The omissions listed by Mr. Yahya Bakhtiar in this behalf are only of an inconsequential nature and do not affect the fundamental statement that it was under the instructions of the Prime Minister that Saeed Ahmad Khan had taken this step.

(7) to (18) The omissions listed at items (7) to (18) in the Chart prepared by Mr. Yahya Bakhtiar relate to the efforts of Saeed Ahmad Khan to bring back Ahmad Raza Kasuri to the fold of the Pakistan People's Party, contain references to the notes/reports sent by



him to the Prime Minister on this subject. The point made is that in the two previous statements, Saeed Ahmad Khan did not refer at all to the efforts made by him or by the late Abdul Hamid Bajwa to bring Ahmad Raza Kasuri back to the Pakistan People's Party, nor did he make a mention of the large number of documents which were proved through him at the trial in support of these efforts.

When questioned in cross-examination about his omission to mention these efforts and documents, Saeed Ahmad Khan stated that "I did not make a mention of this matter in my 164, Cr. P.C. statement, because as far as I remember, I had gone up to stage till I was associated with the supervision of the investigation of the murder case when I was taken off, and this was a subsequent development." Explanation given by the witness seems to be plausible, as in both the previous statements he stopped at the stage ending with the withholding of the publication of Inquiry Report submitted by Mr. Justice Shafi-ur-Rehman to the Punjab Government. It is possible that at that time the Investigating Officer, who interrogated Saeed Ahmad Khan, did not advert to the subsequent efforts to win over Ahmad Raza Kasuri, but the omission of these efforts from the two previous statements has no practical effect, as the evidence in regard to these efforts is proved by the large number of documents brought on the record by both the parties, and the matter does not rest on Saeed Ahmad Khan's oral testimony. Details of these documents, along with their contents, have already been discussed in the preceding paragraphs, and at this stage it has only to be stated that apart from one endorsement containing remarks said to have been made by the appellant on 29th of July, 1975, the genuineness of all other documents is admitted by both sides. In the presence of this documentary evidence, and the plausible explanation given by Saeed Ahmad Khan about his omission to mention these efforts, nothing turns on the so-called omissions listed at items 7 to 18 of the defence chart.

#### **WHETHER SAEED AHMAD KHAN AS AN ACCOMPLICE?**

653. One final contention put forward by Mr. Yahya Bakhtiar in this behalf may now be noticed namely, that Saeed Ahmad Khan was also an accomplice or at least no better than an accomplice, and therefore, his evidence could not be used to corroborate the evidence of another accomplice, i.e. approver Masood Mahmood. The learned counsel submitted that if the prosecution allegations are accepted to the effect that after the murder, Saeed Ahmad Khan and his Assistant the late Abdul Hamid Bajwa made efforts to misdirect the investigation so as to shield the real culprits, then they were both accessories after the fact, and therefore, accomplices in the offences of conspiracy and concealment of evidence, which was also an essential part of the alleged conspiracy. He contended that merely by dropping the charge under section 201, P.P.C., the position of Saeed Ahmad Khan as an accomplice could not be altered or improved. He submitted that the High Court was, therefore, in error in describing Saeed Ahmad Khan as an independent witness, and using his evidence as corroboration of Masood Mahmood. In support of these submissions, the learned counsel referred us to several paragraphs in

the judgment of the High Court dealing with Saeed Ahmad Khan's efforts at misdirecting the investigation. Finally, he drew the attention of the Court to a large number of decided cases to bring out the true import of the term 'accomplice'.

654. In reply Mr. Ejaz Hussain Batalvi, the learned Special Public Prosecutor submitted that Saeed Ahmad Khan could not be treated as an accomplice in the present case as, in the first place, he had categorically stated that he was not aware of the nature of the mission which appellant Zulfikar Ali Bhutto had assigned to Masood Mahmood, and about which he was asked by the appellant to remind the latter; on the contrary, we thought at that time that the mission was to effect a reconciliation between the appellant and Ahmad Raza Kasuri, as Masood Mahmood also hailed from Kasur. Mr. Batalvi next submitted that the true test for determining whether a person was an accomplice or not was to ascertain whether he was directly or indirectly concerned with, or privy to, the offence which was under trial; and that he must be so placed that he could be tried jointly along with the accused, for the same offence. He contended that it was clear that Saeed Ahmad Khan could not be tried jointly with appellant Zulfikar Ali Bhutto or the other co-accused, in this case for the offences of conspiracy and murder; that there was no charge under section 201 of the Pakistan Penal Code regarding concealment or destruction of the evidence; and that, in any case, there was no material on the record to show that Saeed Ahmad Khan knew or reasonably believed Zulfikar Ali Bhutto to be the real offender, and was knowingly taking steps to shield the offender. The learned Special Public Prosecutor accordingly submitted that Saeed Ahmad Khan was rightly treated as an independent witness by the High Court, as he appears to have acted throughout under the instructions of the appellant, and apparently in the belief that the appellant, had been falsely named by Ahmad Raza Kasuri.

655. The question as to who is an accomplice in law has already been considered by me not only on general principles but also in relation to a similar argument advanced against the position of M. R. Welch (P.W. 4) as a witness for the prosecution. Even at the risk of repetition, it has to be stated once again that an accomplice means a guilty associate or partner in crime, or who in some way or the other, whether before, during or after the commission of the offence, is consciously connected with the offence in question or who makes admission of facts showing that he had a conscious hand in the offence. Where a witness is not concerned with the commission of the crime for which the accused is charged, he cannot be said to be an accomplice in the crime. I have observed in this connection that as the terms "accessory before the fact", and "accessory after the fact" have not been used and defined in our law, it would be preferable to avoid their use, as it is not conducive to a proper understanding of the legal position obtaining in this country. Section 201 of the Pakistan Penal Code contains a specific provision for dealing with persons generally described as accessories after the fact, and, accordingly, for determining the position of Saeed Ahmad Khan it would be well to focus attention on the terms of this section.

656. Now, even assuming that an offence punishable under section 201 of the Pakistan Penal Code, although distinct from the offence of conspiracy and murder, could be jointly tried along with the main offence, the fact remains that in the present case there is no charge under section 201 against the appellants in this case; nor was Saeed Ahmed Khan arrayed in the list of the accused persons in the challan submitted by the State. It is true that in the private complaint filed by Ahmad Raza Kasuri, Saeed Ahmad Khan was mentioned as one of the accused persons, but as the present trial proceeded, Ahmad Raza Kasuri did not attribute any incriminating part to Saeed Ahmad Khan.

657. A more important aspect of the matter, however, is that the facts, as brought on the record, do not show that Saeed Ahmad Khan knew W or had reason to believe, at the time he was asked in July, 1974, by appellant Zulfikar Ali Bhutto to convey a message about Ahmad Raza Kasuri to Masood Mahmood, that the message related to the mission of killing Ahmad Raza Kasuri already entrusted by the appellant to Masood Mahmood. On the contrary, Saeed Ahmad Khan has asserted at the trial that he believed at that time that the message was for the purpose of effecting a reconciliation between the appellant with Ahmad Raza Kasuri, for the reason that Masood Mahmood also hailed from Kasur, and he had already taken some steps to bring about a rapprochement between the dismissed Federal Minister Mr. J. A. Rahim and the appellant. In the lengthy cross-examination to which Saeed Ahmad Khan was subjected, nothing was brought out to falsify this assertion of Saeed Ahmad Khan relating to the period when he conveyed the appellant's message to Masood Mahmood in regard to Ahmad Raza Kasuri.

658. At to Saeed Ahmad Khan's subsequent intermeddling with the investigation of the case, there is again nothing to show that at the time he was instructed by the appellant to proceed to Lahore as the appellant's name was being mentioned in connection with this murder before the Shafi-ur-Rehman Tribunal, Saeed Ahmad Khan knew or had reason to believe that appellant Zulfikar Ali Bhutto was, indeed, guilty of this conspiracy and murder. He did not have any hand or conscious involvement in the hatching or execution of the conspiracy leading to the present murder, nor has he been shown to be misdirecting the investigation with the knowledge and intention of screening the offender from legal punishment. He was acting all along under the directions of his employer to clear the latter's name. According to the Lahore police officers, he was advising them to act with wisdom and caution, and also telling them that the Prime Minister had been falsely accused by Ahmad Raza Kasuri. In these circumstances it cannot be held that he could at all be charged under section 201 of the Pakistani Penal Code, and be tried jointly with appellant Zulfikar Ali Bhutto and the other co-accused.

#### **CONCLUSIONS AS TO SAEED AHMAD KHAN**

659. For all these reasons, I see no substance in Mr. Yahya Bakhtiar's contention that Saeed Ahmad Khan should be treated as an accomplice, or no better than an accomplice, and therefore, not relied upon as providing corroboration of the evidence of approver Masood Mahmood. On a consideration of the general circumstances relating to the position held by him under appellant Zulfikar Ali Bhutto, his declared loyalty to the former Prime Minister absence of any material to hold that he has deliberately consented to falsely implicate the appellant in a capital offence simply on account of pressure from the Martial Law authorities, and the availability of ample documentary evidence to support his oral testimony, I am of the view that the evidence of Saeed Ahmad Khan on the various matters deposed to by him has been rightly accepted by the High Court. In all these matters he acted as an agent or functionary of appellant Zulfikar Ali Bhutto, with the appellant's full knowledge and authority, and, in fact, under his personal direction.

#### **CUMULATIVE EFFECT OF TESTIMONY OF MASOOD MAHMOOD AND CORROBORATIVE EVIDENCE SO FAR DISCUSSED**

660. From the foregoing survey of the corroborative evidence offered by the prosecution it becomes abundantly clear that it lends valuable support to the main story narrated by Masood Mahmood, regarding his position of trust, under appellant Zulfikar Ali Bhutto, as Director-General of the Federal Security Force; and the task assigned to him by the appellant to produce the dead body of Ahmad Raza Kasuri or his body bandaged all over. The oral testimony of Ahmad Raza Kasuri, Saeed Ahmad Khan and M.R. Welch, supported by the voluminous documentary evidence., fully brings out the motive existing on the part of the appellant to do away with Ahmad Raza Kasuri, and it also shows how the appellant's officers kept Ahmad Raza Kasuri under constant surveillance, how they intermeddled with the investigation of the murder, and how subsequently they made desperate efforts to win over Kasuri to bring him back to the fold of the Pakistan People's Party. All these activities have been found by me to have been consciously directed by the appellant, as the officers involved had no motive or reason of their own to act in the manner in which they did in regard to Ali mad Raza Kasuri and the present murder. There is overwhelming evidence to show that Saeed Ahmad Khan and his Assistant the late Abdul Hamid Bajwa were acting under the personal directions of the appellant in all these matters. The abortive incident at Islamabad and the identity of the ammunition used in that assault with that of the empties found after the Lahore incident clearly connect the Federal Security Force with both these events. In the circumstances I am fully satisfied that the High Court was right in placing reliance upon the testimony of approver Masood Mahmood, corroborated as it is by the mass of evidence discussed in the preceding paragraphs. This evidence fully implicates the appellants Zulfikar Ali Bhutto and Mian Muhammad Abbas in this crime, besides, of course, the approver himself.

#### **APPRAISAL OF APPROVER GHULAM HUSSAIN'S EVIDENCE**

661. Coming now to Ghulam Hussain approver, the main features of his testimony have already been given above in detail, and it is to be seen whether his evidence is such as can be accepted and safely acted upon provided the requisite corroboration is available on the record; or is it of such an unreliable and improbable nature, lacking intrinsic worth, that the question of seeking corroboration could hardly arise.

662. Taking up the service career of Ghulam Hussain, it appears from the testimony of ASI Zawar Hussain (P.W. 13) of the FSF Headquarters, who deposed with reference to the service record of Ghulam Hussain which he had brought in Court, that Ghulam Hussain joined as an Assistant Sub-Inspector in the FSF on 3-12-1973; he was promoted as Sub-Inspector on 15-1-1974 and as Inspector on 20-8-1974, a remarkable record of promotion in the short period of less than a year. He was attached with Battalions 4 and 5 (stationed at Rawalpindi and Islamabad) from 3-12-1973 to September, 1975. Ghulam Hussain has deposed that earlier he was in the Army from 2-2-1950 to 19-11-1973, where he served as a Commando for 14 years, and for 10 years he was Commando Instructor; and that he mentioned these qualifications in his application for seeking service in the FSF. He further stated that on his joining FSF service he was asked to set up a Commando Camp/Course. Entrustment of such an assignment to him apparently seems to be quite natural keeping in view his previous experience and qualifications and even otherwise also stands proved from documentary evidence in the form of Exh. D. W. 4/5 which is an "Order" of Mian Muhammad Abbas dated 17-7-1974 which indicates that Ghulam Hussain was given a cash award of Rs. 75/- for "having run a Commando Course with great pain and efficiency and for producing good result". This shows that Ghulam Hussain was in the good books of his boss Mian Muhammad Abbas (Director ADMN & OPS), and when Ghulam Hussain deposes that he was entrusted by Mian Muhammad Abbas with the job of eliminating Ahmad Raza Kasuri, there appears nothing unnatural or odd in the selection so made both from the point of view of the long experience and training of Ghulam Hussain, his two rapid promotions, and his efficiency and capability for producing good results, which brought him cash reward as well. He has deposed that his paper posting was in Battalion No. 5, but an oral order was given by Mian Muhammad Abbas, that he would work under him at the Headquarters. This appears to be correct, because as stated by him, the Commando Camp was run under the supervision of Mian Muhammad Abbas, and it was for his efficiency in running that camp that Mian Muhammad Abbas gave him a cash reward vide Exh. D. W. 4/5. The running of a Commando Course-Camp and his being Incharge thereof is further proved from the fact that vide road certificate Exh. P.W. 24/7 dated 9-5-1974 he was issued 1500 rounds of 7.62 mm. cartridges in the name of 5/FSF Battalion, Rawalpindi, by Fazal Ali (P.W. 24) S. I., Armoury, and in that certificate he was described as "Incharge Commando Course". Same description of Ghulam Hussain is given in the corresponding Stock Register entry dated 9-5-1974 Exh. P. W, 24/8. In road certificate Exh. P.W. 24/9 dated 25-11-1974 to which reference will be made later he is again described as "Incharge Commando Course Battalion No. 5, FSF".

663. It may be mentioned that as deposed by Ghulam Hussain, Commando Course/Camp was started in April 1974. Towards the end of May, 1974, he was sent for by Mian Muhammad Abbas to his office and asked as to what methods he would adopt for kidnapping or murdering a person. The witness gave his reply and he was asked to reduce the same into writing. The witness complied with these orders. However, the paper was retained by Mian Muhammad Abbas and the witness came back. Though there is nothing in writing to support this part of the testimony of Ghulam Hussain, but looked at in the light of the cash reward Exh. D. W. 4/5 dated 17-7-1974 which speaks highly of his efficiency, the possibility of his efficiency having been put to test in that way or form, cannot be ruled out, and the statement of the witness in that respect cannot be called as unnatural or improbable in any manner.

664. Ghulam Hussain stated that two or three weeks later he was again sent for by Mian Muhammad Abbas, and was asked whether he knew Ahmad Raza Kasuri. On a negative reply Mian Muhammad Abbas placed a jeep and a driver at his disposal, and asked him to use the jeep after changing the number plate. The witness continued the search and was able to locate and identify Ahmad Raza Kasuri, and his place of residence. In the beginning of August, 1974, he was again sent for by Mian Muhammad Abbas who asked him about the result of his efforts. The witness informed him that he had identified him and located his place of residence. Ghulam Hussain deposed that Mian Muhammad Abbas then informed him that "it would be my duty to remove Ahmad Raza Kasuri from the path of Mr. Zulfikar Ali Bhutto and that it was the order given by Mr. Masood Mahmood, who was the then Director-General, FSF. Since by removing Mr. Kasuri from Mr. Bhutto's path he meant that I should kill Mr. Kasuri, I said to him that I had joined the FSF to provide for my family and that I was not prepared to commit this crime. Mian Muhammad Abbas then said to me that this murder had to be committed because it was the order of Mr. Masood Mahmood and because Mr. Ahmad Raza Kasuri was an enemy of Mr. Zulfikar Ali Bhutto, that I had nothing to worry about and would be afforded full protection. He further told me that as it was a secret mission and since I had been taken into confidence, I shall have to perform the mission. I was further told by him that it was not only my service that would be in jeopardy, even my life would be in danger if I declined to implement his order. Because he promised to protect me, and because he threatened me with the loss of service and my life, and further because of the pressure that he brought to bear upon me, I agreed to implement the orders".

665. Ghulam Hussain has further deposed that: "Mian Muhammad Abbas then gave me a chit and directed me to obtain a sten-gun, a pistol, two magazines and ammunition from Fazal Ali (PW 24) Incharge of the Headquarters Armoury." Ghulam Hussain went to Fazal Ali and asked for the material on the basis of that chit without making any entry in the relevant register, as these were the orders of Mian Muhammad Abbas. Fazal Ali, however, refused to issue any ammunition in such an informal way.

The witness then came back and handed over the chit and reported the matter to Mian Muhammad Abbas who sent for Fazal Ali. Mian Muhammad Abbas repeated the orders to him and informed him that not only he would lose his job but Mian Muhammad Abbas would also settle the score with him, if he did not carry out the orders and deliver the arms and ammunition to Ghulam Hussain without entering them in the register. Ghulam Hussain further deposed that "on this, Fazal Ali expressed his willingness to comply and he and I went to the Armoury. On reaching the Armoury, Fazal Ali handed over to me a sten-gun, two magazines, a pistol with two magazines and ammunition for both without making any entry in the register". The witness handed over a receipt to Fazal Ali and took these things to his Commando Camp. Having procured the arms he then started following Ahmad Raza Kasuri.

666. Fazal Ali (P.W. 24) has supported Ghulam Hussain in material particulars with regard to the talk and incidents which concerned him and there is nothing to disbelieve the two witnesses in this respect, especially when Fazal Ali has no enmity with Mian Muhammad Abbas or as a matter of fact with any of the accused involved in this case.

667. On 20-8-1974 Mian Muhammad Abbas sent for Ghulam Hussain and complained that he had not performed the task assigned to him. He further said that as he was getting him promoted as Inspector, therefore, he had to pay attention to the task because Masood Mahmood was unhappy because of the non-performance of the task, and also because Zulfikar Ali Bhutto had now started abusing him because of this procrastination. Mian Muhammad Abbas told the witness that any further inaction on his part might endanger his own life. This portion of his statement stands borne out from the service record of Ghulam Hussain which shows that it was on 20-8-1974 that he was promoted as an Inspector. This second rapid promotion, it appears, was offered as an inducement for Ghulam Hussain to go ahead with the assignment, especially when any retreat from the same at that stage, as he was told, was with danger to his life and career.

#### **DETAILS OF ISLAMABAD INCIDENT CORROBORATE GHULAM HUSSAIN**

668. On 24-8-1974 then Ghulam Hussain launched an attack on Ahmad Raza Kasuri at Islamabad details whereof have been given in the earlier pages of this judgment, while mentioning the salient features of his evidence. That the said attack did take place is borne out (i) from the prompt lodging of the F.I.R. by Ahmad Raza Kasuri Exh. P.W. 1/1 at Police Station, Islamabad at 5.20 p.m. on the basis of the statement of Ahmad Raza Kasuri Exh. P.W. 23/1; (ii) the recovery of 5 empty cartridges bearing mark 661.71 from the spot by Investigating Officer Nasir Nawaz P.W. 23 vide recovery memo Exh. P.W. 23/3; (iii) statement Exh. P.W. 22 of Ahmad Raza Kasuri before Special Committee of the National Assembly on the very day and (iv) Report of firearm expert Exh. P.W. 23/4 dated 27-8-1974 indicating that the empties recovered were of 7.62 mm. It was deposed by Nasir Nawaz (P.W. 23) that the said case was filed as "untraced" (and if I

may say so, not on the ground of the "occurrence not having taken place at all"). The caliber of the empties clearly shows that the attack was by sophisticated ammunition and weapons which, as elsewhere explained were in use of FSF.

669. Ahmad Raza Kasuri (P.W. 1) gave details of this occurrence which support in all material particulars the statement of Ghulam Hussain. Exh. P.W. 23/2 is the site plan of the place of occurrence. We had a demonstration through a Brigadier of the Pakistan Army to see the manner of fall of empties of 7.62 mm. caliber when fired from a sophisticated weapon from the rear of a jeep from where Ghulam Hussain had deposed, the firing had been done. The observation of this Court as recorded in para. 4 of our inspection note dated 17-12-1978 is as follows:-

"The Brigadier also fired from the back of a jeep one automatic burst of three rounds. However, since the jeep was hooded he had to fire the weapon towards the open sky (in order to save the hood of the jeep from being damaged) and it was noticed that all the empties fell outside the jeep in scattered position towards his right at a distance of about 20-23 feet."

670. The manner of the fall of the empties corroborated the site plan of the Islamabad incident showing the place where the jeep was stationed and the place where the empties fell and from where they were recovered. An argument had been raised by Mr. Yahya Bakhtiar that while firing from a jeep the empties should have fallen in the jeep itself or down below in a perpendicular form at the place where the jeep was stationed. The demonstration has negated this suggestion, as it has shown that the empties had to fall away from the jeep at some distance. The place of fall of the empties, i. e. the place from where they were recovered, is therefore, in consonance with the natural fall of the empties when firing was resorted to from a jeep, and supports the statements of Ghulam Hussain and Ahmad Raza Kasuri regarding the relevant details of the attack.

671. To continue with the deposition of Ghulam Hussain, on coming to know of the failure of the attack, Mian Muhammad Abbas expressed his dissatisfaction/anger and directed the witness to remain on the job. After four days the witness reported to him that according to his search Ahmad Raza Kasuri had left Islamabad. Mian Muhammad Abbas then asked him to return the arms/ammunition to Fazal Ali, which this witness did, after getting back its receipt. It may be mentioned that according to Ghulam Hussain he had taken a sten-gun, two magazines, a pistol with two magazines and ammunition from Fazal Ali. The recovery of empties from the spot shows that some ammunition was definitely consumed in this attack. Ghulam Hussain has deposed that he replaced the deficiency so caused by taking live cartridges from his own Commando Camp. This appears to be correct because full quantity of ammunition could be returned only if the deficiency was made good. Fazal Ali has corroborated Ghulam Hussain in his evidence that full quantity of ammunition was returned to him.



672. Ghulam Hussain has next deposed that after the failure of the Islamabad attack, Mian Muhammad Abbas had sent two persons, namely Liaquat and Zaheer to Lahore to trace out Ahmad Raza Kasuri, but as they reported no progress, Mian Muhammad Abbas called him a day before Eid in October 1974 and asked him to proceed to Lahore. After making the necessary entries in the daily diary of his battalion he went to Lahore, and returned on 26-10-1974. The visit of Ghulam Hussain to Lahore from 16-10-1974 to 26-10-1974 is supported by relevant entries in the daily diary of his battalion. After his return he reported to Mian Muhammad Abbas and told him that he had traced out the residence of Ahmad Raza Kasuri and asked for further orders. This time Mian Muhammad Abbas gave him a detailed plan and asked him to go to Lahore and accomplish the job assigned to him. According to the witness "Mian Muhammad Abbas directed me to take the ammunition from the Commando Camp and proceed to Lahore with Iftikhar, one of the commandos, where I could draw arms from Sufi Ghulam Mustafa who would also provide me a jeep Arshad Iqbal and Ghulam Mustafa who were already in Lahore, would provide these things to me. He also directed me to try an exchange of the ammunition that I would draw from the Commando Camp with similar ammunition from some other source so that it could not be discovered that the ammunition had been supplied by the FSF. I consequently draw ammunition from the Commando Camp. I got Rana Iftikhar from the Commando Camp, had the departure recorded in the daily diary of Battalion No. 5 without showing our destination, as Mian Muhammad Abbas had specifically directed us not to disclose it. I proceeded to Lahore the same day and Iftikhar was with me. He had already drawn the ammunition from the Commando Camp. On reaching Lahore, I contacted Sufi Ghulam Mustafa at the FSF Headquarters in Shah Jamal and apprised him that I had been sent by Mian Muhammad Abbas for killing Mr. Ahmad Raza Kasuri. Ghulam Mustafa replied that he had already been informed of my arrival by Mian Muhammad Abbas on the telephone and that Mian Muhammad Abbas had asked him to help me. He had already been told that the mission was to be accomplished by Iftikhar and me with his help and that of Arshad Iqbal" ..... I then told him that though I had brought the ammunition, he was supposed to provide me with arms and a jeep. He promised to do the needful".

673. Ghulam Hussain has further stated that after a few days he was informed that Mian Muhammad Abbas was very much annoyed over the fact that no positive steps had been taken to accomplish the mission although four or five days had already elapsed. The departure of Ghulam Hussain from Rawalpindi is supported from relevant entries in his battalion along with Rana Iftikhar Ahmad, though the destination of the journey has not been mentioned therein. Ghulam Mustafa obtained a stengun from the battalion of Ameer Badshah (P.W. 20) which was stationed at Walton. On the night between 10th and 11th November, 1974, an attack on the life of Ahmad Raza Kasuri was made as detailed in the earlier pages of this judgment, while he was returning in his car after attending the marriage function in Shah Jamal. The attack was actually made at the Roundabout of Shah Jamal and Shadman Colony as detailed earlier. It resulted in the death of Nawab Muhammad Ahmad Khan.

## DETAILS OF THE PRESENT OCCURRENCE SUPPORT GHULAM HUSSAIN

674. The statement of Ghulam Hussain when read with the deposition of Ahmad Raza Kasuri clearly brings out how, when and where Nawab Muhammad Ahmad Khan was assaulted and killed. Their statements indicate that he was attacked on the night between the 10th and 11th of November, 1974, while he was coming back along with his father and other relations in his car LEJ No. 9495 at about midnight. These statements further indicate that it was in that attack that his father, who was sitting on the front seat on his left, received fire-arm injuries, as a result whereof he died shortly thereafter at the United Christian Hospital. The record of the Hospital contains the necessary entries regarding the admission, treatment and death of the injured person. The existence and collection of blood, broken pieces of glass, a piece of lead of a bullet and 24 empties bearing mark 661.71 from "Shah Jamal-Shadman Colony Roundabout", corroborate the statements of Ghulam Hussain and Ahmad Raza Kasuri regarding the place of occurrence. The nature of injuries on the person of the deceased, and the recovery of a bullet and two thin metallic pieces from his body, leave no room for doubt that the attack was by sophisticated automatic fire-arms. The car No. LEJ 9495 also had bullet marks, its glass was broken, and pieces of broken glass and blood were found from inside the car which corroborate the version of the aforesaid witnesses that it was the same car the occupants whereof were the victims of the assault. This car was present in the United Christian Hospital when it was taken into custody immediately after the occurrence vide memo. Exh. P.W. 1/3. On the basis of this evidence, it can safely be held that Nawab Muhammad Ahmad Khan received injuries by automatic sophisticated fire-arms while he was returning home in car LEJ 9495 after attending a marriage ceremony, along with his son Ahmad Raza Kasuri, on the night between 10th and 11th November, 1974; that the assault took place at "Shah Jamal-Shadman Roundabout" and that the deceased was immediately taken to United Christian Hospital where he succumbed to his injuries and died at 02-55 hours.

675. As regards the actual party which arranged and launched the attack the details have already been given earlier and need not be repeated at this place over again. According to those details Ghulam Hussain posted Arshad Iqbal on the intersection wherefrom he could see the place where Ahmad Raza Kasuri's car was parked. Arshad Iqbal was directed to open fire in the air the moment Ahmad Raza Kasuri's car was about to pass by him. Rana Iftikhar was given the orders to open fire at the first car which came before him after Arshad Iqbal had fired in the air. Ghulam Hussain himself stood in a nearby lane to ensure the operation. The statement of Ghulam Hussain clearly indicates the part played by him, Rana Iftikhar Ahmad, Arshad Iqbal and Sufi Ghulam Mustafa. These appellants also admitted their participation in the attack in their confessional statements under section 164, Cr. P.C. which a court is entitled to take into consideration under section 30 of the Evidence Act against them. The statement of Ghulam Hussain in the overall circumstances mentioned above, thus

inspires confidence and can be accepted as true and be acted upon, provided it is properly corroborated.

### DEFENCE CRITICISM OF GHULAM HUSSAIN'S EVIDENCE

676. However, Mr. Yahya Bakhtiar raised a number of points to contend that Ghulam Hussain was not a reliable witness, and that his testimony should not be accepted for the reasons advanced by him. These points may be discussed at this stage.

677. Taking up the manner of attack, he submitted that the site plan Exh. P.W. 34/5-D shows that the empty cartridges were recovered as indicated therein from four places. Two of these places were actually inside the north-east and south-east of the Roundabout which was surrounded by a shoulder-high hedge and two were outside the Roundabout, one on the northern side and the other on the southern-side. His argument was that if according to the statement of the approver, Ghulam Hussain (P.W. 31), only two persons, namely, Arshad Iqbal and Rana Iftikhar fired at the car; then the empty cartridges could only be at two places where those men were stationed and not at four places.

678. The contention has no merit. It is well-known that targets generally speaking (in so far as relevant for our case) the targets may be of two types namely a "stationary target" and a "moving target". A vehicle is obviously a moving target. In order to engage a moving target, it is necessary to aim ahead of the target, along its line of travel, so that the bullet arrives at a particular point simultaneously as the target, thereby obtaining a hit. The "lead" necessary to hit a moving target depends upon the speed, range and direction of the movement of the target. In the case of such a mobile victim the main target of attack is the vehicle in which the victim is travelling and the attacker to secure his end may, therefore sometimes, depending of course on the facts and circumstances of each case, run side by side or after the vehicle swiftly and for this purpose obviously his position cannot be stationary. Similarly he may have to traverse and swing himself or his gun when the mobile target is adopting a circular route while negotiating a Roundabout. It is, therefore, only natural that the two attackers inside the roundabout may have in their own way chased the target and fired from more than two places with the result that empties also dropped at more than two places (in the instant case at four places). In the very nature of the target being mobile and the form and manner of attack being feasible, the dropping of empties at four places does not belie the prosecution case.

679. The note recorded by this Court while seeing a practical demonstration of firing on 17-12-1978 shows that while fired from SMG/LMG the empties do, not drop perpendicularly at the place where the attacker is standing but away from him at some distance of 20-23 feet in a scattered form. They may fall ahead of the firing base, or towards its rear on the right, depending upon the position of, the weapon. Thus Mr.

Yahya Bakhtiar's argument, based on an assumption of a perpendicular fall of the empties, is misconceived.

680. The next objection raised by Mr. Yahya Bakhtiar was that there was a conflict between the statement of Ghulam Hussain, approver, in Court, on the one hand and his confessional statement on the other hand, inasmuch as, Ghulam Hussain in his deposition in Court stated that he himself did not open any fire, and that he simply attended to the supply of arms and ammunition and organized and supervised the attack, whereas in his earlier confessional statement under section 164, Cr. P.C. marked as Exh. P.W. 10/11-1 he had stated that he too fired at the car. To the same strain were the confessional statements Exh. P.W. 10/2-1 and Exh. P.W. 10/3-1 of Rana Iftikhar Ahmad and Arshad Iqbal respectively. Ghulam Hussain in cross-examination, however, stated that he did not remember to have so stated earlier and that he himself did not fire. Mr. Yahya Bakhtiar submitted that this aspect of the matter gave a serious blow to the veracity of the approver inasmuch as in the very nature of thing he was trying to minimize his part and was exculpating himself and according to Mr. Yahya Bakhtiar it shows that he was not present in Lahore on that day at all and was thus an unreliable witness.

681. A similar situation arose and a similar argument was advanced in *Saravanabhavan and another v. State of Madras*<sup>304</sup> but was not accepted. The actual passage in this respect occurs in para 9 at page 1277 of the report. It is instructive to reproduce the same. It reads as follows:-

"It is next contended that the approver had minimized his own part, that he was a hired assassin and should have played the leading role, but he says that he only struck one blow and that too ineffective. It is argued that he should not be believed. We accept that the approver slurred over his own share in the affair as, in fact, most of the approvers do. Approvers do not want to involve themselves too deeply in the offence even though they depose under the terms of a pardon. The question always is whether on their statements they would be held guilty or not. The approver admits his participation in the guilt sufficient for his conviction. It is obvious that his statement was not self-exculpatory. As his statement must be received with caution, the High Court and the Sessions Judge, being alive to the need of caution, looked for adequate corroboration before accepting his testimony. They have critically examined his evidence before holding that his version is credible. They committed no error either of law or of fact in accepting the testimony of the approver and in view of the principles to which we have already adverted earlier; we do not feel called upon to reject the testimony of the approver."

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<sup>304</sup> AIR 1966 SC 1273

682. The principle alluded to in the above passage was the principle of putting the testimony of an approver to "double test"-a principle well explained in the cases quoted by me above, and which principle I have respectfully followed in this case. Examining in the light of the law relevant on the subject, I do not find that the above contradiction in any manner would save Ghulam Hussain from his guilt. He admits his participation in the crime in so many respects at so many stages and in so many forms which are sufficient for his conviction. His statement when so examined is not self-exculpatory and therefore, a point of the kind at present under discussion cannot lead to the rejection of his testimony of Ghulam Hussain, or denial of his presence at the spot.

683. Mr. Yahya Bakhtiar, however, reiterated his plea and by referring to certain other features of the case to be presently attempted and argued at great length and with great emphasis that Ghulam Hussain on the fateful day of occurrence was not in Lahore, and his deposition that he took part in or supervised the attack on Ahmad Raza Kasuri was totally false. For this purpose he made reference to what he called an authentic piece of evidence, namely Exh. P.W. 3116 which is a T.A. Bill of Ghulam Hussain, and according to which he was not in Lahore on the 11th of November, 1974, but at Karachi.

684. The T.A. Bill of Ghulam Hussain relates to three periods, namely:-

(i) period from 16-10-1974 to 26-10-1974 .... T.A. Bill shows his presence in Lahore.

(ii) period from 31-10-1974 to 22-11-1974 .... T.A. Bill shows his presence in Karachi.

(iii) period from 22-11-1974 to 29-11-1974 .... T.A. Bill shows his presence in Peshawar.

685. Taking up the first period of 16-10-1974 to 26-10-1974, Mr. Yahya Bakhtiar has not disputed the presence of Ghulam Hussain in Lahore. Ghulam Hussain deposed that a day before Eid in October, 1974, he was asked by Mian Muhammad Abbas to go to Lahore, as an earlier party sent there to search for Ahmad Raza Kasuri, had done nothing. He wanted to go after Eid but he was directed to go before Eid. So as per report No, 16 he entered his departure in the daily diary (Exh. P.W. 31/1) of his Battalion on 16-10-1974 indicating that he was leaving for Lahore (*Bakar Serkar*) for official duty, but not indicating as to what the precise duty was. On reaching Lahore, he, on telephone informed Mian Muhammad Abbas of his arrival and Mian Muhammad Abbas on his part also checked up his arrival in Lahore through (if It can be so called) a cross telephonic call. It may be remembered that Ghulam Hussain belongs to village Bango, Tehsil Fateh Jang, District Campbellpur, and if he was not allowed even to spend Eid in his village and was directed to go to Lahore, apparently it must be some very important mission. There is no explanation worth the name on the

record as to what that mission was, except through the mouth of Ghulam Hussain who deposed that the mission was of tracing Ahmad Raza Kasuri. Mr. Yahya Bakhtiar suggested that he might have been sent to Lahore to celebrate Eid at that place, but this suggestion does not fit in the context, because Lahore was not his, native place where he could spend the Eid. Be that as it may, the departure of Ghulam Hussain for Lahore is entered in the daily diary of his Battalion, and his arrival back from Lahore is also similarly entered in that diary as per arrival report No. 91 (Exh. P.W. 31/2). This part of the T.A. Bill, therefore, supports the statement of Ghulam Hussain that during the Eid days which according to the calendar fell on 17th to 19th October, 1974, he was sent to Lahore. That there took place a telephonic call on that occasion between Ghulam Hussain and Mian Muhammad Abbas is clear from the trend of cross-examination on behalf of Mian Muhammad Abbas at page 605 of the deposition of Ghulam Hussain where he was questioned as follows:-

Q. - Is it a fact that Mian Muhammad Abbas rang you up as you have already stated to check your arrival in Lahore for the reason that Mian Muhammad Abbas had not trust and faith in you?

A. - It is quite clear from my statement that he did not trust me at all and that another party had already been deputed to watch me.

686. Taking up the period from 31-10-1974 to 22-11-1974 during which, as per T.A. Bill, he is shown to be in Karachi, we have the statement of Ghulam Hussain who deposed that this portion of the T.A. Bill was incorrect and that during this period he was in fact in Lahore where from he returned on 22-11-1974, though in the Bill he showed his return on 22-11-1974. If this T.A. Bill is examined with reference to the relevant cross entry in the daily diary of his Battalion, report No. 16 (Exh. P.W. 31/3), it shows that he was leaving for some special duty, but neither the nature of the duty nor his destination is mentioned therein. Similarly in the arrival report, which is entered at serial No. 91, there again it is not stated that he had returned from Karachi. In this respect, it is thus obvious that the T.A. Bill is not supported by the aforesaid corresponding entries. The report dated 31-10-1974 above-mentioned which shows departure without destination is also signed by Rana Iftikhar Ahmad appellant who is shown to have left with Ghulam Hussain, but he has asserted in his confessional statement Exh. P.W. 10/2-1 and what he stated in Court that they had both gone to Lahore for this mission. Taking all these aspects into consideration, the T.A. bill loses all authenticity.

687. According to Ghulam Hussain this false T.A. Bill was prepared designedly at the instance of Mian Muhammad Abbas to show his presence away from Lahore during the days of the occurrence. That he was in Lahore is supported by the evidence of Muhammad Amir (P.W. 19) driver of jeep No. LEJ 7084 in which the attack party (who have confessed their guilt) had been reconnoitering in Lahore, and also used it on the

day of the occurrence. This fact is further supported by Sardar Muhammad Abdul Wakil Khan, D.I.G. (P.W. 14) who has deposed as having intercepted a jeep being driven at night without number plate a day before the occurrence on Ferozepur Road, and on inquiry found that it was being driven by an Inspector of the FSF.

688. Further support is available from the statement of Manzoor Hussain (P.W. 21) driver of the staff car of Masood Mahmood, who had arrived in Lahore from Multan and gave to Ghulam Hussain a lift in that car to Rawalpindi on the morning of 12-11-1974. That Manzoor Hussain brought the car of Masood Mahmood from Multan is not contested by the defence, but Mr. Yahya Bakhtiar contended that the factum of his having given any lift to Ghulam Hussain was not correct. It was argued that Manzoor Hussain's statement that he contacted Ghulam Hussain in FSF Headquarters in Shah Jamal where he had gone to get petrol for his car for the onward journey to Rawalpindi was obviously is false as FSF Head-quarters did not have any petrol pump, and therefore how could he go to that place for this purpose. However, we have at page 474 in the statement of Manzoor Hussain that the FSF had a contract for supply of petrol with a petrol dealer on Ferozepur Road. We see no reason to disbelieve this statement.

689. We may also make mention of a question put to this witness in cross-examination on behalf of Mian Muhammad Abbas at page 478. It reads as follows:-

Q. - Is it a fact that it was on the first and not the third of November, 1974 that you travelled to Lahore and the D. G. was travelling with you with Ghulam Hussain, Inspector.

A. - I came to Lahore on 3rd and not on the 1st. Neither the D. G. nor Inspector Ghulam Hussain was with me.

It will be seen that it is implicit in the question put on instructions from Mian Muhammad Abbas, that Ghulam Hussain was in Lahore and not anywhere else during the period in question.

690. Mr. Yahya Bakhtiar argued that Manzoor Hussain was not a reliable witness, as a special favor had been shown to him by reinstating him in service. He stated that the services of this witness were terminated on 23-2-1975, his appeal was accepted in November, 1977 and he appeared as P.W. 21 on 8-12-1977, therefore, he was an obliging witness. I do not find anything to doubt the veracity of this witness. He has no enmity with any of the accused nor, any friendship with Ahmad Raza Kasuri, and the mere fact that a service appeal of the witness was accepted is Do ground to think that he is a false witness, when even otherwise there is ample material on the record to support what he has stated.

691. Continuing the examination of T.A. Bill Exh. P.W. 36/1, we find that according to this document Ghulam Hussain was in Peshawar from 22nd to 29th November, 1974 but again the precise purpose of his visit to that place is not disclosed anywhere. However, we have from documentary evidence Exh. P.W. 24/9 (a road certificate) and Exh. P.W. 24/10 (entry in the Stock Register of Fazal Ali (PW 24) ..... ) that on 25-11-1974 Ghulam Hussain returned the ammunition mentioned therein to Fazal Ali at Rawalpindi. These documents are to be read in the light of the statement of Fazal Ali. Mr. Yahya Bakhtiar submitted that these were forged documents. We have seen the Stock Register. It seems to be properly maintained. It contains details of incoming and outgoing ammunition, date-wise. The entries appear to have been regularly checked by the officer concerned whose signature and seal also exist at the relevant places. These entries prove the presence of Ghulam Hussain in Rawalpindi on 25-11-1974 beyond any shadow of doubt. I see no reason to disbelieve these entries or the statement of Fazal Ali with regard thereto. It may be mentioned that the ammunition returned on 25-11-1974 was of that lot which had earlier been received by Ghulam Hussain from Fazal Ali on 9-5-1974 vide Exh. P.W. 24/7 and Exh. P.W. 24/8 as proved by Fazal Ali at page 489 of his deposition.

692. Mr. Yahya Bakhtiar tried to argue that the deposition of Muhammad Amir driver that in his jeep No. LEJ 7084 he and the accused including Ghulam Hussain approver were connoitering in Lahore, and that it was used on the night of the occurrence was false as much as in the relevant Log Book Exh. P.W. 4-D the entries regarding the use of this jeep did not support him, and rather showed that it was used in Lahore by certain other person or persons. We have already held that the Log Book in question did not satisfy the requirements of section 35 of the Evidence Act, and it was accordingly necessary to prove the individual entries sought to be relied upon by the defence, but no such attempt was made, and as such they were of no evidentiary value, especially when they were not in the hand of Muhammad Amir driver who deposed that he was illiterate.

693. It may here be pointed out that the T.A. Bill Exh. P.W. 36/1 shows that the journeys mentioned therein were undertaken under the orders of the Director, Operation and Administration, i.e. Mian Muhammad Abbas, as would appear from the note given, in the column headed as "purpose of journey". This bill is then signed by Mian Muhammad Abbas, and properly processed under his instruction. It was prepared on 12-11-1974 and passed on that very date. This will show that Mian Muhammad Abbas was a party to the fabrication of this false document, and this is a circumstance which will independently show that he was a member of the conspiracy in this matter. He was questioned about the authenticity of this bill. He did not say that it was a correct bill and all he answered was that the responsibility for its preparation was of the person who claimed the relevant T.A./D.A., namely, Ghulam Hussain. However, his approval and counter-signatures on this T.A. bill prove his responsibility and equal involvement in the matter. I have during the discussion of the T.A. bill



highlighted its various features also with reference to the position of Mian Muhammad Abbas for the reason that the T.A. Bill contained his signatures and quoted him as the authority for the sanction and correctness of its entries.

694. The result of this discussion is that the T.A. Bill Exh. P.W. 31/6 and the Roznamcha entries Exh. P.W. 31/4 and Exh. P.W. 31/5 have been proved on the basis of both oral and documentary evidence to be fabricated documents, and instead of helping the defence have lent a significant support to the prosecution case that to screen this offence fictitious documents were designedly prepared by FSF personnel themselves. This feature of the case, as I will explain later, goes a long way to prove the basic conspiracy for the commission of the offence. However, for the present, confining ourselves to the short point under discussion, it is clear that in the face this overwhelming material on the record, the plea raised by Mr. Yahya Bakhtiar regarding the absence of Ghulam Hussain from Lahore during the dates of the occurrence, has no merit.

695. Mr. Yahya Bakhtiar also challenged another part of the statement of Ghulam Hussain wherein he had deposed that on the day following the occurrence, i.e. 12-11-1974 he had gone to see Mian Muhammad Abbas, appellant on reaching Rawalpindi. It was argued that on 12-11-1974 Mian Muhammad Abbas was in Peshawar and returned from there at 6 O'clock in the evening and reached his house at 7 p.m., whereas Ghulam Hussain had reached Rawalpindi at about 2-30 p.m., and could not have therefore met Mian Muhammad Abbas at that hour or soon thereafter. The point raised is nothing but a magnification of the words that "on reaching Rawalpindi" he saw Mian Muhammad Abbas. I do not subscribe to such a rigid construction of the words "on reaching Rawalpindi" as these words leave scope for safety holding that after he reached Rawalpindi he saw Mian Muhammad Abbas, but not instantaneously. This can be so held, because, Ghulam Hussain has not given, nor was he asked the exact time, when he met Mian Muhammad Abbas. In the absence of any such specification of time, it is not possible to raise any argument of the kind under discussion just in vacuum.

696. Mr. Yahya Bakhtiar then submitted that Ghulam Hussain approver, was arrested on 27-7-1977 and remained in F.I.A. custody 17 for days. He was produced before a Magistrate on 11-8-1977 when he made a confessional statement under section 164, Cr. P.C. On 13-8-1977 he made an application for being made an approver and on 21-8-1977 he made (another) confessional statement. However according to Mr. Yahya Bakhtiar, he was still not satisfied with the statement already made by him, and in his so-called desire to purge himself of his sins, he sent an application to the High Court through Jail on 31-10-1977, during the course of the trial, submitting that his earlier statement as an approver was not wholly correct, and that he will be making a correct statement in the High Court. Mr. Yahya Bakhtiar contended that this was an advance information from the side of the approver that in the High Court he will be speaking the whole truth and will be making a better/correct statement. He submitted that in view

of this type of conduct, or as he termed it the antics of Ghulam Hussain, there was no guarantee that what he stated in the High Court was the gospel truth. He also argued that all statements of Ghulam Hussain had been made by him after remaining in police custody for a good deal of time and as such they were neither voluntary nor true. The contention has no merit as there is nothing to show that Ghulam Hussain was not making a statement voluntarily. He had made two statements earlier, and he deposed to them in Court. No doubt he is an approver, but his statement has been subjected to lengthy cross-examination by counsel for all the accused, with further comments of all types in trial Court and also before us. The present discussion will deal with all of them in their own turn.

697. Mr. Yahya Bakhtiar argued that Ghulam Hussain in answer to a question put to him in cross-examination by learned counsel for some of the accused had stated that Arshad Iqbal fired twice by turning over or by taking a turn. He submits that this was a twist on the part of Ghulam Hussain to increase the number of shots to justify the existence of empties at four places, even though initially he had mentioned just two shots which would have led to fall of empties only at two places. He argued that Arshad Iqbal had not claimed any such thing in his previous confessional statement. He argued that Arshad Iqbal was stationed at the northern end of the roundabout and to say that he then reached the southern end was even otherwise an impossibility, because the distance between these two ends, according to Mr. Yahya Bakhtiar, was 192.5 feet which Arshad Iqbal could not have traversed in such a short time by which the car had to reach at that place, and which naturally would have been faster in speed than a man on foot. From this also it was suggested that Ghulam Hussain was not present in Lahore and that was why his description aforesaid did not quite fit in the whole context.

698. Arshad Iqbal in his confessional statement Exh. P.W. 10/3 had stated that "we fired indiscriminately but the car escaped". Actually he used the words (*Anda dundh firing*) in Urdu which means without count or thought, and are comprehensive enough to cover firing by turning round or firing more than once, or from different places and angles. Mr. Yahya Bakhtiar wanted to refer to the confessional statement Exh. P.W. 10/2 of Rana Iftikhar Ahmad to press his point that this accused also did not refer to any firing by turning round or more than once on the part of any firer. I have gone through that statement. It states (and then we fired from the sten-gun). It is obvious that this statement is also of a comprehensive form, and if later its details come on the record the same cannot be said to be inconsistent or contradictory with the previous statement of the accused in any manner. The upshot of this discussion is that the previous statement of any of the concerned accused if taken into consideration under section 30 of the Evidence Act does not exonerate any member of the attack party.

699. Mr. Yahya Bakhtiar submitted that in the site plan Exh. P.W. 34/2 the way the empties are shown as having been recovered from a particular spot indicates as if they

were lying in a bulk form at one place, whereas according to the demonstration seen by this Court on 17-12-1978 the empties fell in a scattered form.

700. If the empties were lying in a bulk or bunch form, then according to Mr. Yahya Bakhtiar this would give a complete lie to the prosecution case which has failed to explain as to how the empties got collected in that form at four different places in different numbers. He submitted that according to the site plan, 7 empties were recovered from one place, 5 from another and 6 from each of the two other places respectively, that is 24 in all; and a collective fall of so many empties at one place was against the natural working of an SMG/LMG weapon with an ammunition of 7.62 caliber.

701. Though this argument is converse of his earlier argument where he relied upon the theory of a perpendicular fall of empties but even this point also has no merit, as it is based on misreading and mis-appreciation of the relevant evidence in this context. It may be pointed out that Abdul Hayee Niazi, the then Investigating Officer, appeared as P.W. 34 but no question with regard to the point presently under discussion was put to him to explain details and other relevant features of his site plan Exh. P.W. 34/2 which was only (*nazri*) (i. e. visual plan without scale).

702. There is another site plan Exh. P.W. 34/5-D on the record. prepared on 17-11-1974 by Inam Ali Shah Draughtsman which might be looked into for the limited purpose of understanding the submission of Mr. Yahya Bakhtiar. In that plan the empties are shown in somewhat scattered form and the sketch is made on the scale of one inch for sixteen Karams. It is well known that 5 feet make one Karam, and from that point of view 16 Karams will be equal to 80 feet, which means that the scale is 80 feet to one inch. Now one inch consists of 10 centimeters, which means that one centimeter will indicate 8 feet. This site plan further shows that in each of the places the empties are not shown in any bulk or bunch form, but are shown in a scattered form removed at same distance from one another. The precise position is that each empty is shown by a small dot which is apparently at a distance of one or half centimeter, from the other dot - in other words at a distance of 7/8 feet from one another. This indicates quite a natural fall of the empties, which were not found at any one place in a bulk or bunch form, and this position supports the prosecution case that the firing took place from sophisticated arms and ammunition, empties whereof fell in the natural manner shown in the plan.

703. At this place I reproduce Tiaras. 2 and 3 of our demonstration note dated 17-12-1978. They read as follows:-

Para. 2: "In order to simulate the actual position of firing from behind which the assailants had fired on the car of Mr. Ahmad Raza Kasuri at the roundabout of Shadman-Shah Jamal Colony, Lahore, namely, a shoulder high hedge, a similar "hedge" was simulated by the use of chairs piled one upon another from behind

which the Brigadier also fired the SMG automatically in the bursts of three rounds each. Now the pattern of the ejection of the empties noted was that these were mostly thrown towards the right in backwardly direction (some of them also falling towards the right and ahead of the line where the firer was standing) at a distance of about 20-23 feet, and further that the empties were scattered in an area of about 10/12 feet. However, when the Brigadier aimed at a target and fired, the invariable pattern of ejection of the empties noted was that most of the empties fell towards his right in backwardly direction (at a distance of 20-23 feet scattered from each other) although some of the empties also fell towards his right and a little ahead of him.

Para. 3: As to the warning burst allegedly fired at the roundabout of Shadman-Shah Jamal Colony at Lahore, by Arshad Iqbal, in order to alert Rana Iftikhar to the effect that the car of Mr. Ahmad Raza Kasuri was approaching, the Brigadier simulated the said place of occurrence by directly facing the receiving end and the Firing Range (just as Arshad Iqbal would be facing the approaching car of Mr. Ahmad Raza Kcasuri) and fired one automatic burst of three rounds from the SMG. Now the position in which the Brigadier had held the SMG for this demonstration was that its barrel pointed at the sky and its ejecting breach faced and made a parallel line with the receiving end of the Firing Range, with the result that all the empties got ejected towards the right and ahead of the Brigadier where he was standing, and further that the empties fell scattered at a distance of 20-23 feet."

704. The demonstration thus supports the fall of the empties as indicated in the relevant site plan (a). The point raised by Mr. Yahya Bakhtiar is therefore repelled.

#### **ALLEGED OMISSIONS AND IMPROVEMENTS IN GHULAM HUSSAIN'S EVIDENCE**

705. Mr. Yahya Bakhtiar then argued that the evidence of Ghulam Hussain suffers from vital omissions and improvements amounting to contradictions which indicate that he was not a reliable witness. In this respect he filed three charts and took us through the same in minute details. Mr. Ejaz Hussain Batalavi filed counter charts replying to each item of objection. I have attended to these matters in detail and my views with regard to the points raised in these charts are as follows:-

(i) Mr. Yahya Bakhtiar submitted that Ghulam Hussain has deposed that his paper posting was in Battalion No. 5, but an oral order was given by Mian Muhammad Abbas that he would work under him, i.e. Mian Muhammad Abbas at the Headquarters. The witness continued to state that one or two days after he joined service he was assigned special duty at Larkana by Mian Muhammad Abbas. Mr. Yahya Bakhtiar submitted that Ghulam Hussain had not stated so in

his previous statements. The contention has no merit. In his confessional statement Exh. P.W. 10/11 recorded under section 164, Cr. P.C. as also in statement recorded after the grant of pardon, the witness had stated that he was posted in Battalion No. 5, and had been directed by Mian Muhammad Abbas to run a commando course and that he had been summoned by Mian Muhammad Abbas and was asked about the methods of kidnapping, etc. Examined in this context it is evident that in his statement before the High Court, the witness simply provided details as to how, while posted in Battalion No. 5, he was working under Mian Muhammad Abbas. There is thus neither any vital improvement nor contradiction.

(ii) It was next contended that Ghulam Hussain has deposed that for the purpose of training, the trainees in the Camp were to bring their own weapons from their Battalion and for them ammunition was to be drawn from the Armoury at 57-A, Satellite Town, the headquarters of the Federal Security Force. It was submitted that Ghulam Hussain had not stated any such thing in his previous statement. The contention has no merit. In his statement under section 164 of the Criminal Procedure Code (Exh. P.W. 10/11 at page 254, Volume of Documents), the witness stated that he had been given directions by Mian Muhammad Abbas about the Commando Course and setting up a Commando Camp. In his statement before the Court, he provided further information as to wherefrom the Commando trainees were to get ammunition. It is neither a contradiction nor an improvement.

(iii) Mr. Yahya Bakhtiar submitted that Ghulam Hussain has deposed that Mian Muhammad Abbas gave him a chit and directed him to obtain a sten-gun, a pistol, two magazines and ammunition from Fazal Ali, Incharge of the Headquarters Armoury, that he took the chit to Fazal Ali and asked for the material on the basis of a receipt which he was to furnish to him but directed him not to enter the issue of the material in the Register "For such were the orders of Mian Muhammad Abbas". Fazal Ali insisted that he would issue the material only after making entries in the register. Ghulam Hussain reminded him that he had produced a chit from Mian Muhammad Abbas and that he was asking for the material on the basis of the order given by him. Fazal Ali however, refused to do so. Ghulam Hussain then brought this fact to the notice of Mian Muhammad Abbas who sent for Fazal Ali and warned him that he was to carry out the order otherwise he would lose his job, etc. Then Fazal Ali expressed his willingness to comply with the orders. On reaching the Armoury, Fazal Ali handed over to Ghulam Hussain a stengun, two magazines, a pistol with two magazines and ammunition for both. No entries were made in the register. The witness handed over the receipt to him and took these things to his Commando Camp. Mr. Yahya Bakhtiar submitted that the witness had not said any such things in his previous statements. The contention has no force. In his statement under section

164, Cr. P.C. (Exh. P.W. 10/1.1 at page 255, Volume of Documents), the witness stated that Mian Muhammad Abbas had ordered that he should collect two stenguns and 4 rounds of ammunition from Fazal Ali, Incharge, FSF, Headquarters Armoury. He took the sten-guns and ammunition, and went to the Commando Camp, Islamabad. In the High Court the witness only furnished further details with regard to the procedure adopted for issuing the arms and ammunition in question. The statement made in the High Court, it is evident, simply gave more details in that respect and cannot be called an improvement or contradiction inasmuch as it merely explains as to how the ammunition was obtained.

(iv) That after the failure of Islamabad attack Ghulam Hussaii deposed that "I returned to tire Camp and kept on following him After one or two days I rang up the same number of Mr. Ahmad Raza Kasuri, which I had contacted earlier and enquired about him. A third person responded and informed me that Ahmad Raza Kasuri was not available at that place. On my further query, he told me that Mr. Ahmad Raza Kasuri had gone out of Rawalpindi and he did not know when he was returning. I informed Mian Muhammad Abbas accordingly". Mr. Yahya Bakhtia argued that the witness had not stated all that has been mentioned above in his previous statements. The contention has no force In his statement under section 164, Criminal Procedure Code (Exh. P.W. 10/11, P. 256, Volume of Documents), the witness had stated that after an unsuccessful attempt on the life of Ahmad Raza Kasuri in Islamabad, he returned to the Camp, and later of Mian Muhammad Abbas's instructions he travelled to Lahore along with Rana Iftikhar Ahmad, in search of Ahmad Raza Kasuri Examined in this light it is clear that in the High Court, the witness simply provided a few details about his proceeding to Lahore and if his previous statement is kept in view where he had state that he had to travel to Lahore "in search of Ahmad Raza Kasuri" it implies that he had to proceed to Lahore only because Ahmad Raza Kasuri was not found or traced in Rawalpindi. What he stated in the High Court was therefore neither an improvement nor a contradiction.

(v) Ghulam Hussain has stated that "Mian Muhammad Abbas ordered me to depute Head Constable, Zaheer and Liaqat from the Commando Camp, to go to Lahore and search for Mr. Ahmad Raza Kasuri. I complied with the orders and I rejoined my work is the Commando Camp. "It was objected by Mr. Yahya Bakhtiar that the witness had not stated any such thing in his previous statement. The objection has no force inasmuch as what the witness stated in Court was only a matter of minor detail to which he referred in the relevant context. It may M mentioned that thereafter Ghulam Hussain was sent to Lahore to search for and locate Ahmad Raza Kasuri. The said visit o Ghulam Hussain to Lahore has not been denied by Mr. Yahya Bakhtiar and therefore, the objection to the

aforesaid portion of the statement of Ghulam Hussain even otherwise is without any substance.

(vi) Mr. Yahya Bakhtiar then referred to that portion of the statement of Ghulam Hussain wherein he has deposed that Mian Muhammad Abbas sent for him a day before Eid in October, 1974, and told him that his men who had been sent to Lahore were enjoying holiday; and had done nothing. He also told the witness that he was staying in Rawalpindi and since no progress had been made, the then prime Minister was abusing him. Ghulam Hussain replied that he would leave immediately after Eid for Lahore. Mian Muhammad Abbas, however, told the witness that the Eid was the best occasion and that he could deal with Mr. Ahmad Raza Kasuri when he was meeting his friends and relations. The witness entered his departure in the daily diary of Battalion No. 4 and left for Lahore. He rang up Mian Muhammad Abbas from Lahore, as directed by him, and informed him of his arrival there. Mian Muhammad Abbas rang him back at the FSF Headquarters in Shah Jamal and spoke to him. The witness stayed at Lahore for about 10 days and after finding out whereabouts of Mr. Ahmad Raza Kasuri, proceeded back to Rawalpindi where he noted his arrival in the Roznamacha of Battalion No. 4. Mr. Yahya Bakhtiar submitted that the witness had not stated any such thing in his previous statement. It may be pointed out that the witness visited Lahore twice, i.e. once from 16th of October to 26th of October, 1974, and on the second occasion between 31st October and 12th November 1974. The evidence of his presence in Lahore during the first period (16th October to 26th October, 1974) is not being contested by the appellant and is also supported by a portion of the T.A. Bill on which the appellant himself relies. In the circumstances where the basic fact of the witness's presence in Lahore during this period is not in dispute, any objection of the kind under consideration is misconceived as in the portion above referred to the witness simply provided some details in that respect. There is thus no omission or contradiction.

(vii) It was contended that on return to Rawalpindi, Ghulam Hussain has deposed, that he informed Mian Muhammad Abbas that he had found out Mr. Ahmad Raza Kasuri and that his men were watching him in Lahore and that he asked for further orders. It was submitted that the witness had not made any such statement earlier. So long as the visit of Ghulam Hussain to Lahore and his return to Rawalpindi is well established on the record, and as pointed earlier is not in dispute the portion above-mentioned points merely to a minute detail regarding his stay in Lahore and cannot be called either an omission or an improvement or a contradiction.

(viii) Ghulam Hussain has deposed that "between 7.00 and 8.00 p.m. on the 10th of November, 1974, I laid to Sufi Ghulam Mustafa that we should try to find Ahmad Raza Kasuri that day so that we could show some result whereupon

Ghulam Mustafa, Iftikhar, Arshad Iqbal and myself, all four of us left in a jeep towards Model Town. We spotted the car of Mr. Ahmad Raza Kasuri at the place where the main road for Model Town branches off from Ferozpur Road while we were turning into Model Town. We could not reverse the jeep to follow, so we went ahead into Model Town. We, therefore, turned towards the road leading to Ahmad Raza Kasuri's house, but we turned to the right before reaching Ahmad Raza Kasuri's residence and then reached the Ferozpur Road, but we could not spot Ahmad Raza Kasuri's car again". It was argued by Mr. Yahya Bakhtiar that the witness had not made any such statement earlier. The contention has no merit. This matter in general finds due mention in the previous statements of the witness and the portion above reproduced is just a further detail of the same. It is neither an omission nor a contradiction.

(ix) Ghulam Hussain in his statement in Court stated that "we proceeded from there towards the Ferozpur Road and if my memory does not fail me, stopped for a cup of tea to Ichhra and returned to our office in Shah Jamal. We left the jeep there and all four of us, excluding the driver, went upstairs where we resided. We held a conference. Since we knew that his car was there and he was also there and we proceeded to snake a plan for selecting a site for firing at him to kill him. We selected a site which is the intersection on the right if one faces the house in which the wedding was being performed". It was argued that the witness had not stated any such thing in his previous statement. The contention has no merit. In Exh. P.W. 10/11 at page 257, Volume of Documents, this matter is duly mentioned. For example, the witness did say that they identified Ahmad Raza Kasuri's car in Shadman. He did say that all of them went back to FSF Office in Shah Jamal. He further said that they left the jeep and the driver at the office; and that they took areas and ammunition and came back to the spot. In the circumstances, mere omission of taking tea at Ichhra on their way to FSF Office in Shah Jamal, is no more than an insignificant detail. It is neither a material omission nor a contradiction.

(x) Mr. Yahya Bakhtiar submitted that Ghulam Hussain in his statement in court has deposed that "Arshad Iqbal and Iftikhar donned overcoats to keep the sten-gun bidden." He submitted that the witness had not made any such statement before. To say with respect this is a mere hair-splitting and so long as the arrival of the attack party on the spot has fully been described by the witness, the portion referred to by Mr. Yahya Bakhtiar is neither an omission nor a contradiction, for that matter.

(xi) Mr. Yahya Bakhtiar referred to that portion of the statement of Ghulam Hussain where he has deposed that "Iftikhar was given the orders to open fire at the first car which came before him after Arshad Iqbal fired in the air. I had directed Arshad Iqbal to fire in the air for more than one reason. He was facing



the Shamianas and if he had fired at the car, people in the Shamiana might be hit. Secondly, there was a danger of people sitting in the cars or those walking on the road being injured. Thirdly, because Iftikhar could not see the cars arriving from the side where the wedding was taking place and the firing in the air was to be a caution for him". Mr. Yahya Bakhtiar submitted that the witness had not said any such thing in the previous statement. He further submitted that in his previous statement dated 21-8-1977 Exh. P.W. 10/11-1 page 254 at page 257, he gave the reasons for firing in the air as follows: "I told Arshad to fire one or two bursts in the air after identifying the car, so that he may run away". Similarly, in his confession dated 11-8-1977 he stated as follows: "I ordered them that Arshad Iqbal would fire in the air after identifying the car and from the other side Rana Iftikhar would fire (so that there is commotion and our honor is also saved by this plausible excuse;". The portions above replaced according to Mr. Yahya Bakhtiar contradict what the witness had deposed in Court. The contention has no merit. A perusal of the statement Exh. P.W. 10/ 11 pages 257/258 of Volume of Documents will show that there is a clear mention by the witness in his statement that he posted Arshad Iqbal at one place, and Rana Iftikhar at another place 15 paces away. There is a mention of Arshad Iqbal being directed to fire in the air after identifying Ahmad Raza Kasuris car. In the statement before the Court the witness merely provided the details and the reasons for posting the two confessing accused at their respective places at the place of occurrence. In the circumstances, it is neither a material improvement nor a contradiction of his earlier statements. He also clarified the "ambiguity which had been caused by the use of the words, like the commotion", etc. There is thus no omission or improvement or contradiction.

(xii) Ghulam Hussain has deposed that he came to the intersection a number of times to keep Arshad Iqbal and Iftikhar on guard and also to find out whether the people had started leaving the place where wedding was taking place. It was objected that the witness had not stated so in his previous statement. The contention has no merit. In Exh. P.W. 10/11, page 257, Volume of Documents, the witness did state that having posted Arshad Iqbal and Rana Iftikhar Ahmad at their places of posting, he himself went to a side-road. He did not say that he did not come back from that road at all before he heard the sound of fire. In the circumstances, it can neither be a material improvement nor a contradiction. Even otherwise if the witness was organizing the attack, the activities and the movements deposed to by him would only be natural activities in the overall context, and cannot be termed as improvements.

(xiii) Ghulam Hussain has deposed in Court that "when we reached the FSF Headquarters in Shah Jamal, I found that the gate was closed. I asked the others to stay on where they were because I did not want us to be seen by the sentries soon after the firing. When I went near the gate I found the gate was closed but

the sentry had wrapped the blanket around him and was asleep. The gate is on the right side of the building while some plants were growing on the left. We, therefore, went over the wall one by one from the latter side." It was argued that the witness had not stated any such thing in the previous statement. A perusal of Exh. P.W. 10/11, page 257, Volume of Documents will however show that the witness had already stated in his earlier statements that after the incident they came back to the FSF Headquarters and the reason or details for the same were provided in the statement made in Court and it can hardly be considered as an improvement or a contradiction.

(xiv) The witness has deposed that "on checking the ammunition we found that 30 rounds had been fired that day". It was argued that the witness had not stated any such thing in his previous statement. In Exh. P.W. 10/11, page 258, Volume of Documents, the witness stated that he heard three bursts being fired. Giving the number of rounds spent in that firing is a detail which was provided in Court in answer to a specific question. In the circumstances, it cannot be regarded as a material contradiction or an improvement.

(xv) Ghulam Hussain has deposed that "after Sufi Ghulam Mustafa had spoken to Mian. Muhammad Abbas and before I left for Rawalpindi, I kept on making enquiries about the investigation that the Police was making. and trying to find out what was the result". It was argued that the witness had not made any such statement earlier and that the portion hereinbefore reproduced was improvement which was intended to cover the stay of Ghulam Hussain at Lahore on 11th November, 1974 and his going to Rawalpindi on 12th November, 1974, with Manzoor Hussain P.W. 21. The contention has no merit. Exh. P.W. 10/ 11, page 258, Volume of Documents, shows that the witness did state that Ghulam Mustafa made enquiries about the firing on the 11th of November, 1974, and he was told by Police Station, Ichhra, that the firing was at Ahmad Raza Kasuri in which his father was killed. This being a matter in his personal knowledge and from the narrative of his statement under section 164, Cr. P.C., it would appear that enquiries were being made by Ghulam Mustafa while the witness was equally anxious to find out about the investigation. Mere fact therefore that in his statement in Court he said that he kept on making enquiries about the investigation that the Police was making and was trying to find out what was the result, without making a reference that such enquiries were being made through Ghulam Mustafa, fit is too trivial a point to be given any serious consideration. It is neither a material omission nor a contradiction.

(xvi) Ghulam Mustafa has deposed in court that "Mian Muhammad Abbas asked me if I had left anything incriminating at the spot which would disclose that it was an FSF exploit. I told him that the spent ammunition had been left there and we could not find it because of the darkness and the grass". It was argued that

the witness had not made any such statement previously. The contention has no merit. The witness in his earlier statements nowhere mentioned that the empties were not left at the scene of occurrence in Lahore. In the circumstances where the factum of leaving the empties at the scene of the occurrence is not in dispute, the detail of the same being provided by him to Mian Muhammad Abbas, is neither an improvement nor a contradiction.

(xvii) The witness has deposed that "when I wound up the Camp, I returned to Fazal Ali, S.I., the remaining ammunition, live as well as spent, from the Camp. I returned to him on the basis of a road certificate. I was short of total 51 empties, including the 30 fired at Lahore and 7 at Islamabad, and the rest which had been lost during practice firing by trainees and I was aware of it. I had, however, hoped that Fazal Ali would accept the articles from me on the basis of mutual confidence without checking them up and would thus not detect it. He, however, carried out the physical checking and having detected shortage declined to accept the consignment without the 51 spent cases being supplied to him. The shortage was in the sten-gun empty cases and I reported the whole matter to Mian Muhammad Abbas. He asked me to report back to him after three or four days during which he would be able to make some arrangements. I returned to the Commando Camp with this ammunition and went back to Mian Muhammad Abbas after three or four days. He gave me a khaki envelope which contained 51, empty cases of sten-gun ammunition and I went to Fazal Ali and gave him all the ammunition on the basis of road certificate ExhP.W. 24/9 which bears my signatures". It was argued that the witness had not made any such statement before. The contention has no merit. Reference to winding up the Commando Camp under the instructions of Mian Muhammad Abbas; is available in his earlier statement (See Exh. P., W. 10/ 11, Volume of Documents). Rest of it, i.e. returning the live as well as spent ammunition to Fazal Ali Sub-Inspector, is a matter of mere detail. There is other evidence on record litre Exh. P.W. 2419, Road Certificate dated 25-11-1974, p 462, Volume of Documents and Exh. P.W. 24/10, entry in Stock Register, at page 463, Volume of Documents), which supports the return of ammunition. In the circumstances mere omission to make reference to the details connected with the return of ammunition is insignificant, and if these details are provided in Court, it is neither a contradiction nor a material improvement.

(xviii) Mr. Yahya Bakhtiar referred to that portion of the deposition of Ghulam Hussain where he had stated that on the third day after having my arrival recorded in the daily diary I had an entry of my departure for Peshawar recorded. I did so because I was directed by Mian Muhammad Abbas to do so, so as to be shown that I was not at Rawalpindi. This entry was made in the Roznamcha at Exh. P.W. 31 /4, which bears my initials. This entry is dated 22-11-1974 and it was made in my presence. I, however, did not go to Peshawar after

this entry was made in the Roznamcha and I remained in Rawalpindi performing my duties at Commando Camp". It was argued that the witness had not made any such statement before, therefore, the portion aforesaid is an improvement and contradiction. The objection is not well-founded. In the previous two statements there is no reference at all to the T.A. Bill or to the Roznamcha entries, and therefore these details are not mentioned. Both his statements stop short at the time of his return to Rawalpindi after this incident. In the circumstances the omission relied upon by Mr. Yahya Bakhtiar stands easily explained. The details were given when he was asked to prove these documents at the trial.

(xix) It was argued that Ghulam Hussain had stated that "for the days I performed the special duty at Lahore I had claimed my T.A./D.A. for Karachi under the orders of Mian Muhammad Abbas". It was submitted that the witness had not made any such statement earlier. The point has no merit. As the witness had made no mention about T.A. and D.A. bills in his earlier statements, therefore, this detail was not available in his earlier statements. He made the statement when his memory was refreshed by the documents shown to him in the trial Court. However, the witness is supported in this regard by the T.A. and D.A. Bills which shows that he did claim allowances, etc. for being in Karachi under the orders of Mian Muhammad Abbas. It is neither a contradiction nor an improvement.

### **ALLEGED FALSEHOOD OF GHULAM HUSSAIN**

706. Mr. Yahya Bakhtiar then contended that Ghulam Hussain had deliberately made false statements on several points, and for that reason also he was not a reliable witness. The learned counsel elaborated these matters as under:-

(i) It was argued that the statement of Ghulam Hussain that he withdrew the ammunition himself as per Road Certificate Exh. P.W. 24/8 are false inasmuch as at page 585 of his evidence, he deposed that the ammunition was obtained in the name of the Deputy Director of the Battalion No. 5. The contention has no merit, because it is based on some misreading of the record. Exh. P.W. 24/7 and Exh. P.W. 24/8, show that the ammunition was given to Ghulam Hussain and though the ammunition was shown to be in the name of the Deputy Director, Battalion No. 5 but the actual recipient was Ghulam Hussain himself. The ambiguity is clarified by Ghulam Hussain who further stated that "every Battalion has its own armoury but ammunition has not been supplied to Battalions when I drew arms from the Headquarters", which shows that the Battalion name was just used as a matter of form.

(ii) It was argued that Ghulam Hussain has deposed that he was not keeping any record of the ammunition issued to him but at the same time he admitted at page 588 that the ammunition was issued to his Assistant Sadiq Talib "and he used to account for it". Learned counsel argued that this shows that the witness was making a false statement. The contention has no merit. There is no evidence on the record to suggest that any contrary practice was in vogue, and in the circumstances, if Ghulam Hussain deposed that when he gave ammunition to his Assistant Second-in-Command, the latter was to "account for it" that in no way shows that the statement on the subject aforesaid was false in any manner.

(iii) It was further argued that when Ghulam Hussain deposed at page 588 that "loss of empties in practice firing was reported", then it implied that there must be proper registers in which the same was entered. In that view of the matter the statement of Ghulam Hussain that there was no regular register, it was argued, was not correct. As has already been mentioned, the witness emphatically stated that no register was kept at the Commando Camp and no evidence to the contrary has been brought on record. In these circumstances the testimony of Ghulam Hussain cannot be said to be false, when in fact no register showing anything contrary to what Ghulam Hussain deposed has been brought forward by the defence. It may be mentioned that in this respect Ghulam Hussain was simply deposing about a practice which was in vogue during those days. If that practice looks odd, then that is what the witness was trying to expose and he cannot be called a false witness because he disclosed the existence of an odd practice or practices.

(iv) It was next submitted that the story of Mian Muhammad Abbas having called Ghulam Hussain and having asked from him about the methods of abduction and kidnapping, etc. was false, and that similarly the direction of Mian Muhammad Abbas to identify Mr. Ahmad Raza Kasuri was "absurd and contradictory". In elaboration of this submission, it was argued the Ghulam Hussain admitted that he was on intelligence duty in the National Assembly; that in those days the Ahmadi question was being debated there; that Ahmad Raza Kasuri was one of the prominent members of the Assembly; and that constable Zaheer (who knew Kasuri) was also deputed with him for this purpose; and, therefore, Ghulam Hussain's deposition that he took some time in tracing Ahmad Raza Kasuri, was not correct, especially when a jeep and a driver was also at his disposal. The contention has no merit. The witness was asked whether he made an attempt to identify Ahmad Raza Kasuri in the National Assembly with the help of others. His answer was that it was a "secret mission". He was further asked whether he had seen Ahmad Raza Kasuri in the National Assembly's criteria but his reply was again in the negative. These replies squarely meet the point raised by Mr. Yahya Bakhtiar, who at this stage submitted 'x' that the answers given by Ghulam Hussain to the questions put to

him were all false. The contention has no force, inasmuch as there is no evidence on the record to falsify the aforesaid answers. There is no evidence to prove that the witness in fact saw Ahmad Raza Kasuri anywhere before the time claimed by him. The arguments of Mr. Yahya Bakhtiar are based on certain assumptions for which there exists no basis on the record and thus cannot be accepted.

(v) It was then submitted that Ghulam Hussain admits that he identified Ahmad Raza Kasuri 2-3 days after he was asked to do so by Mian Muhammad Abbas, and that according to his previous statements he was asked to do so in May, 1974 and he had been going to the National Assembly for 2 or 3 days and after identifying Ahmad Raza Kasuri he reported to Mian Muhammad Abbas and Mian Muhammad Abbas asked him to kill Ahmad Raza Kasuri; but in Court at page 529/530 he made contradictory and inconsistent statements by saying that he was asked the methods of abduction and killing in May, 1974, that 2-3 weeks later he was called and asked to identify Ahmad Raza Kasuri; that in August, 1974, he was asked about his efforts to identify Ahmad Raza Kasuri and directed to kill him. With reference to the aforesaid portions of his statement it was argued that the improved vision was given by the witness to bring his evidence in line with the prosecution case that the conspiracy came into existence after 3rd June.

The contention has no merit. All the statements made by Ghulam Hussain, i.e. before and at the trial, appear to be agreed on the point that he was able to locate and identify Ahmad Raza Kasuri in a matter of 3 or 4 days after he had been told to do so by Mian Muhammad Abbas, and the contradiction or variation is only in regard to the period of time which elapsed between the initial assignment to locate Ahmad Raza Kasuri, and the final entrustment of the task of killing him. In the previous statements Ghulam Hussain has given the impression that the mission to kill Ahmad Raza Kasuri was given to him by Mian Muhammad Abbas 2 or 3 days after he had been asked to locate Ahmad Raza Kasuri, whereas in Court he stated that this mission was given to him 3 weeks after the first assignment to identify and locate Ahmad Raza Kasuri. The defence had asked several questions in cross-examination to bring out the correct position in this behalf, and Ghulam Hussain's replies thereto are to be found on pages 564 to 567 of the record of evidence. Ghulam Hussain explained at length that the correct position was that the assignment to kill Ahmad Raza Kasuri was given to him 3 weeks after he had been told by Mian Muhammad Abbas to locate and identify the man, but when he was in custody, Mian Muhammad Abbas sent him a message begging that he should not implicate Mian Muhammad Abbas too deeply in this matter, and it was for this reason that in his previous statements he made it appear that the mission to kill Ahmad Raza Kasuri was assigned by Mian Muhammad Abbas 2 or 3 days after the original assignment of locating him. During the course of his replies in cross-examination, Ghulam Hussain

pointedly referred to an application which he had made in the High Court stating that he had given a garbled version of the events in his initial statement but he would make a full and true disclosure in the High Court. In view of this lengthy explanation, elicited by the defence in cross-examination, it appears to me that the contradiction between the two periods of time mentioned in the previous statements and at the trial stands properly explained. I have carefully read the replies given by Ghulam Hussain, and they seem to me to represent the true picture, as there was nothing to be gained by his changing the period to 3 weeks in Court, unless this was the correct position. He could easily have stuck to his statement in which he has stated the interval between the two assignments to be only of 2 or 3 days. In the circumstances I am of the view that this particular contradiction does not, in any manner, belie Ghulam Hussain's testimony at the trial.

(vi) It was argued that according to Ghulam Hussain he was threatened and coerced to do the job. However, he associated Allah Bux and Molazim Hussain with him. It was argued as to who threatened or coerced them. It was submitted as to why did those persons readily agree. The questions are irrelevant, as Allah Bux and Molazim Hussain are not prosecution witnesses in this case. Moreover, they were involved in the Islamabad case and not in the present murder.

(vii) It was then argued that at page 532 of his evidence Ghulam Hussain has stated that he obtained the arms and ammunition from Fazal Ali and kept it in the Camp. At another place he states that he contacted Ahmad Raza Kasuri at 12-30 (noon) on 24-8-1974 and left Rawalpindi for Islamabad to meet him at the appointed place (to kill him). It was argued as to from where he brought the sten-gun and ammunition which he alleges to have used? It was further argued that these weapons were lying in the Commando Camp at Islamabad, but the witness has not deposed that he went to Islamabad and brought the arms and ammunition from there. In the light of the aforesaid questions it was submitted that the evidence of the witness should not be accepted. The contention has no merit, because the witness had duly appeared in the witness-box and if the appellant wanted to obtain details on the points posed above he should have better been cross-examined instead of raising these quibbles at this stage. Having failed to do so, he cannot raise these questions in vacuum before us.

(viii) It was next argued that the Commando Camp was at Islamabad and Ahmad Raza Kasuri was also at Islamabad. The witness deposes that he telephoned Ahmad Raza Kasuri. It was argued as to how the witness came to Rawalpindi to telephone Kasuri. The contention has no merit. See page 594 of the testimony of Ghulam Hussain. There is no mention of any such fact that he phoned from Rawalpindi. The objection is based on misreading of the record.

(ix) It was argued that Ghulam Hussain has stated that a forged number plate had been placed on the jeep". However, at page 594 the witness deposed that the numbers were painted on the bumper of the jeep and whenever false number was allocated the original number was rubbed out. It was argued that this was all contradictory because the practice suggested did not amount to replacement of a number plate. The contention has no merit, because placing of a number plate over the number inscribed on the bumper and then taking away the number plate after having used the jeep as aforesaid obviously involved a process which could in general terms be called changing of the number plate. The point raised by Mr. Yahya Bakhtiar therefore is not of any substance.

(x) Mr. Yahya Bakhtiar argued that the statement of Ghulam Hussain that after the failure of the Islamabad firing Assistant Director Ch. Nazir Ahmad taunted him, and Mian Muhammad Abbas reprimanded him "is absurd and improbable". He has posed several questions in the written arguments supplied to the Court, *viz*: How immediately after the firing the news reached the Prime Minister? How Mian Muhammad Abbas or Ch. Nazir came to know about the incident? He argued that the witness had not informed Mian Muhammad Abbas before going for this mission. Similarly, according to Mr. Yahya Hakhtiar, Masood Mahmood has not alleged that he came to know about this abortive attempt. Mr. Yahya Bakhtiar further submitted that direct liaison between Mian Muhammad Abbas and Prime Minister is not part of the prosecution case. Because if it was so, there was no need for the Prime Minister to introduce Masood Mahmood into this conspiracy. He argued Log Book of the jeep, Register of Vehicles, and the Roznamcha entry regarding taking out of the jeep are not produced. At page 537 the witness stated that he replaced the "empties" with live cartridges and deposited back with Fazal Ali the ammunition obtained from him. He fired 7 cartridges. But the fact that 5 empties were recovered from the spot would show that this witness was not responsible for the firing and he knew nothing about it. It was further submitted that the witness had substituted the name of Zaheer by Allah Bux and that contradictory statements were made as to the persons with whom he wilt to kill Kasuri at Islamabad. In the face of all these objections, it was stated, the testimony of Ghulam Hussain was totally false.

(xi) It seems to me that as regards the promptness and time within which the news regarding the Islamabad attack reached the Prime Minister, the witness obviously could not give the details because he could not be expected to know the Prime Minister's sources of information. The same was the position with regard to the sources of Mian Muhammad Abbas or Ch. Nazir and for that matter of others concerned. In any case, no questions were asked in this behalf from Ghulam Hussain, and in the absence of such cross-examination, this kind of argument is hardly relevant forshaking his credit. In fact these questions could



only be answered by the persons concerned, viz. Masood Mahmood, Mian Muhammad Abbas, or Ch. Nazir.

(xii) The contention that the warning given by Mian Muhammad Abbas to Ghulam Hussain approver to the effect that the Prime Minister was greatly annoyed at the failure of the Islamabad incident, shows that Mian Abbas was in direct touch with the Prime Minister, has really nothing to do with the truthfulness of Ghulam Hussain as he has not deposed anything on this point from his own knowledge. On the contrary, Masood Mahmood has deposed to appellant Zulfikar Ali Bhutto's annoyance on this occasion, whereupon Masood Mahmood reminded Mian Muhammad Abbas, and the latter reassured him that the orders will be carried out. It is nobody's case that there was a direct liaison between Mian Muhammad Abbas and the Prime Minister. However, there is evidence on the record to suggest that appellant Zulfikar Ali Bhutto did name Mian Muhammad Abbas to Masood Mahmood in the very first meeting that Masood Mahmood had with the Prime Minister (See page 66 Volume of Evidence) where Masood Mahmood has stated, "I was advised by him (The Prime Minister) against the termination of services of the re-employed officers without taking his prior permission. He told me that they were useful officers. Mian Muhammad Abbas was particularly mentioned". Referring to the conspiratorial meeting at page 69 Volume I of Evidence, Masood Mahmood stated, "A day or two later I was sent for by the Prime Minister. He, *inter alia*, said to me that he was fed up with the obnoxious behavior of Mr. Ahmad Raza Kasuri and that Mian Muhammad Abbas, an officer of the FSF, knew all about his activities. This officer is an accused in this case. The then Prime Minister further told me that this officer had already been directions given through my predecessor to get rid of Mr. Ahmad Raza Kasuri. The Prime Minister went on to instruct me that I should ask Mian Muhammad Abbas to get on with the job and produce the dead body of Mr. Ahmad Raza Kasuri or his body bandaged all over."

(xiii) As regards the Log Book of the jeep, Register of Vehicle and the Roznamcha entry, no doubt the same have not been produced in this case because the prosecution did not rely on them. However, if the defence wanted to raise any point with reference to that record they were at liberty to summon the same.

(xiv) As regards to the number of the empties, the witness nowhere stated that he physically picked up the empties from the spot after the attack at Islamabad. What has come on the record is that five empties were recovered, and to suggest that if five empties were recovered from the scene of occurrence, seven could not have been fired is not a sound suggestion. Similarly there is no contradiction at all in the statement made by the witness about the names of the others who helped him in the execution of the attack on Ahmad Raza Kasuri at Islamabad.

The witness clearly stated in his evidence that the rounds fired in the Islamabad incident were a part of the cartridges issued to him by Fazal Ali and not a part of the ammunition issued to him on the 9th of May, 1974, as per Road Certificate Exh. P.W. 24/7.

(xv) It was argued that Ghulam Hussain had deposed that the trainees who attended the Camp did so after recording their departure in their respective Battalions. Mr. Yahya Bakhtiar submitted that no entry from daily diary has been produced to show that Zaheer, Liaquat or Iftikhar recorded their departure in the daily diary to attend the Commando Camp and as such, the deposition of the witness on the subject is false. The point about running of a Commando Camp/Course has already been dealt with above and it need not be laboured again. It stands fully proved by the documentary evidence already referred to earlier that Ghulam Hussain was indeed running such a Course or Camp There is accordingly nothing improbable in his assertion that the persons named by him, *viz.*, Zaheer, Liaquat or Iftikhar were among those receiving training under him at this Camp.

(xvi) It was argued that Ghulam Hussain has alleged - (in the words of Mr. Yahya Bakhtiar in order to explain that he did not make true and full disclosure before the Magistrate) - that if he had not obeyed Mian Muhammad Abbas he would have been killed by him. Mr. Yahya Bakhtiar submits that in this context the witness has contradicted himself by referring to page 578 that Mian Abbas told him that he would not be able to hurt him and that he should make a statement after due consideration. It was argued that explanation given by Ghulam Hussain was not satisfactory and as such his deposition on the subject was false. The contention has no merit. There is no contradiction in the witness's testimony on this aspect of the case. At page 565 of Volume 11 of Evidence, witness stated "that statement (referring to the statement of II August, 1977) was also correct so far as I have given an outline in that also, because at that time Mian Muhammad Abbas was not arrested and the life of my children as well as my life were in danger because I was aware of my misdeeds and I knew that I will be removed from the scene because of those". It will be noticed that in this part of his statement, the witness is making reference to his own involvement in the criminal activities of the FSF and on the date he feared his safety,

(xvii) At page 578, the witness then stated, "before I left Rawalpindi, Mian Muhammad Abbas told me that the Director-General as well as the Prime Minister had already been placed under arrest and that he would not be in any way responsible for me and it was for me to make a statement after careful consideration". Here the witness has only explained that the protection which he had enjoyed hitherto was not going to be made available to him because of the arrest of the then Prime Minister and the D.G., FSF. The interpretation put on this

part of the witness's testimony by Mr. Yahya Bakhtiar, *viz.* that Mian Muhammad Abbas could do no harm to him is misconceived. If the two statements are read together, one would find that the witness has rather explained the matters, and stuck to his stand that on the one hand the protection that he had been afforded had been withdrawn and on the other hand he had been put on his guard to be careful, lest Mian Muhammad Abbas may have to deal with him in order to save his own skin.

(xviii) It was argued that Ghulam Hussain had falsely alleged that a message was sent to him by Mian Muhammad Abbas to save him (i.e. Mian Muhammad Abbas), as he had deposed on page 579 that he was lodged at a place where he had no contact with anybody, so that he was not even in a position to say that Masood Mahmood was also lodged in the same prison. It was stated that in this state of affairs, how could have any message reached him. It was argued that if his plea was to be accepted then it meant that the witness was a person amenable to coercion and pressure and changing his statements accordingly. Lastly, on this subject it was argued that plea of message or pressure, etc. was not correct because the witness had already made a similar statement on 11-8-1977, when there was no message from Mian Muhammad Abbas. The points raised by Mr. Yahya Bakhtiar have no substance. At page 579, Vol. II of Evidence, the witness did not say that he was kept in any solitary confinement. To have a contact with a "Mushaqqati" (i.e. a convict worker) is different from having a contact with the world at large. The witness, however, has explained the position in which he was, and in this respect he was subjected to a detailed and thorough cross-examination, and asserted that he was telling the truth before the Court. His evidence in almost every material particular has been corroborated by other witnesses, and no fault can be found in it by reason of such objections. Similarly when the witness stated that he presented the facts in a confused or distorted manner in his earlier two statements, he did not assert that he had made altogether two different statements. The interpretation put by the learned counsel for the appellant on the evidence of the witness is thus totally untenable.

(xix) It was argued that in his statement dated 21-8-1977 he had said that he was called by Mian Muhammad Abbas in November, 1974 and asked to go to Lahore, whereas according to Exh. P.W. 31/3 he had left Rawalpindi on 31-10-1974. This difference of one day according to Mr. Yahya Bakhtiar indicated a contradiction in the statement of the witness. The contention has no merit. It has been proved by unimpeachable evidence on the record, that the witness left Lahore on 31-10-1974. In a statement dated 11-8-1977, the witness stated it was "about November" that he was called by Mian Muhammad Abbas to go to Lahore. The words "about November" do not exclude the date of departure being the last day of October, 1974, i.e. the day preceding the first of November, 1974. The argument is nothing but just hair-splitting.

(xx) It was argued that Ghulam Hussain had falsely alleged that there was another party detailed to kill him and Ahmad Raza Kasuri, if he failed to kill Ahmad Raza Kasuri, because for 3 years after the occurrence he enjoyed service without any harm to him, and similarly Ahmad Raza Kasuri was also not touched by anybody thereafter. According to Mr. Yahya Bakhtiar, this shows that the witness was not truthful in his deposition. The contention has no merit. As far as the witness is concerned, he made two attempts on two separate occasions on Ahmad Raza Kasuri's life (Islamabad on 24-8-1974, and Lahore on 11-11-1974). In the first attempt at Islamabad his conscience prevailed upon him at the last minute, but in Lahore the attack was carried out with all seriousness and planning. Ahmad Raza Kasuri was saved just by providence. After the attempt at Lahore had been unsuccessful to achieve the real object of the conspiracy, it was not only Ghulam Hussain who walked out of it but Masood Mahmood also (See page 75, Vol. I of Evidence). This would, therefore, show that the conspiracy came to an end after a few days of the occurrence at Lahore. Thereafter, if no harm came to Ghulam Hussain or Ahmad Raza Kasuri that is a further proof of what the witness has stated with regard to the termination of the conspiracy. Similarly the fact that he did not disclose this offence to anybody for about 3 years shows rather the continuation of the various threats and dangers about which he had been warned. The argument raised herein is thus misconceived and in fact runs contrary to the tenor of the evidence on the record.

(xxi) It was argued that Ghulam Hussain stayed in Lahore for 10 days. He says that he carried out reconnaissance but added "I was not supposed to communicate the result of my reconnaissance to Mian Muhammad Abbas from Lahore". It was argued that this was a very unnatural statement, and showed that the witness was not speaking the truth, because had he been sent on the aforesaid mission he must have in the natural course of events reported his day to day or periodic progress. That he did not do so shows that he was not sent on any mission. The contention has no merit. The evidence would show that the visit undertaken by the witness between 16th of October, 1974 and 26th October, 1974 was markedly different from the visit undertaken between 31st of October and 12th of November, 1974. During the first visit there was no planning undertaken to execute the conspiracy at Lahore, whereas it is evident from the preparations undertaken during the second visit that full planning had been done (giving contacts like, Ghulam Mustafa, sending another Commando, Rana Iftikhar and making arrangements for the weapons at Lahore, etc.). He has deposed that after the aforesaid first visit when he went back to Rawalpindi, he reported his result of having located the residence, etc. of Ahmad Raza Kasuri. So long as the ultimate reporting was made the question of sending or not sending any daily or periodic reports is hardly material, especially when the mission was also of a secret nature.

(xxii) It was argued that the deposition of Ghulam Hussain on page 602 to the effect that it was the end of August or in the month of September, that Zaheer and Liaqat were sent to Lahore was false for various reasons. Elaborating these reasons it was stated that at page 603 of his statement Ghulam Hussain, states that their duties were to study movements of Ahmad Raza Kasuri in Lahore so that he could make a plan for murdering him but at the same time he stated "I do not think Zaheer and Liaqat sent any intelligence report to me", that he even does not remember how long they were engaged in this duty; that if staff from the Intelligence Wing of FSF Headquarters at Rawalpindi was (already) posted at Lahore and Mian Muhammad Abbas was the Director, Intelligence, then, what was the need of sending Zaheer and Liaqat to Lahore, that the trips of these persons were not supported by any documentary evidence; that at page 604 Ghulam Hussain stated that during his visit he stayed at Shah Jamal. At page 605 he stated that Zaheer and Liaqat were also staying there. At page 694 the witness again stated "I do not know how long after my arrival in Lahore on 16-10-1974, I met Zaheer and Liaqat. But I have no doubt that I met them before I returned to Rawalpindi". For all these reasons it was argued that Ghulam Hussain was not a truthful witness. The questions posed by Mr. Yahya Bakhtiar, however, are of no importance. It has already been observed that if the defence wanted to check up the activities of Zaheer and Liaqat, with reference to any documentary evidence, they were at liberty to summon the same but as this was not done, it was not justified to question the above-mentioned statement especially when even otherwise Zaheer and Liaqat are not pro-secution witnesses in this case, Similarly the suggestion as to why did Mian Muhammad Abbas not induct others into this conspiracy is based on a mere conjecture, though in the earlier pages of this judgment facts have already been mentioned to indicate as to how Ghulam Hussain was allured into this expedition.

(xxiii) It was argued that Ghulam Mustafa accused in his confession does not support Ghulam Hussain on the above subject inasmuch as Ghulam Mustafa does not speak about his arrival and stay at Lahore from 16-10-1974 to 26-10-1974, and on the contrary he says that in October Mian Muhammad Abbas directed him to keep Kasuri under surveillance. Reference was made to page 604 of the statement of Ghulam Hussain and it was argued that according to the same, Ghulam Hussain enquired from Sufi Ghulam Mustafa about the house of Mr. Ahmad Raza Kasuri who knew about it and yet he says, "I do not remember how many days I took to locate Mr. Ahmad Raza Kasuri's house, it may have been four or five days". According to Mr. Yahya Bakhtiar the prosecution has fabricated the story of Ghulam Hussain's going to Lahore for a fictitious mission with a view to explaining the delay and inaction at all ends between the period of August to November, 1974. The arguments are not correct. Ghulam Mustafa has nowhere in his confession denied the presence of Ghulam Hussain in Lahore

between 16-10-1974 and 26-10-1974. Similarly at page 604, Ghulam Hussain stated in detail that he not only located Ahmad Raza Kasuri's house during his stay in Lahore between 16-10-1974 and 26-10-1974 but he also searched for Ahmad Raza Kasuri's friends' houses, the routes that he might adopt in the execution of the conspiracy and for his retreat after the assault, etc. In this context the arguments put forward by Mr. Yahya Bakhtiar are misconceived.

(xxiv) At page 597 Ghulam Hussain denies that he had any meeting with the Director-General in the National Assembly except on one occasion when he was interviewed for his promotion. According to Mr. Yahya Bakhtiar it is a false denial because like Masood Mahmood this witness is also anxious to show that all the candidates for promotion were interviewed "Simultaneously". Mr. Yahya Bakhtiar submits as to why is the prosecution avoiding to show that Ghulam Hussain had at any time an exclusive meeting with the Director-General. In this respect he relies on Ashiq Muhammad Lodhi (P.W.28), Officer Incharge Disbanded, FSF, who deposed that in the end of July, 1974, the Director-General sent for Ghulam Hussain and remained closeted with him for some time when red light throughout that period remained glowing on the door. The plea has no substance Ashiq Muhammad Lodhi (P.W. 28) stands discredited on the ground that in spite of being merely a formal prosecution witness who had been summoned to prove his secret report and forwarding letter (Exh. P.W. 28/1 and Exh. P.W. 3/2-I) relating to the description of the gun man of Ahmad Raza Kasuri, he made unwarranted concession in favor of the defence in cross-examination. Apart from Lodhi's concession, there is no evidence on the record that Ghulam Hussain had any direct contact with Masood Mahmood. The evidence available on the other hand, as already discussed, rather shows that Ghulam Hussain was working directly under Mian Muhammad Abbas.

(xxv) Mr. Yahya Bakhtiar argued that it was very strange that there was no contact between Mian Muhammad Abbas and Ghulam Hussain from 24th of August, 1974 till October, 1974. He posed a question, "Is this conduct of co-conspirators when goading and abusing is alleged." He submitted that according to Ghulam Hussain, Mian Muhammad Abbas did not trust him, and if that was so why he entrusted him with this job. It may be mentioned that Ahmad Raza Kasuri's mission was not the only task assigned to him (which means that he was busy with other work also). However, there is no legal requirement that the conspirators must remain in personal contact with each other throughout the existence of a conspiracy. The argument, based on any such assumption is not well-founded.

(xxvi) Similarly, the question as to why did Mian Muhammad Abbas entrust the assignment of murdering Ahmad Raza Kasuri to Ghulam Hussain when he did not trust him is not well-founded in the overall context of the whole case,

because the evidence reveals that Ghulam Hussain was apparently a good choice for this task, but Mian Muhammad Abbas may have been over-cautions in ensuring vigilance over Ghulam Hussain through other official of the Federal Security Force.

(xxvii) It was argued that Ghulam Hussain had made a false statement when he deposed that whenever he was sent on special duty, he was not to make entries in the Roznamcha, because on his own showing when he was sent to Lahore from 16th to 26th October, 1974 for killing Ahmad Raza Kasuri he did make an entry showing his departure for Lahore. It was argued that the stand taken by Ghulam Hussain on the subject was self-contradictory, and for this reason he was a self-condemned witness. The contention has no merit. It has already been mentioned that during the days aforesaid Ghulam Hussain was only entrusted with the job of reconnaissance. Therefore, the destination was duly shown but its purpose was not shown in the daily diary. In this state of affairs there is hardly any inconsistency in the statement of Ghulam Hussain as the relevant entry in the Roznamcha rather supports him as it does not mention the purpose of his visit to Lahore.

(xxviii) It was argued that Ghulam Hussain had made a contradictory statement as to exchange of ammunition, because, at page 540 he deposed that Mian Muhammad Abbas asked him to exchange the ammunition and at page 541 he stated that "I informed him (Ghulam Mustafa accused) that in compliance with the directions of Mian Muhammad Abbas I had obtained the ammunition and had also exchanged it." At page 607 however he stated that he had not exchanged it. The contention has no merit. The witness clearly explained that Mian Muhammad Abbas had (no doubt) asked him to exchange the ammunition (page 530, Vol. II of Evidence). He further said that however, to quieten all concerned he had said to Ghulam Mustafa that the instructions had been complied with. Then he explained at page 607, Vol. II of Evidence that he did not do it as this was not possible and at that place he gave reasons for the same. In the circumstances it is not a case of contradiction but of disclosing the strategy deployed by him in the matter.

(xxx) It was next argued that Ghulam Hussain had falsely deposed when he stated that (ammunition of) a lot of a similar number cannot be issued to any other unit. It was submitted that as Ghulam Hussain has never been at Havelian Depot and nor had he anything to do with the FSF Armoury therefore his statement on the subject was even otherwise incorrect, especially when Fazal Ali the then Incharge Armoury (P.W. 24) has not made any such statement. The contention has no merit. Ghulam Hussain in this respect conveyed his own impression when he said that ammunition of a lot of similar number cannot be issued to anybody else. There was, however, nothing to stop the learned counsel

for the appellant to cross-examine the witness as to the source of his information in this regard. However, as the evidence shows that he had been dealing with the receipt and return of the arms and ammunition and was also Incharge of the Commando Camp (having vast experience in that line) he can be considered to be in a position to depose about any practice prevalent in the quarters concerned on the subject under consideration at the relevant time. The criticism leveled against him on the ground put forward by Mr. Yahya Bakhtiar in the circumstances is not justified.

(xxx) It was argued that witness Ghulam Hussain also like Masood Mahmood indulged in a campaign of vilification and prejudicing the public by making statements about some alleged plan of the FSr to attack Mr. Jamil Hussain Rizvi (retired Judge) and Mr. Muhammad Ali, Film Star. The contention has no merit, as what is being complained of now was elicited in cross-examination of the witness, and the blame, therefore, if at all lies elsewhere and not on the witness. It may, however, be pointed out that the confessing assured have also supported the witness with regard to such illegal activities of the FSF.

(xxxi) It was argued that Ghulam Hussain had deposed that during his visit to Lahore with effect from 31-10-1974, he was "on paper" putting up in a hotel. It was submitted, however, that no entry from any Hotel register was produced, which shows that the witness was a liar. The contention has no merits, as in the circumstances the question of producing an entry from any hotel register did not arise; rather the absence of any such entry supports the plea of Ghulam Hussain that he was not putting up in any hotel.

(xxxii) It was argued that statement of Ghulam Hussain at page 611 shows that Liaqat and Ghulam Mustafa were also present at the time of the actual occurrence, and this negatives the prosecution case, or else Ghulam Hussain is making a false statement. The contention has no merit. The witness did not say that Ghulam Mustafa and Liaqat were present on the scene at the time of the actual occurrence.

(xxxiii) It was submitted that Ghulam Hussain gave a false explanation as to the name of Ghulam Muhammad mentioned in his previous statement regarding reconnaissance on the evening of 10th November, 1974. According to his evidence, he went to Larkana in the beginning of his service, and thereafter it does not appear that he had ever gone anywhere with the man named Ghulam Muhammad. The reply of the prosecution is that this might be a genuine oversight, or it may have been introduced apparently to save Mian Muhammad Abbas. Anyhow, as man by the name of Ghulam Mohammad is not mentioned by the approver or have played any active part in the occurrence, his mention of this name in the earlier reconnaissance party has no material bearing on the case.



(xxxiv) It was submitted that at page 604 Ghulam Hussain has deposed that the instructions were that they should use secraphone and communicate in code words regarding secret mission and that the office of the Director, Lahore (where he was staying) was equipped with secraphone. However, at page 613 of his testimony the witness has stated that the information regarding murder of Ahmad Raza Kasuri was conveyed to Mian Muhammad Abbas on general telephone. According to Mr. Yahya Bakhtiar it appeared that the witness was not making a natural or correct statement, because in the presence of a secraphone how could such a sensitive matter be told on a general telephone. The contention has no merit. Using the secraphone in the office of the Director, FSF at Lahore would have necessitated his permission and taking him into confidence. There is no evidence that Director, FSF at Lahore Range, was a party to this conspiracy. Therefore it was more advisable that his secraphone should not have been used to convey such a sensitive message. It may be pointed out that the information regarding the occurrence at Lahore was conveyed to Mian Muhammad Abbas on general telephone but he was not asked in cross-examination what were the words used, and in these circumstances the possibility that at that time code words may have been used could not be ruled out. In the absence of any such material on the record the criticism of Mr. Yahya Bakhtiar is not well-founded.

(xxxv) Mr. Yahya Bakhtiar argued that at page 613 of his deposition Ghulam Hussain stated that he was not involved in any other case and therefore could not be threatened by FIA. However, in his evidence in Court he has credited himself with many misdeeds. The statement of Ghulam Hussain, it was submitted, appeared to be clearly contradictory on the subject and the possibility of his having made a statement under fear could not be ruled out. The contention has no force. There is a marked distinction between an approver and an otherwise confessing accused. In the instant case Ghulam Hussain appeared as an approver and the greatest inducement to him is the safety of his own life in this case. In the face of the same to make suggestions for other similar motives is inapt, because, making true and full disclosure in this case has nothing to do with any other alleged deeds or misdeeds of a witness. There is, however, no evidence on the record to suggest whether this witness was involved in any other case. The comments made by the counsel for the appellant therefore are not supported by the record.

(xxxvi) It was submitted that the witness has made a false statement that the F.I.A. did not visit him in Jail, because page 342 of the evidence shows that he was taken to a Magistrate for pardon by the F.I.A. It was argued that this was a clear contradiction in the statement of Ghulam Hussain. The contention has no merit. When the witness has stated that he was not visited by F.I.A. officials while he was in Jail (page 342, Volume II of Evidence), he meant not visited for

interrogation, and therefore, the mere fact that he was taken to the Court of a Magistrate by an F.I.A. official, did not mean that official was a member of any investigating team in this case. There is thus no conflict between both these statements. Again it may be pointed out that on factual plane the witness was not asked whether he knew that the man who escorted him from the jail premises to the Magistrate's Court was an official of the F.I.A. and so far as he (the witness) is concerned, there is no evidence to show that he knew the identity of the person who escorted him from the jail to the Magistrate's Court.

(xxxvii) At page 614 Ghulam Hussain said that he was on leave and therefore could not have met Ch. Nazir Ahmad on 10-5-1977. It was argued that in the next breath he admitted that he was on leave for 4-5 days since 26th April, 1977. It was alleged this also was a contradiction in the statement of Ghulam Hussain. The objection has no merit. The witness stated at page 614 that he remained on leave from 24th of April, 1977, and being on leave could not have met Ch. Muhammad Abdullah, Deputy Director. The reference to going on leave in the evidence is as to when he went on leave and initially for how many days. It is correct that he says that his initial application was for 4 or 5 days but he does not say that he did not extend his leave in any manner thereafter. Even otherwise, in the objection raised in the chart by Mr. Yahya Bakhtiar there are certain factual errors, e.g. the name is mentioned as Ch. Nazir Ahmad whereas in the evidence it is Ch. Muhammad Abdullah, and the date is not 26th of April, 1977, but 24th of April, 1977. The construction placed by Mr. Yahya Bakhtiar on the aforesaid matter in the circumstances explained is not justified, and it also suffers from factual errors.

(xxxviii) Ghulam Hussain stated that after receiving arms and ammunition from Fatal Ali he took it to Commando Camp and "having done so, I started following Ahmad Raza Kasuri". But at page 598 he says that during the day when he was directed to finish Kasuri and the day when the assault was made on 24th August, he did not spot Kasuri nor did he even try to do so till he rang him upon 24th. It was argued that these statements did not coincide with one another on the subject. The contention has no merit, inasmuch as it is based on misreading the relevant portions totally out of their context. At page 532 the witness has said "I took these things to my Commando Camp. Having done so, I started following Ahmad Raza Kasuri. During this period, I also continued to run a course at the Camp". A little later the witness stated "on the 20th of August, 1974 Mian Muhammad Abbas called me to his office. He complained to me that I did not perform the task assigned to me". At page 598, the witness was then asked and replied as follows:-

Q. - Did you ever spot Mr. Ahmad Raza Kasuri between the day when you were directed to finish him off and the day when the assault was made that is the 24th (August, 1974)?

A. - I did not. I did not even try to do so till I rang him up on the 24th to arrange a meeting".

From this evidence it is clear that the witness has done nothing and was being reminded as late as on the 20th of August, 1974, by Mian Muhammad Abbas to carry out the task. Therefore to suggest that there is any contradiction in the aforesaid two statements or that they were irreconcilable is an untenable interpretation.

(xxxix) It was argued that the story narrated by him at page 551 about return of ammunition on 25-11-1974 in order to cast doubt on his T.A. Bill Exh. 31/6 is false:- (because)

(a) It is an improvement.

(b) The Road Certificate of two or three days prior to 25-11-1974 is not produced.

(c) The entire ammunition issued is not returned. He says that it was after winding up of the Commando Camp, therefore, he was expected to return the entire ammunition received by him under Road Certificate 24/7 if his story was correct.

(d) Road Certificate Exh. 24/9 (p. 462) is a forgery

(i) Not on printed form.

(ii) Ghulam Hussain could not issue it. Please see evidence of Fazal Ali, at page 499 where he says, "A Road Certificate is issued by Incharge Armoury or by some senior officer of the Battalion" According to Ghulam Hussain, it is for this reason that Exh. 24/7 was in the name of Ghulam Hussain Butt, Deputy Director, Battalion No. 5 and the ammunition was issued in the name of the said person. (pp. 585-586).

(iii) It is signed by Fazal Ali as having received the ammunition Ghulam Hussain at page 586 says he cannot give any reason why this Exh. 24/9 is not signed by Fazal Ali.

(iv) Ghulam Hussain was not at Rawalpindi on that day as he returned to Rawalpindi on 29-11-1974.

(v) Ghulam Hussain had been directed by Mian Muhammad Abbas not to show his presence at Rawalpindi and in compliance with that he had made entry dated 22-11-1974. Having complied with this order of Mian Muhammad Abbas and involved himself in the murder case, would he disobey Mian Abbas and create written evidence of showing his presence at Rawalpindi.

(vi) The Road Certificate mentions pin of handgrenade. This was never issued to Commando Camp. The question put by Mr. Irshad Qureshi, Advocate, to the witness and the answer of the witness was merely designed to malign and vilify the appellant.

(vii) If the document Exh. 24/9 was genuine and Ghulam Hussain had actually returned the ammunition on 25-11-1974, then Exh. 24/9 would have been signed by Fazal Ali in token of having received the ammunition and returned to Ghulam Hussain for his record. This would have come from the possession of Ghulam Hussain (P.W. 31) or recovered from Battalion No. 5.

(viii) Documents Exhs. 24/9 and 24/ 10 are not shown to have been seized by the investigating agency. No seizure memo has been produced. The documents were not shown or appended with the interim or final. challan. Evidence of P.W. 41 Abdul Khaliq at page 697 may kindly be perused. Fazal Ali according to his evidence at page 495 was no more incharge of the Armoury. The documents have not therefore been produced from proper custody. The prosecution has not summoned these documents.

(xi) Ghulam Hussain at page 551 has stated that he went to return spent as well as live ammunition. From his evidence and confessions of co-accused it is apparent that Ghulam Hussain was in possession of live ammunition. Exhs. P.W. 24/9 and 24/10 do not show deposit of any live ammunition.

(e) Entry Exh. P.W. 24/10 (page 463 documents) supporting the above document Exh. 24/9 is also a forgery: Fazal Ali gives three versions:-

(i) Made by him (p. 492).

(ii) In the handwriting of Bashir (p. 493).

(iii) In the handwriting of Ilyas (p. 493). Ilyas is not examined.

(f) He has stated an inconsistent and contradictory story. He says that he continued to work at the Commando Camp from 22-11-1974 to 29-11-1974. Please see page 556. At page 550 he alleges he wound up the Camp and returned the

spent as well as live ammunition which was not accepted by Fazal Ali as 51 empties were short and that 2-3 days thereafter he went to Fazal Ali and deposited the same. This is said to be on 25-11-1974. Thus on the one hand he says the Camp was wound up before 23-11-1974 and on the other hand alleges that he performed his duty in the Camp up to 29-11-1974.

I have carefully examined these very detailed contentions, and in my opinion, they have no merits. My comments on the points raised seriatim are as follows The T.A. Bill, Exh. P.W. 31 /6 at page 475 for the reason given earlier by me appears to be false document. The entries which are purported to have been verified from the entries in the Daily Diaries as explained earlier do not appear to be genuine, Therefore, the main contention raised herein that it is a genuine document is completely unfounded, The account given by the witness of return of ammunition on the 25th of November, 1974, has been proved to be correct and the documents Exh. P.W. 24/7 and Exh. P.W. 24/9 substantiate that claim:-

(a) It is not an improvement.

(b) The Road Certificate is only meant to be used as an authority for carrying the ammunition. The question of producing the Road Certificate which might have been utilized two or three days prior to the 25th of November, 1974, is neither here nor there. As the ammunition has not been returned on that Road Certificate, Ghulam Hussain did not retain that Road Certificate.

(c) The Certificate Exh: P.W. 24/ 7 (p. 460 of Documents) was with regard to all the ammunition issued to the witness on the 9th of May, 1974. The witness has clearly stated in his evidence that he on 25th November, 1974, returned all the ammunition, live as well as spent. Road Certificate Exh. P.W. 24/9 (p. 460 of Documents) deals with the spent ammunition only. There is no contradiction in the statement made by the witness in this regard and the documents fully support him.

(d) Road Certificate Exh. P.W. 24; 9 is a genuine document-

(i) It is wrong to say that the Road Certificate is not on a printed form. It is on a printed form (cyclostyled). There is no evidence to show that all Road Certificates must be on a certain specified kind of printed form. We must appreciate that Exh. P.W.Q4/9 was issued from the Commando Camp and Exh. P.W. 24/7 with which an effort is being made to compare this Road Certificate was issued from the Headquarters Armoury of Federal Security Force. Further, there is no evidence to suggest that the Commando Camp and the Headquarters had identical stationary.

(ii) From the evidence it would appear that Ghulam Hussain was the only person who could have issued Road Certificate Exh. P.W. 24/9. Fazal Ali's evidence at page 449 would go to prove the fact that Ghulam Hussain was the person who was Incharge of the Commando Camp. He himself was the carrier at the same time. So while he took the spent ammunition for return to the Headquarters Armoury, he was the only person who could have issued the Road Certificate. As it was he who was carrying it, it had to be in his name as an authority for him to carry the spent ammunition. Exh. P.W. 24/7 was in the name of Ghulam Hussain Butt, Deputy Director, merely because, at the time when the ammunition was being issued, it was done in the name of an officer, but Exh. P.W. 24/8 (p. 461), which is the relevant entry in the Stock Register clarifies the situation that it was meant for Ghulam Hussain and nobody else.

(iii) The Road Certificate is a document which authorizes the carriage of ammunition of prohibited bore. As the carrier was Ghulam Hussain, the question of Fazal Ali signing it does not arise especially when he was neither the person who issued the Road Certificate nor the person who was carrying it.

(iv) Ghulam Hussain was at Rawalpindi and there is no evidence to suggest that he returned to Rawalpindi on 29th of November, 1974.

(v) Ghulam Hussain complied with directions of Mian Muhammad Abbas. He showed his presence in Karachi and Peshawar while he was in Rawalpindi. The other directions were also issued by Mian Muhammad Abbas, that is to wind up the Commando Camp and return the ammunition. In order to comply with these instructions there was nothing which he could have done except to issue the Road Certificate and further make entry in the Register for return of ammunition. However, while complying with the aforesaid directions if in the end there was somewhere left a loophole which exposed the hollowness of the trip to Peshawar, the question is not of disobeying the directions and orders of Mian Muhammad Abbas but of lack of care to guard against overlapping steps, which the investigating agency found out while making probe into this case from all angles.

(vi) The Road Certificate, Exh. P.W. 24/9, relates to the spent ammunition. The pin of the grenade was a part, of the spent ammunition. To suggest that the answer given by the witness to a question put by Mr. Irshad Ahmad Qureshi was designed to malign and vilify the appellant, is not a fair comment, because, each accused has a right to defend his own case in such manner and consistent with his stand and defence as he thinks proper. If in the confessional statements various accused had taken up any position they had a right to establish the same in accordance with law, including the process of putting questions and suggestions relevant to their defence to prosecution witnesses.

(vii) This point is based on a misconception about the use of Exh. PW. 24/9, the Road Certificate No. (iii) what has been stated above, provides the complete answer to this point.

(viii) The objections raised herein are fallacious. Fazal Ali in his statement under section 161, (Exh. PW. 39/9-D, page 514 Documents) had said that he would produce all the documents in the Court. The documents have come from the proper custody. As the overall discussion made above (ix) covers points No. (ix) as also point (e) No. (e), therefore, they are not being repeated here to avoid duplication.

(xi) It was argued that the statement of Ghulam Hussain at page 556 that Mian Muhammad Abbas had scrutinized the T.A. Bill to see that he had not shown his presence at Lahore is false. According to Mr. Yahya Bakhtiar, Mian Muhammad Abbas merely marked the bill to the Accountant to deal. It was necessary because the T.A. Bill had shown that the journeys were performed under his orders. Mr. Yahya Bakhtiar further stated that the witness had also made a false statement that payment was made on the same day as the payment is to be drawn from the AGPR. The contention has no merit. The word "to deal" on the bill showed Mian Muhammad Abbas's approval of the Bill because without his signatures in token of the correctness of the entries attributed to him, the question of authorizing the Accountant to deal with the matter and make the payment would not have arisen at all. This matter has independently been dealt with earlier also by me at length, and therefore, it need not be labored any further at this place.

### CONCLUSIONS AS TO GHULAM HUSSAIN'S EVIDENCE

707. After a detailed examination of the large number of submissions made by Mr. Yahya Bakhtiar so as to bring out even minute details of alleged contradictions, omissions, improvements and lies to be found in the evidence of approver Ghulam Hussain, I have come to the conclusion that the statement made by him at tire trial is not such as can be said to be lacking in intrinsic worth. Most of the criticism and objections raised by M. Yahya Bakhtiar is, speaking with respect to him, of a very trivial and inconsequential nature, and not such as to affect the substratum of his evidence. While dealing with these submissions and contentions, copious references have already been made to the corroborative evidence brought on the record by the prosecution to lend support to the oral testimony of approver Ghulam Hussain. It is, therefore, not necessary to go over the same ground again. Reference may now, however, be made to some additional pieces of corroborative evidence, and some other questions arising out of his testimony.

## ADDITIONAL CORROBORATION OF GHULAM HUSSAIN

708. From the statement of Ghulam Hussain, as above indicated, it appears that Sufi Ghulam Mustafa appellant had taken certain ammunition (two sten-guns and 60 cartridges and two pistols and 16 cartridges) from Amir Bakhsh Khan (P.W. 20), Deputy Director, FSF, Armoury Battalion No. 3, Walton Lahore. Ghulam Mustafa in his confessional statement has accepted this part of the prosecution version, and is further corroborated by the statement of Amir Badshah Khan (P.W. 20) who stated that he gave the above supply to him. He is also supported by Muhammad Amir (P.W. 19) driver of the jeep, who deposed that Ghulam Mustafa went in his jeep to Amir Badshah Khan and brought something which was wrapped and which appeared to be some arms /ammunition.

709. Ghulam Hussain has given details of his visit to Lahore during the relevant days involved in this case. I have while discussing his evidence already referred to the same along with the relevant supporting evidence in that respect. For example his visit during 16-10-1974 to 26-10-1974 stands borne out from the first portion of T.A. Bill Exh. P.W. 31/6 and corresponding entries of his departure from and return to his Battalion in Rawalpindi Exh. P.W. 31/1 and Exh. P.W. 31/2. His presence in Lahore during the second visit is supported by the interception by Sardar Muhammad Abdul Vakil Khan (P.W. 14) of his jeep which was being driven without a number-plate. Then there is the evidence regarding the lift given to him by Manzoor Hussain (P.W. 21) driver., who had brought from Multan the car of Masood Mahmood to Lahore and from Lahore Ghulam Hussain went in that car to Rawalpindi on 12-11-1974. The co-accused Rana Iftikhar Ahmad has also accepted presence of Ghulam Hussain in Lahore during his earlier visit and all the confessing accused accept that he was present in Lahore during the attack.

710. Ghulam Hussain has deposed how on various dates he had been drawing ammunition and arms etc. from where, and how, and when he had been depositing the same back. In this respect first of all we have evidence of Fazal Ali, Inspector (P.W. 24) who first deposed about delivery of arms/ammunition to the FSF Armoury in Rawalpindi from C.A.D. Havelian. According to that witness one lot was delivered to him on 13-6-1973. He is supported in this respect by voucher Exh. P.W. 24/1 and Entry in Register E.xh. P.W. 24/2. Second lot was received by him on 9-3-1974 as per voucher Exh. P.W. 24/3 and Register entry Exh. P.W. 24/4, and third lot was received on 8-8-1974 as per voucher Exh. P.W. 24/5 and Register entry Exh. P.W. 24/6. All this is again confirmed by a letter of Col. Wazir Ahmad Exh. P.W. 39/2 dated 28-8-1977 which gives details of all those stocks and supplies. An objection to admissibility of this letter was earlier taken by Mr. Yahya Bakhtiar for want of proper proof but later in his note No. 28 dated 17-12-1978 he withdrew that objection. All these documents show that ammunition of 7.62 caliber was received by FSF Armoury, Rawalpindi, from C.A.D., Havelian.



711. In this context now is to be seen the withdrawal of ammunition, etc. by Ghulam Hussain. On 9-5-1974 Ghulam Hussain vide Road Certificate Exh. P.W. 24/7 obtained *inter alia* 1500 rounds of IMG/SMG cartridges; corresponding Stock Register entry Exh. P.W. 24/8 supports this transaction. (It was or so much of it as was unconsumed was returned vide Road Certificate Exh. P.W. 24/9 dated 25-11-1974 and Register Entry Exh. P.W. 24/ 10). This shows that both on the date of attack in Islamabad and in Lahore ammunition of the caliber of 7.62 bore out of lot No. 661.71 was available with Ghulam Hussain. If, therefore, empties of that lot and caliber are recovered from both these places of attack, that gives a great support to and corroborates the statement of Ghulam Hussain, that he attacked Ahmad Raza Kasuri or arranged that attack on him with those types of sophisticated ammunition and arms.

### **EFFECT OF NEGATIVE REPORT OF BALLISTICS EXPERT REGARDING GUNS OF 3RD BATTALION OF FSF, WALTON, LAHORE**

712. This brings us to Mr. Yahya Bakhtiar's contention that the negative report of the Ballistics Expert dated the 8th of September, 1977, regarding the use of any of the 25 guns of the Third Battalion of the FSF, then stationed in Lahore, in the present crime negatives the entire prosecution case not only in regard to the use of weapons belonging to this Battalion, but also regarding the use of the FSF ammunition, which was, in any case, of a caliber also issued to some other units of the Civil armed forces, and was also available privately in the tribal areas of the North-West Frontier Province.

713. It will be recalled that, according to the prosecution, the appellant Ghulam Mustafa had taken two guns of this Battalion from Deputy Director Amir Badshah Khan (P.W. 20) under the orders of appellant Mian Muhammad Abbas, and delivered them to approver Ghulam Hussain for completion of the mission entrusted to him by Mian Muhammad Abbas in regard to Ahmad Raza Kasuri. It is further in evidence that these were the two guns which were used by the confessing appellants Arshad Iqbal and Rana Iftikhar Ahmad in firing upon Ahmad Raza Kasuri's car. While the crime empties were sent for expert examination on the 23rd of November, 1974, a matter which I have discussed at considerable length, while dealing with the nature of the Lahore incident; but the guns of the Third Battalion of the FSF then stationed in Walton Lahore were not seized by the Investigating Officer. However, when the investigation was reopened in 1977, they were taken into possession by Abdul Khaliq (P.W. 41) and sent for expert examination to Nadir Hussain Abidi (P.W. 36). He reported on the 8th of September, 1977 (Exh. P.W. 36/2) that none of the crime empties matched with any of the 25 guns of the Third Battalion. The prosecution did not prove this report on the record, as they considered that it did not provide any corroboration. However, a copy was supplied to the defence on its request.

## THEORIES OF SUBSTITUTION OF CRIME EMPTIES

714. Mr. Yahya Bakhtiar contends that this negative report of the Ballistics Expert upset the prosecution, and as a result of rethinking, the theory of substitution of empties in the year 1974 was introduced. In fact, according to Mr. Yahya Bakhtiar, the prosecution has advanced at least four alternative theories of substitution of the crime empties for the purpose of getting rid of the effect of the negative report of the expert; but it has not succeeded.

715. According to the learned counsel for the appellant the four theories are:-

(a) The crime empties were taken to the house of the Inspector-General of Police at Lahore on the night of the 11th of November, 1974, by the late D.S.P. Abdul Ahad, when the Inspector-General kept the empties with himself, and they came back to the D.S.P. one or two days before the 23rd of November, 1974, on which date he sent them for expert examination in a sealed cover;

(b) The substitution took place in the Prime Minister's house at Rawalpindi where D.S.P. Ahad had gone on the 13th of November, 1974, and returned on the 15th of November, 1974, after taking instructions from the Prime Minister's Chief Security Officer, Steed Ahmad Khan and his Assistant the late Abdul Hamid Bajwa, during the course of which a draft recovery memo. was also prepared and handed over to the D.S.P., who in turn delivered the same to the then Investigating Officer Abdul Hayee Niazi (P.W. 34). This theory does not show as to who substituted the crime empties, whether Saeed Ahmad Khan or Bajwa, but most probably it must be Bajwa as Saeed Ahmad Khan entered the picture in January, 1975, when the Shafi-ur-Rehman Tribunal had started its inquiry;

(c) The crime empties were substituted at Rawalpindi by Mian Muhammad Abbas who had obtained some other empties from his own subordinate Fazal Ali (P.W. 24) between 15th and 17th of November, 1974, at Rawalpindi, and this is the theory accepted by the High Court, although details of the operation were not brought out in evidence, namely, as to who took the replaced empties to Lahore and when; and

(d) The replacement of the crime empties may have been made by the late Abdul Hamid Bajwa who had taken them away from the late D.S.P. Abdul Ahad, who had conveyed this information to D. I. G. Abdul Vakil Khan (P.W. 14) in response to the latter's inquiry as to why the empties had not been sent promptly for expert's examination.

716. Mr. Yahya Bakhtiar has also referred to the various pieces of evidence having a bearing on these alternative possibilities of the substitution of the crime empties before they were sent for expert examination by the Investigating Officer on the 23rd of November, 1974. After discussing this evidence he has tried to demolish the same, with a view to showing that the High Court was in error in recording a positive finding that the substitution had been done at Rawalpindi by appellant Mian Muhammad Abbas.

717. He contended that all the four theories are destructive of each other, and could not save the prosecution from the damaging effect of the opinion recorded by the Firearms Expert that the crime empties recovered from the spot did not match with any of the guns of the FSF Battalion concerned.

718. The learned Special Public Prosecutor submitted that it is true that the learned Judges in the High Court have observed, in paragraph No. 431 of the judgment, that the empties had been taken away from Lahore from the custody of D. 5. P. Abdul Ahad by the late Abdul Hamid Bajwa and that they were substituted with other empties by appellant Mian Muhammad Abbas. In reaching this conclusion they have relied upon the evidence of Abdul Wakil Khan (P.W. 14) who was then working as Deputy Inspector-General of Police, Lahore Range, and the Investigating Officers, namely, D.S.P. Abdul Ahad and Sub-Inspector Abdul Hayee Niazi (P.W. 34) were his subordinates, and the information about the taking away of the empties by Abdul Hamid Bajwa was given to him by the D.S.P. He, however, contended that he was not in a position to state positively that the crime empties were, indeed, substituted with some other empties by appellant Mian Muhammad Abbas at Rawalpindi and that his submission is that there are no theories of substitution, as contended by Mr. Yahya Bakhtiar, but only a high probability that the original crime empties recovered from the spot on the 11th of November, 1974, were tampered with, so that they lost their authenticity; and it is for this reason that after the lapse of nearly three years, they did not match with any of the guns of the Third Battalion of the Federal Security Force. He submitted that if the empties had matched with any of the guns, it would have provided positive corroboration of the testimony of approver Ghulam Hussain as well as of the confession made by appellant Ghulam Mustafa; and similarly the negative report would have been damaging to the prosecution if the crime empties sent to the Firearms Expert in 1977 for examination in relation to the guns of the Third Battalion were the genuine empties actually recovered from the spot after the incident. He submitted that there was strong indication on the record that the empties were, in fact, not sealed after they had been recovered from the spot, and that they remained unsealed until they were sent to the expert on the 23rd of November, 1974, thus giving rise to a strong probability that they were tampered with or substituted during this period, either by Abdul Hamid Bajwa or by the inspector-General of Police, Punjab, or by Mian Muhammad Abbas, etc. Finally, Mr. Batalvi submitted that the Courts have invariably taken the view that an unexplained delay in the despatch of the crime empties to the Firearms Expert for examination does give rise to suspicion about their

genuineness. In support of his last submission he referred us to *Muhammad Saleem v. The State*<sup>305</sup>, *Muhammad Ilyas and 5 others v. The State*<sup>306</sup>, *Rehman and others v. The State*<sup>307</sup>, *Muhammad Shafi and another v. The State*<sup>308</sup>, *Sher Ahmad v. The State*<sup>309</sup> and *Gulzur and 4 others v. The State*<sup>310</sup>.

719. After carefully considering the submission made by the learned counsel for the parties, I have reached the conclusion that there are, indeed, strong indications on the record that the empties, in fact, recovered from the spot on the 11th of November, 1974, were not sealed at the spot, and might have been replaced before being dispatched to the Firearms Expert on the 23rd of November, 1974. The most important evidence in this behalf is that of Nadir Hussain Abidi (P.W. 36), who had stated even before the Shafi-ur Rehman Tribunal in December, 1974, that he was called in by the Investigating Officer Abdul Hayee Niazi on the morning of the 11th of November, 1974, when he carried out an examination of Ahmad Raza Kasuri's car and also of the spot. Later in the day he went to the Police Station and Abdul Hayee Niazi showed him 24 crime empties and asked his expert opinion as to their caliber, etc. At that time the empties were not in a sealed parcel, but were lying open. After examining them he advised Abdul Hayee Niazi to obtain expert opinion from the G.H.Q. Inspectorate of Armament. This is the basic statement showing that the empties had not been sealed at the spot, as allegedly stated in the recovery memo. prepared on that date or may be later by S.H.O. Abdul Hayee Niazi. There are then statements by two A. S. I. Abdul Ikrarn (P.W: 18) and Bashir Ahmad (P.W. 16), and references to the registers maintained at the Police Station, Ichhra, with a view to showing that the details of the empties were not entered in the relevant register until the 17th of November, 1974. Mr. Yahya Bakhtiar has analyzed and criticized the evidence of these two police officials at some length, but I do not think it necessary to go into these details, for the reason that their evidence has to be read along with the statements made at the trial by D.I.G. Abdul Vakil Khan (P.W. 14) and Muhammad Asghar Khan, Senior Superintendent of Police (P.W. 12) as well as by Sub-Inspector Abdul Hayee Niazi (P.W. 34). Even if there are contradictions and omissions in their testimony, one significant fact remains that the empties were not sent for expert examination until the 23rd November, 1974 and even then the core of the bullet recovered from the head of the deceased was not sent for such examination, and it was despatched only after a direction to this effect had been given by Mr. Justice Shafi-ur Rehman in December, 1974. From the mass of evidence marshalled by the learned Counsel at the Bar it does appear that the late Abdul Hamid Bajwa and the other senior police officers were all involved in the investigation of this case, and it is also in evidence that the late D.S.P. Abdul Ahad accompanied by D.S.P. Muhammad

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<sup>305</sup> 1968 PCr. LJ 538

<sup>306</sup> PLD 1967 SC 443

<sup>307</sup> PLD 1968 Lah. 464

<sup>308</sup> PLD 1968 Lah. 869

<sup>309</sup> PLD 1976 Pesh 90

<sup>310</sup> 1976 PCr. LJ 419

Waris (P.W. 15) had gone to Rawalpindi to seek instructions from Saeed Ahmad Khan and Abdul Hamid Bajwa. During all these days the empties remained somewhere, whether in the custody of the Inspector-General of Police or D.S.P. Abdul Ahmad or S.H.O. Abdul Hayee Niazi, or whether they were taken to Rawalpindi and left in the Prime Minister's house. All these are matters of conjecture. The salient facts stands out that they were not sealed when Nadir Hussain Abidi examined them at Ichhra Police Station several hours after they had been recovered from the spot and were supposed to have been sealed there and then, and, secondly, that they were not despatched for expert examination until 12 days later, for which there is no explanation do the record.

720. It is true that in the cases relied upon by the learned Special Public Prosecutor, the benefit of any suspicious circumstance concerning the recovery of the crime weapon or empties, or unexplained delay in its dispatch for expert examination was given to the accused, the plain reason being that the reports obtained in those cases by the prosecution were positive, and thus unfavorable to the accused. The Courts refused to place reliance on the genuineness either of the recovery or of the results obtained after delayed expert examination. It seems to me that in the peculiar circumstances of the present case, namely, where the empties were not sealed at the spot, and they were not sent for examination for 12 days, and the alleged weapons of offence were not made available for comparison for at least three years, the prosecution is right in submitting that the non-matching of these empties with any of the guns of the Third Battalion of the FSF would not have the effect of destroying the prosecution case, especially when there are a number of statements made by the concerned officials that the empties were not sealed at the spot but they were apparently handled by various high officials during the period intervening between their recovery and dispatch to the expert. It is not a question of giving any benefit to the prosecution, but of deciding whether the negative report as to the matching of the guns with the crime empties would necessarily destroy the evidence of Ghulam Hussain approver. In the circumstances explained above I am of the view that this consequence does not follow in this case.

721. The matter, however, does not end here. Even though the crime empties did not match the guns of the Third Battalion of the FSF, when sent for expert examination in 1977, the fact remains that in the recovery memos relating to both the Islamabad incident and the Lahore incident the markings of the crime empties are shown as 661.71, thus showing they had come from the same source. Read along with the evidence of Fazal Ali (P.W. 24) who was in charge of the FSF Armoury at Rawalpindi, as well as of the letter of Col. Wazir Ahmad, the objection to whose admissibility was later dropped by Mr. Yahya Bakhtlar, this identity of marking would support the prosecution claim that ammunition of the FSF had been employed in both the incidents, and this is precisely what approver Ghulam Hussain and the confessing accused had stated at the trial.

## GHULAM HUSSAIN'S EVIDENCE WORTHY OF ACCEPTANCE

722. My conclusion, therefore, in regard to the evidence of approver Ghulam Hussain is that, in the first place, there is nothing improbable or unnatural about is that in view of his experience and training as a commando and the rapid promotions given to him by appellant Mian Muhammad Abbas, he was obviously a suitable choice for the execution of the mission to eliminate Ahmad Raza Kasuri; that the details given by him as to the manner of execution of the conspiracy find valuable support from the oral and documentary evidence brought on the record through Fazal Ali (P.W. 24) as well as Amir Badshah Khan (P.W. 20). The discrepant statements appearing in his T. A. Bill showing as his visits to Karachi and Peshawar stand explained satisfactorily, and the connection of Mian Muhammad Abbas with the activities of Ghulam Hussain approver is fully established by the fact that in the relevant column of the T. A. Bill it was clearly stated that the journeys had been under-taken under the orders of Mian Muhammad Abbas; and it was under the directions of this appellant that the T. A. Bill in question was expeditiously processed by the Accounts officials concerned. Ghulam Hussain had no enmity with any of the other accused so as to implicate them falsely in the actual firing incident, or in the supply of guns as in the case of Ghulam Mustafa; nor had he any motive to fabricate a false story attributing effective role to his Director Mian Muhammad Abbas who had been kind enough to give him rapid promotions and commendation certificates, etc. It is also to be noted that Ghulam Hussain had fully implicated himself in the crime. Finally, the important parts of his testimony with regard to the incident at Lahore find confirmation from the confessional statements made by appellant Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad, which they have reiterated at the trial when questioned under section 342 of the Criminal Procedure Code. The cumulative effect of this evidence and the circumstances is that the statement made by approver Ghulam Hussain as to the circumstances of the crime can be acted upon.

723. As a result, it stands proved upon the record that Ghulam Hussain was inducted into the conspiracy by appellant Mian Muhammad Abbas, and that, in association with appellants Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad, he organized and carried out the attack on Ahmad Raza Kasuri's car during the course of which Kasuri's father was killed.

724. Mr. Yahya Bakhtiar contended that even if the facts alleged by the prosecution are held to have been proved on the record, they do not establish the essential ingredients of the offence of conspiracy, for the reason that there was no agreement on the part of approver Masood Mahmood, nor on the part of the other participants in the alleged conspiracy, as they have all asserted that they were acting under duress. Mr. Yahya Bakhtiar submitted that Masood Mahmood has deposed at the trial that he had no motive of his own, nor any intention, to have Ahmad Raza Kasuri assassinated, and he fell in line with the suggestion or orders given to him in this behalf by appellant

Zulfikar Ali Bhutto only when he was threatened by the appellant with being chased by the Establishment Secretary Mr. Vaqar Ahmad. Similarly approver Ghulam Hussain has averred that he was being pressurized and threatened by Mian Muhammad Abbas, and the other accused persons have also made similar statements in their confessions recorded under section 164 of the Criminal Procedure Code. Mr. Yahya Bakhtiar submitted that it is an established position in law that if the prosecution chooses to lead direct evidence to prove the existence of conspiracy, then it cannot be permitted to fall back upon circumstantial evidence in case the direct evidence falls short of the necessary proof.

725. In reply, the position taken by the learned State counsel was that the agreement essential for constituting the offence of conspiracy is not to be confused with agreement forming the basis of a contract, as the two are fundamentally different in their connotation; that any plea of duress, pressure or coercion has to be specifically taken by the accused persons concerned in order to negative the existence of agreement on his part; and that, in any case, no such plea can succeed unless it satisfies the requirements of law in regard to the degree of duress or coercion essential to negative the presence of mens rea. He next contended that the mode of proving an offence of conspiracy is in no manner different from that for proving any other offence, and, therefore, it is erroneous to think that if prosecution has chosen to lead direct evidence in proof of conspiracy then it is debarred from relying on circumstantial evidence. He submitted that the entire evidence in its totality has to be looked at for the purpose of determining whether the prosecution has succeeded in proving the essential ingredients of the offence or not; and that any dichotomy of the evidence led by the prosecution into direct and indirect evidence, and then exclusion of indirect evidence from consideration, would be a highly artificial method of appraising evidence in a criminal case, which is completely unwarranted by law, and certainly calculated to lead to injustice.

726. The law of criminal conspiracy in this country is by and large founded on the concept of conspiracy as it had developed under the Common Law of England over the centuries. In the well-known case of the House of Lords, *viz. Denis Dowling Mulcahy v. Reg*<sup>311</sup>; Willes, J. in delivering his opinion pointed out that:

"A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means. And so far as proof goes, conspiracy, as Gross, J. said in

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<sup>311</sup> (1868) 3 HL 306

*Rex v. Birssac*<sup>312</sup>; is generally 'matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them'."

The Lord Chancellor and the other Law Lords entirely concurred with these observations. However, in this connection Lord Cranworth further observed:

"It is a mistake to say that conspiracy rests in intention only. It cannot exist without the consent of two or more persons, and their agreement is an act in advancement of the intention which each of them has conceived in his mind. The argument confounds the secret arrangement of the conspirators amongst themselves with the secret intention which each must have previously had in his own mind, and which did not issue in act until it displayed itself by mutual consultation and agreement."

727. Even earlier in *Deniel O' Connel and others v. Her Majesty the Queen*<sup>313</sup>; on appeal before the House of Lords, Tindal, C. J. in delivering the opinion of the Judges of England observed:-

"The crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing; that is, to effect something in itself unlawful, or to effect, by unlawful means, something which in itself may be indifferent or even unlawful."

He further observed that:

"It has accordingly been always held that to be the law, that the gist of the offence of conspiracy, is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not."

728. In *Quinn v. Leathem*<sup>314</sup>; a case under the Law of Tort, Lord Brampton in his speech in the House of Lords said:

"A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful or harmful towards some other person. It may be punished criminally by indictment, or civilly by an action if damage has been occasioned to the person against whom it is directed. It may also consist of an unlawful combination by unlawful means."

729. Willes, J.'s definition in *Mulcahy's case* was expressly approved by the House of Lords in this case, and for the matter of that still holds the field. In this connection in

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<sup>312</sup> 4 East 171

<sup>313</sup> (1844) 8 E R 1061

<sup>314</sup> (1900-1903) ER (Reprint) 1



*Withers and another v. D.P.P.*<sup>315</sup>; Lord Kilbrandon observed that: "A conspiracy is an agreement to do a certain thing. It is not the doing of a thing by agreement; the doing of the thing may be evidence from which the making of the agreement can be deduced. When the thing is a criminal act, the agreement constitutes the crime of conspiracy." In another case in *R. v. Newland and others*<sup>316</sup>; decided by the Court of Criminal Appeal, Lord Goddard, C. J. observed that: "A conspiracy consists of agreeing or acting in concert to achieve an unlawful act or to do a lawful act by unlawful means." In the *Queen v. Aspinall and others*<sup>317</sup>; it was held that the crime of conspiracy is completely committed, if at all it is committed, the moment two or more persons have agreed that they will do, at once or at some future time, something unlawful or in an unlawful manner. It is not necessary in order to complete the offence that anything should be done beyond the agreement.

730. In Halsbury's Laws of England, 4th Edition, para. 58 defines the offence of conspiracy as under;

"The essence of the offence of conspiracy is the fact of combination by agreement, express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however it may be. The *actus reus* in a conspiracy is the agreement to execute the illegal conduct, not the execution of it. It is not enough that two or more persons pursue the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It is not, however, necessary that each conspirator should have been in communication with every other."

731. In British India, before the Partition of the Indo-Pakistan Sub-Continent, Chapter V-A on Criminal Conspiracy comprising sections 120-A and 120-B was inserted by the Indian Criminal Law Amendment Act, VIII of 1913 to form a part of the Indian Penal Code of 1860. Before this amendment, conspiracy to commit offences against the State was dealt with under Chapter VI of the Code. It was also laid down in section 107, secondly, that a person "abets" the doing of a thing, who engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing. But these provisions in the Code were not considered adequate. The scope of this amendment thus introduced by the Criminal Law Amendment Act, VIII of 1913 was explained in the following statement of the objects and reasons:

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<sup>315</sup> (1970) 60 Cr. App. Rep. 85(H L)

<sup>316</sup> (1954) 1 QB 154)

<sup>317</sup> 1876 QBD 48

"Experience has shown that dangerous conspiracies are entered into in India which have for their object aims other than the commission of the offences specified in section 121-A of the Indian Penal Code and that the existing law is inadequate to deal with modern conditions, The present Bill is designed to assimilate the provisions of the Indian Penal Code to those of the English law with the additional safeguard that in the case of a conspiracy other than a conspiracy to commit an offence some overt act is necessary to bring the conspiracy within the purview of the criminal law. The Bill makes criminal conspiracy a substantive offence ....."

732. Section 120-A of the Pakistan Penal Code defines criminal conspiracy as under:-

"When two or more persons agree to do, or cause to be done:-

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy;

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

*Explanation.* - It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."

733. This section makes criminal conspiracy a substantive offence on the statute book like every other offence in the Penal Code. By its very definition criminal conspiracy consists in the mere agreement between two or more persons to do an illegal act, or an act which is not illegal by illegal means. However, as pointed out in *Mulcahy's case* a conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an illegal act, or to do act by illegal means. As long as the design rests in intention only it is not indictable. The proviso to this section, however, expressly lays down that no agreement, except an agreement to commit an offence, shall amount to a criminal conspiracy unless some overt act besides the agreement is done in pursuance thereof.

734. This in essence is the whole gist of the offence of conspiracy and its characteristics. At the core, in a conspiracy, lies some sort of agreement, be it express, implied or implicit, or in any other form, between the parties thereto to do an illegal act or to do a legal act by unlawful means. Indeed, this is common ground, and on this there was no difference between the parties at the hearing before us, It is, therefore, not necessary to labour the point any further.

735. The next question that falls for consideration is as to the nature and character of the agreement which is of the very essence of the offence of conspiracy.

736. Mr. Yahya Bakhtiar submitted that as the word "agreement" as used in section 120-A of the Pakistan Penal Code, had not been defined in the statute itself, it had not technical meaning, and should be given its ordinary dictionary meaning. He stated that it is not his contention that the agreement, forming the basis of the offence of conspiracy should be judged in the light of the provisions of the Contract Act, but his submission is that there cannot be any departure from its ordinary meaning, which connotes a coming or knitting together of; a coming together in opinion or determination; the coming together in accord of two minds on a given proposition; the union of two or more minds in a thing done or to be done; a mutual assent to do a thing. In support of this definition he referred us to Black's Law Dictionary (page 89), Ballentine's Law Dictionary (page 82) and Stroud's Judicial Dictionary (page 95). He further argued that the word "consent" also conveys the same sense, namely unity of opinion or accord of minds, to agree or to give assent to something proposed or requested; or concurrence of wills; voluntarily yielding the will to the proposition of another; acquiescence or compliance therewith. He contended that if this element of a voluntary coming together of the minds is absent, then there is no agreement as required by the law of conspiracy.

737. Valuable assistance on this point is available in Volume 13-A of Corpus Juris Secundum (pages 602 to 603), in which it is stated as under:-

"No formal agreement between the parties to do the act charged is necessary; it is sufficient that the minds of the parties meet understandingly so as to bring about an intelligent and deliberate agreement to do the acts and to commit the offence charged, although such agreement is not manifested by any formal words, or by a written instrument. If two persons pursue by their acts the same object often by the same means, one performing one part of the act and the other another part of the act, so as to complete it with a view to the attaining of the object which they are pursuing, this will be sufficient to constitute a conspiracy.

It is not essential that each conspirator has knowledge of the details of the conspiracy, of the illegality of the end which would be accomplished thereby, or of the exact part to be performed by the other conspirators in execution thereof; nor is it necessary that the details be completely worked out in advance to bring a given act within the scope of the general plan."

738. It is further emphasized that the existence of the agreement is generally a matter of inference from the acts of the parties. It is sufficient to constitute the offence, as far as the combination is concerned, if there is a meeting of the minds, a mutual implied understanding or tacit agreement, all the parties working together, with a single design,

for the accomplishment of the common purpose. For this purpose it is not essential that the parties meet or that they confer and formulate their plans, or that each conspirator has knowledge of the scope of the conspiracy or the means by which the purpose is to be accomplished, or has knowledge of all the details or ramifications of the conspiracy. It is sufficient that there is a general plan to accomplish the result sought by such means as may from time to time be found expedient. Conspiracy implies concert of design and not participation in every detail of execution, and it is not necessary that each conspirator should have taken part in every act, or know the exact part performed or to be performed by the others in the furtherance of the conspiracy.

739. Dr. Glanville Williams in his treatise on Criminal Law (Second Edition), on page 666, has expressed the opinion that:-

"The nature of the agreement required for conspiracy is in some doubt. On the face of it one might suppose that the agreement necessary for conspiracy is the same as the agreement necessary for contract; it is a "meeting of the minds," resulting usually from an offer and acceptance. Undoubtedly this type of agreement would be sufficient; but the question is whether the word "agreement" may not have a laxer meaning in conspiracy than it has in contract. There is some authority for supposing that it may. In *Leigh* (1775 C & K 28 n.) it was ruled that an agreement to hiss an actor (or rather, perhaps, to raise a riot in a theatre) might be inferred from the acts done at one time and place, and that it was not necessary that the defendants should have come together for that purpose or have previously consulted together."

740. According to Criminal Law by Smith and Hogan (Fourth Edition) page 236, a bare decision to perpetrate the unlawful object may be sufficient to constitute the agreement to the conspiracy. In this connection it was observed:-

"It may be that an agreement in the strict sense required by the law of contract is not necessary but the parties must at least have reached a decision to perpetrate the unlawful object."

741. In the same connection Gerald Orchard, Lecturer in Law, University of Canterbury, Newzealand, has contributed a pains-taking and thought-provoking article on "Agreement in Criminal Conspiracy" (1974 Cr. L. R. 293 and 335) in order to examine the nature and possible scope of a conspiratorial "agreement". The learned author has observed that the law does not require that the act of agreement take any particular form and the fact of agreement may be communicated by words or conduct. Thus, it has been said that it is unnecessary to prove that the parties "actually came together and agreed in terms" to pursue the unlawful object, there need never have been an express verbal agreement, it being sufficient that there was "a tacit understanding between as to what should be done".

He has gone on to say that:

"In the context of conspiracy the courts have not analyzed the concept of agreement in terms of offer and acceptance, and furthermore the court for Crown Cases Reserved, rejected the need for any such 'contractual' agreement in *Tibbits* (1902) 1 KB 77,".

742. It will be seen that the correct position appears to be that the term "agreement", as used in relation to the offence of conspiracy is not to be construed in any technical sense, as understood in the law of contract; nor is there any requirement that it should be expressed in any formal manner, or words; all that is required is that the minds of the parties meet understandingly so as to bring about an intelligent and deliberate agreement to do the acts and to commit the offence charged. There should, indeed, be a union of two or more minds in a thing done or to be done, or a mutual assent to do a thing. To borrow the words of Black's Law Dictionary, agreement also connotes consent of two or more persons to contract a mutual obligation, and the word consent means a concurrence of wills, voluntarily yielding the will to the proposition of another; or acquiescence or compliance therewith. The agreement can be express or implied, or in part express and in part implied. It is also not essential that each conspirator should have knowledge of the details of the conspiracy, or of the exact part to be performed by the other conspirators in execution thereof; nor is it, in fact, necessary that the details be worked out in advance to bring a given act within the scope of the general plan. It is sufficient that there is a general plan to accomplish the result sought by such means as may from time to time be found expedient. In other words, it is sufficient to constitute the offence, as far as the combination is concerned, if there is a meeting of the minds, a mutual implied understanding or tacit agreement, all the parties working together, with a single design, for the accomplishment of the common purpose.

743. It is further to be noted that, as stated by Halsbury, the conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is, until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration, or due to some other cause.

744. This being the meaning and essence of the agreement constituting the offence of conspiracy, it will be a question to be determined, in the facts and circumstances of each case, whether the prosecution has succeeded in establishing the existence of such an agreement. If circumstances are brought out in evidence to negative the essential ingredients of a conspiratorial agreement, as defined in the preceding paragraphs, then the charge of conspiracy would not be established. It is not possible to enumerate the variety of circumstances which may be relevant in this behalf, but it is obvious that they may include duress or threats of a kind which could, in the context of the facts of the case, be regarded as sufficient to negative the existence of an agreement.

745. It is one of the corner-stones of criminal justice that the burden of proving the ingredients of an offence remains throughout on the prosecution; and it is only when the prosecution has discharged this burden, that the onus shifts to the accused person under section 105 of the Evidence Act, if he wishes to bring his case within any of the general or special exceptions or provisos contained in the Pakistan Penal Code or any other law defining and creating the offence in question. Even then, as held by the Federal Court in *Sajdar Ali's case*<sup>318</sup>, following the well-known Woolmington's case, it remains the duty of the Court to review the entire evidence that has been produced by the prosecution and the defence; and if after examination of the whole evidence, the Court is of the opinion that there is a reasonable possibility that the defence put forward by the accused might be true, it is clear that such a view reacts on the whole prosecution case. In these circumstances, the accused is entitled to the benefit of doubt, not as a matter of grace, but as of right, because the prosecution has not proved its case beyond reasonable doubt.

746. In this view of the law, Mr. Ijaz Hussain Batalvi is not right in saying that no plea of duress or threat, not falling within the ambit of section 94 of the Pakistan Penal Code, can be entertained at this stage to negative the existence of the agreement. The question at this stage is not whether any of the accused persons is protected by section 94 or any other provision of the law, by way of a general or special exception, but whether there are present on the record circumstances such as would negative the existence of an agreement necessary to constitute the offence of conspiracy.

747. In these circumstances it is not necessary to refer to the cases cited at the Bar on the question of duress or compulsion, etc., namely, *Lynch v. Director of Public Prosecutions for Northern Ireland*<sup>319</sup>; *Mirza Akbar v. King-Emperor*<sup>320</sup> and *Kalil Munda and others v. King-Emperor*<sup>321</sup>. In any case, the very elaborate discussion by the noble Lords in the case of Lynch is not germane for our purposes, as the law obtaining in Pakistan in this behalf stands embodied in section 94 of the Penal Code, with which I shall have occasion to deal while discussing the cases of the other appellants, namely, Mian Muhammad Abbas, Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad. The other two cases cited at the Bar turn on their own peculiar facts.

### MODE OF PROOF OF CONSPIRACY

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<sup>318</sup> PLD 1953 FC 93

<sup>319</sup> 1975 AER 913

<sup>320</sup> AIR 1940 PC 178

<sup>321</sup> ILR 28 Cal. 797

748. The question now arises as to the mode of proof permissible in a case of conspiracy. *Gross, J. in Rex v. Brissac*<sup>322</sup>, said that "conspiracy is a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them". These observations were adopted, by Willes, J. in his oft-quoted definition of the offence of conspiracy in) *Mulcahy v. Reg.*

749. In *R v. Duffield and others*<sup>323</sup>, it was held that the essence of this offence is the combination to carry out an unlawful purpose, and the unlawful combination and conspiracy is to be inferred from the conduct of the parties. If several persons take several steps, all tending towards one obvious purpose, it is for the jury to say whether those persons had not combined together to bring about that end which their conduct so obviously appears adopted to effectuate.

750. In this behalf in *Reg. v. Charles Steward Parnell*<sup>324</sup>, a case from Ireland before the Queen's Bench Division, Fitzgerald, J. in his address to the jury, in summing up the law of conspiracy, said;

"But I have now to inform you, as part of the law of conspiracy, there is no necessity that there should be express proof of a conspiracy such as that the parties actually met and laid their heads together, and then and there actually agreed to carry out a common purpose. Nor is such proof usually attempted."

In this connection he further observed:

"It may be that the alleged conspirators have never seen each other, and have never corresponded, one may have never heard the name of the other, and yet by the law they may be parties to the same common criminal agreement. Thus in some of the Fenian cases tried in this country, it frequently happened that one of the conspirators was in America, the other in this country, that they had never seen each other, but that there were acts on both sides which led the jury to the inference, and they drew it, that they were engaged in accomplishing the same common object, and, when they had arrived at this conclusion, the acts of one became evidence against the other."

Addressing the jury further he added that:

"The agreement to effect a common object is usually an inference to be deduced by the jury, as men of common sense, from the acts of the alleged conspirators in furtherance of their purpose."

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<sup>322</sup> (1803-4) East 164

<sup>323</sup> (1851-52) 5 Cox's Cr. LC 404

<sup>324</sup> (1877-82) 14 Cox's Cr. LC 308

751. Similar views were expressed in *Benoyendra Chandra Pandey and another v. Emperor*<sup>325</sup>; *Emperor v. Shafi Ahmad*<sup>326</sup>; *State v. Shankar Sakharam Jadhav and another*<sup>327</sup>; *Barindra Kumar Ghose and others v. Emperor*<sup>328</sup>; *Keshabdeo Bagat v. Emperor*<sup>329</sup>; *Nadir Ali Barqa Zaidi and others v. The State of U.P.*<sup>330</sup>; *Manghan Khan v. Emperor*<sup>331</sup>; *Emperor v. Ring*<sup>332</sup>; *Amiruddin v. The State*<sup>333</sup>; *Noor Mohammad Yusuf Momin v. The State of Maharashtra*<sup>334</sup> and *Bhagwandas Keshwani etc. v. State of Rajasthan*<sup>335</sup>.

752. It is not necessary to dilate at any length on the observations appearing in these judgments, but it will perhaps be useful to state that in the case of Noor Mohammad Yusuf their Lordships of the Indian Supreme Court thought it fit to observe that:

"like other offences, criminal conspiracy can be proved by circumstantial evidence. Indeed in most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts. Surrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material."

753. In the last case, also from the Indian Jurisdiction, the Court observed that:

"in cases of conspiracy better evidence than the acts and statements of conspirators in pursuance of the conspiracy is hardly ever available."

754. I now take up the further question that if, as in this case, prosecution has produced direct as well as circumstantial evidence to prove the factum of agreement constituting the offence of conspiracy, then is the Court debarred from looking at the circumstantial evidence besides the direct evidence, if for any reason the direct evidence appears to fall short of complete proof of the offence alleged.

755. No authority was cited at the Bar in support of such a drastic proposition. In fact, in the final written note submitted by Mr. Yahya Bakhtiar it has been stated that:

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<sup>325</sup> AIR 1936 Cal. 73

<sup>326</sup> (1925) 31 Bom. LR 515

<sup>327</sup> AIR 1957 Bom: 226

<sup>328</sup> ILR 37 Cal. 467

<sup>329</sup> AIR 1945 Cal. 93

<sup>330</sup> AIR 1960 All. 103

<sup>331</sup> AIR 1937 Sindh 61

<sup>332</sup> AIR 1929 Bom. 296

<sup>333</sup> PLD 1967 Lah. 1190

<sup>334</sup> 1971 SCJ 43

<sup>335</sup> AIR 1974 SC 898



"It may be conceded that no special mode of proof is prescribed. The conspiracy may be proved by direct or indirect evidence or by both, but it is essential that indirect or circumstantial evidence should not contradict or negative the direct evidence .....

It is submitted that the prosecution has set up a specific agreement and the prosecution is bound to prove the same. If the evidence of Masood Mahmood falls short of proving it, circumstantial evidence or evidence of overt acts of Masood Mahmood contradicting the oral evidence cannot be relied upon .... That it is not possible to disbelieve the approver and at the same time hold that he is corroborated on certain points by circumstantial evidence and therefore his evidence should be accepted."

756. As the contention has been formulated in the final written arguments, it does not question the right of the Court to look at both direct and circumstantial evidence to determine whether the prosecution has succeeded in proving the offence. This contention only relates to the appreciation of evidence, namely, whether the approver can be partly believed and partly disbelieved, as the case may be, if he is corroborated or contradicted by the circumstantial evidence. This is a question relating preeminently to the facts and circumstances of the case, to which I shall presently attend.

757. It may, however, be stated that the weight of authority is to the effect that both the kinds of evidence stand on the same footing; and that, in some situations, circumstantial evidence may even be preferred to direct evidence for the reason, as stated by Monir, men may lie but the circumstances will not.

758. In Woodroffe and Amir Ali's Law of Evidence in India, (10th Edition), it is stated on page, 124 of Volume I, that:-

"As regards admissibility, direct and circumstantial evidence stand, generally speaking, on the same footing circumstantial evidence is no longer excluded by direct, and, even in criminal cases, the *corpus delicti* may generally be established by either species, or, indeed, by the defendant's mere admission out of Court."

759. Similarly Phipsan has remarked (Law of Evidence, 11th Edition, page 61) that:-

"One of the most conspicuous features of the modern law is its persistent recession from this once famous rule of leading best evidence (i.e. direct evidence)."

Cross, in his book on Evidence (page 15), has endorsed this observation.

760. In *Gatton v. Hunter*<sup>336</sup>, Lord Denning M. R. disapproved the rule of best evidence as laid down by Scott, L. J. in *Robinson Brothers (Brewers) Ltd. v. Houghton and Chester-le-Street Assessment Committee*<sup>337</sup>, and observed "that now-a-days we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility".

761. The same principle is reiterated on pages 905 to 916 of Volume 15-A, of *Corpus Juris Secundum*, namely, that a conspiracy may be proved by direct or indirect evidence or by both; and that circumstantial evidence is sufficient to sustain a conviction if the circumstances, acts, and conduct of the parties are of such a character that the minds of reasonable men may conclude therefrom that an unlawful agreement exists.

762. Reference may finally be made to *Asadullah v. Muhammad Ali*<sup>338</sup> and *Mst. Razia Begum v. Hijrayat Ali and 3 others*<sup>339</sup>, both of which have direct relevance to the point we are considering here. In the first case it was observed that:-

"The object of corroborative evidence is to test the veracity of the ocular evidence. Both have, therefore, to be read together and not in isolation as the learned Judge did in the instant case. Indeed it would be anomalous to hold that the ocular evidence should be appraised on its own merits without reference to the corroborative evidence. What would then be the use of corroborative evidence which cannot by itself be the basis of conviction."

763. In the second case following significant observations were made:-

"In the instant case, the error is much more serious. The learned Judges have rejected direct ocular evidence for reasons which on scrutiny appear to be fallacious, have also completely ignored what is plainly cogent confirmatory evidence of the prosecution version. Therefore, the learned Judges have failed to determine the guilt of the three respondents on the totality of legal evidence available in the case as they should have had. It is a well established rule governing the administration of criminal justice that evidence should not be considered in isolation as so many bits of evidence, but the whole of it should be considered together and its cumulative effect must be weighed and given effect."

764. Having laid down this principle, the Court proceeded to appraise the direct as well as the circumstantial evidence available in the case and arrived at the conclusion that the respondents were guilty of the offence of murder. The judgment in this case

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<sup>336</sup> 1969 A11 ELR 451

<sup>337</sup> 1937 All ELR 208

<sup>338</sup> PLD 1971 SC 541

<sup>339</sup> PLD 1976 SC 44

was delivered by Muhammad Gul, J. and concurred in by two other Judges, including the learned former Chief Justice. I cannot see any reason for departing from the same in the present case.

765. Turning now to the facts of this case, it is true that while giving oral evidence as the second witness for the prosecution, Masood Mahmood has stated at the trial that he protested when the former Prime Minister told him that he was fed up with the obnoxious behavior of Ahmad Raza Kasuri, and that the witness should ask Mian Muhammad Abbas to get on with the job and to produce the dead body of Ahmad Raza Kauri or his body bandaged all over, and that he would held Masood Mahmood personally responsible for the execution of this order. According to Masood Mahmood, he told the Prime Minister that it was against his conscience and also against the dictates of God, but the Prime Minister lost his temper and shouted that he would have no nonsense from him or Mian Muhammad Abbas and added "you don't want Vaqar chasing you again do you?"

766. If this oral statement had stood alone, without there being any further evidence at all as to how Masood Mahmood conducted himself subsequently in regard to this matter, there would have been some basis for Mr. Yahya Bakhtiar's contention that the essential ingredients of a conspiratorial agreement were lacking in this case. But viewed in the light of the voluminous evidence showing as to how Masood Mahmood, in fact, conducted himself after receiving these directions, the protest deposed to by him at the trial loses all meaning and significance.

767. In the first place, it should be noted that the threat uttered by the appellant was whether Masood Mahmood wanted the Establishment Secretary Vaqar Ahmad to chase him again, meaning thereby that Masood Mahmood might be in some trouble with his service career. There is no threat of any physical violence or any other coercion or duress. For an officer of the rank and seniority of Masood Mahmood, the threat or warning given by the former Prime Minister was, or ought to have been, of little or no consequence considering the gravity of the mission being assigned to him. However, after this interview Masood Mahmood called Mian Muhammad Abbas to his office and repeated to him the orders given by the Prime Minister, knowing fully well that he had been made personally responsible for the execution of this order. On subsequent occasions Masood Mahmood was reminded and goaded again and again about the execution of this order by the former Prime Minister both personally, as well as on the green telephone, and also through Saeed Ahmad Khan. There is no material whatsoever, not even an assertion by Masood Mahmood, to show that he protested in any manner on these occasions, or that he expressed his inability to execute the mission assigned to him. On the contrary, we have in evidence of Saved Ahmad Khan that when he conveyed to Masood Mahmood the message of the Prime Minister, Masood Mahmood answered "alright". This answer clearly indicated his acquiescence or compliance with the directions or proposal given to him by the Prime Minister in

regard to doing away with Ahmad Raza Kasuri. Such conduct on the part of Masood Mahmood clearly amounted to consent, in one of the senses indicated in the definition relied upon by Mr. Yahya Bakhtiar himself. It is significant that up to this stage Masood Mahmood had not taken any step whatsoever to get himself released from the obligation placed upon him by the Prime Minister. He continued to serve as Director-General Federal Security Force without any apparent indications of his unwillingness to proceed with the assignment. He even inducted Mian Muhammad Abbas into the conspiracy, although stating before the Court that Mian Muhammad Abbas gave him to understand that he already knew of this mission since the days of Masood Mahmood's predecessor.

768. In cross-examination Masood Mahmood made it clear that from the time of the interview spoken of by him, he was also in the conspiracy, and that earlier it were Mr. Haq Nawaz Tiwana, appellant Zulfikar Ali Bhutto and Mian Muhammad Abbas. This answer given in cross-examination clearly shows an awareness on the part of Masood Mahmood that he had, in fact, joined the conspiracy.

769. The matters, however, do not rest here. He not only conveyed the directions to Mian Muhammad Abbas as desired by the former Prime Minister, but took further steps in July, 1974, during his visit to Quetta along with the then Prime Minister, inasmuch as he instructed his Local Director M. R. Welch (P.W. 4), to eliminate Ahmad Raza Kasuri as this man was an anti-State element. According to M. R. Welch, Masood Mahmood also told him that Kasuri was making obnoxious speeches against the then Prime Minister. Masood Mahmood has spoken of an audience which he had at Quetta with the former Prime Minister before he gave these instructions to M. R. Welch. In the lengthy cross-examination, to which Masood Mahmood was subjected, nothing was at all elicited to show that Masood Mahmood was not a willing party to the common design of getting rid of Ahmad Raza Kasuri.

770. Masood Mahmood then took further action in September, 1974, when Ahmad Raza Kasuri actually visited Quetta. The correspondence, to which reference has already been made, between M. R. Welch, and Masood Mahmood shows that Masood Mahmood was consciously trying to use M. R. Welch in furtherance of the common design between him and appellant Zulfikar Ali Bhutto, but M. R. Welch, however, did not play the game. The evidence of M. R. Welch makes it clear that one of the letters was, in fact, addressed to Masood Mahmood by name, in which it was stated that Ahmad Raza Kasuri did not sleep in his hotel room in Quetta, and on the margin thereof Masood Mahmood had made a special note that this was to be discussed at Quetta. A perusal of this correspondence, read in the light of the oral testimony of M. R. Welch, leaves me in no doubt whatsoever that Masood Mahmood was, indeed, a willing participant in the common design, and there could be no question, therefore, of saying that he did not share the common intention, or that there was no meeting of the minds in this behalf.

771. Before the September, 1974 visit of Ahmad Raza Kasuri to Quetta, Ahmad Raza Kasuri was fired upon at Islamabad on the 24th of August, 1974. Although at the trial he euphemistically stated that he had only a hunch that this attack was also in furtherance of the conspiracy, the fact remains that as Director-General of the Federal Security Force he was fully aware as to what had happened, specially because Ahmad Raza Kasuri had registered a formal report of the incident on that very day at the Islamabad Police Station, and had also made a statement before the National Assembly, clearly indicating that fire had been opened on him with automatic weapons from a blue jeep. If Masood Mahmood was not a willing partner in the conspiracy he could riot have been content with only having a hunch and doing nothing at all to see whether his Force was involved in the attack or not, and whether he should take any measures to see that such an occurrence is not repeated.

772. I should also have mentioned that it was elicited from Masood Mahmood in cross-examination by the defence that after his Quetta audience with the Prime Minister on the 29th July 1974, as a result of which he had given instructions to M. R. Welch, and before the Islamabad incident on the 24th of August, 1974, the former Prime Minister had said to him that so far nothing had happened; that he fully understood the inference of this remark and conveyed it to Mian Muhammad Abbas. Now, if Masood Mahmood was, indeed, not voluntarily and consciously participating in the conspiracy, then this kind of understanding of the remark, and his passing it on to Mian Muhammad Abbas, cannot be easily explained.

773. Finally, when we come to the incident of the 11th of November 1974, during which Ahmad Raza Kasuri's father was assassinated, we find that on that day Masood Mahmood was present at Multan along with the former Prime Minister, and on their return to Rawalpindi again a meeting took place between them, and it was at this stage that he finally decided to disassociate himself from this conspiracy. On returning to Rawalpindi Masood Mahmood also met Mian Muhammad Abbas, when the latter told him that although his plan had succeeded but unfortunately instead of Ahmad Raza Kasuri his father had been killed. Even this conversation leads to the irresistible inference that Masood Mahmood was full in the conspiracy, willingly and consciously, and constantly, in touch with his Director Operations, namely, appellant Mian Muhammad Abbas in regard to this affair.

774. For the foregoing reasons, I have reached the conclusion that, in the first place, the protest lodged by Masood Mahmood on hearing appellant Zulfikar Ali Bhutto's proposal to eliminate Ahmad Raza Kasuri, and the threat uttered by the appellant to have Vaqar chase Masood Mahmood, are not matters as could effectively negative the coming into existence of an agreement between the two in this behalf. After narrating this part of the story, Masood Mahmood has himself made it clear that on going back to his office he immediately called his Director Mian Muhammad Abbas and asked him to

get on with the job. The threat uttered was a meaningless one in the context of the gravity of the mission being assigned to Masood Mahmood. He had full opportunity to try to escape from the situation by resigning or proceeding on leave, but he did nothing of the kind. Instead he passed on the directions to his subordinate Mian Muhammad Abbas. I am, therefore, satisfied that even at the initial meeting an agreement did come into existence.

775. In the second place, taking an over-all view of the totality of evidence, I think there can be no doubt whatsoever that irrespective of the oral protest mentioned by Masood Mahmood, it stands clearly established that there was, indeed, a conscious understanding, or a meeting of the minds between the former Prime Minister and approver Masood Mahmood to eliminate Ahmad Raza Kasuri for the reason that he was indulging in obnoxious criticism against the Prime Minister. It is not necessary to go to the extent of disbelieving Masood Mahmood's testimony as to the protest he is supposed to have made at the initial meeting and it is enough to observe that whatever his initial reaction may have been, he undoubtedly fell in line with the proposal or proposition put forward by appellant Zulfikar Alt Bhutto, and, therefore, an agreement of the kind mentioned in section 120-A of the Pakistan Penal Code did come into existence so as to constitute the offence of conspiracy. In order to arrive at this conclusion, all the facts and circumstances brought out in the evidence have to be considered, and when that is done this conclusion becomes irresistible. The Court cannot adopt an artificial dichotomy between the oral testimony of Masood Mahmood and the mass of circumstantial evidence showing his factual conduct after his initial meeting with the former Prime Minister regarding the elimination of Ahmad Raza Kasuri.

776. There is no rule of law, nor of prudence, that the entire evidence of an approver has either to be accepted or rejected, unlike the evidence of any other competent witness, where the Courts have ion adopted the rule of sifting the grain from the chaff. It is notorious that an approver may try to under-state his own involvement in crime, or may even try to save some of his own friends or relatives, but these weaknesses in the approver's character have never prevented the Court from appraising his evidence in the light of all the corroborative circumstances brought on the record. As early as 1915, in the case of Balmokand already referred to in another context, the learned Judges had taken note of this weakness and observed that there were certain kinds of falsehoods which did not damn the whole of the evidence. Again in *Bhola Nath and others v. Emperor*,<sup>340</sup> it was stated: "Where the approver makes positively false statements in respect of a particular point and yet the evidence produced in the case goes to prove beyond any doubt that in other respects his evidence is trustworthy and is fully corroborated by very best evidence produced, it would be wrong in that case to suggest

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<sup>340</sup> AIR 1939 All. 567

that because the approver has made a wrong statement on a particular point his whole evidence should be rejected".

777. It seems to me, therefore, that even if I were to hold that Masood Mahmood's testimony as to the protest supposedly lodged by him when the Prime Minister initiated the conspiracy, is contradicted by circumstantial evidence as to his subsequent conduct, it would have no bearing on the fact that the evidence as a whole clearly establishes his volume acquiescence or compliance with the proposal made by the former Prime Minister, so as to constitute the necessary agreement essential for the offence of conspiracy.

778. A point was raised by Mr. Yahya Bukhtiar as to which conspiracy Masood Mahmood had deposed to at the trial, whether the one hatched between appellant Zulliqar Ali Bhutto and Masood Mahmood's predecessor Malik Haq Nawaz Tiwana, or some subsequent conspiracy. The point is only one of academic interest for the reason that the prosecution has not charged the appellant with the earlier conspiracy, and the only reference to it is contained in the statement made by Masood Mahmood that appellant Zulfikar Ali Bhutto had told him that Masood Mahmood's predecessor knew all about the affair, and that Mian Muhammad Abbas also knew about it. The fact remains that no evidence was led by the prosecution regarding this conspiracy, nor was it alleged by the defence, in cross-examination or otherwise, that anything had at all been done by Malik Haq Nawaz Tiwana or Mian Muhammad Abbas in relation to that earlier conspiracy. Such being the case, it is, indeed, irrelevant to discuss the question as to which conspiracy Masood Mahmood is trying to prove. It is clear that he is proving the conspiracy which was entered into between him and appellant Zulfikar Ali Bhutto, and into which later Mian Muhammad Abbas and the other appellants and the approver Ghulam Hussain were inducted.

779. More or less similar considerations apply to the part played in this affair by Mian Muhammad Abbas and other three appellants. Although they have also alleged coercion or pressurization by their superiors, but evidence as to their conduct clearly establishes a pattern of a voluntary participation, in the crime, details of which will be discussed when disposing of their appeals.

### **Application of sections 111 and 301 of the Pakistan Penal Code**

780. Mr. Yahya Bakhtiar and Mr. Ghulam Ali Memon next contended that the High Court fell in error in convicting the appellant under section 111 of the Pakistan Penal Code, as the death of Nawab Muhammad Ahmad Khan could not be regarded as a probable consequence of the alleged conspiracy to kill his son Ahmad Raza Kasuri; and at in any case this section could not be invoked as the appellant was not charged there under. They further contended that the High Court could not alter, or add a charge without observing the procedure prescribed by sections 227 and 231 of the Procedure

Code, and giving the accused an opportunity to recall the prosecution witnesses. Finally, they submitted that the High Court also erred in applying section 301 of the Penal Code to the accused other than the two contesting accused, namely, Z.A. Bhutto and Mian Muhammad Abbas (and on the same reasoning Ghulam Mustafa) could at least be convicted only under section 120-13 for conspiracy and under section 307 read with section 109, P.P.C., for the attempted murder of Ahmad Raza Kasuri.

781. Section 111, P.P.C., provides that:-

"When an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it:

Provided the act done was a probable consequence of the abetment and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment."

782. The finding of the High Court that section 111, P.P.C., was attracted in the circumstances of the case was vehemently criticized by Mr. Ghulam Ali Memon, who addressed arguments on this part of the case, and his submissions were reiterated by Mr. Yahya Baktiar during the final reply. On the basis of the judgments delivered in a large number of cases brought to our attention, namely, *Queen-Empress v. Mathuto Das*<sup>341</sup>; *Sukha v. Emperor*<sup>342</sup>; *Harnam Singh v. Emperor*<sup>343</sup>; *Po Ya v. Emperor*<sup>344</sup>; *Mumtaz Ali v. Emperor*<sup>345</sup>; *Girja Prasad v. Emperor*<sup>346</sup> and *Sonappa Shina v. Emperor*<sup>347</sup>; it was contended that section 111 did not come into play, and that from the above-cited cases the following propositions were deducible:

- (1) That section 111 has to be closely and strictly construed, other wise there will be no limit to which it can be extended.
- (2) That the different act ensued must be the probable consequence of the conspiracy as originally formed.
- (3) That the different act done must have been done in pursuance of the conspiracy constituting the abetment.

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<sup>341</sup> ILR 6 All. 491

<sup>342</sup> AIR 1918 All. 97 (2)

<sup>343</sup> AIR 1919 Lah. 256

<sup>344</sup> AIR 1919 Law. Bur. 20 (2)

<sup>345</sup> AIR 1935 Oudh 473

<sup>346</sup> AIR 193 All. 346 (2)

<sup>347</sup> AIR 1940 Bom. 126



(4) That the relevant time for determining whether or not a different act done is the probable consequence is the time when the conspiracy was hatched disregarding subsequent developments; and

(5) that the above ingredients of the offence must be established affirmatively by the prosecution.

783. It was submitted that the case of the prosecution was that the appellant had entered into a conspiracy to kill Ahmad Raza Kasuri and admittedly there was no conspiracy to kill Nawab Mohammad Ahmad Khan. On the state of evidence it was incumbent upon the prosecution to establish that the alleged killing of Nawab Mohammad Ahmad Khan was the "probable consequence" of the act actually abetted, namely, the killing of Ahmad Raza Kasuri and further that the act of killing of Mohammad Ahmad Khan was done in pursuance of the alleged conspiracy. It was added that it was necessary for the prosecution to establish that at the time of entering into the alleged conspiracy the conspirators could reasonably apprehend the act of killing Mohammad Ahmad Khan as a probable consequence of the act for the commission of which the conspiracy was entered into.

784. Analyzing the provisions of section 111, P.P.C., the learned counsel submitted that there were two essential ingredients of the section which must be fulfilled, namely, (i) it should be affirmatively proved that the act done was the probable consequence of the abetment and (ii) that the act done was in pursuance of the conspiracy which constituted the abetment. It was further argued that a different act must have been visualized as the probable consequence of the act abetted at the time the conspiracy was entered into and not at the time when the different act was done. In other words, the conspirators must visualize the probability at the time when the conspiracy was hatched. Mr. Memon submitted that in the present case the prosecution has produced no evidence that at the time the alleged conspiracy was entered into in June, 1974, the conspirators could visualize that as a result of the abetment of the act of killing of Ahmad Raza Kasuri a different act, namely, that of Nawab Mohammad Ahmad Khan being killed, was the probable consequence. Further, as it was the prosecution case that the alleged conspiracy itself was confined only to the killing of Ahmad Raza Kasuri, the alleged killing of his father could not possibly fall within the expression "in pursuance of the conspiracy which constituted the abetment". He submitted that the High Courts have consistently held that a very close and strict test should be applied to the interpretation of the penal statute and specially section 111, P.P.C., as otherwise if the section is construed loosely it is difficult to say to what limits it might not be stretched.

785. In reply, Mr. Batalvi submitted that the prosecution did not wish to join issue with the defence so far as propositions I and 3 formulated by Mr. Memon were concerned. Further, the prosecution generally agreed with the submission contained in

proposition No. 5. However, before examining the provisions of section 111, P.P.C., he invited our attention to the provisions of section 107, P.P.C. which reads:

"A person abets the doing of a thing who

First. - Instigates any person to do that thing; or

Secondly. - Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly. - Intentionally aids, by any act or illegal omission, the doing of that thing."

786. Section 107 deals with abetment and covers three kinds of this offence:-

- (1) Abetment by instigation;
- (2) Abetment by aid; and
- (3) Abetment by conspiracy.

So far as the aspect of conspiracy was concerned, the test was given in the section itself, namely, that the act or illegal omission should take place in pursuance of the conspiracy.

787. In response to the propositions formulated by the defence, the Counsel submitted that he had the following points to put forward:-

- (1) An objective test was to be applied to determine whether the act done was a probable consequence of the conspiracy.
- (2) The act done might not have been foreseen but it should have been foreseeable by the abettor/conspirator.
- (3) For the responsibility of the probable consequence, a participant in the conspiracy could not take benefit if he had limited imagination or if in his own recklessness he did not want to foresee.

Section 111 according to the counsel dealt with a by product of a criminal enterprise. In this the only factor to be determined was the relationship of the act done to the act abetted. In other words, the proximity of the act abetted and the act done had to be studied. The section undertook an anatomy after the act had been done. It looked at a

situation post facto and it apportioned responsibility or liability. The test, according to the counsel, was that the law told the conspirator: "You did not foresee the act done but you should have foreseen it." Where, therefore, it could be said that the act done stood in a close proximity to the act abetted the act done was the probable consequence of the act abetted.

788. Dealing with the defence argument that even if the prosecution evidence were to be believed, section 111 could not be applied and no culpability could be attached to Z. A. Bhutto, the learned Special Public Prosecutor submitted that the following facts were noteworthy:-

(1) The conspiracy was between Z. A. Bhutto, Masood Mahmood and others and it was to kill Ahmad Raza Kasuri through the personnel of the FSF.

(2) The attack was mounted on a moving car having been identified as Kasuri's car and having the knowledge that he was returning from a wedding reception in the middle of the night.

(3) The assailants were members of the FSF and they used automatic weapons of a prohibited bore and continued firing on the car as long as they could.

(4) The death of Nawab Mohammad Ahmad Khan was the direct result of their attack. In these circumstances, the question for determination was whether the death of Nawab Muhammad Ahmad Khan was the probable consequence of the act abetted in pursuance of the conspiracy. According to Mr. Batalvi, if the conspiracy was to fire at Ahmad Raza Kasuri with automatic weapons and if his father sitting one foot away was killed, it was a probable consequence of the act conspired and not a distinct or unrelated act. The act done was the firing at Ahmad Raza Kasuri and if the missiles missed him and hit the man sitting next to him, it was the probable consequence of the act abetted. He quoted Russel on Crime.(Twelfth Edition Volume 1, page 161) wherein the writer states: "If the principal totally or substantially varies from the terms of the instigation, if being solicited to commit a felony of one kind, he willfully and knowingly commits a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt But if the principal complies in substance with the instigation of the accessory, varying only in circumstances of time or place, or in the manner of execution, the accessory will be involved in his guilt And where the principal goes beyond the terms of the solicitation, yet if in the events the felony committed was a probable consequence of what was ordered or advised, the person giving such orders or advice will be an accessory to that felony."

789. He also cited Criminal Pleadings, Evidence and Practice by Archbold (39th Edition, para. 4144, page 1711 that "if the counsellor and procurer orders or advises one

crime, an the principal intentionally commits another; as, for instance, if he was ordered or advised to burn a house, and instead thereof committed theft, the counsellor and procurer would not be liable. If, however, the counsellor and procurer ordered the principal to commit a crime against A, and instead of so doing the principal by mistake committed the same against B, it seems that the counsellor and procurer would be liable."

790. Mr. Batalvi next cited *Corpus Juris Secundum*, Vol. XII, 1911 Edition, page 545. While dealing with the question of means in carrying out a conspiracy, the learned author states that it was not necessary that the means or the time of the offence ought to have been agreed upon by the conspirators. When individuals conspired leaving one to execute the conspiracy and let him choose his own means, methods and devices, the conspiracy was complete. The rule was well settled that when separate parties gathered, each was responsible for the acts of the confederates committed in furtherance of the common design and the purpose and the act of one was the act of all. Wherever, these conspirators acted, they continued with their agreement and it was immaterial whether one or two were not even present when the offence was committed. Each was responsible for everything done which followed the execution of the common design, even though some parts were not intended to be parts of the common design. The ordinary and probable effect of the act specifically agreed should have followed so that the connection might reasonably be deduced.

791. Mr. Batalvi submitted that if the attack on the life of Ahmad Raza Kasuri was in the execution of or in pursuance of the conspiracy then his father's death, who was sitting next to him, was a probable consequence of the original design or plan. Relying on *Corpus Juris* the learned counsel submitted that he who conspired with others to take human life was expected to know the result of the conspiracy. Such accidents as take place in carrying out the conspiracy should be capable of being reasonably inferred from the act done. In such a situation the instigator was squarely liable. The authors of *Corpus Juris* have at another place observed that the meaning of probable consequence was to the effect that an abettor or co-conspirator would always be liable for any act which followed incidentally in the execution of the common design even though what was done was not intended as part of the original design or plan.

792. Reverting to section 111, Mr. Batalvi submitted that for the purpose of the application of this section, all that had to be examined was whether the act had been done in pursuance of the conspiracy, and the intention of the person executing the conspiracy was irrelevant and could not be taken into consideration. He referred to section 34 of the P.P.C., which trade one liable for the act of others if the act done was "in furtherance of the common intention". Similarly, in section 10 of the Evidence Act which deals with a somewhat similar subject, the expression was "in reference to the common intention". However, in section 111 these phrases had been discarded and the expression used was "in pursuance of the conspiracy". Therefore, intention was not

relevant for purpose of applying sections 111, P.P.C., When it was established that the act done was in pursuance of the conspiracy, it was immaterial whether it was intended or not and it would make the conspirator liable to the same degree. According to him, section 111 would be applicable if the following two conditions were fulfilled:

- (1) The actor or the co-conspirator should be acting to pursue the conspiracy and achieve the desired object and if the result of it was different from the object of conspiracy, it should not be unrelated to the act done; and
- (2) The result achieved, i.e. probable consequence should not be a probable consequence of the intention but of the act done in pursuance of the conspiracy.

793. In this connection reference was invited to *Queen-Empress v. Mathur a Dos* (which was also relied upon by the learned counsel for the appellant) wherein it was, *inter alia*, observed to put it in plain terms the law says to a man: "If you choose to run the risk of putting another in motion to do an unlawful act, he, for the time being, represents you as much as he does himself; and, if, in order to effect the accomplishment of that act, he does another which you may fairly from the circumstances be presumed to have foreseen it would be a probable consequence of your instigation, you are as much responsible for abetting the latter act as the former."

794. Continuing his arguments Mr. Bataivi submitted that Zulfikar Ali Bhutto had been charged under sections 302, 301 and 109, P.P.C., The conviction had been recorded under section 302, P.P.C., read with sections 301, 109 and 111, P.P.C., For the purpose of conviction section 111 had been added, but section 109 had not been excluded. He submitted that section 301, P.P.C. dealt with a situation when the intention of the accused was to cause the death of one person but another in his place had been killed. It was a provision of law which dealt with the same situation as section 111 did with the exception that it exclusively applied to murder.

795. Section 301, P.P.C., is in the following terms:

"If a person by doing anything which he intends to or knows to be likely to cause death commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intends or knew himself to be likely to cause."

The learned counsel submitted that the section looked after a situation in which a mistake crept in and a person who was not intended to be killed was done to death. The punishment was the same as if he had intended to cause his death. He submitted that section 111 dealt with joint responsibility of all the conspirators when the act done and

the result achieved were different and pointed out that in such a situation the criterion was to judge if the result was the probable consequence of the act done.

796. The counsel submitted that the two confessing accused Arshad Iqbal and Rana Iftikhar had been convicted under sections 301 and 302, P.P.C. They never had the intention to kill Nawab Mohammad Ahmad Khan but they had been held guilty of culpable homicide amounting to murder. In these circumstances there was no reason to think that these two accused could be convicted thus, but not the person with whose concert the gruesome offence had been committed.

797. The position was all the more clear by I the application of section 109, P.P.C., This section reads;

"Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment and no express provision is made by this Code for the punishment of such abetment be punished with the punishment provided for the offence.

*Explanation.* - An act or offence is said to be committed in consequence of abetment when it is committed in consequence of the instigation or in pursuance of the conspiracy or with the aid which constitutes abetment."

798. Mr. Batalvi submitted that these two sections together with section 10 of the Evidence Act, which allowed a certain type of evidence otherwise barred, fell into a set pattern. They were all parts of the scheme of the law which dealt with criminal conspiracy. He submitted that a study of this scheme showed that all conspirators were agents of each other and each one was liable for the acts of the other. If a conspirator set into motion evil forces, he was liable for the offence whether he was present at the place of occurrence or not. Even if the conspirator employed an innocent agent he would be held to be responsible for the offence because the act was the result of the malice of the instigator. If the instigator gave some poison to a child under seven, to whom no criminal liability was attached and he administered it to a person named by the instigator the child was not responsible but the instigator was. According to him, if an illegal act was done in pursuance of a conspiracy all the conspirators were liable. If the conspiracy was for killing a particular person but someone else was killed, section 111 took care of that. It dealt with the responsibility of the man pulling the strings from behind. His plea was that the case was covered by section 111 P. P.C.,but in case that section was found to be inadequate sections 301 and 109 fully covered the ground.

799. Learned counsel also relied on *Betts do Ridley v. Rex*<sup>348</sup>; *Allan Bainbridge v. The Queen*<sup>349</sup>; *Boyd v. United States*<sup>350</sup> and *Sahib Dltta v. Emperor*<sup>351</sup>.

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<sup>348</sup> 22 Cr, Rep. 148

800. So far as the cases relied upon by the learned counsel for the a appellant are concerned, Mr. Bitalvi submitted that most of them were distinguishable, and one of them, which was to some extent similar namely, *Po Po Ya v. Emperor*<sup>352</sup>; did not lay down good law. He, therefore, submitted that the High Court had rightly convicted the appellant, *inter alia* under section 111, P. P.C.

801. Mr. Yahya Bakhtiar, in reply, submitted that the submission of Mr. Batalvi that the expression "probable consequence" in section 111, P.P.C., can be substituted with the expression "incidental to the execution of the design" was not tenable. According to him, Mr. Batalvi's stress on the point that the test whether the abettor could foresee as a reasonable man the consequences of his abetment is objective and not subjective is not correct, and in this connection he also referred to a passage from Russel on Crime, Twelfth Edition, page 162 to the effect: "Nowadays, is submitted, the test should be subjective and the person charged as accessory should not be held liable for anything but what he either expressly commanded or realised might be involved in the performance of the project agreed upon. It would on this principle, therefore be a question of evidence to satisfy the jury that the accused did contemplate the prospect of what the principal has in fact done, Of course, in considering the evidence, the jury will naturally bear in mind the probability that what the ordinary average man would have foreseen was also foreseen by the accused, and that his present denial, now that he is charged, may be false." Even on the "objective" test what has to be judged is to see whether the abettor as a reasonable man could visualize or foresee at the time of abetment the commission of the different act as a result of the commission of the act abetted. As for the cases and textbooks on foreign law quoted by Mr. Batalvi, it was submitted that they did not deal with or define 'probable consequence' as used in section 111. P.P.C., As to English law, it was submitted that there was no provision analogous to section 111, P.P.C., in the Accessory and Abetment Act, 1861 and therefore, quotations from English law were of no assistance. Similarly. Mr. Batalvi had not pointed to any American statute law containing any provision similar to section 111. P.P.C., So far as the cases of *Betts & Ridley v. Rex*<sup>353</sup>; *Allan Banbridge v. The Queen*<sup>354</sup>; *Boyd v. United States*<sup>355</sup>; were concerned it was contended that these were not relevant as they did not deal with any provision similar to section 111, P.P.C.; and that even otherwise on their own facts, it is clear that these cases did not relate to the situation where the principal offender had killed a person different than the one intended.

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<sup>349</sup> 43 Cr. Rep. 194

<sup>350</sup> 142 US 1077

<sup>351</sup> 20 PR 43

<sup>352</sup> AIR 1919 Low. Bur 20

<sup>353</sup> 22 Cr. A. Rep. 148

<sup>354</sup> 43 Cr. A. Rep. 1514

<sup>355</sup> 142 US 1077

802. So far as the case of *Sahib Ditta v. Emperor*<sup>356</sup>; is concerned, it was submitted that it was not relevant as the "act done" was not different from the "act abetted" and section 111 was wrongly applied.

803. I am inclined to agree with Mr. Yahya Bakhtiar that the judgments from the English and American Courts are not very relevant as the facts therein bear no similarity to the facts of the present case and that It has also not been shown that they dealt with a provision similar to section 111 of the Penal Code. Similarly, most of the cases from the Sub-Continent relied upon by either of the two since are not apposite, as these cases did not relate to the situation where the principal offender had killed a person different from the one intended. The only case dealing with this situation is *Po Ya v. Emperor*. The facts of the case were that the appellant Po Ya and another accused were alleged to have attacked one Lu Pe, a headman of a village while he was driving a bullock-cart accompanied by a little boy Po Myit. The appellant had instigated the attack on Lu Pe who was hit with a stick from behind, but the blow hit him only on the side of the head and the main force of the blow fell on the head of the little boy who was either sitting besides or behind him on the cart and the blow fractured his skull. Po Myit died as a result of the fracture. Lu Pe was also severely injured. On these facts the appellant Po Ya was convicted of murder and sentenced to death. He was also found guilty of an offence under section 326, I.P.C. for causing grievous harm to Lu Pe. In these circumstances the learned Judges in Loner Burma observed: "When the boy Po Myit was struck on the head, the case appears to be that contemplated in section 111, I. P.C. where an act is abetted and a different act is done. Po Ya undoubtedly Abetted his confederate's attack on Lu Pe but he could be held liable for the injury caused to Po Myit only, if the act which caused injury was probable consequence of the abetment. And it is clear that it was not. If I instigate A to strike B, it is by no means a probable consequence" that A will strike somebody else who happens to be close-by at the time. Po Ya can therefore be held liable only for what he and his confederate did to Lu Pe in pursuance of their common intention of causing grievous hurt to him....."

804. In my view this judgment does not lay down good law. It is apparent from the facts that Po Myit was sitting besides or behind Lu Pe. Therefore, a reasonable man would have foreseen that the attack on Lu Pe might result in the blow being deflected to the person who was sitting beside him. The view taken in this case, moreover, has not been followed in any other case and Mr. Batalvi invited us to reject it, and I agree with him.

805. The only other instance having a similarity to the present case is an illustration quoted by Russell, while dealing with this subject at page 172 (Eleventh Edition), in his work on "Crime". He observes; "More difficult questions arise where the principal by mistake commits a different crime front that to which he was solicited by the accessory.

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<sup>356</sup> 20 PR 43



It has been said that if *A* commands *B* to kill *C* and *B* by mistake kills *D* or aiming a blow at *C* misses him and kills *D*. *A* will not be accessory to this murder because the person was different (1 Hale P.C. 617; 3 Con. Inst. 51). But as pointed out by Gour, Sir Michael Foster, *Animadverts* on this view holding that the order was to commit murder and the fact that the wrong person was murdered was no exoneration of the crime. (Foster Cr. L. 372; 1 Hawk, P.C. c. 29, s. 22).

806. According to Sir Hari Singh Gour the view of Foster has been adopted in our Penal Code and enacted as illustration (a) in section 111, as opposed to the view of Lord Hale. (See Penal Law of India by Hari Singh Gour, 6th Edition, page 480). Thus, according to Gour, in a case where a person is ordered to kill another and in pursuance of the command he aims at him but by mistake another person is killed, the case fails under the mischief of section 111 as the killing of the person other than commanded can be deemed to be a probable consequence of the order given. I am inclined to agree with this view.

#### **Killing of Kasuri's father was probable consequence of conspiracy**

807. In the present case the conspiracy which constituted the abetment was to murder Ahmad Raza Kasuri. In pursuance of that conspiracy a murderous assault was in fact launched at him with automatic weapons. The bullet missed Kasuri, but his father who was sitting next to him in the car was hit and killed. The act done, namely the murder of Ahmad Raza Kasuri's father was thus clearly in pursuance of the conspiracy to kill Kasuri.

808. The killing of Ahmad Raza Kasuri was a task assigned by Zulfikar Ali Bhutto to the FSF which he knew was equipped with sophisticated and automatic weapons. As a man of ordinary common sense and prudence he was also expected to know that bullets fired from rifles and automatic weapons have long ranging killing potential, and if they missed the target could hit and kill another person. Thus, when the conspiracy was to murder Ahmad Raza Kasuri by using the FSF the danger of another person being killed as a result of a bullet fired at Ahmad Raza Kasuri ought to have been visualized as a 'probable consequence'. Limited imagination cannot be pleaded as a defence. For, a person who sets in motion a plan to murder, and his co-conspirators implement the plan and mount a murderous attack on the victim but miss him and kill a person nearby, he is responsible for the acts of his agents committed in furtherance of the conspiracy, because such a result is the probable consequence of the murderous attack. When a man conspires to murder, and in furtherance of the conspiracy an attack with automatic weapons is mounted on the person intended to be murdered, he cannot plead that he could not visualize that the probable consequence would be that a bullet may miss the target and kill another person nearby. No man can say that he did not authorize an act which he could or ought to have foreseen as the probable consequence of his conspiracy. If he did not, he might and ought to have foreseen and is liable to the

same extent as if he had foreseen. The death of Kasuri's father was thus clearly the probable consequence of the murderous attack on Ahmad Raza Kasuri.

809. Relying on *Queen-Empress v. Mathura Das and others*<sup>357</sup> and *Harnam Singh v. Emperor*.<sup>358</sup> Mr. Yahya Bakhtiar contended that, in any case, the act of appellants Arshad Iqbal and Rana Iftikhar Ahmad in firing 30 rounds of ammunition was a reckless act, such as to negate the proposition that the death of Ahmad Raza Kasuri's father was a probable consequence of the alleged conspiracy.

810. A perusal of the two judgments relied upon by Mr. Yahya Bakhtiar, shows that both were cases of robbery, during the course of which murder was committed. In the first case, after having laid down the test, namely that;

"The test in these cases must always be whether, having regard to the immediate object of the instigation or conspiracy, the act done by the principal is one which, according to ordinary experience and common sense, the abettor must have foreseen as probable,"

and adding that;

"the determination of this question as to the state of a man's mind at a particular moment must necessarily always be a matter of serious difficulty, and conclusions should not be framed without the most anxious and careful scrutiny of all the facts."

Learned Chief Justice proceeded to observe that there was no satisfactory material before him from which he could infer that the abettors must have known that excessive violence would be employed such as was likely to result in death or even in bodily injury likely to cause death. It will be seen that the principle laid down in this case is not different from the conclusion reached by me in the preceding paragraphs, but In its application to the facts of that particular case the learned Chief Justice formed the opinion that excessive violence had been used, by the culprits at the spot, which could not have been foreseen by the abettors.

811. Similarly, in the second case having spelt out the same principles, the learned Judges of the Lahore High Court concluded that even assuming that the appellant before them was an abettor, it could not be said that murder was a probable consequence of the abetment to commit robbery. The discussion of the facts in the body of the judgment shows that the learned fudges were not convinced that resort to violence was a probable consequence of the original conspiracy to commit robbery. It

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<sup>357</sup> 6 All. 491

<sup>358</sup> AIR 1919 Lah. 256

may not be possible to agree with the conclusion formed by the learned Judges on the facts of that case, but that is not the question before me. The relevant fact for the present purpose is that in both the cases, the finding of fact recorded by the Court was that the violence resulting in death was uncalled for in relation to the conspiracy in pursuance of which the offence of murder came to be abetted.

812. Now, in the present case, the submission made by Mr. Yahya Bakhtiar, overlooks the basic fact that when sophisticated automatic weapons with tremendous power of rapid firing were to be employed in the execution of the conspiracy, the agents at the spot could not be accused of indulging in recklessness, or use of excessive violence, if they fired 30 rounds in rapid bursts on seeing Ahmad Raza Kasuri's car approaching the Roundabout, and then negotiating the same on its, forward journey. It has to be remembered that the direction to kill did not contain any restriction that killing was not to be resorted to during the night, or that it should be done during the day, or in any particular manner. Obviously, the actual plan of execution was left to the choice of the concerned assailants, and the law recognizes such situation as squarely falling within the ambit of conspiracy. However, one thing I certain that the killing was to be achieved through the personnel of the FSF, so as to utilize their skill together with sophisticated arms and ammunition which were in their use. Whereas on the one hand attack by sophisticated weapons is by itself a measure of some guarantee of achieving a sure and desired result with more certainty, but on the other hind at the same time, their use involves a risk also, and that is that generally firing by sophisticated weapons especially during a dark night and particularly on fleeting targets is done through bursts, and not one stray shot as the target in darkness obviously is not visible clearly. A burst leads to a series of shots which vary from 5 to 30 depending upon the pressure of a trigger and thus projects simultaneous exit of a large number of bullets in a parabolic form covering an area of certain well-known diameter which is called a "beaten-zone" or sometimes as a "danger sphere", with the result that if a person other than the desired victim is located or falls within that zone he is sure to be hit. This danger is therefore inherent in the deployment of sophisticated weapons during a dark night and is natural and most probable and relevant consequence of their use, just in the same way, as the use of fire involves in it the natural and consequent probability of its spreading beyond expectations. In the example given, it is the fire which expands, whereas, in the case of sophisticated weapons, it is the beaten-zone of the bursts which will expand and vary depending upon the facts relevant for that purpose. To continue with the subject, a person who asks to set the house of another on fire cannot escape the consequent liability if the fire spreads and embraces the adjoining houses also. Nor can a person who directs breach of canal for purpose of destroying by inundation water the house, factory, land or crops, etc. of another escape liability if the escaped water causes similar danger to others also. Similarly if one abets and conspires for an attack on another by sophisticated arms and ammunition, he cannot escape liability if anybody else also gets hit due to his being within the beaten-zone of those weapons. Giving another example, if 4 person keeps a lion in his house and lets it loose to kill his enemy he cannot escape

liability if the lions pounces upon others also. Sophisticated weapons, if one can so say in this context, are no less ferocious than a lion. If you let them loose ask somebody to fire with them then you are responsible if they kill all those who come within their range or beaten-zone which naturally extends to a sufficiently wide diameter, and you cannot be heard to say that you desired only one man to be killed by an attack in that manner. It is such a natural and probable consequence which is so evident at the time when direction for use of such weapons is given that a person cannot plead its ignorance.

812-A. It has further to be kept in mind that the burst fired by Arshad Iqbal was only in the nature of a warning, so as to indicate to the other appellant Rana Iftikhar Ahmad that the marked vehicle was approaching the chosen spot. This plan cannot, by any stretch of imagination, be termed as a reckless act. It has further to be noted that although several bullets hit the body of Ahmad Raza Kasuri's car, yet only one or two bullets hit his father, who was seated next to him on the front seat of the car. In the presence of these facts, it is futile to argue that the actual assailants had indulged in a reckless act, so as to radically depart from the plan of the conspiracy.

813. It is, therefore, clear to me that the killing of Nawab Muhammad Ahmad Khan has been rightly held by the High Court to be a probable consequence of the conspiracy resulting in the murderous attack on Ahmad Raza Kasuri, and also that it was committed in pursuance of this conspiracy.

### **Section 301, P.P.C., not applicable to certain appellants**

814. The High Court has convicted Zulfikar Ali Bhutto, Mian Muhammad Abbas and Ghulam Mustafa, *inter alia*, under section 301, P.P.C. I am, however, of the view that the aforesaid section was not attracted in their case, as it applies only to the actual killer and not to the abettor. For the latter the provision applicable appears to be section 111 of the P.P.C. This is clear from the wording of section 301 itself, which, so far as relevant says: "If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender if of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause". This provision, therefore, applies to a person who actually causes the death of another and not to one who is merely an abettor.

815. Generally speaking, it is true that an abettor may, in certain circumstances, be also held responsible for the consequences which may result because of his having abetted the offence, but an abettor is not strictly speaking, a person who can be held guilty under section 301, P.P.C. for committing culpable homicide. The legislature appears to have separately provided for the case of actual killer and that of the abettor.

So far as the actual killer was concerned, it was considered that if he has caused the death of a person whose death he may neither have intended nor known himself likely to cause, he can still not be heard to say that he really never intended to do so and that the death of the victim which was actually caused, was never intended by him. In case of a heinous offence such as murder, this defence has not been made available to the killer.

816. The above fiction of law, however, has not been made applicable to the abettor with the same rigidity as applicable to the actual killer. So far as the abettors are concerned, the law has laid down two conditions before they can be held liable for the result achieved which may be different from the one intended by them. A reference to the proviso to section 111 shows that in such a type of case liability of the abettors will arise if (i) the act done was the probable consequence of their abetment and (ii) was committed under the influence of the instigation or with the aid or in pursuance of the conspiracy which constituted abetment. On comparison of this section with section 301, P.P.C., it will appear that the abettor's liability is conditional on fulfillment of the conditions hereinbefore mentioned, whereas the application of section 301 to the actual killer is totally unconditional. That the case of abettors, even in the cases of murder, comes within the mischief of section 111 is evident from illustration (c) appended to the aforesaid section. Thus I am of the view that the persons other than the actual killers, namely, Zulfikar Ali Bhutto, Mian Muhammad Abbas and Sufi Ghulam Mustafa could not be held guilty under section 301, P.P.C., but were liable to be convicted under section 302, P. P.C., read with sections 109 and 111, P. P.C.

#### **Non framing of Charge under section 111, P.P.C., not material**

817. I now turn to the question as to what is the effect of not framing a charge against the appellants Zulfikar Ali Bhutto, Mian Muhammad Abbas and Ghulam Mustafa under section 111, P.P.C., under which they have been convicted. They were charged under section 302, P.P.C., read with sections 109 and 301, P.P.C., but were convicted under section 302 read with section 301, P. P.C., and sections 109 and 111, P. P.C., I have just held that section 301 of the Pakistan Penal Code was not attracted to their case.

818. The learned Special Public Prosecutor, Mr. Ijaz Hussain Batalvi submitted that in view of the provisions of section 237, Cr. P.C., the omission to frame a charge under section 111 against these appellants was of no consequence, because under section 237, Cr. P.C. an accused may be convicted of the offence which he is shown to have committed although he was not charged with it.

819. In reply, Mr. Yahya Bakhtiar submitted that as a general rule a person cannot be convicted of an offence unless he is charged with it, but there are two exceptions enacted in sections 237 and 238, Cr. P.C. Under section 238, Cr. P.C., which is not

relevant here, he can be convicted of a minor offence. Section 237, Cr. P.C., the provision of which is presently relevant, is in the following terms:-

"237. - (1) If, in the case mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it."

820. Section 237 is thus controlled by section 236, which is as follows:-

"236. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences."

The learned counsel pointed out that according to this section, it applied only to those cases where "a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute".

821. Mr. Yahya Bakhtiar contended that in the present case no such doubt existed and in respect of the murder of Muhammad Ahmad Khan the appellant could only be charged under section 111, P.P.C., as it was nobody's case that there was any conspiracy or abetment to kill Muhammad Ahmad Khan. Consequently, sections 236 and 237 were not applicable to the facts of the case. It was further submitted that the illegality was of such a fundamental character that it was riot curable under sections 535 and 537, Cr. P.C., as in the proceedings before the trial Court the appellant had no notice that he had to meet the ingredients of the offence under section 111, P.P.C., which created a criminal liability distinct from that of the actual perpetrators of the murder, who were directly liable under sections 302 and 301, P.P.C., as also distinct from the liability created by section 109, P.P.C. He argued that on the contrary in the notice given to him in the charge and in the evidence led by the prosecution the appellant Z. A. Bhutto was sought to be made liable only under sections 302, 301 and 109, P.P.C., and not section 111.

822. Relying on a large number of cases, namely, *Emperor v. Isan Mohammad*<sup>359</sup>; *Sinnaswami Chetti v. Pannadi Palani Goundan*<sup>360</sup>; *Raghu Nath v. Emperor*<sup>361</sup>; *Jaffar v. Idris Ali*<sup>362</sup>; *In re: Thaikkottahil Gunheen*<sup>363</sup>; *Tamizuddin Master v. Asimuddin*<sup>364</sup>; *The State v. Abed*

<sup>359</sup> 31 Bom. 218

<sup>360</sup> 26 Cr. LJ 1057

<sup>361</sup> 27 Cr. LJ 152

<sup>362</sup> PLD 1951 Dacca 128

*Ali*<sup>365</sup>; *Nanak Chand v. The State of Punjab*<sup>366</sup>; *Surajpal v. The State of Uttar Pradesh*<sup>367</sup>; *Azam Ali v. Rex*<sup>368</sup>; *Naruirchand v. State*<sup>369</sup>; *Muhammad Anwar v. State*<sup>370</sup>; *Cibakar Das v. Saktidhar Kabiraj*<sup>371</sup>; and *Cheda Singh v. King-Emperor*<sup>372</sup>; it was submitted that the following principles are deducible therefrom:

- (1) That the framing of a specific and distinct charge in respect of every distinct head of criminal liability constituting an offence is the foundation for a conviction and sentence therefore.
- (2) That the absence of a specific and distinct charge in respect of every distinct head of criminal liability is a very serious lacuna in the proceedings.
- (3) That the exceptions to the above-said rules are contained in sections 237 and 238, Cr. P.C.
- (4) That the section 237 is controlled by section 236 and would apply only in those cases where section 236 applies.
- (5) That section 236 only applies to the cases where the act or series of acts is of such a nature that it is doubtful which of the several offences the facts which can be proved will constitute.
- (6) That the application of sections 237 and 238, Cr. P.C. as well as sections 535 and 537, Cr. P.C. is subject to the overriding principle that the accused person had notice of the offence for which he is convicted.
- (7) That in doing so no prejudice is caused to the accused.
- (8) That in case of constructive liability the accused cannot be convicted unless he has notice of it.
- (9) That each case depends upon its facts and the relevant question that has to be decided is whether the evidence adduced in support of the charge gave sufficient

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<sup>363</sup> 25 Cr. LJ 212

<sup>364</sup> AIR 1946 Cal. 305

<sup>365</sup> PLD 1963 Dacca 806

<sup>366</sup> AIR 1955 SC 274

<sup>367</sup> PLD 1956 SC (Ind.) 21

<sup>368</sup> (1950) 51 Cr. L J 1073

<sup>369</sup> 1952 Cr. LJ 246

<sup>370</sup> PLD 1956 SC (Pak.) 440

<sup>371</sup> 54 Cal. 476

<sup>372</sup> AIR 1924 All. 766

notice of all the facts which would constitute the offence for which he is convicted.

(10) That if the offence charged and the offence for which the accused is convicted fall under distinct heads of criminal liability the conviction would be illegal as in such a case the accused cannot be said to have notice of the charge or the circumstances he is called upon to meet and is prejudiced in his defence.

823. In reply, Mr. Batalvi submitted that sections 236, 237 and 238 of the Code of Criminal Procedure empower the Court in certain cases to convict an accused person with respect to an offence even though he was not charged with it. Sections 236 and 237, Cr. P.C. were to be read together, and when there is no difficulty about the facts and it is alleged that the accused has done a single act or series of acts but they are of such a nature that it is doubtful which of several offences the accused has committed on those facts, and i.e., is charged with having committed one of such offences, he may be convicted of a different offence. He may be convicted of the offence which he is shown to have committed, although he was not charged with it. The facts have to be set out in the charge with sufficient particularity so that the accused may know what act or acts he is said to have done, and the question remains only one of law as to what offence the act or acts constitute. In this case the accused was given sufficient notice of the facts constituting the offence. All the relevant facts which were later proved through evidence were contained in the charge. The trial Bench on the basis of the facts came to the conclusion that along with section 301/302 read with section 109, section 111 was also applicable. The basic requirement of law to come within the purview of sections 236 and 237, Cr. P.C. in this case was fulfilled. The accused were convicted on the basis of proved facts of which they also had due notice through the charge as framed. In support of these submissions the following cases were relied upon:-

- (1) *King v. Charles John Walker* AIR 1924 Bom, 450.
- (2) *Begu v. Emperor* AIR 1925 P C 130,
- (3) *Mohammad Anwar v. State* PLD 1956 S C (Pak.) 440.
- (4) *Ahmad Ali v. State* PLD 1960 Dacca 828.
- (5) *Amir Bakhsh v. Tike State* PLD 1960 Lab. 15.
- (6) *Fateh Muhammad v. State* PLD 1961 Lab. 212.
- (7) *State v. Muhammad Latif* PLD 1962 Kar. 756.
- (8) *State v. Abed Ali* PLD 1963 Dacca. 806.



(9) *Muhammad Yaqub v. State* 1971 SC M R 756.

824. If may observe that the law on the subject has been laid down with sufficient clarity both by the Privy Council and this Court. In *Dequ v. Emperor*<sup>373</sup>; the appellants were convicted under section 201, P.P.C., although they had not been charged under that section and were only charged under section 302 P.P.C. On appeal to the High Court the convictions and sentences of the appellants were affirmed. On appeal to the Privy Council, the point was raised that in the circumstances of the case the conviction of the appellants under section 201 was bad in law. Viscount Halden, J., delivering the judgment for the Board, after reproducing the provisions of sections 236 and 237, at page 131 observed;

"The illustration makes the meaning of these words quite plain. A than may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. That is what happened here. The three men who were sentenced to rigorous imprisonment, were convicted of making away with the evidence of the crime by assisting in taking away the body. They were not charged with that formally but they were tried on evidence which brings the case under section 237. Their Lordships entertained no doubt that the procedure was a proper procedure and one warranted by the Code of Criminal Procedure."

825. This judgment was followed by this Court in *Mohammad Yaqub v. State*<sup>374</sup>. An extensive discussion on this point has been made by this Court in the earlier case of *Muhammad Anwar v. State*<sup>375</sup>. In this case the ratio of *Suraj Pal v. State of Uttar Pradesh*<sup>376</sup>; was distinguished and the applicability of sections 236 and 237, Cr. P.C. discussed and the conclusion expressed as follows:-

"Without wishing in any way to minimize the importance of precision in the framing of charges, so that the accused persons may be apprised, at the earliest stage, of the case which they are required to meet we consider that the suggestion that accused persons in cases like the present carry in the forefront of their minds throughout their trial, the precise terms of the charges framed against them, and in presenting their defence, are guided by their conception of the nature of the charge try the exclusion of the evidence which is presented to the Court, is altogether too fanciful and remote from reality to be worthy of acceptance. As has been seen, the case was of such a nature as to be precisely within the terms of sections 236 and 237, Cr. P.C. Consequently there was no

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<sup>373</sup> AIR 1925 PC 130

<sup>374</sup> 1971 SC MR 756

<sup>375</sup> PLD 1956 SC (Pak.) 440

<sup>376</sup> PLD 1956 S C (Ind.) 21

irregularity committed, the prejudicial effect of which we might have felt it necessary to estimate."

826. The survey of the cases shows that the law, as embodied in sections 236 and 231 of the Criminal Procedure Code read together appears to be that if on the facts alleged it was doubtful which of several offences the proved facts will constitute, and on the facts eventually proved, of which the accused may be taken to have notice during the recording of evidence at the trial an offence other than the one charge has been committed, then he may be convicted of this other offence; even though he was not charged with it. Their Lordships of the Privy Council have indeed put it simply and shortly by saying that a man may, be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made.

827. The question next arises whether the provision of sections 236 and 237, Cr. P.C. are attracted to the circumstances of this case. The question whether the abettors in the circumstances of this case could not be convicted under section 302, P.P.C., for the murder of Nawab Muhammad Ahmad Khan by recourse to the provisions of sections 301 and 109, P.P.C. is not free from doubt. It is possible to argue that section 301 is a special provision covering cases of murder and, therefore, displaces section 111, which is a general provision, According to the special provision the actual perpetrator is made liable for the murder if he kills a person different from the one he intended to kill, and that on account of this fiction enacted under section 301, P.P.C., the abetment contemplated under section 109, P.P.C., can be deemed to be an abetment of the act of the actual perpetrator, even when he kills a person different from the one originally intended. On these premises, in such circumstances, a charge could conceivably be laid under section 302 read with sections 301 and 109, P.P.C. I have however, found that it is not possible to have recourse to the double fiction alluded to above and that the case of the abettors, is covered by section 111, P.P.C., while section 301, P.P.C, applies only to the actual killer. In any event, this was a case where it was doubtful which of several offences the facts which can be proved will constitute and hence fell within the purview of section 236, Cr. P.C. Being a case falling within the contemplation of section 236, Cr. P.C. the appellants could be convicted of the offence which was shown have been committed although not charged with it under section 217, Cr. P.C. However, the facts have to be set out in the charge with sufficient particularity so that the accused may know what act or act he is said to have done, so that the question that remains is one of law, namely, as to what offence the act or acts constitute.

828. A perusal of the charge shows that it is framed under three heads of which the first two are relevant here. The first charge is in the following terms:-

"Firstly, that you, sometime in the middle of 1974, conspired with Masood Mahmood approver countenancing the murder of Ahmad Raza Kasuri, then a

member of the National Assembly, through the agency of the Federal Security Force, and thereby committed an offence punishable under section 120-B of the Pakistan Penal Code, and within the cognizance of the Lahore High Court, Lahore".

According to the first charge the accused is informed that:-

- (i) He conspired with Masood Mahmood;
- (ii) countenancing the murder of Ahmad Raza Kasuri;
- (iii) through the agency of the Federal Security Force; and
- (iv) thus committed an offence punishable under section 120-B, P. P.C.

829. The definition of the criminal conspiracy given in section 120-A is that "when two or more persons agree to do, or cause to be done an illegal act ... such an agreement is designated a criminal conspiracy." Section 120-B, which deals with punishment of criminal conspiracy, then lays down that "Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence....."

830. Thus the allegations set out above bring home to the accused the factual foundation for the said charge, and also bring to his attention the provision (S. 120-B) relevant to its punishment. He is further notified of the criminal conspiracy entered into between him and Masood Mahmood approver for murdering Ahmad Raza Kasuri through the agency of the FSF. The words "through the agency of FSF" are sufficiently comprehensive so as to include the personnel of the FSF, and the weapons as well as the ammunition employed by the said force.

831. The second head of the charge states that "that in pursuance of the aforesaid criminal conspiracy and in pursuance of directions given by Masood Mahmood approver at your behest to Mian Muhammad Abbas, co-accused, an attack with automatic weapons was organized by Ghulam Hussain approver, in the course of which Ghulam Hussain approver, Arshad Iqbal and Rana Iftikhar Ahmad co-accused, all of the Federal Security Force, fired on the night between the 10th and 11th November, 1974, at the Shadman-Shah Jamal Colony Roundabout, Lahore, at the car of the aforementioned Ahmad Raza Kasuti which was occupied at that time by him, his father Nawab Muhammad Ahmad Khan and two ladies resulting in the murder of Nawab Muhammad Ahmad Khan ... and an offence under section 302, P.P.C. was committed in consequence of your aiding and abetment and you have thereby

committed an offence punishable under section 302, P.P.C., read with sections 109 and 301 of the Penal Code."

832. A reading of the above shows that the accusations made in this charge have been set out in the form of separate allegations and that all the ingredients necessary to bring home the charge of murder punishable under section 302 read with sections 109 and 111, P.P.C. have been brought to the notice of the accused. He has, for instance, been told that he was the originator of the criminal conspiracy for the murder of Ahmad Raza Kasuri; that it was in pursuance of the said conspiracy and in pursuance of the directions given by Masood Mahmood at his behest to Mian Muhammad Abbas that an attack was organized with automatic weapons through Ghulam Hussain approver, in the course of which the co-conspirators fired at the car of Ahmad Raza Kasuri (the details of its occupants have been duly mentioned in the charge). The accused was further informed that the said attack resulted in the murder of Nawab Muhammad Ahmad Khan, which offence was in consequence of your aiding and abetment."

833. In view of the mention of all these allegations to argue that the accused was not told, or that he was not charged with a specific allegation that the murder was the "probable consequence" of his aiding and abetment and he was also liable under section 111, P. P.C., is misconceived. The charge clearly sets out the relevant facts for attracting the provisions of section 111, P. P.C., namely, that the man sought to be killed (Ahmad Raza Kasuri) was attacked in pursuance of the conspiracy in that behalf but a different man was actually killed (Nawab Muhammad Ahmad Khan), and attributes the death of the latter to be a consequence of the conspiracy to get the former (Ahmad Raza Kasuri) killed by the use of automatic weapons.

834. Thus the accused was given sufficient notice of the facts constituting the offence. The facts were set out in the charge with sufficient particularity so that the accused could know what act or acts he was said to have done, and the only question that remained was one of law namely, as to what offence the said act or acts constituted. It has been observed that the true test is whether the facts are such as to give the accused notice of the offence for which he is going to be convicted though he was not charged with it, so that he is not prejudiced by the mere absence of a specific charge. Thus the conviction of the appellant under section 111, P.P.C. in the absence of a specific charge in that behalf is not open to any objection.

### **Section 227 of the Criminal Procedure Code not applicable**

835. The last objection taken by Mr. Yahya Bakhtiar to the conviction, under section 111, P.P.C. of Zulfikar Ali Bhutto was that section 111, P.P.C., was merely added at the time of writing the judgment. It was submitted that in doing so an illegality was committed which vitiated the trial. Attention was drawn to section 227, Cr. P. C which reads as follows:-

"(1) Any Court may alter or add to any charge at any time before judgment is pronounced, or, in the case of trials before the Court of Session or High Court, before the verdict of the jury is returned or the opinions of the assessors are expressed.

(2) Every such alteration or addition shall be read and explained to the accused."

836. Under section 231, Cr. P.C it was pointed out, the accused in such a case has a right to ask for the recall of all the prosecution witnesses and can cross-examine them. Since the trial Bench, while adding the charge under section 111, P.P.C. did not consider that the provisions of section 227 (2), Cr. P.C. were mandatory and had to be complied with the trial, therefore, became illegal. In support of this submission, attention was drawn to a judgment of the Allahabad High Court reported as *Ranghunath v. Emperor*<sup>377</sup> wherein it was observed:-

"Section 227 of the Cr. P.C. deals with alteration of a charge but it requires that the alteration shall be read and explained to the accused. The accused must know what he is charged with and what offence he has to answer. Section 237 of the Cr. P.C. must be read with section 227 of that Code. A Court cannot convict an accused person of an offence of which he has not been told anything."

837. I find that, in the first place, this case, is distinguishable on the short ground that it was not at all a case falling under section 237 of the Code, as in the same judgment, after the passage reproduced above and relied upon by Mr. Yahya Bakhtiar, it is stated:-

"Then again section 237 applies only to cases mentioned in section 236, Cr. P.C. which deals with cases in which an act is of such a nature that it is doubtful which of several offences the facts will constitute. In the present case it was not doubtful whether an offence under section 34 of the Police Act or under section M of the Indian Penal Code was committed. In my opinion, section 237 cannot apply to this case and even if it can be said to apply, the accused must be told what he is charged with. It is not just to convict a man without telling him his offence."

838. Thus the ratio of the case appears to be that section 237, Cr. P.C. was not applicable, and further that sufficient particulars of the charge were not provided so as to give notice to the accused of the offence for which he was ultimately convicted. Thus the judgment relied upon by Mr. Yahya Bakhtiar is not an authority for the proposition that a person cannot be convicted for an offence which is not included in the original charge; in fact it does not relate to section 237, Cr. P.C.

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<sup>377</sup> 27 Cr. LJ 152

839. In the second place, the observation made by the learned Judge regarding the application of section 227 of the Code to a case falling under section 237 thereof, besides being in the nature of an obiter, is contrary to the express provisions of the statement, and also the clear enunciation of the law by the Privy Council as well as by this Court in the cases mentioned above. This case must, therefore, be read as being confined only to its own peculiar facts.

#### CONCLUSIONS AS TO APPLICABILITY OF SECTIONS 111 AND 301, P.P.C.

840. For the foregoing reasons, I am of the view that on the facts proved in this case, section 301 of the Penal Code was applicable only in the cases of appellants Arshad Iqbal and Rana Iftikhar, but not in the cases of appellants Zulfikar Ali Bhutto, Mian Muhammad Abbas and Ghulam Mustafa. Their cases were covered by section 111 of the Penal Code, and they could be convicted under this section even if they had not been specifically charged there under, in view of the enabling provisions contained in section 237 of the Criminal Procedure Code read with section 236 thereof. All the essential and relevant facts constituting the offence made punishable under section 111, P.P.C. as the probable consequence of the conspiracy, were fully set out in the charges read out to these appellants at the commencement of the trial, and later brought out in evidence led by the prosecution. In the circumstances, the determination of the correct provision of the Penal Code applicable to their cases was primarily a question of the application of the law to the proved facts. The High Court did not, therefore, act illegally in recording a conviction under this section,

#### **Applications of bias against the Trial Bench**

841. I am now left to deal with the last remaining contention pressed before us by Mr. Yahya Bakhtiar, learned senior counsel for Zulfikar Ali Bhutto appellant, that this entire trial stands vitiated for the reason that the learned presiding Judge of the trial Bench, namely, Mr. Justice Mushtaq Hussain was biased against the appellant, and that the trial was not conducted fairly inasmuch as the evidence was not recorded faithfully in accordance with the deposition of the witnesses, objections raised by the defence were frequently not recorded, and more often illegally overruled; and that as a result of the cumulative effect of such prejudicial orders the appellant was compelled to boycott the trial from the 10th of January, 1978 onward as a measure of protest.

842. It is indeed a most painful and delicate part of this case in which the learned Acting Chief Justice of the High Court who headed the trial Bench was accused of bias and prejudice against the appellant in the course of this trial. I have therefore, devoted my most anxious considerations to it.

843. To begin with, it shall be helpful to briefly narrate a few facts relevant to this part of the case. On the 5th of July 1977 the Martial Law was imposed in the country with the fall of Bhutto's regime at the time, and a new administrative set up was established for the governance of the country under the Chief Martial Law Administrator. In that connection on the 6th of July 1977 Mr. Justice Aslam Riaz Hussain, the then Chief Justice of the Lahore High Court was appointed as the Acting Governor of the Province and in his place on the 13th of July 1977 Mr. Justice Mushtaq Hussain, senior puisne Judge of the Court was appointed as its Acting Chief Justice. Afterwards on the 16th of July 1977 he was also appointed as the Chief Election Commissioner, in the then existing vacancy, for the purposes of holding the impending elections to the National and Provincial Assemblies in the country.

844. On 28th of July 1977, Mr. Justice Mushtaq Hussain in his capacity as the Chief Election Commissioner held a televised Press Conference and announced revised Election Rules to ensure free and impartial elections. In that connection he also made some observations against the March 1977 general elections held in the past in the country under the previous regime. This evoked an immediate reaction from the Pakistan People's Party and on 3rd August 1977 the Central Executive of the Party under the Chairmanship of the appellant passed a resolution which was also released to the Press.

845. On the 27th of July 1977, Mr. Ahmad Raza Kasuri had filed a private complaint under section 302/307/34 read with sections 120-A, 109, 102-B, P.P.C. against Zulfikar Ali Bhutto and three others in the Court of local Magistrate at Lahore. This case was transferred for trial on the original side of the Lahore High Court and was pending before a Division Bench of which Mr. Justice K. M. A. Samadani was a member.

846. In the meantime the investigation into this case on the basis of the F.I.R. dated 11th of November 1974 was also revived and Zulfikar Ali Bhutto appellant was arrested from his residence in Karachi on the 3rd of September 1977. On the 17th of September 1977 an incomplete challan in the case was presented to the Court of the Magistrate concerned who forwarded it to the Sessions Court at Lahore.

847. On the 13th of September 1977 Mr. Justice K. M. A. Samdani sitting singly allowed bail to the appellant in the challan case, observing, however, that the bail could be cancelled in the light of any fresh material being made available to connect him with the crime. On that same day on 13th September 1977 Mr. Justice Mushtaq Hussain, the Acting Chief Justice of the Lahore High Court, on an application made by the State through the Special Public Prosecutor a day earlier ordered the transfer of the challan case for disposal on the original side of the High Court and constituted a Bench of five Judges, headed by himself for the purpose. The accused were summoned in the case for 24th September 1977. In the meantime on 18th September 1977 the learned Judges of the Division Bench who had earlier taken cognizance of the private complaint of Ahmad

Raza Kasuri passed an order directing that the same may also be placed before the Full Bench trying the challan case.

848. On the 20th of September 1977, an application was made on behalf of the State in the High Court for the cancellation of the bail already granted to the appellant by Mr. Justice K. M. A. Samdani, in which a notice was issued to Zulfikar Ali Bhutto appellant. It was served on him in Karachi Jail wherein he had been detained from the 17th of September 1977 under Martial Law Order No. 12.

849. On the 21st of September 1977 the appellant filed a petition for special leave to appeal bearing No. 84-R of 1977 in the Supreme Court at Lahore against the order of the Acting Chief Justice dated the 13th of September 1977 transferring the challan case from the Sessions Court to the original side of the High Court on a number of grounds. But it was dismissed by this Court on the 24th of September 1977, with the observation that in the first instance all the objections may be raised before the High Court.

850. Accordingly, on 4th October 1977 Zulfikar Ali Bhutto filed two petitions in the High Court, *viz.* Cr. Misc. No. 932-M of 1977 questioning the very constitution of the High Court and the validity of the appointment of the Acting Chief Justice; and Cr. Misc. No. 93.3-M of 1977 attributing personal bias to him. But both these petitions were dismissed by the trial Bench of the High Court by a consolidated order passed on 9th of October 1977. This order gave rise to a Petition for Special Leave to Appeal No. 281 of 1977 against it to this Court. But at the hearing on the 13th of November 1977, after considerable discussion at the bar, Mr. Yahya Bakhtiar, learned counsel for appellant stated that he would like to withdraw the petition for special leave to appeal in so far as it was based on the allegations of bias in the learned Acting Chief Justice arising out of his Misc. Petition No. 933-M of 1977 by reserving his right to suitably raise these and any other plea of prejudice caused to the appellant, afterwards in appeal from the final judgment of the High Court, or at any earlier stage of the trial, if necessary. In view of this statement the petition was dismissed to the extent of the impugned order arising out of the aforesaid Misc. petition. Leave was however, granted to the petitioner against the impugned order arising out of Cr. Misc. No. 932-N4 of 1977 against the very constitution of the High Court and the legality of the appointment of Mr. Justice Mushtaq Hussain as the Acting Chief Justice. But after hearing the parties this appeal was also dismissed by a Bench consisting of five Judges of this Court on the 8th of December 1977.

851. In the meantime 11th of October 1977, the trial of the accused in this case before the Bench consisting of the five learned Judges of the Lahore High Court headed by its Acting Chief Justice was commenced. On the 5th of November 1977, Zulfikar Ali Bhutto filed a miscellaneous application before the trial Bench objecting to an interview granted to Mr. Mark Tully and another foreign correspondent by the Acting Chief



Justice. Its report appeared in The Pakistan Times of November 2, 1977 and was also broadcast by the B. B. C. on the basis of dispatch sent by Mark Tully.

852. On 18th December 1977 Zulfikar Ali Bhutto moved yet another application (Cr. Misc. No. 7-M of 1978) under section 561-A, Cr. P.C. for transfer of the case for trial by another Bench, or Judge preferably the Sessions Judge, Lahore. This application was actually filed in the Registry on 18th December 1977. But it could not be placed before the trial Bench in time before the Court closed for the winter vacation on 22nd December 1977. In these circumstances on 22nd December 1977, the appellant sent another application through the Jail authorities to the Court praying that the transfer application already filed by him may be taken up for hearing by a Bench for disposal at an early date during the winter vacation. But this request could not be allowed and the two applications were placed before the trial Bench immediately on the reopening of the Court after the winter vacation on 9th January 1978, when they were heard in chamber and dismissed in *limine*

853. In this court before us the allegation concerning bias and prejudice in the learned Acting Chief justice of the High Court are mostly based on what was incorporated in the aforementioned transfer petition dated 18th December 1977 (Cr. Misc No. 7 m of 1978) which was dismissed in *limine* by the learned trial Bench on 9th January 1978 Mr. Yahya Bakhtiar learned counsel for the appellant dwelt at great length before us in support of his contentions in this behalf, and submitted that the trial of the appellant was vitiated by the alleged bias and prejudice exhibited by the trial bench headed by the learned Acting Chief Justice. In order to supplement his arguments also filed three more charts incorporation some further instances of the alleged bias and prejudice borne on the record of this case.

854. All these allegations were strongly refuted by the learned Special Public Prosecutor on behalf of the State. He submitted that they were altogether misconceived and ill founded. According to him, the learned Acting Chief Justice of the Lahore High Court, much less the trial Bench as such, did not entertain even the slightest bias or prejudice against the appellant throughout the course of the trial of this case. He laid stress to contend that out of the trial Bench consisting of the five learned Judges these allegations were almost exclusively confined against the learned Acting Chief Justice only. The other four learned Judges constituting the Bench were independent and capable enough to deliver their own impartial judgment in the case, free from any bias and prejudice. It could not therefore, be held that the judgment under appeal delivered by the learned trial Bench was tainted. He submitted that right from the beginning of the trial these allegations were made with the ulterior design to make a mockery of the trial in slanderous abuse of the law, and to shake public confidence in the judiciary and must therefore, be rejected with contempt.

855. Let me therefore first briefly deal with the allegations contained in the aforementioned transfer petition (Cr. Miss. No. 7-M of 1978), one by one in the background of the facts before us. It is an unusually lengthy application, running into 53 typed pages comprising 31 paragraphs containing allegations of bias, partiality and prejudice of the learned Acting Chief Justice against Zulfikar Ali Bhutto appellant. Its first 18 paragraphs are mostly a repetition of the allegations contained in the three earlier petitions (Cr. Miss. No. 932-M and 933-M of 1977 and the petition dated 5th of November 1977) made by the appellant before the trial Bench relating to some of the incidents that took place in Court during the course of the hearing. These are followed by a lengthy paragraph 19, divided into a number of sub-paragraphs and clauses containing instances about the alleged "Remarks against the petitioner". "Insulting treatment to the Defence Counsel" and "Incorrect Record of Proceedings". In the succeeding paragraphs are recorded some further incidents that had happened in Court in support of the allegations.

856. To begin with, in the petition, emphasis was laid on a resolution passed by the Central Executive of the Pakistan People's Party under the chairmanship of the appellant on 3rd August 1977 against Mr. Justice Mushtaq Hussain, the Chief Election Commissioner. The necessary facts in this connection briefly are that on 28th July 1977, Mr. Justice Mushtaq Hussain, in his capacity as the Chief Election Commissioner, held a purposes Press Conference announcing the revised rules framed for the purposes of ensuring fair, free and impartial elections for the coming National and Provincial Assemblies under him in the country. In that connection he also stated that in the past "Democracy had not been given a chance and the electoral process so abused as to completes frustrate its objectives. He gave several examples how in the March elections those who wished to contest had been prevented from doing sir by force or fraud while genuine votes were nullified by bogus votes or by outright theft of ballot boxes." On this on 2nd August 1977 the Central Executive Committee of the Pakistan People's Party at its meeting held under the chairmanship of Zulfikar Ali Bhutto appellant expressed the opinion that the Chief Election Commissioner was prejudiced and partial against the Party, and in its statement issued to the Press alleged that combining the office of the Chief Election Commissioner with that oaf the Chief Justice of the largest High Court in the country was a travesty of justice, and that the Chief Election Commissioner who was superseded by the People's Party Government has already betrayed his bias and prejudice against the Party in his recent television Press Conference, and had made irrelevant, fortuitous and baseless remarks against it and thereby shown his partisan attitude. In that connection on 5th August 1977 the Election Commission of Pakistan issued 4 Press note repudiating these allegations, and remarked that the observations by the Chief Election Commissioner were supported by the records of the, Commission. The Commission however, decided to ignore the allegations as it had no intention to enter upon any controversy in this behalf.

857. In this connection it may be mentioned that a Full Bench of five Judges of this Court has already authoritatively held in Criminal Appeal No. 109 of 1977, decided on 8th December 1977, *Re: Zulfikar Ali Bhutto v. The State*<sup>378</sup> that the appointment of Mr. Justice Mushtaq Hussain as the Acting Chief Justice of the Lahore High Court in the vacancy was validly made, and that in the circumstances of the case there was also no bar in the way of his further appointment as the Chief Election Commissioner. It is a matter of recent history that the announcement of the results of the last general elections to the National Assembly held in March 1977 under the regime of Zulfikar Ali Bhutto appellant gave rise to large scale and country-wide agitation against the allegedly massive rigging of the elections against the mandate of the Constitution. This ultimately led to the downfall of the previous regime and the imposition of the Martial Law in the country on 5th July 1977. These allegations of massive riggings in the elections had its echoes also in the historic case of *Begum Nusrat Bhutto v. Chief of the Army Staff*<sup>379</sup> against the imposition of Martial Law in the country, in the Supreme Court decided on 10th November 1977 which presents a dismal reading about the conduct of these elections and their results. The findings in the case were based on the information received from the records of the then Chief Election Commissioner, Mr. Justice Sajjad Ahmad Jan, a retired Judge of the Supreme Court, his judgments announced in some of the individual cases setting aside the elections of the important functionaries of the then Government, and the Press reports at the time. In these circumstances, there is hardly any doubt left in my mind that Mr. Justice Mushtaq Hussain, in his capacity as the Chief Election Commissioner in his televised Press Conference held on 28th July 1977 was merely speaking from the records of the Election Commission of Pakistan as was also pointed out in the Press note issued by the Election Commission on 5th August 1977. I have therefore, no hesitation in finding that his observations at the time were based on facts borne on the record of the Commission and did not betray any bias in him. This allegation against him was therefore, altogether unjustified. At any rate, there was nothing against the appellant personally in the televised Press Conference.

858. It is also mentioned in the resolution of the Central Executive Committee of the People's Party, and it was often repeated before the trial Bench as well as in this Court, that Mr. Justice Mushtaq Hussain, who was the senior puisne Judge of the, Lahore High Court, was superseded at the time of the appointment of the Chief Justice of that Court by Zulfikar Ali Bhutto's Government in the vacancy arising on the retirement of Mr. Justice Sardar Muhammad Iqbal as the Chief Justice in October 1976, he, therefore, entertained a grievance against him. But this contention is evidently misconceived. It may be that ordinarily supersession amongst the Judges in such matters is not well received by the public and the Judges alike. The hard fact, however, remains that the office of the Chief Justice of the High Court is not available to any one as a matter of right by seniority. Howsoever one may not like it, nonetheless it is just incident of the service.

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<sup>378</sup> PLD 1978 SC 40

<sup>379</sup> PLD 1977 SC 657 At pp.695 to 698

But it cannot be that an incumbent who was superseded starts cultivating bias and prejudice against his employer merely for that reason. At any rate such a thing can never enter the mind of the Judges, much less influence them in their task in the administration of even-handed justice under all circumstances. In the instant case Mr. Justice Mushtaq Hussain, along with seen other learned Judges, was superseded on that occasion at the time of the appointment of the Chief Justice and he was not the only one singled out. In spite of this none of them had resigned for that reason and they all continued in service. Afterwards he was even sent abroad during Bhutto's regime on an assignment with the international conference held in connection with the Humanitarian Laws.

859. In this connection it is also noteworthy that actually in the resolution of the Central Executive Committee of the Pakistan People's Party in question at which the appellant presided, it was alleged that the Chief Election Commissioner (Mr. Justice Mushtaq Hussain) who was superseded by the People's Party Government had already betrayed his "bias and prejudice against the party" in his recent television Press Conference and had made irrelevant, fortuitous and baseless remarks against it and thereby shown his partisan attitude. In this all that was alleged was that he was biased and prejudiced against the Pakistan People's Party as such because of his supersession during the People's Party Government. Even in the Criminal Petition for Special Leave to Appeal No. 84-R of 1977 filed in this Court, at the earliest, on 21st September 1977, by the appellant before the commencement of the trial, it was merely alleged that in view of this resolution passed by the Central Executive Committee of the party under the chairmanship of the appellant, judicial propriety demanded that he should not have constituted the Full Bench to be presided over by him or withdrawn the private complaint in this case from the Division Bench already seized of the matter.. Strictly speaking, neither in the aforementioned resolution nor even in the petition for special leave it was even alleged that because of this supersession the learned Acting Chief Justice was biased and prejudiced against the appellant personally. I am, therefore, of the opinion that this contention has no force and there could be no legitimate and genuine apprehension in the mind of the appellant on this account.

860. In the transfer petition a grievance was also made about the order dated 13th September 1977 passed by the learned Acting Chief Justice whereby he had transferred this case to the High Court on its original side without notice to the accused and constituted a Full Bench of five Judges headed by himself for its disposal, while the private complaint filed by Ahmad Raza Kasuri was pending before another Division Bench of the Court. In this connection it is necessary to make a mention of few additional facts.

On the 27th of July 1977, Mian Iftikhar Ahmad Tari, ex-M.P.A. and once a Provincial Minister in Bhutto's regime had filed a private complaint against Zulfikar Ali Bhutto and 19 others under sections 120-B, 119, 193, 194, 201, 202, 203, 323, 342, 345, 363, 365,

504 and 506 read with section 109, P.P.C., in the Court of Ilaqa Magistrate at Lahore. At the same time he had also filed an application (Cr. Misc. No. 93-T of 1977) under section 526 of the Code of Criminal Procedure in the High Court for the transfer of the case from the Court of the learned Magistrate to the High Court for its trial on its original side. In that case, on the 30th of July 1977, Shafi-ur-Rehman J. accepted the application without any notice to the respondents before him. He observed that considering the nature of allegations made and the personalities involved it was eminently a fit case for enquiry and trial on the original side by the High Court. In that connection he also relied on the decision in *Ali Nawaz Gardezi v. Yusuf Ali Khan*<sup>380</sup>; which *prima facie* permitted a transfer of the case even at that stage. The learned Judge then forwarded the file to the Acting Chief Justice for the constitution of a larger Bench to try the complaint case, as according to him, it was "exceptional on facts as well as in law". Similarly, Ahmad Raza Kasuri had also filed a complaint under sections 302/307, 120-A, 120-B, 109/34, P.P.C., in respect of the murder of his father Nawab Mohammad Ahmad Khan against Zulfikar Ali Bhutto and others and likewise on his application (Cr. Miss. No. 100-T of 1977) made under section 526, Cr. P.C. on 15-8-1977. Shafi-ur-Rehman, J. transferred it to the High Court for reasons recorded in Cr. Miss. No. 93/T-77 (*Iftikhar Ahmad Tari v. Z. A. Bhutto and others*). In due course this case was also referred to the Division Bench consisting of K. M. A. Samdani and Mazharul Haq, JJ. for disposal on its original side. Another complaint case *Re: Syed Zafar Ali Shah v. Zulfikar Ali Bhutto and 10 others* under sections 302, 307, 342, 365, 395, 396, 397, 398, 440, 148, 149, 109 and 114, P.P.C., was similarly transferred to the High Court (Cr. Miss. No. 113-T of 1977) on the 20th of August 1977. These three cases against Zulfikar Ali Bhutto involving allegations of heinous nature were thus transferred without notices to the accused by a learned Judge to the High Court for disposal on its original side.

861. Afterwards, the police also filed an incomplete challan in this case before a Magistrate at Lahore on the 11th of September, 1977. The Magistrate acting under section 193 of the Code of Criminal Procedure, sent the challan the same day to the Court of Sessions. The State filed an application in the High Court for its transfer to the High Court on 12th September, 1977. On this on the 13th of September, 1977, the learned Acting Chief Justice of the High Court in due course passed the order transferring the case to the High Court for disposal on its original side and constituted a larger Bench of five Judges headed by him.

862. In this connection in disposing of the aforementioned Criminal Petition for Special Leave to Appeal No. 84-R of 1977, this Court had provisionally observed that as to the grievance that the challan case could not have been transferred by the High Court for trial on its original side without notice to appellant, subsection (3) of section 526, Criminal Procedure Code does vest in the High Court the power to act in this behalf either on the report of the lower Court or on the application of a party interested, or on

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<sup>380</sup> PLD 1962 Lah.558; PLD 1963 SC 51

its own initiative; but the specific requirement of notice, as contained in subsection (6) of the section, refers only to the case when application for transfer is made by the accused person.

863. Thereafter, the appellant filed the Criminal Miscellaneous Petition No. 933-M of 1977 in the High Court *inter alia*, reiterating his grievances in this behalf, which was dismissed in *limine* on 9th October 1977. It was held that the transfer of the case was rightly made without notice under section 526, Criminal Procedure Code. This order gave rise to the Criminal Petition for Special Leave to Appeal No. 281 of 1977 filed in this Court by the appellant. But after a considerable discussion at the Bar, Mr. Yahya Bakhtiar stated that he would like to withdraw the petition for special leave to appeal in so far as it related to the allegation of bias on the part of the learned Acting Chief Justice as contained in appellant's Misc. Petition No. 933-M of 1977, reserving his right to raise all these and any other points that may arise, causing prejudice to the petitioner, at the time of the appeal, if any, against the final judgment of the High Court; or at any earlier stage of the trial, if so advised.

864. It appears that this part of the case concerning the validity of the order dated 13th September 1977 transferring the challan case to the High Court and constituting the Full Bench for its disposal was not pressed at the hearing before this Court in the second round of the litigation nor was any great emphasis laid on it before us during the arguments now. Anyhow I find no force in this contention. As mentioned above the three successive complaints filed against Zulfikar Ali Bhutto and others had been transferred by Shafi-ur-Rehman, J. without notice on the grounds that considering the nature of allegations made and the personalities involved they were fit cases for trial on the original side of the High Court and a Division Bench nominated to deal with them as they were "exceptional on facts as well as in law". These considerations, if I may say so, were applicable with greater force to the present case as well. In this connection I am of the considered view, in keeping with our tentative opinion expressed in the order of this Court dated 24th September 1977 while dismissing the Criminal Petition for Special Leave to Appeal No. 84-R of 1977 in this case, that subsection (3) read with subsection (6) of section 526, Criminal Procedure Code, permits the High Court to transfer, on its own initiative, a criminal case from one subordinate Court to another or to itself, in its administrative capacity, requiring no notice to the parties. In the circumstances learned Acting Chief Justice, in his discretion had the lawful authority and was justified in transferring the challan case to the High Court without notice. There was no legal bar in ordering the transfer on 13th September 1977 when only the interim challan had yet been filed and produced before the Local Magistrate. There could have been no *mala fide* intention on the part of the Acting Chief Justice in constituting the Full Bench of five learned Judges headed by him to try this case in view of its great national importance and complicated nature. It is usual for the Chief to head the Benches constituted to hear important cases of national importance. It was for the same reasons that this appeal has been heard by the Full Court consisting of nine Judges and is now left with seven

Judges to dispose it off after a hearing extending over seven months. In the Civil Petition for Special Leave to Appeal No. 84-R of 1977 filed by the appellant it was wrongly averred that the private complaint of Ahmad Raza Kasuri pending before the Division Bench consisting of K. M. A. Samdani and Mazharul Haq, JJ was withdrawn from them. In fact the Division Bench had *suo motu* forwarded it to the Full Bench for disposal after the challan case had been transferred to the High Court. It may also be mentioned here that, in this case as discussed above, the learned trial Bench was fully justified in proceeding with the challan case first while the complaint case was still pending with it for disposal.

865. In this case *in innuendo* it was also suggested in the trial Court that it was only after the appellant had been allowed bail by K. M. A. Samdani, J. on 13th September 1977, that learned Acting Chief Justice had hastened to withdraw the challan case from the lower Court. transferred it to the High Court and constituted the Full Bench with himself at its head immediately on 13th September 1977. But the contention was adequately repelled by the learned trial Bench in its order dated 9th October 1977. Actually, the State had applied to the High Court for the transfer of the challan case on 12th September 1977. On this the learned Acting Chief Justice had passed the order for the transfer of the case in the early hours of the day's work on 13th September 1977, while the order allowing bail to the appellant was passed afterwards by K. M. A. Samdani, J. a few minutes before the recess Which started at 10-30 a.m. It was presumably for this reason that this precise plea was not afterwards raised in the Cr. Misc. No. 7-M of 1978 before the High Court.

866. It was next alleged by the appellant in his transfer petition (Cr. Misc. No. 7-M of 1978) that at the first hearing of this case on 24th September 1977 the appellant had requested for three weeks adjournment. The Bench however, adjourned the case for 7 days, as required by law assuring him that further adjournment would be considered if needed by his counsel. On this the learned junior counsel for the appellant (Mr. Aftab Gul, Advocate) intervened, requested for more time and stated that "even after Mr. Bhutto had made a request for adjournment of the case for three weeks, this Court had granted a shorter adjournment". When he was asked by the Court to explain as to what did he mean by it, the appellant rose, put his learned counsel aside and stated that: "I have the fullest confidence in your Lordship" and the matter ended there. But, afterwards after this news item had come in the Press the appellant appeared in Court and raised an objection and he tried to explain that at the previous hearing, the Court had taken amiss the intervention made by Mr. Aftab Gul, Advocate and the question pertained only to fixing the next date of hearing of the challan case, about which he had expressed his satisfaction and confidence in that limited context and not fullest confidence generally in the Bench". He added that it was inconceivable for him to have specifically instructed his counsel to move the Supreme Court against the prejudice and partiality of Mr. Justice Mushtaq Hussain and yet on the same day and at about the same time expressed his fullest confidence in the Bench presided over by him. But the trial

Bench in rejecting the explanation in its order dated 9th October 1977 observed that "this explanation is not worthy of any credence."

867. This order dated 24th September 1977 was actually passed in the presence of the appellant and his learned counsel and there does not appear to be any ambiguity about it. The Criminal Petition for Special Leave to Appeal No. 84-R of 1977 against the order dated 13th September 1977 passed by the learned Acting Chief Justice had been filed in this Court on 21st September 1977. After hearing it on 24th September 1977 it was dismissed as withdrawn with the observation that the contentions, may in the first instance, be raised before the Bench in the High Court itself. At the time the appellant did not personally appear in the Supreme Court. He was, however, personally present before the High Court on 24th September 1977 when he had voluntarily made the statement reproduced above with full awareness. It is not his case that this statement was not correctly recorded by the High Court, although afterwards he took up the stand that on 24th September 1977 he had expressed his satisfaction and confidence in the Court in a limited context implying thereby that he was satisfied with the seven days adjournment on the assurance of the Court that if needed, a further adjournment would be granted. The learned trial Bench has rejected this explanation and is not possible to hold otherwise in the circumstances.

868. This brings me to another incident which took place in the course of the hearing of this case before the trial Bench on 8th October 1977. It was alleged by the appellant that while Mr. Ghulam All Memon, learned counsel for him was arguing Cr. Misc. No. 932-M of 1977, the appellant rose on two or three occasions to intervene on certain points. On each occasion he was categorically assured that he would be given ample opportunity to address the Court after the conclusion of the submissions made by his learned counsel and that the learned Acting Chief Justice had even promised that he would be free to make his submission for "hours and hours". However, at the conclusion of the arguments by his learned counsel on 8th October 1977, before the appellant could rise to make his submission as promised to him, the learned Acting Chief Justice, to his utter surprise observed that he could not be permitted to address the Court but, if he wanted, he could submit his views in writing, for which the services of a Stenographer were made available to him. But he politely refused to avail of the offer made by the Court to make his submissions in writing and brought this fact on the record by filing a note to the effect in Court on the same day.

869. In this connection the learned trial Bench in its order dated 9th October 1977 has stated that while the learned counsel for the appellant was arguing, the appellant intervened and made an attempt to address the Court and the Bench agreed to give him an opportunity to make submissions after the close of arguments by his counsel. After the arguments were concluded the accused was asked to give his sub. missions in writing and the services of a Stenographer/Typist were also made available to him and he was told that Court would announce its judgment on the next day after taking into



consideration his written submissions. It was denied that at any stage the Bench gave any indication that he would be heard for "hours and hours" or that he would be heard to supplement the arguments of his counsel.

870. If a party is represented by a counsel he has no right to address the Court except with the permission of the Court. At the relevant time in this case the appellant was also represented by his counsel who was addressing the arguments. According to the appellant during the course of arguments when he tried to intervene the Court had assured him that he could make his submissions for hours and hours after the conclusion of the arguments by his learned counsel. But the learned trial Bench in its order disposing of this objection observed that the Bench did not give any indication to the appellant that he would be heard for "hours and hours" to supplement the arguments of his learned counsel. It, however, seems to me that it is quite unnecessary to make any further probe into these two opposing contentions. Suffice it to mention here that admittedly the learned Bench had agreed to give the appellant an opportunity to make his submissions after the close of arguments by his counsel. I am, therefore, unable to appreciate as to why a reasonable opportunity was not allowed to him in this behalf in case he was not willing to give his submissions in writing and for the purpose avail of the services of the Stenographer placed at his disposal. But actually nothing turns on this episode and it does not show any bias or prejudice of the Court against him. If that were not so, why should the Court have in the first instance agreed to allow an opportunity to him to make his submissions at all. Whatever the reasons, it appears to me that the Court had passed the order in good faith in telling the appellant to file his submissions in writing, after having heard his counsel at full length, and there could be no *mala fides* of the Court about it. It is, therefore, difficult to conclude from is that the learned Acting Chief Justice was biased and prejudiced against him. At the same time it is not possible to appreciate the stand taken by the appellant in refusing to reduce his submissions in writing, if he was at all keen about them.

871. It was next alleged in the petition under consideration that before the commencement of the trial, when the application for cancellation of bail was being argued, within the passage of a night, a dock was put up in the Court and the appellant was directed to be seated behind it with two Police and Intelligence Officers sitting on his left and right. This seating arrangement was continued throughout at the hearing and had deprived the appellant of an opportunity to give instructions to and communicate with his lawyers in confidence in Court out of the hearing of these officers. Moreover, according to the appellant, the dock was specially devised and put into use for the first time in the High Court at Lahore to cage and humiliate him. The object was also to devalue his importance and stature and to psychologically prepare public opinion for a biased and prejudicial decision. It was further alleged that the day the dock was put up in Court the appellant along with the other accused were sitting behind it, when the Acting Chief Justice rudely remarked "we know that you are used to very comfortable life. I am providing you with a chair behind the dock instead of a

Bench". In these circumstances, the learned counsel for the appellant submitted that there was absolutely no reason whatsoever for these unkind and uncalled for remarks made by the learned Acting Chief Justice and this betrayed his deep seated bias against the appellant.

872. ut in disposing of this objection the learned trial Bench in its order dated 9th January, 1978 explained that the drink had to be prepared for segregating the accused from the large number of visitors to the Court who in view of the sensational nature of the trial had been swarming the Court room. The appellant was given a seat in the front row which was quite close to the seats of his learned Advocates who had been taking instructions from him regularly during the trial and talking to him in whispers. The other accused persons had also been off and on though not so frequently, giving instructions to their learned counsel without any inconvenience. The appellant was given all possible facilities to meet his counsel not only in Jail but also in the High Court Once, at times convenient to his Advocates. According to the Court the observation about the 'Bench' had to be made in view of the protest of the appellant about the nature of chairs on which he was made to sit and that these were the chairs meant for the use of the learned members of the Bar and were quite comfortable, It is observed in the order that it is well known that the accused persons, either stand in the dock or are made to sit on benches in Courts.

873. In this connection the learned Special Public Prosecutor submitted that on that occasion the appellant actually gave a Press interview in Court during tea break and the necessity was therefore, felt in good faith for segregating the accused from the public. Mostly all Courts holding Sessions trials have their own built in docks for the purpose. It may be observed that the purpose of providing the docks in Courts is not to humiliate the accused but to protect them and to segregate them fort the safer and better administration of justice without interference. Every under trial prisoner is entitled to mercy, kindness and humanitarian treatment.

874. In the Court room in the High Court in which this trial was held there was no dock and it was therefore, installed before the commencement of the trial. According to the appellant this dock was specially devised to cage, humiliate and devalue him in public eye. This may be an unfortunate impression formed by him in the circumstances, but otherwise the necessity for segregating the accused was genuine and apparent from the fact that very great interest had been shown by the public in this case. It is therefore, difficult to doubt the *bona fides* of the Court in installing the dock in question. Similarly, there appears to be some room for misunderstanding concerning the remarks about the "benches" against which the appellant was aggrieved. The allegation that as a result of the seating arrangement in the dock the appellant and his learned counsel were handicapped in communicating with each other in Court for the purpose of this case is not borne out from the record. It does not appear that any complaint to that effect was at any time brought to the notice of the Court or any application was at all moved in

Court to draw its attention towards any such difficulty experienced by the appellant in the course of the trial. Before us neither the other accused nor any of their learned counsel supported the appellant, in this complaint, nor did they ever make any such grievance in Court about it.

875. In the course of the trial, on 1-11-1977, the learned Acting Chief Justice gave an interview to two foreign correspondents, Mr. Mark Tully, a BBC's representative and another covering the trial. The interview was broadcast by the B. B. C. and reported in the national Newspapers including the Pakistan Times, Lahore. The learned Acting Chief Justice told the two correspondents that he would like everyone to feel that this case was being tried in a way it should in a country with common law tradition and said that the Amnesty International had wished to observe the trial but that he was disappointed as they did not do so. He inquired from the two correspondents if they had all the facilities they needed to cover the case. He told them that the case was being tried by a Bench of five Judges which he was heading himself, whereas the law demanded only two. He also said that all the proceedings were being taped. Besides; all those involved had been given photo copies, of every evidence produced in the Court. In this connection he further informed them that defendant Z. A. Bhutto himself had questioned the typed-record more than once and that these questions had been checked against the tape-recorded version.

876. Objections were raised against this interview given to the two foreign correspondents reported in the national Press and also broadcast by the B.B.C. It was alleged that its object was to impress upon the world that the appellant was getting a fair trial according to common law traditions and that special arrangements had been made like tape-recording the proceedings. The appellant objected that it was not normal for Judges claiming to follow common law traditions to give Press interviews about the manner and conduct of trial whilst the trial is a progress. According to him it indicated that the learned Acting Chief Justice had felt that the general impression inside and outside the country was that he (appellant) was not getting a fair trial, and that therefore, the learned Acting Chief Justice was at pains to dispel this impression in the said Press interview.

877. It is surprising that even this Press talk of the learned Acting Chief Justice that the trial would be held in the full light of the day should have evoked such a reaction on the part of the appellant. The interview should have rather allayed his fears, if any. It does not lend any support to his plea of bias in the learned Acting Chief Justice, rather it proves to the contrary.

878. It was further alleged that in the course of the trial the appellant fell ill and could not attend the Court for several days under the advice of the Doctors. In spite of this the learned trial Bench did not allow sufficient adjournment and proceeded to record the evidence of the prosecution witnesses in his absence on more than one occasion to his

great prejudice. This aspect of the case has been discussed at length at another place in this judgment and I have held that in the circumstances of the case, in exercise of the discretion vested in the learned trial Bench under section 540-A of the Code of Criminal Procedure, it had dispensed with his personal attendance in Court on the three occasions in question. In thus proceeding to record the prosecution evidence in the presence of his learned counsel no prejudice was in fact occasioned to him. 3 see no force in the contention of the learned counsel that the orders passed by the learned trial Bench in this connection were *mala fide* and illegal.

879. It was also alleged in the transfer petition that once again the learned Acting Chief Justice could not repress his resentment and prejudice with regard to his supersession when Mr. Ghulam Ali Memon learned counsel for the appellant was arguing the Cr. Misc. No. 932-M/ 1977 and No. 933-M/1977. It is said that addressing the appellant in open Court, the Acting Chief Justice asked him "as to what would be the effect if, 'in a hypothetical case', under coercion and under influence (or words to that effect) Judges were superseded at the time of appointment of the Chief Justice?" In this connection in the corresponding para. of the order in question passed by the trial Bench, it is stated that the hypothetical case referred to in this behalf was put to the learned counsel for properly understanding his point of view and that it was never addressed to the appellant. According to the Court, this observation should have rather allayed his fears, if any, if he had understood the hypothetical case as referring to his order of having superseded the Judges at the time of appointment of the Chief Justice, as having been passed under coercion and undue influence. In the opinion of the learned trial Bench at any rate, even if, these remarks had been addressed to the appellant (which was not correct) it could not be possibly construed as an example of resentment and prejudice on the part of the Acting Chief Justice against him. In this connection we find from the Cr. Misc. Nos. 932 and 933-M of 1977 filed on behalf of the appellant and the consolidated order dated 9-10-1977 passed by the learned trial Bench that diverse questions relating to the constitution of the Lahore High Court in the absence of the Chief Justice as its permanent incumbent, who was at the time appointed as the Acting Governor of the Province, and the capacity of the learned Acting Chief Justice to act in his place were raised before it. These questions were also agitated at length in this Court before us in Criminal Appeal No. 109 of 1977 by special leave filed by the appellant. It may be that in the course of the arguments advanced on behalf of the appellant before the trial Bench such a hypothetical question might have been raised in the context of the plea to the effect that the Lahore High Court was not properly constituted in the absence of the Chief Justice himself who was appointed as the Governor of the Province of Punjab, or that thereby the Office of Chief Justice had not fallen vacant and consequently the appointment of the Acting Chief Justice could not have been lawfully made in his place. The hypothetical question rested on the basic assumption that the order of supersession of Judges in the appointment of the Chief Justice had been procured by coercion and undue influence and for this reason the analogy did not hold good and did not have even the remotest relevancy to the

supersession of Mr. Justice Mushtaq Hussain in the appointment of the Chief Justice of the High Court during the Pakistan People's Party Government. It could not therefore, be possibly construed in the light in which the appellant has done it and there appears to be room for misunderstanding of the *bona fide* remarks, made by the learned Acting Chief Justice which could have been avoided. It cannot, however, be held that thereby he was biased and had betrayed it towards the appellant.

880. According to the appellant, once when his learned counsel was addressing the Court on Martial Law, the Acting Chief Justice went out of his way to uphold it by stating irrelevantly, and unnecessarily that the appellant had also continued the Martial Law in the country during his regime after the fall of the Yahya's regime. These remarks, even if made by the learned Acting Chief Justice appear to be too trivial and casual in nature. Nor were they meant to be personal against the appellant so as to merit any serious consideration.

881. According to the appellant in the course of this trial, the learned Acting Chief Justice had again and again condescended to tell the appellant in patronizing tone that in 1968 he gave a "fair trial" to him when he was detained under the Defence of Pakistan Rules, during the country-wide agitation against President Ayub Khan, and that on a couple of occasions he added that he also got an Inspector-General removed for maltreating him during his detention. It was submitted that the appellant was at a loss to understand as to why those patronizing and lordly assertions were being repeated. In disposing of this objection, the learned trial Bench observed that the matter pertained to 1968, when the appellant was under detention and his case was decided by Mr. Justice Mushtaq Hussain (as he then was) and it could not give rise to any resentment on his part, except for the reason that a reference to the integrity of the Acting Chief Justice may not have been palatable now to the appellant in his drive to malign the High Court for political reasons in this trial. In my opinion the observations attributed to the learned Acting Chief Justice could have been said innocently to reassure him that if he could administer justice for him without fear or favor when he was under detention during the country-wide agitation against President Ayub Khan in 1968 he need not entertain any doubts against him now in this trial. There could not possibly have been any sinister or ulterior motive or insinuations against the appellant behind these remarks attributed to the learned Acting Chief Justice. This grievance of the appellant is rather far-fetched, if not wholly imaginary.

882. It was also alleged that when the appellant was unable to attend the Court for several days due to his illness supported by the medical certificates, the Acting Chief Justice, afterwards decided to constitute a Board of Doctors of his own choice to verify if he was really unable to attend the Court. In that connection he is said to have called for a Stenographer to dictate his order. However, as the Stenographer was not present in Court, the learned Acting Chief Justice is attributed to have loudly told his Private Secretary. "Khokhar, where have the other two fellows gone? I hope they are not

suffering from Influenza (call them) what are they meant for". According to the appellant such sarcastic, insulting and uncalled for remarks were made almost daily in the course of the trial. Once or twice, according to him, when the insulting remarks had touched the limits of his patience and he got up to protest, but anticipating the reactions, the learned Acting Chief Justice in a harsh and rude tone shouted "you sit down". On another occasion, without rhyme or reason, he shouted at the appellant and told him to "keep standing".

883. In disposing of this objection in the order dated 9-1-1978 the trial Bench stated that the reference to what was alleged to have been said to the Private Secretary was false and it was pointed out that Khokhar is the reader of the Acting Chief Justice and has never been his Private Secretary. In the opinion of the Court the appellant had given a twist to an act of the Court which was for his benefit. The appointment of a Board of Doctors should have been appreciated rather than decried against by him. The Court denied that any sarcastic or insulting and uncalled for remarks were ever made against the appellant in the course of the trial. According to the learned trial Bench the conduct of the appellant was not respectful and sometimes he also became unruly. At times he would rise from his seat and interfere in the proceedings, he was asked not to interfere and take his seat. Sometimes, while making his submissions he would keep sitting. There were occasions when he had to be directed to make his submissions while standing. In the opinion of the High Court the appellant had taken exception to such directions by twisting and introducing incorrect matters into it.

884. It is borne out from the record that at least on two separate occasions the learned trial Bench did constitute a Board of Doctors to medically examine the appellant after he had fallen ill in the course of his trial. There could be nothing wrong with those orders. But I am constrained to observe that on both these occasions the appellant refused to be examined by the Medical Board.

885. It was further submitted in the petition under consideration that on 16th of October 1977, when Mr. Ehsan Qadir Shah, learned counsel for the appellant was cross-examining Mr. Ahmad Raza Kasuri P.W. 1, a law point for arguments was raised and Mr. D. M. Awan, senior counsel for him, stood up to address the Court in that connection. But he had hardly uttered the words "My Lords", when the Acting Chief Justice in a loud voice asked him "Sit down", and refused to hear him. On this Mr. D. M. Awan helplessly remarked with utmost respect that:-

"My Lords, we know that all the restrictions are for the Defence Counsel."

This infuriated the Acting Chief Justice who severely reprimanded Mr. D. M. Awan and when he looked at him in astonishment, he (Acting Chief Justice) screamed at him saying:

"Why are you staring at me"

And the learned counsel was brow-beaten. After the incident, the learned Acting Chief Justice warned the representatives of the Press not to release any news concerning it to the Press.

886. But in giving its account of the occurrence, the learned trial Bench said that the behavior of Mr. D. M. Awan, counsel for the appellant at the trial, showed that he had acted as if he had completely aligned himself with his client. On 16th October 1977, Mr. D. M. Awan was unwell to resume the cross-examination of Ahmad Raza Kasuri P.W. I and at his request with the permission of the Court Mr. Ehsan Qadir Shah was allowed to take up the cross-examination of witness on behalf of the appellant. In this we do not know as to what was the precise law point which at the time had touched off the incident giving rise to this complaint. But it cannot be denied that at the time the witness was in the hands of Mr. Ehsan Qadir Shah and therefore, it could be said that Mr. D. M. Awan learned senior counsel for the appellant had no business to thus interfere with and interrupt the proceedings without the permission of the Court and he was accordingly asked to sit down. But instead of complying with the direction, he gratuitously made those remarks attributing partiality to the Bench in its face and then stared at it. I find that the learned counsel has filed a separate petition in this Court for expunction of the observations made against him, which is pending in this Court. I have therefore, refrained from expressing any final opinion in that behalf without having heard him. As at present advised, to say the least, on that date, i.e. 16th October 1977, when the trial of the accused was hardly five days old, nothing serious and out of the ordinary course, was brought to our notice from the record to have induced the learned counsel to have made the uncharitable remarks in the discharge of his professional duties as the defence counsel. In the circumstances there was nothing wrong in the learned Acting Chief Justice in having warned the Press representatives not to report anything about this incident concerning the Court and one of its senior Advocates.

887. As to the episode which took place in Court on 17th December 1977, when the appellant in addressing his counsel uttered the words "damn it" and was told not to address his counsel like that in Court, I have already dealt with it in some detail in an earlier portion of this judgment. It was an unfortunate incident. In this connection while I cannot absolve the appellant for his behavior displayed in Court on that occasion, despite the fact that, he was in a disturbed state of mind at the time, yet the learned trial Court after having already called upon Mr. Awan, to resume his submissions, could have just ignored his further remarks gratuitously uttered by him to the effect that "he had had enough". Nonetheless I find that the Court was vested with the authority and had exercised its control in passing the impugned order against the appellant on the merits which was warranted under the law. In my opinion, therefore, the appellant has failed to establish that in passing the impugned order, the learned Acting Chief Justice was biased and prejudiced against the appellant.

888. It was further alleged that in the course of the evidence the Special Public Prosecutor wanted to bring on record the report of the Enquiry Tribunal made by Shafiqur-Rehman, J. and Mr. D. M. Awan learned counsel for the appellant also supported the Special Public Prosecutor in the request. But the learned Acting Chief Justice disallowed the joint request and consequently it was not brought on the record. On this Mr. D. M. Awan submitted that some contents of the report were being proved and that almost everything concerning the report was being brought on record except the report itself. At this the learned Acting Chief Justice is said to have taken a very strong exception to these remarks and reprimanded the defence counsel for having made insinuations against the Court. But I find that the High Court was of the considered opinion that the report of the Enquiry Tribunal was not relevant and the mere fact that both the parties had agreed to its being brought on the record did not make the report admissible. The enquiry report in question was not admissible and could not legally form part of the evidence in the criminal trial notwithstanding the joint request of the parties. Even before us in this Court the learned counsel for the parties were not able to cite any law to show that it was legally admissible in the evidence with the consent of the parties, Therefore, the remarks uttered by the learned defence counsel were uncalled for and not justified. It rather belies the contention that the Acting Chief Justice was biased and prejudiced against the appellant and proves that he was impartial and did not accede to the request made by the prosecution supported by the defence in refusing to admit the evidence against law.

889. On the 7th of December 1977, the Acting Chief Justice had passed an order under section 265-M, Cr. P.C. to the effect that the Court would be working for longer hours beyond usual working hours till 4-00 p. m. on each day. Mr. D. M. Awan, learned counsel for the petitioner on the next day filed a written application and stated that it would not be possible for him to attend the Court daily till 4 O'clock in the evening. On this the learned Acting Chief Justice was stated to have taken a strong exception and reprimanded and compelled him to withdraw his application. In this connection the learned trial Bench has observed that in view of the delay in the trial which had kept five Judges of the Court busy in one case, the Acting Chief Justice had passed the order under section 265-M, Cr. P.C. that the Court would work till 4-00 p. m. each day. On this Mr. D. M. Awan lodged a protest in a language and manner in which Courts are never addressed by the Hon'ble members of the Bar. The Bench took strong exception to this on which Mr. D. M. Awan withdrew the application which he wanted to submit along with his, oral protest. The other learned counsel also made submissions but in proper language; for review of the order. Finding that the timing fixed by the Court, although they were convenient to the Court, were not found convenient by the learned counsel, a fresh order under that section was passed. In this Court also a fuss was made about this incident. Indeed it appears to us that it was too trivial a matter to be raised again in this Court by the appellant after it had been thus patched up and closed, and the application itself having been withdrawn by the learned counsel. Needless to



observe that under section 265-M of the Code the Court had the power to regulate the time of holding the sitting and it is difficult to approve of the defiant attitude adopted by the learned counsel at the time. Nonetheless ultimately good sense had prevailed by the accommodation shown by the Court. This circumstance does not betray any bias or prejudice on the part of the learned Acting Chief Justice either against the appellant or his learned counsel.

890. On 28-12-1977, during his examination-in-chief, Muhammad Abdul Vakil Khan (P.W. 14) had referred to an earlier incident when he was on patrol duty and had intercepted a jeep belonging to the F.S.F. According to him a person came out of the jeep and disclosed that he was "Inspector" in the F.S.F. but the word "Inspector" had not been specifically mentioned by the witness anywhere in his previous statements. In that connection the witness was cross-examined and asked the name of the Inspector but he did not give his name. In spite of this however, Mr. Justice Gulbaz Khan, who was then dictating the evidence sin that day, introduced the name of "Ghulam Hussain Inspector" in giving dictation to the Court Typist. On this spontaneously the learned defence counsel raised the objection against it, and immediately on verification from the witness in the witness-box the name of Ghulam Hussain was ordered to be deleted. According to the appellant this solitary but significant instance sufficiently reflected against the working of the mind of the Court. In disposing of this allegation the learned trial Bench explained that the name of Ghulam Hussain Inspector was dictated under mistake and that it was corrected then and there on the spur of the moment. In this connection it is common ground between the parties that at the time the evidence was being dictated to the typist by Gulbaz Khan, J. in the presence of the parties in open Court. This is the only solitary occasion in which this allegation was made concerning Gulbaz Khan, J. Otherwise, on the entire record of this case, there is not even a remote suggestion by the appellant to doubt his integrity which is free from blemish. We have therefore, no reason to doubt him and the explanation furnished by the Bench that the name of Ghulam Hussain Inspector was dictated under a mistake which was corrected there and then. It was altogether an inadvertent and *bona fide* human error and in the circumstances no motive could have been possibly ascribed to Gulbaz Khan, J. or the other learned Judges of the Bench.

891. It was asserted that actually the corrections, if any, in the record of the day to day proceedings were made as and when required, only during the conduct of the daily proceedings in Court. The suggestion hat in Court only the draft statements of the witnesses were prepared that, after Court time, they were recasted and retyped, was denied by the Court. We are least impressed by the suggestion against the learned Bench of having tampered with the record. Indeed if there was any truth in it, the appellant and his learned counsel could not have failed to have instantly raised it in writing on the spur of the moment in open Court in course of the day to day proceedings.

892. I have discussed above at some length the more important allegations made against the learned Acting Chief Justice in the transfer petition (Cr. Miss. No. 7-M. of 1978). I am now left to briefly mention and dispose of the comparatively less important allegations contained in the petition.

893. It was generally alleged that material and relevant questions asked from some of the prosecution witnesses in their cross-examination were disallowed or overruled and most of the questions, as also the answers given in that connection were not even brought on the record. Masood Mahmood P.W. 2 had married the wife of his friend after she had procured a divorce from him and certain questions were put to him in his cross-examination which were disallowed by the Court on the ground that they were scandalous and irrelevant. According to the appellant, the learned Acting Chief Justice often used to remark without any justification that the cross-examination of the prosecution witnesses by the defence counsel was against the interest of the appellant and that the defence counsel was proving the case of the prosecution. On another occasion he told the learned counsel for the appellant in a sarcastic tone that it was finished with questions, he should better take time and not put irrelevant questions. Once while Mr. Masood Mahmood was being cross-examined by the learned defence counsel, in answer to a question he made a long and irrelevant speech against which the Court remarked that all that was as much irrelevant as the question put to him. On another occasion the learned Acting Chief Justice had threatened the appellant's counsel with the law of contempt of Court. No adequate opportunity was allowed to effectively cross-examine the prosecution witnesses and to contradict them by confrontation with their previous statements in accordance with law, especially when they evaded to answer the questions put to them by saying that they did not remember and that there were material omissions and contradictions brought out on the record in the evidence of the witnesses. It was also alleged that on the other hand the Special Public Prosecutor had been allowed to ask all types of questions, relevant or irrelevant, admissible or inadmissible including leading ones to their own witnesses and the objections taken by the defence were ignored with contempt or overruled summarily. In that connection the protests of the defence counsel were rejected often with a threat of an action under "another law", the law of contempt of Court. Whenever some answer favorable to the accused's defence was given there was a prompt interjection from the Bench suggestive of the answer to the witness. At times Mr. Irshad Ahmad Qureshi, Advocate, learned counsel for the confessing accused was illegally permitted to cross-examine the prosecution witnesses for the second time on behalf of Ghulam Mustafa accused, after they had already been cross-examined on behalf of the appellant., at his cost and disadvantage thereby prejudicing his defence. It was also stated that the learned Acting Chief Justice, at the request of Arshad Iqbal accused had deputed a police guard to enable him to collect a document and the explosives which he wanted to produce in defence and thereby the Court illegally assumed the role of the Investigating Agency for the production of the articles in Court. According to the appellant he had requested the Court for the retaped cassettes of the proceedings or the grant of the permission to

tape record the proceedings by placing his own tape-recorder in the Court room, because he had a fear that the Court tapes were likely to be tampered with to his detriment, But his request was disallowed. He further alleged that on 26th October, 1977 he noticed that when there were observations against the appellant or his counsel from the Bench, the learned members of the Bench would pit their hands on the microphone so that their observations were not tape-recorded. An objection was also raised that the record of the evidence was full of Inadmissible-hearsay evidence.

894. I have carefully gone through all these objections raised by the appellant one by one and the corresponding orders passed by the learned trial Bench in that connection. I find that the allegations that the questions put to the prosecution witnesses were either disallowed or overruled and most of them were not even brought on the record, are highly vague and much too general. However, one thing is certain that in this behalf the defence had all along failed to adhere to the usual practice by reducing the objections into writing in the form of applications filed in the face of the Court for its order. This would have been helpful in keeping the record straight. I am therefore, not impressed with these allegations and am constrained to observe that they were belated and appear to have been made as an afterthought. I am inclined to hold that the questions put to P.W. 2 Masood Mahmood impeaching his credit by injuring his character should have been allowed under section 148 of the Evidence Act. But at best it was a *bona fide* error of judgment made by the Court and it does not lend support to the contention that the Court was prejudiced against the appellant. In recording the evidence of witnesses the Courts are required to exercise their intelligent control on them. In that process the Courts often make their casual observations about the admissibility and utility of the evidence being produced on the record. But these cannot be taken amiss. I am therefore, not prepared to attribute motive to the Court in suggestion to the defence counsel that the question was against the interest of his client. I think the Court was justified in asking the counsel to seek an adjournment in case he was not prepared and had no questions to ask, or in telling him that he should be relevant. The procedure adopted in confronting the witnesses with their material omissions, and contradictions has been discussed above in the context of the evidence of some of the prosecution witnesses. It appears to me that in the circumstances of this case the Court had erred in allowing Mr. Irshad Ahmad Qureshi, Advocate to cross-examine the prosecution witnesses for the second time on behalf of Ghulam Mustafa as stated above. But from this it cannot be concluded that the Court was at all prejudiced against the appellant. The Court did not act as a prosecuting or investigating agency in providing the co-accused at his request with the necessary facility to enable him to collect the material which he wanted to produce in his defence. The Court had in its discretion refused to accede to the request of the appellant for the retaped proceedings of the cassettes or for the permission to place his tape-recorder in Court. The suggestion made by the appellant is wholly mischievous and cannot be believed that the learned members of the Bench used to put their hands on the microphone so that their observations may not be recorded. This amounts to another unwarranted slur on the Court deliberately made in order to

whittle down the authenticity of the record of the trial proceedings which was being simultaneously tape-recorded also.

895. In the course of argument the learned counsel for the appellant also drew our attention to two orders both purported to have been made on 5th November, 1977 on an undated application filed in Court on the same date, without any specific prayer, but once again expressing his lack of confidence in the trial Bench. According to the first order passed by the Court the application was placed on the record to be disposed of in accordance with law, after the trial. But the second order which was also dated 5th November, 1977 shows that the application was disposed of the same day. However, there is sufficient evidence in this second order itself to show that it must have been made some time after the announcement of the judgment by this Court in *Begum Nusrat Bhutto's case* on 10th November, 1977. According to the learned counsel for the appellant he came to know of this second order only when they got the record for the purpose of this appeal. There is no doubt that the second order must have been passed by the Court only after 10th November, 1977 or may be, even after the trial as indicated in the first order itself. But it seems that by sheer inadvertence and mistake in typing, this order was also dated 5th November, 1977. Otherwise there could be no ulterior motive in putting a wrong date on the order.

896. Before us the learned counsel also drew our attention to another incident in Court which took place on 11th January, 1978, in course of the cross-examination of P.W. 31 Ghulam Hussain by Mian (urban Sadiq Ikram on behalf of Mian Muhammad Abbas) accused. The witness, while describing the purpose for which the first sten-gun had already been secured by Ghulam Mustafa stated that it had been obtained for use against Chief Justice. The witness later corrected by saying that by Chief Justice he meant Retired Justice Syed Jamil Hussain Riavi. The learned Acting Chief Justice while pointing out to the witness that he should have said Judge and not Chief Justice observed that the turn of Chief Justice had not yet come. At this the appellant remarked from his seat (it will come). The learned Chief Justice directed the officer in charge of the police on escort duty to take note of it and have an entry made at the nearest Police Station. He further remarked that not that he was offended by the remark but that if anything did happen, someone would be accountable for it.

897. Much was made out of this incident before us by the learned counsel to contend that it betrays the bias of the learned Acting Chief Justice against the appellant. He even submitted that by directing that a report may be lodged about this incident at the nearest Police Station he arrayed himself virtually as a party and became the complainant against the appellant concerning this incident which had happened in Court.

898. In this connection it appears to me that all that was said in a lighter mood and not seriously. Therefore, while I agree with the learned counsel that the Court could

have ignored it with equanimity, at the same time I cannot hold that direction issued to the officer incharge of the police on escort duty in this behalf amounted to the lodging of a formal F.I.R. against the appellant at his behest the fact remains that no further action was taken on it against the appellant. I, therefore, find no force in this contention which is repelled.

### **CONCLUSIONS AS TO FIRST PART OF DEFENCE SUBMISSION ON BIAS OF THE TRIAL BENCH**

899. From the above discussion I find that the learned trial Bench of the High Court was lawfully and properly seized of this case on its transfer for disposal on its original side. There was no question of the learned Judges of the Bench having been the slightest pecuniary or proprietary interest in the subject-matter of the proceedings. The apprehensions in the mind of the appellant, if any, about the partiality or prejudices of the learned Acting Chief Justice have been found by me to be baseless. The allegation of bias leveled against him in his capacity as the Chief Election Commissioner by the Central Executive Committee of the Pakistan People's Party was totally misconceived. In fact on 24th September, 1977 at the hearing in Court the appellant had for once himself expressed his confidence in the learned Acting Chief Justice. The fact that in the circumstances explained above the trial Bench did not allow an opportunity to the appellant to make his submission on 9th October, 1977 after the close of the arguments by his learned counsel did not betray any bias of the Court against him. At the commencement of the trial the dock had to be prepared for segregating the accused from the visitors in Court and there was no *mala fides* of the Court about it. Strictly speaking the allegations in connection with the "dock" and the "benches" had nothing to do with the actual proceedings conducted in the case. The appellant has failed to establish that thereby he was handicapped in communication with his counsel in giving instructions to him in Court. To say the least the conduct of the learned defence counsel in Court was far from desirable and at time he even aligned himself with his client. Even the appellant himself did not lag behind and was at times unruly. This is in addition to the fact that he had repeatedly, all along indulged in baseless allegations of scurrilous and scandalous character against the learned Acting Chief Justice with scant regard for the contempt of Court so often committed by him. Even the Press talk by the learned Acting Chief Justice that the trial would be held in the full light of the day attracted the wrath of the appellant to vilify him and strangely enough was taken to be an expression of bias on this part. The allegation that the record of the case was manipulated and tailored in a fashion to suit the prosecution is devoid of any force and the appellant has failed to substantiate it. Indeed the entire proceedings in the trial Court were tape-recorded and this could have been easily verified in case the appellant was at all serious about his allegations. In this connection it seems that most of the grievances put forward by the appellant were imaginary rather than real. I have already found against the appellant in connection with his other grievances contained in his petition dated 18th December, 1977 (Cr. Misc. No. 7-M of 1978). His allegations were

based on distrust and suspicions entertain by him from the very beginning shown against the Court, without any justification on surmises and conjectures.

900. It is a pity to find that from the very beginning the appellant entered upon his trial with an initial bias ingrained into him against the Court and as the prosecution evidence involving him began to pour in, he instead of defending himself became more and more defiant and indulged in scurrilous and scandalous attacks on the Court. He was thus responsible for having created a tension and it was rendered increasingly difficult for the Court to maintain the decorum and control the proceedings.

901. In conclusion I have held that the impugned judgment of the learned trial Court is substantially based on the evidence on the record and its conclusions are well founded. Indeed I have agreed with the learned trial Bench and substantially affirmed its findings on all the material issues raised in this case. As discussed above the allegations of bias against the trial Bench are unfounded. In spite of the heavy odds the procedure followed at the trial in the case, as held by me above was warranted under the law and it did not in fact occasion and result in any prejudice caused to the appellant.

902. In this connection the learned counsel for the appellant has also filed two charts before us. The first chart deals with the alleged "instances showing bias of the trial bench in passing conflicting orders, admitting inadmissible evidence led by the prosecution and shutting out admissible evidence of defence." I shall briefly deal with these points without giving them in detail owing to the length of this and tire other chart. A perusal of the charts would be necessary for a proper understanding of the remarks made here.

903. As discussed above the conversation between Masood Mahmood and Waqar Ahmad, the then Establishment Secretary was admissible as direct evidence under section 60 of the Act. Even if the office copy of the T. A. Bill Exh. P.W. 2/7 is not admissible in the evidence it does not prove any bias of the Court. P.W. 2 Masood Mahmood in his evidence did not depose to the contents of the letter and the objection raised has not force. The evidence of P.W. 2 Masood Mahmood about his poor state of health, etc. was neither irrelevant nor scandalous and this objection had no force. The next allegation has already been discussed above and overruled. The question put to P.W. 3 Saeed Ahmad was not a leading one and evidence of witness concerning Mr. Qutab was rightly admitted under section 50 of the Evidence Act. Even if the copy of Exh. P.W. 3/2-D is held to be inadmissible it does not prove any bias of the Court. The question put to P.W. 3 Saeed Ahmad Khan (at page 232) was rightly overruled and it is difficult to agree that it was relevant to impeach the credit of the witness. Evidently it is wrong to contend that the letter dated Path September 1972 (Exh. P.W. 3/14-D) was misconstrued by the Court. In the absence of the original letter dated 12th September 1972 its Photostat copy was not admissible in the evidence and the order passed by the

Court is unexceptionable. The appellant has failed to elaborate as to how the question relating to Exh. P.W. 3/17D was relevant and the objection fails. The appellant has failed to establish that the admonition given to Mr. Awan for using provocative language against the witness was uncalled for and this objection is untenable. The objections as to the alleged improvements made by the prosecution witnesses have been discussed above. There was no harassment caused by the Court to the defence counsel in that connection. The evidence of P.W. 12 Muhammad Asghar Khan was admissible as direct evidence under section 60 of the Evidence Act and the objection raised was misconceived. The question as put to the witness (pp. 374-5) was rightly disallowed and if the learned counsel had any further question to ask in that connection there was nothing to preclude him from doing so. The questions (pages 375 and 376) put to P.W. 12 Muhammad Asghar were rightly overruled. Even otherwise this does not show any bias on the part of the Court. The portion of the evidence of P.W. 14 Abdul Vakil (page 383) was admissible as direct evidence about what he had heard and it did not constitute hearsay evidence. The other question put to the witness (page 402) was altogether irrelevant and did not arise in the absence of any evidence that his statement under section 164, Cr. P.C. was not correctly recorded. The evidence of P.W. 19 Muhammad Amir (page 443) was admissible as direct evidence and the objection raised was misconceived. Both the objections about the evidence of P.W. 23 Nasir Nawaz have no force and were rightly rejected. The signatures of Ghulam Hussain on Exh. 24/9 were competently proved by P.W. 24 Fazal Ali who was conversant with them. The controversy about the omissions in the statements of prosecution witnesses recorded under sections 161 and 164, Cr. P.C. have been discussed above. The evidence (pages 511-12) relating to the practice followed by the witness was admissible in evidence and the objection was rightly overruled in this case. The Court question was put to P.W. 16 Muhammad Bashir for clarification of the answer elicited by the counsel for the appellant from the witness in his cross-examination and there could be no valid objection against it. P.W. 31 Ghulam Hussain deposed (page 561) from his knowledge and the answer given was both admissible as well as relevant. The various contradictions put to the witnesses have been discussed above in detail and these need not detain us here. P.W. 36 Nadir Hussain Abidi did not depose to the numbers inscribed on the base of the empties as an expert on the point and his evidence to that extent was not admissible and was rightly disallowed. The correction in the evidence of P.W. 39 Muhammad Boota was made with the consent of the parties after the tape-record was played. As a result of the above discussion I find that the objections raised in the chart are by and large misconceived, devoid of any force and even frivolous. These do not even remotely go to establish bias of the Court.

904. The next chart produced on behalf of the appellant relates to the alleged instances showing how the course of evidence of witnesses was influenced. But this does not even remotely raise any inference of bias of the Court. The question put to P.W. 2 Masood Mahmood (page 144) was rightly disallowed by the Court as it was based on his "guess" and not on the facts from his knowledge. It was open to the

learned counsel to have removed the ambiguity by eliciting answer to further questions put to the witness in his cross-examination, which he failed to do. The trial Court was justified in putting the further question (at page 289) to P.W. 4 M. R. Welch for the sake of clarification of his answer given by him. The Court in recording tike evidence is required to exercise its intelligent control and play its part in eliciting the truth. Any suggestion challenging the *bona fide* of the Court in this behalf was altogether misconceived. It appears to me that the Court was justified in exercises of its discretion in refusing permission to the defence to further cross-examine P.W. 10 Zulfiqar Ali Toor Magistrate and in allowing the two questions put to the witness by Mr. Irshad Qureshi, Advocate for the confessing accused. The incident showing how the name of Ghulam Hussain Inspector was recorded by mistake in the evidence of P.W. 14 Abdul Vakil Khan has been discussed above in detail. I have already held that it was due to a *bona fide* mistake on the part of Gulbaz Khan, J. in giving the dictation that this mistake had crept which was corrected there and then. As regards the suggestion that the record of evidence was determined by the bias of the trial Bench. I have carefully gone through the chart. In my opinion the Court was justified in putting the further question to P.W. 1 Ahmad Raza Kasuri for clarification of the answer already given by him. In law he could not be confronted with his statement referred to in a part of the report of the Enquiry Officer, especially when no copy of his actual statement had been supplied to the defence. This was indeed an attempt at misleading the witness which was not permissible. On the objection raised by the learned Prosecutor the Court was justified in asking the witness to repeat his answer which was faithfully recorded. The objection raised against it is untenable. I find that the Court had erred in overruling the questions (at page 135 and at page 140 of the Misc. Petition) put to P.W. 2 Masood Mahmood in his cross-examination. Likewise the Court had erred in overruling another question put to the witness (page 113) about the illegal supply of arms to Jam Sadiq Ali, especially to view of his own evidence on the point. Similarly the Court had erred in disallowing the question put to P.W. 2 Saeed Ahmad Khan (at page 267) about the record of the interviews granted by the Prime Minister. These questions though not wholly irrelevant did not have a material bearing on the matter in issue between the parties. In my opinion it was due to a *bona fide* error of judgment that the Court had disallowed them. The contention that the proceedings were re-typed, tailored and polished before its copies were issued has been repelled by me for the reasons recorded above. The proceedings held in Court were tape-recorded. But the learned counsel did not even dare to substantiate his plea by asking for verification of the proceedings by comparison with the tape-recorded version. The suggestions thus made are highly motivated, baseless and are repelled. There could be no valid objection to the statement of P.W. 14 Abdul Vakil Khan recorded in connection with his previous statement made under section 164, Cr. P.C. and the Court question put to him. The allegation that it was done as a "rescue operation" performed by the Court was misconceived.

905. In this connection before us a great stress was also laid on the record of the proceedings taken down on 28th November 1977 in the course of the evidence of P.W.



14 Abdul Vakil Khan (at page 384). It is alleged that in answer to a question put to the witness by the learned Public Prosecutor the witness stated as under:-

"It occurred to me that Mr. Bajwa wanted to see the empties and might want to suggest to us to tamper with the empties. Mr. Bajwa was associated with the FSF and I had seen him using the vehicles of F.S.F."

906. It was further alleged that this answer of the witness was dictated and the same was typed. The Acting Chief Justice meanwhile wrote something on a piece of paper and read it to the witness. This reads:-

"I know that Mr. Bajwa was associated with the F.S.F. very closely and I wanted to avoid any suggestion from him in order to exonerate the F.S.F."

It is next alleged that the Acting Chief Justice then asked the witness;

"This is what you want to say"

And the witness replied in the affirmative and thus the answer drafted by the Acting Chief Justice and not that of the witness formed part of the record.

907. In reply to these allegations the Court stated that it was not possible to recollect what was stated therein. The Court was not bound to dictate each and every word uttered by the witness but only the substance of his statement.

908. It was not expected of the Court to have remembered orally about the details of what a particular witness had allegedly stated. If what is being alleged is correct the easiest thing to do for the learned counsel was to have put all this in writing there and then in the face of the Court in the form of an application and not filed the application after about 20 days. This would have been immensely helpful in keeping the record intact when the things were fresh in the minds of all concerned. In the circumstances, at this stage, therefore, it is difficult to vouchsafe about the truth of such serious allegations and positively hold that the answer given by the witness was thus recast and then brought on the record in a tailored form. It was rightly laid down in *Anwar v. Crown*<sup>381</sup> that the fact that there was a paralysis of the judicial faculties in a biased Judge cannot be proved by independent evidence. Suspicions however, strong raised by the appellant cannot take the place of truth in such matters. In my opinion taking into consideration all the facts and circumstances of this instance, the appellant has failed to prove that there was any likelihood of bias and substantiate his allegations in this behalf. I have already commented on the objection arising out of the statement of P.W. 16 Muhammad Bashir. No exception can be taken against the note dictated by the Court

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<sup>381</sup> PLD 1955 FC 185

in the evidence of P.W. 19, Muhammad Amir concerning the Log Book and the objection raised is fallacious. The Court rightly did not allow the permission to Mr. Qurban Sadiq Ikram to put further question to P.W. 34 Abdul Hayee Niazi after he had already cross-examined him and the objection raised has no force. In my opinion the objection raised by the learned counsel for the appellant against the leading form of the question (at page 442) put by the prosecution to its witness (P.W. 19 Mohammad Amir) was tenable and the Court was not justified in having overruled it. But this irregularity did not affect the merits, and was due to a *bona fide* error on the part of the Court and not willful.

909. The appellant has also filed another chart of the alleged instances of some paragraphs in the impugned judgment showing the so-called paralysis of the judicial faculties in the trial Court. Generally speaking these objections have been taken care of in my above judgment and there is no need for any separate discussion of the matter at this stage.

910. In paragraphs 610 to 616 of the impugned judgment the High Court has made gratuitous observations about the personal belief of the appellant and delivered a sermon as to the mode of conduct prescribed by Islam of a Muslim ruler. It is also stated that the appellant was "a Muslim in name only" and that he had abused his powers under the Constitution. I am inclined to agree with the learned counsel that the observations in these paragraphs were not necessary for the disposal of the case by the High Court. In this connection, however, the learned counsel further submitted that these observations and remarks about the appellant disclose the extreme hostility and bias entertained on the part of the learned trial Bench against the appellant. It, however, appears to me that the High Court had found the appellant guilty along with the other co-accused on the merits of the evidence adduced in the case. Its findings to that effect were not influenced by any such extraneous considerations. In fact it was only towards the end of the judgment that this discussion occurs and the conclusion was drawn in proposing the punishment as stated in paragraph 617 that the appellant was "thus liable to deterrent punishment". Although even for this limited purpose also these observations were not strictly relevant, yet that did not thereby vitiate the order of conviction of the appellant which was not based on any such extraneous considerations.

911. In the proceedings as well as in the impugned judgment the learned trial Bench has often used the term "principal accused" in referring to the appellant. In that connection stress was laid before us by his learned counsel to contend that this by itself sufficiently disclosed bias and prejudice of the Bench towards him. But it is evident that on the findings recorded by the trial Court, the appellant alone had the motive behind the attempted murder and had thought about it. Even otherwise having regard to his status in life he was the principal amongst the co-conspirators and occupied the most important position amongst them. It cannot however, be denied that strictly speaking, in law, the description of the appellant as the principal accused as an abettor was inapt.

But this by itself is not sufficient to betray any bias and prejudice of the Court against him who was otherwise found guilty on the merits. Similarly the mere use of the other terms like the "arch culprit" and "compulsive liar", etc. against the appellant do not go to prove the bias of the Court against a guilty accused.

912. One last contention advanced by the prosecution in this connection may also be mentioned here in passing. The trial Bench consisted of five learned Judges of the High Court including its learned Acting Chief Justice heading it. Each one of the Judges was independent and not susceptible of any influence of the learned Acting Chief Justice in their judgment. The allegations alleged in this case were almost entirely directed against the learned Acting Chief Justice. In these circumstances the independent opinion expressed by the other learned Judges constituting the Bench was entitled to its due weight and respect.

913. It has been authoritatively laid down in a number of decided cases by this Court that "mere suspicion of bias, even if it is not unreasonable, is not sufficient to render a decision void. A real likelihood of bias must be established". A mere apprehension in the mind of a litigant that he may not get justice, such as is based on inferences from circumstances is not sufficient. This, indeed, is the true test to be applied in sifting the evidence in arriving at a conclusion in such cases. In this connection in *Syed Ikhtlaque Hussain v. Pakistan*<sup>382</sup> it was laid down that mere suspicion of bias even if it is not unreasonable is not sufficient to render a decision void. A real likelihood of bias must be established. But this however, is subject to the exception where bias is based on pecuniary or proprietary interest the position is different and interest however small may be is operative as a disqualification in the Judge. Similarly, in the *President v. Mr. Justice Shaukat Ali*<sup>383</sup> this Court observed that a mere assertion of a bias can never be sufficient to disqualify a Judge in hearing a cause or matter. In the absence of any pecuniary or proprietary interest in the subject-matter of the proceedings it is essential that a real likelihood of bias must be shown. Also in *Islamic Republic of Pakistan v. Abdul Wali Khan*<sup>384</sup> this Court observed that no Judge can possibly be disqualified on the basis of vague and nebulous suggestion and mere suspicion of bias, even if it is not unreasonable, is not sufficient to disqualify him in the disposal of a case brought before him.

914. On another aspect, in connection with the bias in a Judge, a number of authorities were cited before us, some of them from foreign jurisdictions. But the law on the point was authoritatively laid down by the Federal Court of Pakistan in the year 1955 and still holds the field. It is therefore, not necessary to examine the other cases cited before us. In the reported case of *Khairdi Khan v. Crown*<sup>385</sup> it was at one time laid

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<sup>382</sup> PLD 1969 SC 201

<sup>383</sup> PLD 1971 SC 585

<sup>384</sup> PLD 1976 SC 57

<sup>385</sup> PLD 1953 FC 223

down by the Federal Court that bias simpliciter, of whatever kind, has the effect of vitiating all proceedings held before a biased Judge and that all adjudications made by him are void by the mere fact of his being subject to some extra-judicial influence, however, correct, reasonable, or well founded his conclusions may be. But this dicta was overruled in *Anwar v. Crown* and it was expressly observed that the rule laid down in *Khairdi Khan's case* that bias vitiates all judgments and all orders made by a biased Judge are void, is incorrect and no longer forms part of the law of Pakistan. In that case Muhammad Munir, C. J. in his leading judgment (with which A. S. M. Akram and Muhammad Sharif, J. concurred but Cornelius, J. dissented) in summing up his conclusions held that every accused person has the right to be tried on the evidence by judicially minded person. If the Judge is functioning under an influence brought about by his own act or by the act of another person, which has the effect of paralyzing his judicial faculties, there is no fair trial. The fact that there was a paralysis of judicial faculties in a Judge cannot be proved by independent evidence but must appear from the manner in which he held the proceedings or arrived at his conclusions. Unless, therefore, it be shown that "the proceedings held were not fair or impartial or that his conclusions were wrong", an allegation of paralysis of judicial faculties would be as much out of place as the allegation that the Judge was deaf when it appears from the record that he heard the evidence and prepared a true and faithful record of it. Bias in a Judge is the paralysis, complete or partial, of judicial faculties and therefore, the allegation of bias against a Judge would be wholly unfounded unless it be shown that the proceedings held by him were irregular and one-sided or the conclusions reached him were wrong and reasons given in support thereof erroneous. Whatever may be the cause of it, it can never be held to be proved in the case of a Judge whose judgment is right because the fact that his decision was correct is a complete refutation of the allegation that his judicial faculties were paralyzed. A biased Judge producing a correct result is a contradiction in terms. These conclusions however, must be read subject to the important exception on grounds of public policy to the effect that no Judge can be a Judge in his own cause, or in a case in which he is personally interested. In *M. H. Khondkar v. The State*<sup>386</sup> while Cornelius, C. J. (with which Fazle Akbar, J. agreed) adhered to his earlier opinion expressed in *Oar v. Tire Crown*: A. Rahman, J. observed that the rule was correctly laid down by the majority judgment in what case and the reasoning adapted by Kaikus and Hamoodur Rainman, 11. also evidently supported that view. In *Mohammad Ismail Chaudhry v. Abdul Khaliq*<sup>387</sup> the case in *Anwar v. State* was not even mentioned and it cannot therefore be taken as an authority for laying down any proposition of law to the contrary.

### Final conclusions as to bias

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<sup>386</sup> PLD 1966 SC 140

<sup>387</sup> PDD 1960 SC 301

915. In the light of the declared law and the facts discussed above I have reached the conclusion that although some of the orders made by the trial Bench in the day to day conduct of the case may not have been correct, on a strict view of the law; and some others may not have been fully called for in the facts and circumstances of the case, yet these were all matters within the discretion of the Court, and mere error therein cannot amount to proof of bias. The appellant was unfortunately misled into thinking from the very start of the case that the learned Acting Chief Justice was biased against him. There was, in fact, no factual basis for such an apprehension. In any case there was no such apprehension in respect of any of the other four learned Judges constituting the Bench. The trial of the appellant has by and large been conducted substantially in accordance with law, and the conclusions reached by the High Court on the merits of the case have been found to be correct on detailed analysis of the evidence and the law. I would therefore, repel the contention that the trial was, in any manner, vitiated by reason of bias on the part of the Presiding Judge of the Bench.

**Regarding letter of Investigating Officer Abdul Khaliq dated 18th February 1978 to his Departmental Superior recommending a brother of appellant Iftikhar Ahmad for employment**

916. At this stage an ancillary matter which cropped up during the hearing of these appeals may also be disposed of. On 8th October 1978 Mr. Yahya Bakhtiar brought to the notice of the Court a document purporting to be a photo stat copy of a letter written by Abdul Khaliq, Deputy Director, F.I.A. (who has appeared in this case as P.W. 41) addressed to the Director, Central Zone, F.I.A. on 18th February 1978, making a recommendation for the employment of one Riaz Ahmad a brother of the confessing accused Iftikhar Ahmed, as an assistant sub inspector in the F.I.A. for the assistance given by Riaz Ahmad and his father Muhammad Sadiq in persuading Iftikhar, Ahmad and his co-accused to stick to the confessions, made by them. The purpose of producing the aforesaid letter, as submitted by Mr. Yahya Baktiar was to show that the confessions made by the concerned accused were not voluntary, but were result of an inducement or pressure.

917. We called for a report from Abdul Khaliq as to the authenticity of this letter, as well as its contents. We further directed that the relevant file of appointment of Riaz Ahmad in the F.I.A. should also be made available. A photostat copy of the aforesaid letter, along with its enclosures, was supplied to Mr. M. A. Rehman, Advocate-on-record, who was directed to contact the authorities and get the needful done.

918. Abdul Khaliq has filed his reply. He has given details of the dates when each of the accused involved in this case was arrested; when he was interrogated and when he made the confessional statement before a Magistrate. As those details already exist on the record, I need not reproduce the same here, except so far as they are relevant for the precise matter under consideration, as will be shown later.

919. Abdul Khaliq has stated that being the officer incharge of this case, he had been appearing in Court to assist the Public Prosecutor and also watch the proceedings. He has pleaded that efforts were being made by the parties and counsel (Qazi Mohammad Saleem, Advocate) of Mr. Bhutto to win-over witnesses. Mr. Yahya Bakhtiar and others concerned have refuted these allegations.

920. Abdul Khaliq has stated that during the trial Mohammad Siddiq, father of Iftikhar Ahmed, met him. He explained the difficulties in which his family was, both for financial strain as well as due to the involvement of his aforesaid son. Though he at the same time was disapproving the acts of his accused son, but seemed to be ready to face what the destiny might have in store for him, with one consolation that at least his son had disclosed the truth and exposed all concerned. He expected some help for employment for his son Riaz Ahmad. It was purely on humanitarian grounds that in that context he wrote letter dated 18th February 1978 recommending some job for Riaz Ahmed. It was not an inducement for big son to make the confession which had already been made on 26th July 1977, and not withdrawn on 11th October 1977 when the accused replied to the charge-sheet which was read out to him in Court.

921. I have considered this matter. As the facts disclose, confession of Iftikhar Ahmed had been recorded on 26th July 1977; the confession of Arshad Iqbal accused was recorded on the same date; the confession of Ghulam Mustafa, accused, was recorded on 1st August 1977; the confession of Ghulam Hussain, approver, was recorded on 11th August 1977; the confession of Masood Mahmood was recorded on 24th August 1977 and the confession of Mian Abbas accused was recorded on 18th August 1977. In the face of the aforesaid data a letter written on 18th February 1978 could hardly be a ground for inducing appellant Iftikhar Ahmad to make a confession or to stick to that confession. Again, in the natural course of human conduct it even otherwise looks odd that a father would persuade his one son to keep on sticking to his confession which may lead him to the gallows in consideration for a petty job for another son; and much less can such an inducement be of any relevancy to the other accused, totally unrelated to Iftikhar Ahmad by blood or otherwise.

922. In these circumstances, the plea of any inducement as raised by Mr. Yahya Bakhtiar on the basis of the letter under consideration appears to be far-fetched. All the confessing accused have voluntarily reiterated their confessions in this Court during their personal appearance. This could not have been due to the offer of a petty job in the F.I.A. to a brother of Iftikhar Ahmad.

### **SUMMARY OF CONCLUSIONS**

923. My conclusions on the entire case may now be summarized.

924. This was an unprecedented trial, involving a former head of the Government, and for this reason the proceedings before the trial Bench were of a particularly difficult and taxing nature. Unfortunately the task of the Bench was not made any the easier by certain attitudes adopted by appellant Zulfikar Ali Bhutto at various stages of the trial. In this Court, major part of the arguments addressed by the defence were devoted to demonstrating that the trial had not been held fairly, and that it suffered from a large number of procedural illegalities, which went to the root of the matter vitiating the whole trial, and the convictions and sentences recorded as a result thereof. My examination of these submissions, ranging over almost the entire field of criminal procedure, has led me to the conclusion that by and large the trial was held substantially in accordance with the provisions of the Criminal Procedure Code; and that any omissions, errors or irregularities, or even illegalities, that have crept in, were of such a nature as did not vitiate the trial, and were certainly curable under the provisions of section 537 of the Criminal Procedure Code as it now stands in its amended form since 1972.

925. I have further found that the allegations of bias against the Presiding Judge of the Bench, and criticism of the actions and orders made by the Bench during the course of the trial are not justified. In spite of the events, and the background, alluded to by the appellant and his counsel, the High Court Bench of five Judges has done its best to conduct the trial as fairly as possible, in the circumstances then prevailing.

926. The oral and documentary evidence led by the prosecution has succeeded in establishing beyond reasonable doubt, that:-

(i) Ahmad Raza Kasuri was an admirer of appellant Zulfikar Ali Bhutto, and became one of the founder members of the Pakistan People's Party, was made the Chairman of the Local Branch of the Party in Kasur, and subsequently awarded the Party ticket for election to the National Assembly of Pakistan in the elections held in December, 1970, and was so elected. However, thereafter differences began to develop between the two, and Ahmad Raza Kasuri became a virulent critic of the person and policies of the appellant, both inside and outside the Parliament. He lost no opportunity of accusing appellant Zulfikar Ali Bhutto of being power-hungry, and being responsible for the break-up of Pakistan. He made speeches in Parliament criticizing the provisions of the Constitution, which in his view, were aimed at perpetuating the rule of one man, and stifling human freedoms and rights in Pakistan. He even refused to sign the 1973 Constitution which had the support of all sections of the National Assembly, and ultimately he broke away from the Pakistan People's Party and joined the Tehrik-e-Istaqlal Party of Pakistan. The records of the Parliament contain ample evidence of the outspoken and bitter criticism of Ahmad Raza Kasuri against the appellant.

(ii) The climax, or the breaking point was reached on the 3rd of June, 1976, when a highly unpleasant altercation took place between the two on the floor of the Parliament during the course of which Zulfikar Ali Bhutto told Ahmad Raza Kasuri to keep quiet, adding "I have had enough of you; absolute poison, I will not tolerate your nuisance".

(iii) (a) The motive to do away with Ahmad Raza Kasuri is thus firmly established on the record on the part of Appellant Zulfikar Ali Bhutto. During the lengthy cross-examination of Masood Mahmood and other prosecution witnesses no tangible motive was shown to exist on the part of either Masood Mahmood or, Saved Ahmad Khan, or any of the other accused persons involved in this case, to arrange for the assassination of Ahmad Raza Kasuri through the agency of the Federal Security Force.

(b) Ahmad Raza Kasuri was certainly not a non-entity in so far as the P.P.P. was concerned. In one of the letters written by the appellant to Kasuri the latter was praised very high and described as a man of crisis. Even his speeches in Parliament display his flair for pungent speech. His surveillance and subsequent pursuit by the former Prime Minister's Chief Security Officer and his Assistant show his importance to the appellant.

(iv) It was at this juncture that Zulfikar Ali Bhutto entered into a conspiracy with approver Masood Mahmood, who was then the Director-General of the Federal Security Force, to get Ahmad Raza Kasuri eliminated through the agency of the F.S.F. The exact direction given by Zulfikar Ali Bhutto to Masood Mahmood was to produce the dead body of Ahmad Raza Kasuri, or his body bandaged all over. In spite of the fact that Masood Mahmood protested to the then Prime Minister against the carrying out of such a task, yet all his subsequent actions show that he became a voluntary participant in the design to eliminate Ahmad Raza Kasuri, and for this purpose he inducted appellant Mian Muhammad Abbas into the conspiracy, whose name had also been indicated to Masood Mahmood by Zulfikar Ali Bhutto, saying that this man was already in the know of the thing having been given instructions in this behalf by Masood Mahmood's predecessor Malik Haq Nawaz Tiwana.

(v) Mian Muhammad Abbas inducted approver Ghulam Hussain as well as appellants Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad, directing them to assist Ghulam Hussain in his task. He also gave instructions to witnesses Amir Badshah Khan and Fazal Ali for the supply of arms and ammunition to Ghulam Mustafa and Ghulam Hussain for this purpose. Ghulam Hussain had been specially selected for the task as he had been a commando instructor in the army for 14 years, and had also demonstrated his capabilities in this behalf by running a commando course for the Federal Security Force under the direct



supervision of Mian Muhammad Abbas, and had been given rapid promotions from A.S.I. to S.I., and to Inspector in less than a year;

(vi) That it was in pursuance of this conspiracy that an abortive attack was made on Ahmad Raza Kasuri's car in Islamabad on the 24th of August, 1974, Ahmad Raza Kasuri promptly registered a case in this behalf at Islamabad Police Station, and the Investigating Officer Nasir Nawaz was able to recover five crime empties bearing the mark 661/71 and expert examination showed that they were of 7.62 M. M bore, i. e. of the type which was in use with units of the Federal Security Force. However, this case was filed as untraced, although Ahmad Raza Kasuri tabled a privilege motion in the National Assembly.

(vii) On the 29th of July, 1974, the Prime Minister and Masood Mahmood were together in Quetta, and there Zulfikar Ali Bhutto again gave instructions to Masood Mahmood to take care of Ahmad Raza Kasuri during the latter's proposed visit to Quetta. Masood Mahmood thereupon gave instructions to his local Director M. R. Welch, who has given oral and documentary evidence in support of this part of the prosecution case. A study of the documents proved by M. R. Welch leaves no doubt whatsoever that there was, indeed, a conspiracy to get Ahmad Raza Kasuri killed during his visit to Quetta, but he escaped owing to the fact that M. R. Welch did not play, the game. The correspondence proved by M. R. Welch shows beyond doubt that Mian Muhammad Abbas was fully in the picture at that stage. The oral testimony of M. R. Welch further establishes that the reason for getting Ahmad Raza Kasuri killed was that he was making obnoxious speeches against the Prime Minister.

(viii) After the failure of the Islamabad incident, and inability of M. R. Welch to take care of Ahmad Raza Kasuri during his visit to Quetta in September, 1974, the scene of activities shifted to Lahore. The whole plan was again master-minded by Mian Muhammad Abbas through approver Ghulam Hussain and the other appellants already name As a result the attack was eventually launched upon Ahmad Raza Kasuri's car when he was returning home after attending a marriage in Shadman Colony. 30 rounds were fired from automatic weapons at a carefully selected road junction, as a consequence whereof Ahmad Raza Kasuri's father Nawab Muhammad Ahmad Khan deceased was hit and later died at the United Christian Hospital at 2-55 a.m. on 11th of November, 1974. The evidence clearly establishes that the actual attack was made by appellants Arshad Iqbal and Rana Iftikhar Ahmad after the plan had been finalised by consultation among approver Ghulam Hussain, appellants Ghulam Mustafa and Arshad Iqbal as well as Rana Iftikhar Ahmad.

(ix) in the First Information Report registered soon after the death of his father, Ahmad Raza Kasuri clearly stated that the attack was launched on him as a

result of political differences, and that he had previously also been similarly attacked, and he recalled that an unpleasant incident had taken place between him and Zulfikar Ali Bhutto in the Parliament in June, 1974.

(x) The caliber of 34 empties recovered from the scene of the crime again shows that they were of 7-62 MM. bore, and they had the same marking, namely, 661/71 as was the case with the crime empties recovered after the Islamabad incident. The investigation of the case did not, however, make any headway.

(xi) A Tribunal presided over by Mr. Justice Shafi-ur-Rehman of the Lahore High Court was appointed by the Punjab Government to enquire into the incident, but its Report was not allowed to be published for the reason that the Provincial Chief Minister, who was fully competent to decide the question of publication, "respectfully" sought the advice of the appellant in the matter. The original Report of the Tribunal has not been traced, but an office copy of the letter written by the Chief Minister of the Punjab to the former Prime Minister gives a gist of the conclusions and findings of the Tribunal, and also the directions given by it for further investigation of the case. However, nothing came out of further investigation, and ultimately the case was filed as untraced on the 1st of October, 1975.

(xii) In the meantime Ahmad Raza Kasuri kept on clamoring for justice, and demanding the resignation of the then Prime Minister on the ground that he would not get justice as long as Zulfikar Ali Bhutto was in power. In spite of the identity of ammunition used in both the incidents at Islamabad and Lahore, the investigation was not allowed to travel in the direction of the Federal Security Force, owing to the intervention of the Prime Minister's Chief Security Officer Saeed Ahmad Khan, and his Assistant the late Abdul Hamid Bajwa. The senior officers of the Punjab Police like D. I. G. Abdul Vakil Khan, S.S.P. Muhammad Asghar Khan and D.S.P. Muhammad Waris have also testified that they did not have a free hand in the matter of this investigation, and everything was being done in accordance with directions given by the Chief Security Officer and his Assistant.

(xiii) When the case was reopened after the promulgation of Martial Law in Pakistan on the 5th of July, 1977, it was found that there was voluminous documentary evidence to show the intermeddling of the Prime Minister's Chief Security Officer and his Assistant with the investigation of the case, so much so that even a copy of the Report of the Shafi-ur-Rehman Tribunal was found to have been sent to Saeed Ahmad Khan by the Chief Secretary to the Punjab Government, indicating that the matter had already been discussed between the two. It also transpired that both the officers on the staff of the appellant had been making frequent visits to Lahore during the pendency of the Inquiry before the

Tribunal, as well as subsequently. The testimony of Saeed Ahmad Khan, supported by relevant documents, unmistakably shows that all this was being done under the directions of the appellant and he was kept fully informed of the day-to-day progress of the activities.

(xiv) There is also voluminous oral and documentary evidence to show that after the murder Ahmad Raza Kasuri was kept under special surveillance, and reports on his activities and utterances were being submitted to the former Prime Minister in quick succession by the late Abdul Hamid Bajwa and Saeed Ahmad Khan. Even the physical description and identity of the gun-man engaged by Ahmad Raza Kasuri was brought on the record.

(xv) In the final phase, efforts were initiated by the appellant to bring Ahmad Raza Kasuri back to the fold of the Pakistan People's Party, and this task was entrusted to his Chief Security Officer Saeed Ahmad Khan and the late Abdul Hamid Bajwa. The prosecution has placed on the record an exceptionally large number of documents which leave no doubt whatsoever that in a subtle manner these two experienced police officers were working on a much younger man like Ahmad Raza Kasuri, and almost succeeded in convincing him that his political future and the safety of his own life and family lay in a rapprochement with the Prime Minister. After a careful and detailed analysis of these documents I am left in no doubt at all that the moves had been initiated by the appellant, otherwise the repeated visits of his senior officers like Saeed Ahmad Khan and Abdul Hamid Bajwa to this disgruntled politician did not make any sense. In fact, the last document in the series significantly speaks of "negotiations" having been conducted for the last six months with Ahmad Raza Kasuri so as to bring him back to the Pakistan People's Party. This part of the evidence makes it clear that these moves were initiated so as to silence Ahmad Raza Kasuri, who was still persisting in his loud demand for justice against the sitting Prime Minister. As a result of these moves Ahmad Raza Kasuri did return to the People's Party and was shown petty favors, including his deputation on a Parliamentary delegation to Mexico, from where he sent a report eulogising the leadership of the appellant. In evidence he has asserted that he had to adopt this stance as a matter of self-preservation. All these acts of subsequent conduct are relevant under section 8 of the Evidence Act, and are incompatible with the appellant's innocence.

927. The cumulative effect of all this oral and documentary evidence is to establish conclusively the existence of motive on the part of appellant Zulfikar Ali Bhutto; and the existence of a conspiracy between him, approver Masood Mahmood, approver Ghulam Hussain and appellants Mian Muhammad Abbas, Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad. It is significant that the task was entrusted to the Director-General of the Federal Security Force who was made personally responsible for its execution. The various subordinate officers were inducted at various levels and at

various stages for the execution of the conspiracy through the employment of highly sophisticated and automatic weapons of the Federal Security Force as well as its trained personnel.

928. It is true that most of the evidence was collected in this case after the promulgation of Martial Law, but I have not been able to persuade myself, that highly placed officers like Masood Mahmood, Saeed Ahmad Khan, M. R. Welch, D.I.G. Abdul Vakli Khan, S.S.P. Muhammad Asghar Khan and a host of other smaller officers, have all come forward to concoct a false story against the former Prime Minister under pressure from the Martial Law authorities. Masood Mahmood and Saeed Ahmad Khan had enjoyed positions of special privilege and power under Zulfikar Ali Bhutto, and were in constant and close touch with him throughout his years in office right up to his fall on the 5th of July, 1977. In view of their seniority, age and experience, and their close association with the former Prime Minister, and the privileges enjoyed by them under his patronage, it is difficult to believe that they would falsely fabricate such detailed evidence against him. Even if they were under any pressure to falsely implicate the former Prime Minister, I have not been able to discover any reason why people like Masood Mahmood, M. R. Welch, approver Ghulam Hussain and witnesses Fazal Ali and Amir Badshah Khan should falsely implicate appellant Mian Muhammad Abbas who was holding the rank of Director in the Federal Security Force at the relevant time. These circumstances lend assurance to their evidence, which, in any case, stands amply corroborated by contemporaneous documents, to which extensive references have already been made. It may also be observed here that it is true that some of the confessing accused expressed their willingness to confess after they had been in detention for four to six weeks, but this factor is irrelevant once the approver has appeared in Court to give direct testimony and subjected himself to cross-examination. In any case, his evidence is not to be accepted unless properly corroborated. In the present case this requirement has been more than amply fulfilled.

929. It has also to be remembered that the case was registered as long ago as the early hours of the morning of the 11th of November, 1974, and the Prime Minister's name had been clearly mentioned therein by the complainant Ahmad Raza Kasuri. In spite of the identity of ammunition used in Islamabad incident and the Lahore incident being established, and clearly pointing to the use of the Federal Security Force, both the cases were filed as untraced. There is no explanation as to why the investigation was not allowed to be conducted properly and independently, except that the Prime Minister must have apprehended that if the Investigators were to reach the Director-General of the Federal Security Force, he might divulge the whole plan. It is significant that the expert reports, to the admissibility of which objection was taken by the defence during the course of arguments in this case, were obtained by the police officers of two different districts, namely, Islamabad and Lahore from the same Ballistics Expert namely, the Inspectorate of Armaments G.H.Q. Leaving aside the question of their legal admissibility, which is only a technicality for the purpose of the trial, the police officers

engaged in the investigation of the two incidents had obviously no doubt that the crime empties found had been fired from Chinese automatic weapons of 7.62 mm. caliber. In spite of this valuable information being available, no steps at all were taken to take the investigation into that direction. The confessing accused and the two approvers could not have prevented such a probe.

930. In these circumstances there is absolutely no support for the contention that the present case was politically motivated, or was the result of international conspiracy. The case having been registered almost three years before the ouster of the appellant from power, and a clear indication being available as to the possible identity of assailants, not only in the kind of ammunition used in both the incidents, but also in the Report of the Shafi-ur-Rehman Tribunal, the investigation was deliberately allowed to be stultified. It is, therefore, futile to urge that the prosecution of the appellant is politically motivated, or a result of international conspiracy.

### **CONVICTIONS UPHELD**

931. As a result of the very detailed and exhaustive examination of the evidence of the two approvers, supported as it is by a mass of oral and documentary evidence, I am left in no doubt that the prosecution has fully succeeded in establishing its case, namely, the existence of the conspiracy the identity of conspirators and also the further fact that the death of Ahmad Raza Kasuri's father Nawab Muhammad Ahmad Khan deceased was a probable consequence of the aforesaid conspiracy and was brought about during the course of a murderous assault launched on Ahmad Raza Kasuri in pursuance of this conspiracy. On these findings all the convictions recorded against the appellants are fully justified, except that in the case of appellant Zulfikar Ali Bhutto, Mian Muhammad Abbas and Ghulam Mustafa section 301 of the Pakistan Penal Code has been found by me to be inapplicable; as this section applies only to the actual killers, which in this case means Arshad Iqbal and Rana Iftikhar Ahmad.

932. It is true that the three appellants Zulfikar Ali Bhutto, Mian Muhammad Abbas and Ghulam Mustafa were not specifically charged under section 111 of the Pakistan Penal Code, but in this regard I have found that the matter is fully covered by the provisions of section 237 of the Criminal Procedure Code, read with section 236 thereof, for the reason that in the ultimate analysis it was a question of law as to whether the facts proved on the record fell within the purview of section 301 read with section 109, or section 302 read with sections 109 and 111 of the Pakistan Penal Code. All the essential facts were fully within the knowledge of the appellants, having been brought during the course of evidence recorded in their presence, or in the presence of their counsel.

### **QUESTION OF SENTENCE**

933. Taking now the question of sentence, I will at this stage deal with the case of appellant Zulfikar Ali Bhutto in the first instance. The facts summarized in the preceding paragraphs establish beyond any doubt that the appellant used the apparatus of Government, namely, the agency of the Federal Security Force, for a political vendetta. This was a diabolic misuse of the instruments of State power as the head of the administration. Instead of safeguarding the life and liberty of the citizens of Pakistan, he set about to destroy a political opponent by using the power of the Federal Security Force, whose Director-General occupied a special position under him. Ahmad Raza Kasuri was pursued relentlessly in Islamabad and Lahore until finally his father became the victim of the conspiracy, and Ahmad Raza Kasuri miraculously escaped. The power of the Prime Minister was then used to stifle proper investigation, and later to pressurize Ahmad Raza Kasuri in rejoining the Pakistan People's Party. All these facts go to show that there are no extenuating circumstances in favor of the appellant, and the High Court was accordingly right in imposing the normal penalty sanctioned by law for the offence of murder as well as its abetment.

#### **EXPUNCTION OF CERTAIN PARAGRAPHS FROM THE HIGH COURT JUDGMENT**

934. Before concluding this part of the case I may refer to the grievance made by appellant Zulfikar Ali Bhutto, and his counsel, that the High Court had gone out of its way to make gratuitous observations in paragraphs 610 to 616 of its judgment regarding the personal beliefs of the appellant, and delivering a sermon as to the mode of conduct prescribed by Islam for a Muslim ruler. The appellant, while appearing in person at the close of the arguments in his appeal, was particularly indignant that he had been described by the High Court as "a Muslim only in name". He also took objection to the observations contained in these paragraphs to the effect that he had abused his powers under the Constitution for satisfying his personal inane craving for self-aggrandizement and perpetuation of his rule. It was submitted that the observations contained in these paragraphs not only showed bias of the Court against the appellant, but were also completely irrelevant for the disposal of the case before the High Court. It was, accordingly, prayed that they be expunged from the impugned judgment.

935. The question of bias has already been dealt with in an earlier part of this judgment, and it is not necessary to advert to it again. However, after carefully perusing the contents of the paragraphs in question, I am inclined to agree with the submission made on behalf of appellant Zulfikar Ali Bhutto that the observations contained in these paragraphs were, indeed, not necessary for the disposal of the case before the High Court. They are in the nature of a theoretical exposition of the duties and conduct prescribed for a Muslim ruler by Islam, and also contain observations as to the abuse of the Constitution by the appellant, although this subject was not a part of the trial before the High Court, nor was the High Court inquiring into the question whether the appellant was a good Muslim, or a Muslim only in name. Further these paragraphs do

not, in any manner, except by implication and innuendo, contain any reference to the case under trial before the High Court.

936. The operative part of the conclusions of the High Court is fully contained in paragraph 609 of the judgment, which reads as follows:-

"The principal accused (i.e. Zulfikar Ali Bhutto) is the arch culprit having a motive in the matter. He has used the members of the Federal Security Force for personal vendetta and for satisfaction of an urge in him to avenge himself upon a person whom he considered his enemy. For his own personal ends he has turned those persons into criminals and hired assassins and thus corrupted them."

937. This paragraph could logically have been followed by paragraph 617 of the judgment, which consists of just one line reading, "the principal accused is thus liable to deterrent punishment". The intervening paragraphs from 610 to 616 were not at all necessary for slating the, conclusion embodied in paragraph 617.

938. In these circumstances, I am of the view that paragraphs 610 to 616 of the judgment can safely be deleted without, in any manner, affecting its integrity, meaning and logical sequence. I would, accordingly, direct that they shall be expunged from the judgment.

#### **CASE OF APPELLANT MIAN MUHAMMAD ABBAS**

939. As regards Mian Muhammad Abbas (appellant in Criminal Appeal No 12), his learned counsel, Mian Qurban Sadiq Ikram, submitted that, although, the appellant had contested the case in the trial Court by pleading not guilty to the charges framed against him, and had also led defence evidence on certain points, he had submitted a written application to this Court through the Jail authorities, duly attested by his counsel, stating that he accepted the prosecution allegations against him as correct. In these circumstances, Mian Qurban Sadiq Ikram stand that he would confine his submissions to only two points:

(a) That the case of Mian Muhammad Abbas was fully covered by section 94 of the Pakistan Penal Code inasmuch as whatever was done by him in furtherance of the conspiracy to assassinate Ahmad Raza Kasuri was done under a constant threat of injury from the then Prime Minister of Pakistan Zulfikar Ali Bhutto, and the then Director-General of the Federal Security Force, namely, approver Masood Mahmood, as the appellant himself had no motive or animus of any kind to do away with Ahmad Raza Kasuri; and

(b) That, in any case there were strong mitigating circumstances which justified the imposition of the lesser penalty.

940. Section 94 of the Pakistan Penal Code provides that:

"Except murder, and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence; provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint."

941. It will be seen that under this section a plea of compulsion by threats which reasonably cause the apprehension of instant death is a good defence by a person charged with any offence except murder and offences against the State punishable with death. Now, in the present case, it is true that Mian Muhammad Abbas has not been charged with the offence of murder, but only with the offence of abetment of murder under section 302/301 read with section 1699 of the Pakistan Penal Code, and for this reason his case could fall within the ambit of this section, if it is possible to hold that he acted under threats which reasonably caused the apprehension that instant death would otherwise be the consequence; provided he did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death place himself in the situation by which he became subject to such constraint. The question is whether the evidence discloses the existence of any such threats.

942. The evidence led at the trial discloses that Mian Muhammad Abbas had retired from the police service after attaining the rank of Superintendent of Police, and was re-employed as a Director in the Federal Security Force, and was in charge of operations, administration and intelligence. He is supposed to have been inducted into the conspiracy originally by the former Director-General of the Federal Security Force, the late Malik Haq Nawaz Tiwana, but apparently no overt act of any kind was done during the tenure of this officer. He was succeeded by approver Masood Mahmood, and the latter conveyed, sometime in the middle of 1974, to Mian Muhammad Abbas the directions of Prime Minister Zulfikar Ali Bhutto to do away with Ahmad Raza Kasuri. According to Masood Mahmood, Mian Abbas readily fell in line and asked Masood Mahmood not to worry about it. The evidence discloses a number of steps taken by Mian Abbas, in furtherance of the conspiracy, including the deputation of approver Ghulam Hussain, appellant Ghulam Mustafa and other officials of the Federal Security Force to execute the plan. It is also established that it was under the orders of Mian Muhammad Abbas that Ghulam Hussain drew arms and ammunition from the Federal Security Force Armouries at Rawalpindi and Lahore, and it was under his directions that an earlier attempt was made on the life of Ahmad Raza Kasuri at Islamabad on the 24th of August, 1974. It is also in evidence that at various stages in the execution of the plan, Mian Muhammad Abbas took steps to see that the subordinates



deputed by him for this purpose did not shrink from carrying out the assignment given to them.

943. The evidence further shows that, in fact, the Director-General of the Federal Security Force had left the execution of the design almost entirely to Mian Muhammad Abbas, and the latter remained active in this behalf for almost five months, i.e. from June, 1974 to November, 1974 when the present incident happened. There is nothing on the record to show that he made any serious effort to disassociate himself from this conspiracy, except a concession made by the Director-General's Private Secretary, Ahmad Nawaz Qureshi (P.W. 5) that Mian Abbas had tendered his resignation from the Federal Security Force two or three times but the same was not accepted by the Director-General. In his confessional statement recorded by the Magistrate under section 164 of the Criminal Procedure Code on the 18th of August, 1977, the only threat mentioned by Mian Abbas was that the approver Masood Mahmood had told him that if he did not fall in line, he would find himself on the road. Even Mian Qurban Sadiq Ikram was not able to contend that this meant a threat of instant death; at best it meant removal from the service. It is clear, therefore, that at no stage was Mian Muhammad Abbas faced with a threat of violence to his person, leave alone a threat causing apprehension of instant death. Such being the case, the benefit of the provisions contained in section 94 of the Pakistan Penal Code is not available to this appellent.

944. I may now examine whether there are any mitigating circum. stances in his favor. Mr. Qurban Sadiq Ikram submits that almost all the officials of the Federal Security Force, like Welch (P.W. 4), Ghulam Hussain (P.W. 31) and the confessing accused Arshad Iqbal, Ghulam Mustafa and Rana Iftikhar Ahmad, have testified to the fact that Masood and Mahmood was a ruthless Director-General whose orders and wishes could not be opposed by his subordinates without fear of consequences; that Masood Mahmood and Prime Minister Zulfikar Ali Bhutto were repeatedly insulting and abusing Mian Muhammad Abbas on the delay that was taking place in the assassination of Ahmad Raza Kasuri; and that in spite of these threats and insults Mian Muhammad Abbas tried to delay the execution of the plan for several months; that he was prepared to disclose all the facts about the working of the Federal Security Force, including the details of the present murder, and for this reason he even requested the Investigating Officer Ch. Abdul Khaliq (P.W. 41) to make him an approver in this case; and even though he, had retracted his confession during the trial, yet in the end, he had confessed his guilt during the pendency of this appeal, by admitting all the facts alleged against him by the prosecution. The learned counsel, finally, contends that Mian Muhammad Abbas had no motive of his own to murder Ahmad Raza Kasuri or his father, and that at the time of the occurrence he was an elderly man of 61 years of age. He submits that Mian Muhammad Abbas is not only now an old man of 65 years of age but is also a patient of heart disease, factors which clearly entitled him to leniency in the matter of punishment. In support of his submissions the learned counsel has placed

reliance on *Bodhi alias Faqir Hussain and 2 others v. The State*<sup>388</sup>, and *M. Siddique Kharal v. Pakistan through the Secretary to the Government of Pakistan, Cabinet Secretariat*<sup>389</sup>.

945. It is true that Mian Muhammad Abbas is, indeed, an elderly man of 65 years of age and is also possibly suffering from heart disease. At the same time, it is clear that in spite of his experience and maturity, he easily fell in line with the conspiracy to assassinate Ahmad Raza Kasuri and took special steps over a prolonged period of time towards its implementation. I have already pointed out that the only threat mentioned by him or his counsel is that approver Masood Mahmood had told him that if he did not fall in line he would find himself on the road. This kind of threat could hardly influence a man of conscience, who had already attained the age of superannuation in the regular police service, and was enjoying years of extended re-employment in the Federal Security Force. All the evidence points to the fact that he was a willing instrument in carrying out this criminal conspiracy, and it was he who was directly supervising its execution through approver Ghulam Hussain and the confessing accused. In these circumstances I regret I am not in a position to accept the plea raised on behalf of Mian Muhammad Abbas that he deserves to be leniently treated in the matter of sentence. The High Court has imposed a legal sentence, and no compelling reasons have been made out for the Supreme Court to interfere.

#### **CASES OF APPELLANTS GHULAM MUSTAFA, ARSHAD IQBAL AND RANA IFTIKHAR AHMAD**

946. On behalf of appellants Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad (In Criminal Appeal No. 13 of 1978) Mr. Irshad Qureshi contended that although they had made confessional statements under section 164 of the Criminal Procedure Code and had stuck to them during the trial, yet they were not guilty of the offences of which they had been convicted by the High Court, for they were protected under section 22 of the Federal Security Force Act, 1973, and sections 76 and 94 of the Pakistan Penal Code. He submitted that as employees of the Federal Security Force they were bound by their oath to obey all orders of their superiors; and had been made to do the unlawful acts in question under coercion and threats of physical violence, besides having been brain-washed to the effect that Ahmad Raza Kasuri was an enemy of the Prime Minister and a traitor to Pakistan. The learned counsel argued that these circumstances were clearly established from the confessions made by these appellants, as well as the replies given by them during the trial under section 342 of the Criminal Procedure Code, and also found support from the statement made by appellant Mian Muhammad Abbas (Exh. DW. 1/1) on 21-7-77 before the Inquiry Officer Arbab Hidayatullah Khan, an O. S. D. in the Establishment Division, describing the illegal activities of the Federal Security Force and the treatment usually meted out to recalcitrant subordinates. Mr. Qureshi

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<sup>388</sup> PLD 1976 Lah, 1418

<sup>389</sup> PLD 1977 Kar. 1044

contended that the appellants had no chance or channel of escape, as superior officers of the Federal Security Force did not allow a subordinate to resign from the Force if he had ever been, assigned a secret mission of the nature involved in this case, and they inflicted harsh and illegal punishments if any subordinate showed signs of disobedience. The learned counsel further submitted that it had been brought out in evidence that the approver Ghulam Hussain was supposed to be carrying a hand grenade to kill the appellants Arshad Iqbal and Rana Iftikhar Ahmad instantly if they had hesitated in firing on Ahmad Raza Kasuri's car on the fateful night, and thus they had a reasonable apprehension of instant death. Finally, he submitted that Ghulam Mustafa had not actually taken part in the attack; and the other two appellants were entitled to leniency on the ground of their young age. He stated that at the time of the occurrence Arshad Iqbal was only 19 or 20 years of age, and Rana Iftikhar Ahmad was about 21 years old. thus both of them were not mature enough to resist the pressure of their superiors,

#### **IMMUNITY AVAILABLE UNDER SECTION 22 AF THE FEDERAL SECURITY FORCE ACT, 1973**

947. Taking first the question whether these appellants are in any manner protected by section 22 of the Federal Security Force Act, 1973, it may be stated that the Federal Security Force was established in 1972 under an executive order, and in 1973 the Federal Security Force Ordinance, 1973 (X of 1973) was promulgated. This Ordinance was later replaced by the Federal Security Force Act of the same year. In accordance with section 22 of the Act every member of the Force has to sign a Form of Affirmation, as set out in II Schedule to the Act, to the effect that he shall bear true faith and allegiance to Pakistan and that he will, as in duty bound, honestly and faithfully serve in the Federal Security Force and go wherever he may be ordered by air, land or sea, and that he will observe and obey all commands of any officer set over him even to the peril of his life. The Roman-Urdu translation of this Affirmation, included in the same Schedule, makes a significant change by saying that the employee concerned shall bear true faith and allegiance to the Government of Pakistan. In the English version the allegiance is to Pakistan and not to the Government of Pakistan. However, in the context of the arguments raised by Mr. Irshad Qureshi this does not appear to make any material difference.

948. It was stated at the Bar by Mr. Irshad Qureshi that in the oath prescribed by the authorities before the promulgation of the Federal Security Force Ordinance and the Federal Security Force Act, it was stipulated that members of the Force shall bear true faith and allegiance to the then President of Pakistan by name, namely, Mr. Zulfikar Ali Bhutto. On behalf of these appellants, who had apparently been enrolled before the promulgation of the Ordinance, their service records were summoned through Abdul Majid (P.W. 4), but no such oath was found present in those documents. It is, therefore,

not possible to say whether these appellants were, indeed, under any solemn obligation to render personal allegiance to the then President of Pakistan and for the purpose of the present case must therefore proceed on the basis that these appellants had subscribed to the Form of Affirmation as set out in the Schedule II.

949. It is true that in this oath the obligation of the members of the Force is stated to be to "observe and obey all commands of any Officer set over me even to the peril of my life", and the qualifying phrase 'lawful' is not used, as has been done in Rule 1228 of the Punjab Police Rules; but the absence of the adjective 'lawful' cannot make any difference for the reasons that section 9 of the Act clearly lays down that:-

"It shall be the duty of every officer or member of the Force promptly to obey and to execute till orders and warrants lawfully issued to him by any competent authority, to detect and bring offenders to justice; and to apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient grounds exist."

#### **RE: SECTION 12 OF THE F.S.F. ACT**

950. I also find that in section 12 of the Federal Security Force Act, which deals with punishment for heinous offences committed by an officer or member of the Force, clause (g) (i) makes punishable disobedience of a lawful command of his superior officers. The same phraseology is repeated in clause (v) (i) of section 13 of the Act which deals with punishment for "less heinous offences".

951. It will be seen, therefore, that the obligation as spelt out in the Form of Affirmation does not extend to obeying illegal or unlawful commands of superior officers. Even if section 9 had not been included in the Act, it is clear, on general principles, that no member of the Federal Security Force could be under an obligation to obey the unlawful commands of his superiors, especially if they directly involve the commission of criminal offences like murder and attempted murder, etc.

952. The immunity or indemnity granted by section 22 of the Act, namely, that "no suit, prosecution or other legal proceedings shall lie against any person for anything which is in good faith done or intended to be done under this Act or any rules or regulations made there under", cannot for obvious reasons extend to criminal acts executed by the appellants in pursuance of unlawful commands of their superiors. Such acts can never be regarded as acts done in good faith in the execution of their lawful duties.

#### **RE: APPLICATION OF SECTION 76 OF THE PENAL CODE**

953. Let me now examine whether section 76 of the Pakistan Penal Code can be any avail to these applications. This section lays down:-

"Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be bound by law to do it."

954. This section came in for examination by the Lahore High Court as early as, 1883 in *Niamat Khan and others v. The Empress*<sup>390</sup> and the observations then made by Rattigan, J. can be reproduced here with advantage:-

"To entitle a person to claim the benefit of section 76 it is necessary to show the existence of a state of facts which would justify the belief in good faith; that the person to whom the order was given was bound by law to obey it. Thus in the case of a soldier, the Penal Code does not recognize the mere duty of blind obedience to the commands of a superior as sufficient to protect him from the penal consequences of his act .... Such a construction of the law may indeed subject the soldier to military penalties, and, in certain cases, place him in the serious dilemma of either refusing to obey an order which he believed to be unjustifiable in fact, thereby rendering himself liable to Military law, or, by obeying it, to subject himself to the general criminal law of the land. But on a balance of considerations the Legislature has deemed it wise for the safety of the community that no special exemption should be allowed to a soldier who commits what would ordinarily be a penal offence from that enjoyed by any other person, who does the same act believing in good faith that he is bound by law to do it."

955. Similar views were expressed in *Queen-Empress v. Latif Khan*<sup>391</sup>, *Allahrakhio and another v. The Crown*<sup>392</sup> and *SubE Khan v. The State*<sup>393</sup>.

956. In order, therefore, to come within the purview of this section, the appellants have to show that they were bound in law, or by reason of a mistake of fact and not by reason of a mistake of law, they, in good faith, believed themselves to be so bound, to obey the orders of their superiors whose object was to embark upon a criminal venture for taking the life of a member of the National Assembly. The only explanation offered by them is that they were acting under the orders of their superiors, but they do not show as to how they regarded these orders as being binding on them in terms of sections 9 and 12 of the Act by which they were clearly governed, or by the Form of Affirmation to which they had subscribed as members of the Federal Security Force. It

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<sup>390</sup> 1883 PR 17

<sup>391</sup> ILR20 Bom. 394

<sup>392</sup> AIR 1924 Sindh 53

<sup>393</sup> PLD 1959 Lath, 541

is clear therefore, that the case of the appellants does not fall within the ambit of section 76 of the Pakistan Penal Code.

**RE: APPLICATION OF SECTION 94, P. P.C.**

957. As to the application of section 94 of the Pakistan Penal Code, it may be stated at once that its benefit is not available to appellants Arshad Iqbal and Rana Iftikhar Ahmad for the simple reason that they were charged with, and have been found guilty of, the offence of murder. The opening words of the section specifically exclude from its purview the offence of murder and offences against the stage punishable with death. It is, therefore, not necessary to consider the further question whether these two appellants were at any stage threatened with violence, which may have reasonably caused the apprehension of instant death at the time they fired on Ahmad Raza Kasuri's car, which fire resulted in the death of his father.

958. The case of the third appellant Ghulam Mustafa could fail within the ambit of this section, as he has been convicted of the offence of abetment of murder and not of murder itself, but unfortunately the other requirements of the section are not fulfilled in his case. Apart from the general assertion that he acted under the orders of his superior Mian Muhammad Abbas and that some threats were conveyed to him by Assistant Director Muhammad Abdullah, or that he had been brainwashed by his superiors that Ahmad Raza Kasuri was an enemy of the Prime Minister and a traitor to the country, there is no averment whatsoever that he was, in any manner, threatened with violence causing a reasonable apprehension of instant death when he arranged to obtain weapons for the use of Ghulam Hussain and his assistants under the directions of Mian Muhammad Abbas. There is also nothing to show that he had not of his own accord placed himself in the situation in which he became subject to coercion and pressure from appellant Mian Muhammad Abbas and Assistant Director Abdullah. On this view of the matter even Ghulam Mustafa is not protected by section 94 of the Pakistan Penal Code.

959. Mr. Irshad Qureshi referred us to some passages in textbooks on Public International Law in support of his contention that the appellants could not be burdened with criminal liability as they had acted in obedience to the orders of their superiors, but none of the statements relied upon by the learned counsel appears to be relevant in the circumstances of the case before us. In the first place, we are not dealing with a case of war crimes, which is the subject discussed in the passages relied upon by Mr. Qureshi, on the contrary we have before us a case falling under the ordinary municipal law of Pakistan, which contains a specific provision directly dealing with this question. And, secondly, even Oppenheim has clearly stated that the major principle is that members of the Armed Forces are bound to obey lawful orders only and that they cannot escape liability, if, in obedience to a command, they commit acts which both violate rules of warfare, and outrage general sentiments of humanity.

960. I now proceed to examine whether there are any extenuating circumstances in favor of all or any of these three appellants so as to justify the imposition of the lesser penalty. It has already been stated that, besides narrating the working conditions prevailing in the Federal Security Force under which no subordinate could disobey the orders of his superiors, Mr. Irshad Qureshi has emphasized the fact that appellant Ghulam Mustafa did not participate in the actual killing, and that the part played by him was confined to obtaining weapons, under the orders of Mian Muhammad Abbas for the use of approver Ghulam Hussain Std his mesa. It is also true that these appellants had no motive of their own to do away with Ahmad Raza Kasuri or his father.

961. After giving my anxious consideration to the submissions made on behalf of these three appellants, I am of the view that although they did not have a motive of their own to take the life of Ahmad Raza Kasuri or his father, yet the fact remains that they took various steps, over a prolonged period of time, to implement the criminal design or conspiracy into which they had been inducted b appellant Mian Muhammad Abbas and approver Ghulam Hussain. Their assertions at the trial or in their confessional statements that otherwise they would have been physically eliminated are not very convincing. They have deliberately acted in taking human life, and there is no reason why they should not be subjected to the normal penalty prescribed for murder and its abetment.

962. As a result of the foregoing discussion, I would dismiss all the three appeals, uphold and confirm the convictions and sentences recorded against the appellants by the High Court, with the modification that in regard to appellants Zulfikar Ali Bhutto, Mian Muhammad Abbas and Ghulam WSW& suction 301 of the Pakistan Penal Code will not apply.

#### **Appreciation Of Assistance Rendered By Counsel**

963. The arguments In this case were spread over several months, during the course of which learned counsel for both sides gave us valuable assistance in the exposition of difficult questions of criminal law and procedure. The written notes submitted by them were found extremely useful by the Court and showed the extraordinary amount of labour, which had gone into their preparation. We are grateful to the learned counsel for both sides, namely, M/s. Yahya Bakhtiar, Ghulam Ali Memon. D. M. Awan, Muhammad Sharif, Abul Hafiz Lakho, Qurban Sadiq Warn, Muhammad Sadiq Abbasi and Irahad Ahmad Qureshi for the defence, and Messrs Ijaz Hussain Batalvi, M. A. Rehman, Riaz Ahmad and Mahmood A. Shaikh for the State, for their valuable assistance.

**MUHAMMAD HALEEM, J.**—I have had the benefit of reading the judgment proposed to be delivered by my learned brother G. Safdar Shah, J., and I entirely agree with the reasons and the conclusions reached therein. However, I feel inclined to add a short note.

2. As the prosecution case mainly hinges on the evidence of the approver, Masood MahmQod, the question arises as to whether he should be believed or not? An overall examination of his evidence has led me to conclude that it is not of the quality on which reliance can be placed. Not only that it suffers from inherent weaknesses but also tends to show that he was a man of conscience which conduct is wholly unnatural in the background of the facts elicited in his evidence. This feature had opened the gate for the argument as to whether the alleged order given to him by appellant Zulfikar Ali Bhutto to kill Ahmad Raza Kasuri and his own reaction to it amounted to an agreement within the meaning of section 120-A, P.P.C. However, this question has been resolved in the judgment of my learned brother G. Safdar Shah, J., and I need not go into it. The High Court has construed the substantial omissions and improvements in his evidence as one of "details or omissions of matters which have been brought on record by the Public Prosecutor by putting specific questions\*\*". In my opinion these omissions and improvements vitally affect his truthfulness; and, therefore, in resolving it in favour of the prosecution the High Court has given an illusory value to his evidence. If I may say so with respect, this was wholly unjustified, for, the benefit of doubt in the evidence must, in law, go to the accused as that is the elementary principle of criminal jurisprudence.

3. It is also not understandable that being in the position of an approver he would not be aware of the Islamabad incident; when questioned about it in the cross-examination, he stated that he had a hunch of it. The reply hardly inspires his role as an approver. It is difficult to believe his tale that he was apprehensive of his life whilst he was receiving all the favours from appellant Zulfikar Ali Bhutto. Apparently, this explanation was tailored to justify his reaction to the direction to kill Ahmad Raza Kasuri which appears to me to be a padding. These are some of the salient features which I have pointed out but there are others which also reflect on his truthfulness.

4. Considering the appalling nature of the defects in his evidence which have been sufficiently dealt with in the judgment of my learned brother G. Safdar Shah, J., I am firmly of the opinion that his evidence is unnatural and, thereby, lacks the guarantee to inspire confidence. Lastly, if I may say so that while giving evidence, he appeared to sit on the fence trying to minimise his role which is not the ordinary conduct of an approver. Such being the state of his evidence it does not appeal to wisdom and I would, therefore, disbelieve him. This should suffice to demolish the case of conspiracy. Nevertheless it would not be out of place to refer to the corroboratory evidence which to me appears to be inconclusive and thus fails to lend assurance to the ipse dixit of the approver in essential respects. One limb of it is furnished by Saeed Ahmad and the



other by M. R. Welch; his two secure reports, one of which was addressed to Masood Mahmood; and a letter sent by him in reply to the query made by Mian Abbas, a co-conspirator.

5. Taking first the evidence of Saeed Ahmad, all that he says is that at the conclusion of a routine meeting, appellant Zulfikar Ali Bhutto asked him as to whether he knew Ahmad Raza Kasuri to which he replied in the negative and, thereupon appellant Zulfikar Ali Bhutto told him to remind Masood Mahmood about something he had asked him to do, which message he conveyed to Masood Mahmood on the green line. This part of his evidence is inherently improbable as appellant Zulfikar Ali Bhutto could have himself conveyed it on green line to Masood Mahmood in which case there was no occasion to have an intermediary. I fail to see how, even if it is accepted, the same can be read as corroboratory evidence, for, it was indefinite; and it was Masood Mahmood alone who understood what it meant, whose evidence again required corroboration. Therefore, in my opinion, such corroboratory evidence is useless as being vague.

6. As for M. R. Welch, he has not implied Zulfikar Ali Bhutto in what was conveyed to him at Quetta on 29th of July, 1974, by Masood Mahmood and, therefore, the communication fails to connect him with the alleged conspiracy. In regard to his own conduct, he affirmatively stated that he disassociated himself from what he was told to do; and as for the secure reports he described them as being routine in the context of his duties. As for the query made by Mian Abbas as to where Ahmad Raza Kasuri had slept during his visit to Quetta, he replied to it in a routine manner after a lapse of month and a half or so. I cannot help observing that the secure reports and the two communications on the face of them do not give me impression of having emanated pursuant to any conspiracy but the High Court read it in that light. The learned Public Prosecutor also contended at the Bar in support of it but to me such a reading of these documents is tantamount to straining it towards a particular end which is not permissible as it would contravene the rule of doubt. This corroboratory evidence is, therefore, of no avail.

7. The learned Public Prosecutor next contended that in assessing the guilt of appellant Zulfikar Ali Bhutto, the evidence should be read as a whole but I may point out that before such evidence can be taken into consideration the law requires that each piece of evidence should be free from doubt which is not the case here. Enough has been said to raise doubt on its authenticity in the judgment of my learned brother G. Safdar Shah, J. Apart from it the other pieces of evidence do not directly involve the appellant, Zulfikar Ali Bhutto, as a conspirator. Such being the case, the prosecution has failed to establish its case against Zulfikar Ali Bhutto.

8. As for Mian Abbas, he has been absolved from the crime for the very justifiable reasons given in the said judgment and I do not think it necessary to go into this

question again. The other three appellants, Ch. Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar have not only stuck to their confessions but have admitted their guilt when examined under section 342 of the Code of Criminal Procedure. There can, therefore, be no manner of doubt so far as their guilt is concerned. As to why they implicated themselves it is not for me to answer this hypothetical question. It might be that there was another conspiracy apart from the one the prosecution had relied on.

9. Accordingly, I would allow appeals Nos. 11 and 12 of Zulfikar Ali Bhutto and Mian Muhammad Abbas respectively and acquit them; and dismiss Appeal No. 13 of the other three appellants.

**DORAID PATEL, J.** - These three appeals have been filed against a judgment of the Lahore High Court convicting the appellants for murder and for various other charges. As the particulars of these convictions have been set out in the judgment of my Lord the Chief Justice, I need not refer to them except when relevant, and I will first examine the appeal of Mr. Zulfikar Ali Bhutto (hereinafter called Mr. Bhutto).

2. The prosecution case against Mr. Bhutto rests on the evidence of Masood Mahmood and Ghulam Hussain. As both these witnesses are approvers, their evidence cannot be accepted without corroboration which implicates Mr. Bhutto in the crimes for which he was tried. Therefore, the prosecution relied on evidence of motive which was given by Mr. Ahmad Raza Kasuri (hereinafter called Mr. Kasuri) and by evidence of Mr. Bhutto's conduct, because, according to the prosecution, Mr. Bhutto had kept a surveillance on Mr. Kasuri before and after the murder, and because he had interfered with the investigation of the murder of Mr. Kasuri's father. But evidence of motive is always a weak form of corroboratory evidence. And apart from the evidence about Mr. Bhutto's alleged interference with the investigation of the murder, the evidence produced by the prosecution about his conduct is of a very equivocal nature, and as it is reasonably capable of an innocent interpretation, it has no corroborative value. Therefore, Mr. Batalvi rightly placed great stress on Mr. Bhutto's interference with the investigations. But the witnesses examined in order to prove this plea were Police Officers; who claimed to have interfered with the investigations so effectively that the case was filed as untraced. But this means that these Police Officers were accomplices, and as the High Court has placed very great reliance on their evidence, Mr. Yahya Bakhtiar submitted that the learned Judges had violated the principle that the evidence of approvers could not be corroborated by accomplices. In rejecting this plea, the learned Judge relied on the observations of the Bombay High Court in *Papa Kamal Khan and others v. Emperor*<sup>394</sup> and on a judgment of the Privy Council in *Srinivas Mall Bairoliya and another v. Emperor*<sup>395</sup>. But neither of these judgments relate to approvers, and as both the judgments relate to convictions for petty offences, the question which requires examination is whether a rule for the corroboration of accomplice evidence in petty offences should be extended to the evidence of approvers in murder cases. Therefore, it is necessary to examine the law about approvers and accomplices in some detail, the more so, as Mr. Batalvi submitted that the Police Officers, on whose evidence the High Court relied, were not accomplices, because they were only accessories after the fact.

3. I would first examine the meaning of the word "accomplice", because there was once a cleavage of opinion between the High Courts of the sub-continent on the precise scope of this word, and Mr. Yahya Bakhtiar and Mr. Batalvi naturally relied on the rulings which supported their respective submissions. In order to appreciate this

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<sup>394</sup> AIR 1935 Bom. 230

<sup>395</sup> PLD 1947 P C 141

controversy, it is necessary to bear in mind that the law about accomplices is contained in the Evidence Act and in the Penal Code. As only two sections of the Evidence Act are relevant, I will first examine them.

Section 133 reads:

"An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

Section 114 in so far as it is relevant reads:

"The Courts may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case.

### *Illustrations*

The Court may presume:

(a)-----

(b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars;

(c) to (i)-----

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it as to illustration (a)-----

as to illustration (b) -- A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself

as to illustration (c) a crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating C, and the accounts corroborate each other in such a manner as to render previous concert highly improbable."

4. The only provision of the Penal Code which is relevant to the arguments of the learned counsel is section 201. This section prescribes that "Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false," is guilty of an offence under the section.

5. Now, whilst there is no ambiguity about these sections or about the other provisions of the Penal Code, such as section 107 which also deals with accomplices, neither of these Statutes define the word accomplice. Therefore, we have to construe it according to its ordinary dictionary meaning, and the Oxford Dictionary defines the word as "an associate in guilt, a partner in crime". Chambers' Dictionary defines the word as "an associate in crime".

6. Munir in his Law of Evidence (Pakistan Edition ) page 1448 defines the word "accomplice" as:-

"An accomplice means a guilty associate or partner in crime, a person who is believed to have participated in the offence, or who, in some way or other, is connected with the offence in question, or who makes admissions of facts showing that he had a conscious hand in the offence."

7. Accomplices, therefore, are persons concerned or associated with each other or one another, as the case may be, in the crime or crimes committed by them. So if A conspires with B to murder C, or helps B to murder C, A will be an accomplice of B in the murder, and if he has only conspired with A to commit the murder, he will be an accessory before the fact within the meaning of section 107 of the Penal Code. But if he has joined B in killing C, he will be an accessory at the fact within the meaning of section 107. But, if A is merely present at the murder, the question whether he is an accomplice or not will depend on the circumstances of the case. There are times when presence speaks, and a man may help in the commission of a crime by his presence at the scene of the crime. But if he is an involuntary spectator of the crime, he will not be an accomplice merely because he fails to report the crime to the Police. This failure to report the crime may be an offence punishable under the law, but because he has not acted in pre-concert with the criminal, he does not have the mens rea, which is essential to the crime of being an accomplice.

8. I would now turn to another obvious example which is very relevant to these appeals. People seldom commit crimes with the intention of being caught, and many crimes would not be committed, if the criminals were not in a position to attempt to destroy traces of the offence committed. In other words having committed a crime, they commit the further crime of destroying evidence of the crime committed by them. So in the hypothetical example which I was considering, if D helps B to conceal evidence of

C's murder by burying C's corpse secretly, he will be an accomplice of B because a man who helps to conceal the corpse of a man, who is murdered cannot but know that he is concealing evidence of a crime. But, if, for example, A steals B's jewellery and C carries it for A to a place where it is not detected, although C will have helped in the theft committed by A he will be an accomplice only if he knew that the jewellery carried by him for A was stolen, and she will not be an accomplice if he did not know that the property carried by him was stolen property. Therefore, the question will always be of the guilty intention and no person can be an accomplice without the *mens rea*.

9. I used the expressions accessory before the fact and at the fact. They are expressions borrowed from the common law and in the hypothetical case in which D helps B to bury C's corpse, D would be an accessory after the fact and would be liable to imprisonment "of either description for a term which may extend to seven years..." under section 201 of the Penal Code. Now the succession of Police Officers examined by the prosecution to prove that Mr. Bhutto had, through their connivance, suppressed evidence of the murder of Mr. Kasuri's father, had, on their own admissions, committed offences under section 201 of the Penal Code. Therefore, they were accomplices. But, according to Mr. Batalvi, they were not accomplices, because the doctrine of accessories after the fact does not find any place in the Evidence Act, and as it" was a peculiarity of the English common law, learned counsel's submission was that it should not be followed in Pakistan.

10. I regret my inability to agree with this submission. In the first place, the law of accomplices is also contained in the Penal Code. Secondly, the Oxford Dictionary defines the word accessory as "aiding in a crime". So an accessory before the fact is a person, who helps in the planning of a crime, and if he is an accomplice, why should a person who helps the criminal after the performance of the main crime not be treated as an accomplice? Additionally, our law of accomplices is borrowed from the English common law. This was first pointed out by the Calcutta High Court more than a hundred years ago in *R. v. Elahé Buksh*<sup>396</sup> and the view of the Calcutta High Court was expressly approved by the Privy Council in *Bhuboni Sahu v. The King*<sup>397</sup>. Sir Beaumont, C. J., who delivered the judgment of the Board, observed "the law in India, therefore is substantially the same on the subject as the law in England, although the rule of prudence may be said to be based upon the interpretation placed by the Courts on the phrase "corroborated in material particulars" in illustration (b) to section 114 (of the Evidence Act)". As our law of accomplices is substantially the same as the English law, there is no reason why the English doctrine of an accessory after the fact should not be applicable to our conditions, and on the contrary, provisions like sections 107 and 201 of the Penal Code having been enacted in order to give effect to the English doctrine, but in the manner and to the extent specified in these provisions, therefore, Mr. Batalvi's

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<sup>396</sup> 5 W R 80 (Cr.)

<sup>397</sup> PLD 1949 C 90

submission does less than justice to the long and exhaustive labours of the Law Commissioners. As this is not the place for examining the history of the Penal Code, I would only quote here a passage from Dr. H. S. Gour's Penal Law of India, 9th Edition, page 1624 on the history of section 201 and the connected sections;

"Aiders and abettors have been classed in English Law as accessories before the fact, accessories at the fact, and accessories after the fact. The first two are reached by the Code under the law of abetment. Accessories after the fact were dealt with by the Law Commissioners as "subsequent abettors" but these last were swept away by the English Law Commissioners from the list of abettors. "There seems no reason", they said, "for continuing the provisions as to accessories after the fact, the offence of parties falling within the description at present, being for the most part referable to the class of offences against public justice. The Law Commissioners acceded to this view and provisions relating to subsequent abetment were deleted from the chapter on abetment and the offences so available were distributed over the other parts of the Code. This section (namely section 201); with its illustration formed section 106 of the original Bill, and it was a section under the chapter on abetment. Its transposition to this place (i.e. section 201) was effected in pursuance of the view that there was no reasonable justification for the retention of the tripartite division of accession of English law."

11. The learned author then proceeds to discuss the extent to which the common law rules about accessories after the fact have been enacted in the Penal Code. This history of the section resolves all doubts about question whether English rule of accessories after the fact should be followed by our Courts or not. It must be followed, but only to the extent and in the manner specified in the Penal Code, and I venture to think that the cleavage of opinion on this question, which once existed between the High Courts of the sub-continent, would not have occurred if the Courts had examined the history of the section. And it is very surprising that this cleavage of opinion persisted, despite the judgment of the Privy Council in *Mahadeo v. The King*<sup>398</sup>. There a conviction for murder was set aside because it was based on the uncorroborated testimony of one Sukraj, and as to his role in what happened after the homicide, the Privy Council observed: "The appellant, and Sukraj removed the body from under the tree and hid it in broken ground in the bush." Then, as to the question whether the witness was an accomplice, the Privy Council observed:

"It is well settled that the evidence of an accessory which Sukraj plainly was on his own showing, must be corroborated in some material particulars not only bearing upon the facts of the crime but upon the accused's implication in it and

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<sup>398</sup> AIR 1936 P C 242

further that evidence of one accomplice is not available as corroboration of another."

12. Mr. Batalvi attempted to distinguish this authority on the ground that Sukraj had been charged for the homicide by the prosecution. Nothing turns on this distinction, because the prosecution cannot defeat the law and convert an accomplice into an ordinary witness by not prosecuting him under section 201, I.P.C In any case, the question is of the ratio of the Privy Council's judgment, and the Privy Council's observations which. I quoted are very clear.

13. After this pronouncement by the Privy Council, the question whether an accessory after the fact was an accomplice was re-examined by the High Courts, and I would only refer here to the leading case of *Ismail v. Emperor*<sup>399</sup> because it is a judgment of the Lahore High Court. The learned Judge observed in paragraph 14 of judgment;

"The expression 'accomplice' has not been defined in the Evidence Act, but there can be little doubt that it means a person who knowingly of voluntarily cooperates with or aids and assists another in the commission of a crime. The expression obviously includes principals in the first and second degree. In the case in AIR 1936 P C 242 their Lordships of the Privy Council held that the expression is wide enough to include persons who are known to the English law as accessories after the fact. An accessory after the fact is one who, knowing a felony to have been committed, receives, relieves, comforts or assists the felon. Three conditions must unite to render one an accessory after the fact; (1) the felony must be complete; (2) the accessory must have knowledge that the principal committed the felony; and (3) the accessory must harbour or assist the principal felon. Mere acts of charity which relieve or comfort a felon, but do not hinder his apprehension and conviction nor aid his escape, do not render one an accessory after the fact (4 Blackstone's Commentaries, p. 38). He must be proved to have done some act to assist the felon personally .... To render a person an accomplice his participation in the crime must be criminally corrupt."

14. As these observations state the correct law, a further examination of the. question is hardly necessary. But as the learned Judges of the Lahore High Court have not followed the very able judgment (I say so with respect) of their own Court, I would examine Mr. Batalvi's attempt to defend the view of the learned Judges. Learned counsel only relied on the judgments reported in *Emperor v. Percy Henry Burn*<sup>400</sup>, in *Narain Chandra Biswas and others v. Emperor*<sup>401</sup>; in *Nga Pauk v. The King*<sup>402</sup>, in *S A. Sattar*

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<sup>399</sup> AIR 1947 Lab. 220

<sup>400</sup> 4 I.C 268 (Bom.)

<sup>401</sup> AIR 1936 Cal. 101

<sup>402</sup> AIR 1937 Rang. 513



*Khan and others v. The Crown*<sup>403</sup>, in *Jagannath v. Emperor*<sup>404</sup>; in *Ghudo and another v. Emperor*<sup>405</sup> and in *Crown v. Ghulam Rasul and others*<sup>406</sup>.

15. I would begin with the Lahore judgment in *Ghulam Rasul's case* because it turns on the conduct of a very brave lady, who happened to be living alone. One night she heard a call for help from a neighboring room, and rushed to help, but was threatened by men who were killing someone. She begged them to desist but they threatened to kill her, chased her to her room and locked it from outside. Presumably the lock was broken up by her neighbors the next morning, but as she failed to report the occurrence, her evidence was challenged on the ground that she was an accomplice. This frivolous plea was rightly rejected, because, as I explained, the guilty intention is an essential of the crime of being an accomplice and in the case cited the witness was an involuntary spectator of a crime which she was powerless to prevent. This judgment is in no way inconsistent with the ratio of Ismail's case and it is completely irrelevant to the instant case, because the question before us is whether we should rely on the evidence of witnesses who have asserted, sometime falsely, that they had tampered with the investigations.

16. The facts in *Jagannath's case* were similar to *Ghulam Rasul's case*. The witness was the driver of a vehicle which plied for hire. He was engaged by two persons who were complete strangers to him. During the course of the journey, they told him to stop. He stopped his vehicle. The strangers got down and robbed two cyclists who were passing. Because the witness did not report the robbery till the next day, his evidence was challenged on the ground that he was an accomplice. This plea was rightly rejected because the witness was an involuntary spectator of a crime.

17. The *Bombay case* and the *Madras case* both relate to stolen property. In both cases, the witness, whose evidence was challenged on the ground that he was an accomplice, had carried the stolen property at the request of the persons responsible for the crime. In both cases, the learned Judges held that the prosecution had failed to prove that the witness knew that his superiors were committing a crime. These judgments are not relevant to the instant case before us have confessed to a crime, namely section 201. P.P.C.

18. Next as to the *Calcutta case*, it is distinguishable on more than one grounds. In the first place, as observed by the learned Judges, in addition to the evidence of the accomplices "there is the evidence of witnesses mentioned as independent witnesses-examined on the side of the prosecution to corroborate the evidence of the former. The evidence coming from these witnesses appears to or to be wholly trustworthy and

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<sup>403</sup> AIR 1939 Mad. 283

<sup>404</sup> AIR 1942 Oudh 221

<sup>405</sup> AIR 1945 Nag. 143

<sup>406</sup> PLD 1950 Lah. 129

reliable." Therefore, as there was ample corroboration of the evidence of the accomplices, the observations on which Mr. Batalvi relied are only obiter, and further the learned Judges observed that the evidence of "persons coming technically within the category of accomplices cannot also be treated as on precisely the same footing." This observation had reference to the fact that the witnesses, whose evidence was challenged on the ground that they were accomplices, had nothing to do with the main charge, and if they were guilty at all, which is not clear from the judgment, they were guilty of very petty offences. There is no analogy between such accomplices, and accomplices who, being Police Officers, destroy evidence of a murder, therefore, this judgment is not relevant to the instant case.

19. However, the *Rangoon and Nagpur cases* on which Mr. Batalvi relied fully support his submission. But the attention of the learned Judges in these two cases was not drawn to the Privy Council's judgment in *Mahadeu's case*. Further as these judgments follow the majority view in *Ramaswami Gounden v. Emperor*<sup>407</sup>, and as this majority view in *Ramaswami's case* has been followed in some other judgments also, which were not cited by learned counsel, it is necessary to examine this majority view in some detail.

20. The facts in this case were that the appellant had carried on an affair with a female servant, and because she attempted to blackmail him, he murdered her. Another servant of his, a boy of about 16 or 18 years, one Velappa saw the murder, and the prosecution case was based solely on his evidence and on evidence of motive. The Sessions Judge who tried the case held that Velappa had helped the appellant to conceal the corpse of the murdered woman and had falsely denied having thus aided the appellant. He, therefore, convicted the appellant, who challenged his conviction in an appeal in the Madras High Court. Ayyar, OJ, had doubts about Velappa's role in the occurrence, but observed that "in dealing with this case it is perhaps better to proceed as if Velappa had assisted the accused in the way supposed, though I cannot say I believe he did so assist". Later on Ayyar, OJ, repeated his doubts about the precise role played by Velappa in the occurrence, and this doubt escaped the attention of the learned Judges who have treated the judgment as an authority for the proposition that an accessory after the fact can never be an accomplice. So, I would emphasize here that if Velappa did not assist the appellant, in concealing evidence of his crime he was not an accomplice, but if he did assist the appellant, he was an accomplice and was also not a witness of truth and the view taken by Ayyar, OJ, would be contrary to the law declared by this Court in *Mumtazuddin v. The State*.<sup>408</sup>

21. Reverting however to the judgment of Ayyar, OJ, despite his doubts about the precise role of Velappa in the occurrence, he examined the appeal on the assumption that Velappa had helped the appellant to conceal the body of the murdered woman,

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<sup>407</sup> ILR 27, Mad. 271

<sup>408</sup> PLD 1978 SC 11

therefore, the question was whether Velappa was an accomplice and whether a conviction could be based on Velappa's evidence alone. Ayyar, OCJ, held, on the basis of the judgments reported in *Rex v. Boyes*<sup>409</sup> and *Rex v. Hargrave*<sup>410</sup>, that the appellant could be convicted on Velappa's uncorroborated testimony. Secondly, without examining the history of the section, Ayyar, OCJ, observed that Velappa "might be indictable under section 201 of the Penal Code for the concealment of the body", but that as the appellant could not be tried under this section, Velappa was not an accomplice. Thirdly, Ayyar, OCJ, held that although Velappa was guilty under section 202 of the Penal Code for not having reported the murder, this did not make him an accomplice either. Accordingly, he dismissed the appeal with Ayyangar, J., concurring with him, while Boddam, J., did not.

22. As all the three grounds for dismissing the appeal support Mr. Batalvi's arguments, it is necessary to examine them, and as to the last ground, I would refer to the judgment of the Indian Supreme Court in *Vemireddy Satyanarayan Reddy and others State of Hyderabad*<sup>411</sup>. The convictions in this case were for murder and the prosecution case rested on the uncorroborated testimony of a young boy, who was a servant of the appellant at the relevant time. He had neither participated in the murder nor helped in any way in concealing evidence of the murder, but he had failed to report the murder and had continued to work for some time with the murderers. Therefore, it was contended that he was an accomplice and that the convictions were bad because they were based on the uncorroborated testimony of an accomplice. The learned Judges of the Indian Supreme Court rightly held (I say so with respect) that the witness was not accomplice merely because of his failure to report the murder, but nonetheless, they were of the view that the evidence of such a witness stood more or less on the same footing as that of an accomplice and that it was not fit to be accepted without corroboration. Accordingly, they set aside the convictions and allowed the appeals. Thus it will be seen that the premise on which Ayyar, OCJ, based his view has ceased to be a good law even in India, and, I am in respectful agreement with the judgment of the Indian Supreme Court.

23. I now turn to the question whether Ayyar, OCJ., laid down the correct law in applying the rule in *Rex v. Boyes* and in *Rex v. Hargrave* to accomplice evidence in a murder case. Both these cases were decided about the middle of the last century and are very badly reported cases. In *Rex v. Hargrave*, the prosecution was for man-slaughter. All that the report states is that the victim died in a prize fight, and as the prosecution case rested on the evidence of a witness who had watched the prize fight, his evidence was challenged on the ground that he was an accomplice. This plea was rejected, but the report of the judgment does not state why this plea was rejected, and it does not even give any particulars of the prize fight. However, from a reference to this judgment

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<sup>409</sup> 9 Cox CC 32

<sup>410</sup> 172 ER 925

<sup>411</sup> BLD 1956 SC (Ind.) 280

in the judgment of *Hawkin, J., in Queen v. Concy and others*<sup>412</sup>. I find that the prize fight which Hargrave watched was a boxing match. And as death occurs very seldom in a boxing match, there is no analogy whatever between a person watching a boxing match and a person helping in the commission of a murder by burying the corpse of the murdered man, and even on the footing that the witness in this English case had encouraged the boxing match by his presence the offence committed by him was so trivial that it hardly reacted against his veracity, therefore, to equate his position with that of Velappa was, in my humble opinion, to beg the question.

24. I now turn to the judgment reported in *Rex v. Boyes*. The respondent had stood for the parliamentary election of 1859 and was prosecuted for obtaining votes by bribing the voters. It would appear from the judgment that the respondent was separately tried for the bribes paid to different voters with the result that the charge against him in each case rested on the uncorroborated testimony of the voter who had received a bribe. The respondent submitted that a voter who had received a bribe was a self-confessed accomplice, therefore, he could not be convicted on the uncorroborated evidence of an accomplice. The direction given to the jury by the Judge on this charge was that it could convict the respondent on the evidence of a solitary voter if it was satisfied that the witness was speaking the truth. And as to the legal plea advanced by the respondent, the learned Judge said in his direction to the jury-

"Is there any law which prohibits a jury from believing a man who spoke the truth merely because he is not corroborated? I know of none. I know of no rule of law myself, but there is a rule of practice which has become so hallowed as to be deserving of respect. I believe these are the very words of Lord Abinger, it deserves to have all the reverence of the law."

25. In view of the direction that the rule about corroboration was not a rule of law, the jury convicted the respondent, who challenged his conviction in an appeal, but the appeal was dismissed on the short ground that there was no error in the Judge's direction to the jury. Now, under the law as it stood in 1861, there was no error in the direction to the jury which I have quoted, but much water has flown under the bridges since 1861 and in *Davies v. Director of Public Prosecutions*<sup>413</sup>, the House of Lords held that this rule of corroboration about accomplice evidence had hardened into a rule of law. I may also observe here that there has been a parallel development in the Jurisprudence of the sub-continent, and therefore once again the promise on which Ayyar, OCJ., based his conclusion has ceased to be a good law.

26. Additionally, in applying the rule in this *English case* to *Rama Swami's case*, Ayyar, OCJ., assumed that corroboration, which was sufficient to corroborate

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<sup>412</sup> 8 QBD 534

<sup>413</sup> 1954 A C 378

accomplice evidence in a bribery case, would also be sufficient to corroborate accomplice evidence in a murder case. With the utmost respect, I am not able to agree with this view, and I will presently explain why.

27. I now turn to the ground given by Ayyar, OCJ., for holding that Velappa was not an accomplice. As Velappa was guilty under section 201, I.P.C. and as the learned Judge thought that Ramaswami could not be prosecuted under this section, he held that Velappa was not an accomplice because he had not helped Ramaswami in the murder committed by him. However, Ramaswami had not only committed a murder, but he had also instigated Velappa to commit an offence under section 201, I.P.C. therefore, he was guilty under section 107 read with section 201 of the Penal Code, whilst Velappa was guilty only under section 201, so Velappa should have been tried with Ramaswami. But merely because the prosecution did not, it could not take advantage of its own wrong in not prosecuting him and then claiming that he was not an accomplice. Additionally, the question is of the validity of the premise on which Ayyar, OCJ., based his view that Ramaswami could not be tried for concealing evidence of murder under section 201, I.P.C. even though he had concealed evidence of a murder. On the ground that the view of Ayyar, OCJ., was obiter, it was overruled by a Division Bench of the same High Court in *Chinna Gangappa v. Emperor*<sup>414</sup>. Additionally, Mr. Yahya Bakhtiar submitted that the view of Ayyar, OCJ., was inconsistent with that of the Privy Council in *Begu and others v. Emperor*<sup>415</sup>. Mr. Batalvi submitted that this judgment was distinguishable. Even if it is, the question whether a person charged for murder could also be tried under section 201 was examined by the Indian Supreme Court in *Kalawati and another v. The State of Himachal Pradesh*<sup>416</sup> and the Court observed:

"Section 201 is not restricted to the case of a person who screens the actual offender; it can be applied even to a person guilty of the main offence and under section 201."

This means that the third premise on which the view of Ayyar, OCJ., was based has ceased to be good law in India. I further agree with the view taken in *Kalawati's case* and in *Gangappa's case*, and I would hold that any person who conceals evidence of a crime is an accomplice to that crime.

28. Next, as to the *Rangoon and Nagpur cases* on which Mr. Batalvi relied, no doubt they support learned counsel's submission, but as they merely follow the view of Ayyar, OCJ., in *Ramaswami's case*, in my opinion, these judgments too are not good law.

29. I now turn to the question for the principles for evaluating the evidence of accomplices, and we had very lengthy arguments on the question whether the evidence

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<sup>414</sup> AIR 1930 Mad. 870

<sup>415</sup> AIR 1925 P C 130

<sup>416</sup> AIR 1953 SC 546

of an approver had to pass the scrutiny of two tests before it could be accepted. Mr. Yahya Bakhtiar relied on the following passage by Munir in his Law of Evidence (Pakistan Edition) at page 1429:

"The appreciation of an approver's evidence has to satisfy a double test. The first initial test is that his evidence must show that he is a reliable witness and that is a test which is common to all witnesses. If this test is satisfied the second test, which still remains to be applied, is that the approver's evidence must receive sufficient corroboration."

30. The evidence of an ordinary witness does not require corroboration if he is found to be reliable, but as the evidence of an accomplice always requires corroboration, it follows that it has to pass a double test, so that even when it has passed the test that it is reliable, it still cannot be accepted without corroboration. Therefore, I cannot but express my surprise at the very lengthy arguments addressed by the learned counsel on this question, and in my opinion, what is called the double test is nothing but the corollary of the principle that the evidence of an accomplice is presumed to be unreliable, therefore, the real question for determination is whether this presumption against the veracity of an accomplice is justified.

31. Although Mr. Batalvi did not go to the length of contending that the prosecution was not justified, he wanted us to whittle it down, because unless we do so, the prosecution must fail. On the other hand, Mr. Yahya Bakhtiar wanted us to stand fast to this presumption, and as his plea is supported by judgments going back to almost a couple of centuries, I am somewhat reluctant to rush in where Judges far wiser than me have feared to tread, so I would turn to the reasons why Judges have, for generations, treated the evidence of accomplices as unreliable. The judgments on this question are legion, but as the learned Judges have, in the judgment under appeal, assessed the evidence of the two approvers *inter alia* on the basis of the *obiter dicta* in *Kamal Khan's case* and as that was a bribery case, I would begin with an earlier and much more well-considered judgment of the Bombay High Court in *Queen v. Maganlal and Motilal*<sup>417</sup>.

32. The appellants in this leading case of the Bombay High Court were Government classers, who had been convicted for taking bribes from villagers, who said that the classers had threatened to raise their assessment and harass them unless they were paid bribes. As the convictions of the appellants were based solely on the evidence of these persons, the appellants had resisted their prosecution on the ground that a conviction could not be based on the uncorroborated evidence of accomplices. As this plea was rejected by both the lower Courts, the appellants challenged their conviction in the High Court. As the appeals were allowed, the learned Judges explained why the

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<sup>417</sup> ILR 14 Bom. 10

evidence of accomplices had always been treated as untrustworthy and it would be sufficient to refer here to the judgment of Scott, J., who observed at page 119:

"Accomplice evidence is held untrustworthy for, three reasons: (1) because an accomplice is likely to swear falsely in order to shift the guilt from himself; (2) because an accomplice, as a participator in crime and consequently an immoral person, is likely to disregard the sanction of an oath; and (3) because he gives his evidence under promise of a pardon, or in the expectation of an implied pardon, if he discloses all he knows against those with whom he acted criminally; and this hope would lead him to favor the prosecution."

33. I agree with these observations about the temptations which render the evidence of an accomplice untrustworthy, and of the three temptations noted by Scott, J., the last is the strongest. But an approver is an accomplice who has been granted a pardon, and as the prosecution relies on the evidence of two approvers, can it be said that the evidence of an approver stands on a higher footing than that of other types of accomplices, because he has been pardoned? I do not think so because an approver's fate remains uncertain until the end of the trial, as his pardon can be cancelled at any time during the pendency of the trial under section 339 of the Criminal Procedure Code. Therefore, Robert, C. J., observed in *Nga Aung Pe v. Emperor*<sup>418</sup> "if the accomplice is an approver and gives his evidence under express promise of a pardon ... he may ... be likely to favor the prosecution and therein to exceed the bounds of truth." An even stronger case is the judgment of the Bombay High Court in *Allisab Rajesab v. Emperor*<sup>419</sup>. The question in this case was whether the evidence of an accomplice who had "pleaded guilty, was convicted and sentenced and then put in the witness-box" required corroboration, and the Sessions Judge was of the view that it did not, because "there is no serious allegation of enmity between the witnesses and the accused". And this is the very plea advanced in the instant case by Mr. Batalvi. But, Beaumont, C.J., held that the evidence of the accused required corroboration, although he had been sentenced as "even after sentence he may have had in mind that if he helped the prosecution his sentence might be reduced". I agree with this view and generally the evidence of an approver is more tainted than that of an accomplice, who is not an approver, for obvious reasons which have been repeatedly stressed by this Court. Thus, for example, in *Ishaq v. The Crown*<sup>420</sup> Munir, C.J., observed:

"As distinguished from a pretended confederate who associates with wrongdoers in order to obtain evidence, an accomplice is a moral wretch who not only publicly boasts of his own part in the crime which is often committed in his interests and at his instigation but who, prompted by a mean desire to save his own skin, shamelessly betrays his companions in the dock and who has no

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<sup>418</sup> AIR 1937 Rang. 209

<sup>419</sup> AIR 1933 Bom. 24

<sup>420</sup> PLD 1954 FC 335

scruples either in exaggerating their part in the crime or in substitution in a well thought out narrative a completely innocent man for a friend whom he is still anxious to save."

The emphasis by the learned Chief Justice in this passage is on the danger that because an approver has no scruples, he will have no hesitation in substituting "In a well-thought out narrative a completely innocent man for a friend whom he is still anxious to save." This warning has been given by eminent Judges for generations, and unless we are so presumptuous as to think that we have the monopoly of wisdom, we must not disregard this warning. And that means that the rule of corroboration laid down by this Court in *Nazir and others v. The State*<sup>421</sup> must not be extended to accomplice evidence and this was expressly clarified in *Nazir's case* itself. The Court drew a distinction between accomplice evidence and other types of evidence. It refused to equate the evidence of an interested witness with that of an accomplice and Kaikaus, J., observed with reference to accomplice evidence:-

"It is possible to lay down a rule of law that a witness belonging to a particular category is to be presumed to be unworthy of credit without corroboration. In the case of an accomplice such a rule has already been accepted by the Courts. But we had no intention of laying down an inflexible rule that the statement of an interested witness (by which expression is meant a witness who has a motive for falsely implicating an accused person) can never be accepted without corroboration."

34. I have quoted this passage at some length, because at one stage of the arguments Mr. Batalvi submitted that the rules about the corroboration of accomplice evidence had been evolved by Judges and could be modified by Judges and the submission was that these rules were too strict with the result that the guilty could go unpunished. Learned counsel appeared to think that these rules about corroboration could be assimilated to the rule about corroboration laid down in *Nazir's case*, but as this passage shows the Judges in *Nazir's case* held that the rule for corroboration of interested witnesses was different from the rule for the corroboration of the evidence of accomplices. And I see no reason whatever for dissenting from this Court's view in *Nazir's case*.

35. I, however, agree with the learned counsel that the nature and extent of the corroboration necessary in a case must depend upon the circumstances of the case and especially the nature of the offence and the degree of suspicion attaching to the accomplice's evidence. Thus for example, as between accomplices who have confessed to a murder, one of the accomplices may have been guilty of offences other than those for which he has been pardoned. Such an accomplice will be under a far greater temptation than the other accomplice to give false evidence, because of the, hope that he

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<sup>421</sup> (1962) 2 PSCR 140



might escape his trial for the other offences committed by him if he gives evidence on lines which favors the prosecution case. On the other hand, there might be a very extraordinary case in which an accomplice has confessed his crime and become an approver not in order to save his own skin, but because he has renounced the way of violence, therefore, there cannot be any universal or inflexible rule about the nature of the corroboratory evidence necessary for accepting the evidence of approvers and accomplices. As was very aptly observed nearly fifty years ago in *Muhammad Fanah v. Emperor*<sup>422</sup>, the force of the presumption that the evidence of an accomplice is unreliable, "varies as the malice to be imputed to the deponent. Whatever attenuates the wickedness of the accomplice tends at the same time to diminish the presumption that he will not acknowledge and confess (the truth) with sincerity."

36. I would now turn to some of the other circumstances relevant to the appreciation of evidence of accomplices. As the case before us is of murder even though murder is a heinous offence, there are murders and murders, and the moral turpitude attached by society to the murder is not irrelevant to the question of the veracity of accomplices, who have participated in it. I would illustrate the point by reference to a type of murder which is still frequent in the tribal areas of the country. As was observed by Fazle Akbar, J. (as he then was) in *Ajun Shah v. The State*<sup>423</sup>:-

"It is a matter of tradition and even a family duty (in the tribal areas of the country) to avenge the murder of a father. Such murders are committed in that area out of a sense of honor and self-respect."

37. As a murder committed out of a sense of honor does not attract as much social condemnation as an ordinary murder, the evidence of an accomplice in this type of murder would stand on a somewhat higher footing than the evidence of accomplice in an ordinary murder.

38. Another circumstance relevant to the veracity of an accomplice is the question of his complicity in the crime committed by him. By the nature of things, there is a difference between the veracity of an accomplice who has planned a crime for his own benefit and an accomplice who has been led into the crime on account of some restraint or force, and by force or restraint, I do not mean the degree of force or threats which would entitle the accomplice to the benefit of section 94 of the Penal Code. Thus, for example, in *Muhammad Pahah's case*, the accomplice was a tribesman, and, as he had committed the offence on the orders of his Sardar, the learned Judges observed that:-

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<sup>422</sup> AIR 1934 Sindh 78 (2)

<sup>423</sup> PLD 1967 SC 485

"he was coerced and threatened into submission. He is not a criminal of the basest kind. The corroboration necessary to establish his credit will be less than if his complicity in the offence had been voluntary and spontaneous."

39. I agree with this passage, but I would clarify here that it is all very well for a village rustic to say that he was overawed by his Sardar or by an official, but it is a very different thing to say that an educated man holding a high office has been overawed by someone higher than him, and that is Masood Mahmood's claim in the instant case.

40. I have, therefore, to observe that if the prosecution invites the Court to believe that the evidence of an accomplice does not require strong corroboration, because he was led into the crime on account of some constraint or pressure, the burden of proving this plea is on the prosecution, and this burden cannot be discharged by the bare testimony of the accomplice himself. This is for the obvious reason that an accomplice's evidence is, presumed to be unreliable, and therefore, if the Court were to accept the *ipse dixit* of an accomplice that he was threatened into committing the crime, it would be flouting the rule that the evidence of an accomplice cannot be accepted without corroboration. The law on this point is too well settled to require recapitulation and I would only refer to the last of a long line of authorities on this point. In *Bhuboni Sahu v. The King*<sup>424</sup>, Sir John Beaumont observed:

"An accomplice cannot corroborate himself; tainted evidence does not lose its taint by repetition."

41. Now, the principle that an accomplice cannot corroborate himself and that tainted evidence does not lose its taint by repetition necessarily reacts on the question of the number of witnesses which the prosecution is required to produce in order to prove its case. Mr. Batalvi stated that the prosecution was not required to produce all the witnesses available to it. That could be so in an ordinary case, and the judgments on which he relied related to ordinary cases. But the position is quite different when the prosecution relies on the evidence of accomplices. In such cases when independent evidence is available to corroborate any statement made by an accomplice which is material to the prosecution case, then the prosecution must produce that independent evidence, and the failure to do so would be fatal to that part of the evidence of the accomplice which could have been but was not corroborated by independent evidence.

42. Finally, without wishing to categorize all the circumstances relevant to the appreciation of the evidence of accomplices, I must refer here to one obvious circumstance which reacts on the veracity of accomplices. This is the nature of the offence in the commission of which the accomplice has aided. The more heinous the offence and the greater the moral turpitude attached to it, the greater is the necessity of

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<sup>424</sup> AIR 149 P C, 257

corroborative evidence. At one end of the scale are offences like murder, and at the other end of the scale are technical offences, which do not involve any *mens rea*, and whilst strong corroborative evidence is necessary in the former case, in my humble opinion, the evidence of accomplices in a prosecution for a technical offence, which does not involve any *mens rea*, does not require any corroboration, because in such cases the evidence of an accomplice does not suffer from any taint, and this is what is enacted in the first part of the illustration to clause (b) of section 114 of the Evidence Act. That is also why the Legislature has not fettered the discretion of the Courts under section 133 of the Evidence Act, by laying down a rigid rule, and has prescribed that the Court may convict on the evidence of an accomplice.

43. However, between the heinous offences like murder and technical offences which do not involve any *mens rea*, there will be a vast range of offences which involve some measure of moral turpitude, and it is with such crimes that the lower Courts are pre-occupied. It is also difficult for the prosecution to procure independent evidence in such cases. Would it, therefore, be safe to dispense with the necessity of corroboration in such cases merely because section 133 leaves it to the discretion of the Court? In my opinion, the answer to this question can only be in the negative, and it has been so answered by authorities going back to the promulgation of the Evidence Act.

44. Many of these authorities relate to bribery cases because corruption has always been with us. To give a bribe to a Government servant has been considered a usual thing to do in the sub-continent for centuries, and it is also extremely difficult to produce independent evidence of the payment of bribe because bribes are always paid secretly, therefore, Judges have been asked again and again to relax the rule for the corroboration of the evidence of accomplices in order to ensure that the corrupt do not go unpunished. And as this was Mr. Batalvi's plea before us, a brief reference to the bribery cases would be useful.

45. In *Queen-Empress v. Maganlal and Motilal* to which I referred earlier, the Court held that little or no moral turpitude was attached by society to the payment of bribes, and it also agreed with the submission of the State that it was very difficult to produce independent evidence of the payment of bribes, because such payments were always made in secret, yet it rejected the contention of the State that the rule about corroboration of the evidence of accomplices should be relaxed, and I would only refer here to the judgment of Jardine, J., at page 138, who observed:

"I do not think an exception can be made in favor of bribers. because they are not, in my opinion, people of good character, and because, if such exception were allowed, men of previously good character would be exposed to charges of receiving bribes, without sufficient protection, as happened in the half dozen cases where we reversed the convictions today.

46. This view was approved and followed by another Division Bench of the Bombay High Court in *Queen-Empress v. Chagan Dayaram and another*<sup>425</sup> and again in *Queen-Empress v. Malhar Martand Kulkarni*<sup>426</sup>.

47. Beginning with the judgments reported in *Queen-Empress v Deodar Sing and another*<sup>427</sup> and in *Emperor v. Edward William Smither*<sup>428</sup> the Calcutta and Madras High Courts have consistently taken the same view.

48. Turning now to our Courts, although the facts were distinguishable, Cornelius, J. (as he then was) took the same view in *Emperor v. Anwar Ali*<sup>429</sup> and this judgment was followed by the High Court of West Pakistan in *Ghulam Muhammad v. The Crown*<sup>430</sup>, and the same view was taken by Hamoodur Rehman, J. (as he then was) in *Osimuddin Sarkar v. The State*<sup>431</sup>.

49. The Bombay High Court had, however, struck a discordant note in *Papa Kamalkhan and others v. Emperor* and it is this case on which the High Court has relied. The appellants in this case had been convicted on the evidence of persons who had bribed them, and they challenged their convictions on the ground that convictions based on the uncorroborated evidence of accomplices were illegal. The Court was satisfied with the evidence produced by the prosecution to show that the bribe-givers had been forced to give bribes, but the learned Judge observed:

"It is not possible to expect absolutely independent evidence about the payment of a bribe, and a distinction has to be made between persons who have voluntarily paid a bribe to a public servant in order to secure some advantage for themselves, and persons ... who have been compelled by improper pressure put upon them by a public servant to pay a bribe. In cases of this kind, where the payment of the bribe has not been voluntary, very slight corroboration would be sufficient to make the evidence of such persons admissible against the receiver of the bribe."

50. With respect, I agree with the distinction drawn by the learned Judge between persons who have voluntarily paid bribes and those who have been compelled to do so, but I cannot agree with the approach of the learned Judge that the rule about corroboration becomes almost redundant in the case of persons who have paid bribes under pressure, and I would emphasize here that these observations were obiter,

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<sup>425</sup> ILR 14 Bom. 331

<sup>426</sup> ILR 26 Mad. 1

<sup>427</sup> ILR 26 Bom. 193

<sup>428</sup> AIR 1948 Lah. 27

<sup>429</sup> ILR 27 Cal. 144

<sup>430</sup> PLD 1957 Kar. 410

<sup>431</sup> PLD 1961 Dacca 798

because of the express finding that there was ample corroboration of the evidence of the accomplices. Secondly, this obiter is inconsistent with the ratio of the earlier judgments of the Bombay High Court, and I cannot do better than quote here from the judgment of Fulton, J., in *Kulkarni's case* at page 197:

"Now the cases of Maganlal and Chagan show beyond doubt that persons who give bribes are accomplices of persons who receive them. They also show that the learned Judges who dealt with those cases felt strongly how unsafe it usually would be to convict public servants of receiving bribes on the uncorroborated evidence of persons who said they had given them. We share that feeling. In this country false accusations are numerous, and public servants who fearlessly discharge their duties are likely to make many enemies. It is, therefore, most necessary for their protection that the Courts shall be vigilant in requiring strong and convincing evidence before nastily accepting charges brought against them. The humbler classes of public servants are especially in need of this protection."

51. I respectfully agree with these observations, and I would add that my own experience of the inspection of the subordinate Courts in the Province of Sindh has convinced me of the necessity of protecting "public servants who fearlessly discharge their duties" against false charges of bribery, therefore, in my opinion, the obiter dicta in *Kamal Khan's case* have gone too far.

52. In the result, I would hold that except for technical offences, which do not involve any *mens rea*, the evidence of accomplices (and I am now using the word in its widest sense to include approvers) should not be accepted without corroboration, but the quantum of the corroborative evidence would depend on the nature of the offence and the complicity of the accomplice in it. And, further, if the rule of corroboration cannot be relaxed in the case of bribery cases, there can be no question whatever of relaxing it in the case of heinous offences, and the instant case is one of a heinous offence.

53. I would now turn to the question of the nature of the corroborative evidence necessary in prosecutions for heinous offences. I cannot do better than quote a passage from Munir's Law of Evidence (Pakistan Edition), page 1427:

"As a matter of strict law, the uncorroborated testimony of an accomplice could, if accepted, form the basis of a conviction in a criminal case. However, in the course of judicial precedents, a rule of prudence has been evolved under which it is always insisted that there ought to be independent corroboration of an approver's statement on material points suggesting a link between accused persons and the crime before such a statement could be accepted as a safe foundation of their conviction. The reason for the rule is obvious. There is always

danger of substitution of the guilty by the innocent in such cases and it is realized that it would be extremely risky to act upon the statement of a self confessed criminal who while trying to save his own skin, might be unscrupulous enough to accept suggestions of others to inculcate a person unconnected with the crime in place of his real accomplice for whom he may have a soft corner."

54. Once again the emphasis in this passage is on "the danger of substitution of the guilty by the innocent", regardless of the question whether the accomplice has any motive to implicate the accused falsely, and the learned author has based his view on a long line of authorities beginning with the classic judgment of Abinger, C. B., in *Regina v. Farler*.<sup>432</sup>

"No one can hear the case without entertaining a suspicion of the prisoner's guilt, but the rules of law must be applied to all men alike. It is a practice which deserves all the reverence of law, that Judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance. Now, in my opinion, that corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all. If a man was to break open a house and put a knife to your throat and steal your property, it would be no corroboration that he had stated all the facts correctly, that he had described how the person did put a knife to the throat, and did steal the property. It would not at all tend to show that the party accused participated in it."

55. I now turn to the case-law of the sub-continent. Beginning with the judgment in *Reg v. Budhu Nanku and others*<sup>433</sup>, the Bombay High Court has consistently followed the view in *Faler's case*. The Calcutta High Court took the same view in *Queen-Empress v. Bepin Blswas sued others*<sup>434</sup>, and observed at page 973:-

"Nothing is easier for a man than to narrate events with accuracy, and yet more, when coming to describe the acts of a particular person, to change his personality so as to exculpate a guilty friend, and to implicate an innocent person or any enemy."

56. All the High Courts of the sub-continent have followed this view of the Bombay and Calcutta High Courts and it would be tedious to refer to the stream of judgments

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<sup>432</sup> 8 CAR & P 107

<sup>433</sup> ILR 1 Bom. 475

<sup>434</sup> ILR 10 Cal. 970

on this point. However, I would refer to a Bombay judgment in order to show that Public Prosecutors may change, but their pleas do not, so I would explain here that one of Mr. Batalvi's submissions before us was that no one except Mr. Bhutto had a motive to kill Mr. Kasuri, therefore, Masood Mahmood's evidence was highly probable and we should accept it as reliable on this ground. In repelling an identical plea, Beaumont, C. J. observed in *Shankarshet Ramshet Uravane v. Emperor*.<sup>435</sup>

"But the mere fact that the approver's story is a very probable one, is no reason for dispensing with the rule that such evidence requires independent corroboration. That proposition was acted upon recently by this Court in *Emperor v Allisab*<sup>436</sup> where it was laid down as a definite rule of prudence that the evidence of an accomplice should not be acted upon unless corroborated as against the particular accused in material respects and that rule should be applied however little reason there was to doubt the approver's story. I have no doubt that the strict application of that rule does sometimes result in a guilty person being acquitted, and this may be one of those cases. But on the other hand I am quite sure that if the rule were otherwise, the result would frequently be the conviction of innocent persons, because it is so easy for an approver or an accomplice, who is telling story which is in substance true, and therefore, not capable of being shaken in. cross-examination, to introduce into that story the names of innocent persons along with the guilty."

57. The next year, Abdul Rashid, J. (as he then was) observed in *Mungal Singh v. Emperor*<sup>437</sup> at page 347:-

"As stated above, the direct evidence in the case consists only of the statement of the approver. It is a rule of practice, which has acquired the sanctity of a rule of law, that no conviction should be based on the testimony of an approver, unless it is corroborated in material particulars by independent evidence connecting each of the culprits with the commission of the crime."

58. I have referred to this case, because it is the earliest pronouncement of the High Courts of the sub-continent in which it was clarified that the rule of practice about corroboration had hardened into a rule of law.

59. I now turn to the pronouncement of this Court and I would begin with the judgment of Munir, C. J., in *Ishaq v. The Crown*<sup>438</sup>. It was observed at page 343;

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<sup>435</sup> AIR 1933 Bom. 482

<sup>436</sup> AIR 1933 Bom. 24

<sup>437</sup> AIR 1934 Lah. 346

<sup>438</sup> PLD 1970 SC 166

"Accomplice evidence is admitted from necessity, it being often impossible, without having recourse to such evidence, to bring the principal offenders to justice. The first reaction of the Court or Jury who are called upon to judge such evidence is a feeling of distrust and suspicion, and for reasons which have been mentioned too often to be repeated here and are all based on the peculiar position that an accomplice occupies, it has in modern times been an almost invariable rule not to act on his evidence, unless it is corroborated in material particulars against the prisoner."

60. These observations do not of course mean that the evidence of an accomplice about the details of a crime does not require corroboration. It does, like all other evidence, and generally an accomplice could have no difficulty in giving a correct narrative of the crime, because he has participated in it. But his evidence must satisfy a further test. This test is that it must be "corroborated in material particulars against the prisoner".

61. This principle was re-affirmed in *Abdul Khaliq v. The State*<sup>439</sup>, whilst in *Abdul Maid and another v. The State*<sup>440</sup>, this Court, after reviewing all its previous pronouncements, re-affirmed the warning given in *Ghulam Qadir v. The State*<sup>441</sup>, that:-

"There is (in the evidence of accomplices) always danger of substitution of the guilty by the innocent ... and it is realized that it would be extremely risky to act upon the statement of a self. confessed criminal who while trying to save his own skin, might be unscrupulous enough to accept (the) suggestions of others to inculcate a person unconnected with the crime in place of his real accomplice for whom he may have a soft corner."

62. It is not surprising that the superior Courts of other common law countries have also taken the same view, and in *Major E. G. Barsay v. State of Bombay*<sup>442</sup> at page 1781 the Indian Supreme Court observed;

"The corroboration must be by independent testimony confirming in some material particulars not only that the crime was committed but also that the appellant committed it."

63. Thus the law on the question of the corroboration of accomplice's evidence is clear, consistent and uniform, and as pointed out by Beaumont, C. J., in *Shankarshet's case*, even though it "does result in a guilty person being acquitted ... if the rule were otherwise the result would frequently be the conviction of innocent person".

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<sup>439</sup> PLD 1954 FC 335

<sup>440</sup> PLD 1973 SC 595

<sup>441</sup> PLD 1959 SC (Pak.) 377

<sup>442</sup> AIR 1961 SC 1762



64. Mr. Batalvi invited us to relax the rigor of this rule because we had to take judicial notice of what had happened in the country during Mr. Bhutto's Government. Learned counsel referred to the murder of several leaders of the Opposition and pointed out that the assailants had never been traced. He also referred us to some of the admissions made in evidence by witnesses in the instant case. He then painted a grim picture of how the rule of law had come to an end in the country in the last few years, and submitted that it would be impossible to punish the guilty if we insisted on applying in all its rigor a rule of corroboration laid down in earlier times.

65. This plea has a familiar ring. It has been raised time and again past, because the common law, in its long evolution, has been through periods of strain as great as any which we have passed through, but this was never treated as a ground for relaxing the rule. However, I will confine myself to the judgments of sub-continent in which this plea was raised.

66. As Bengal was seething with terrorist activity after the First World War, it was extremely difficult for the prosecution to prove political murders, and in *Ambica Charan Roy and others v. Emperor*<sup>443</sup> in resisting appeals against convictions of terrorists under section 302, the State appears to have advanced the same plea which Mr. Batalvi made before us, but Rankin, C. J., observed:-

"A man who has been guilty of a crime himself will always be able to relate the facts of the case and, if the confirmation be only of the truth of that history without identifying the person, that is no corroboration at all ... I cannot think that it is correct reasoning to say that because the charge brought is a charge which it is difficult to prove therefore, the Court may be justified in not insisting upon so high a degree of proof. It does not matter how difficult the charge may be to prove it must be proved, if there is to be a conviction. We have, I think, to look carefully at the evidence to see if there is to be a conviction. We have, I think to look carefully at the evidence to see if there is independent evidence implicating each one of these other accused."

67. The same view was taken in *Nga Aung Pe v. Emperor*<sup>444</sup>, although these appeals arose out of convictions for murders committed during the rebellion in Burma in 1931.

68. As our Court have fortunately been spared the problems of trying cases of this nature because they have generally gone to tribunals, Mr. Yahya Bakhtiar referred us to the observations of Hamoodur Rehman, J. (as he then was) in *Ramzan Ali v. The State*<sup>445</sup>, Hamoodur Rehman, J. (as he then was), observed at page 552:

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<sup>443</sup> AIR 1931 Cal. 697

<sup>444</sup> AIR 1937 Rang. 209

<sup>445</sup> PLD 1967 SC 545

"We are not unmindful of the fact that by reason of the riverine nature of many of the districts of the Province of East Pakistan the incidence of dacoity in the Province is unusually high and that more often than not such crimes remain undetected due largely to the failure of the witnesses to identify the dacoits but at the same time we cannot agree that even these difficulties can furnish any justification for the non-observance of the rules relating to appreciation of evidence in criminal cases or that the same should in any way be relaxed. These, rules have been laid down to secure for accused persons the assurance of a fair and martial trial and practical difficulties notwithstanding the standards which have been laid down for the safe dispensation of criminal justice, cannot be altered or deviated from to meet the difficulties of the investigating agencies in the Province."

69. I would re-affirm the view thus taken in *Ramzan Ali's case*, and as there can be no question of relaxing the rigor of the rules about corroboration of the evidence of accomplices (including approvers), I would now examine Masood Mahmood's evidence in the light of this discussion. Masood Mahmood has confessed his guilt in one of the most heinous crimes known to society, murder, and according to the prosecution, it was not the murder of a tyrant, but a murder instigated by a tyrant to eliminate a public spirited leader, who had the courage to criticize the tyrant. It is also clear from Masood Mahmood's evidence that he participated in the attempt to murder Mr. Kasuri, because he did not want to give up the pomp and power which were the trappings of his office. Therefore, as the murder of 10th November 1974 was one of the basest types of murder, *prima facie*, the approver's evidence is not fit to be accepted without strong corroboration. The High Court has, however, taken a different view because the approver said in his evidence that he had been forced to participate in the murder. With all respect to the learned Judges, I find it difficult to believe the plea of the approver. It is not easy to murder a politician who is in the limelight as Mr. Kasuri was, therefore, the mission which Mr. Bhutto had entrusted to the approver was a very delicate mission, and it would have been very stupid on Mr. Bhutto's part to force the approver to accept such a delicate mission, the more so, as according to the approver, Mian Abbas had already been entrusted with that mission.

70. Additionally, as observed by the Privy Council in *Bhuboni Sahu's case*, an approver cannot corroborate himself. And as the approver's evidence on a point so crucial to the prosecution case is completely uncorroborated, it is not fit to be accepted. However, after stating that Masood Mahmood "must have acted under pressure", the Court observed;

"But as pointed out in *Kamal Khan v. Emperor* an accomplice is sometimes not a willing participant in the offence, but victim to it". It was in view of his

proposition that it was observed in *Srinivas Mail v. Emperor* by the Judicial Committee that:

No doubt the evidence of accomplice ought as a rule to be regarded with suspicion. The degree of suspicion which will attach to it must, however, vary according to the extent and nature of the complicity; sometimes the accomplice is not a willing participant in the offence, but a victim of it. When the accomplices act under a form of pressure which it would require some firmness to resist, reliance can be placed on their uncorroborated evidence."

71. It is obvious that the learned Judge dissented from the view taken by the Privy Council in *Bhuboni Sahu's case*, because of the two judgments referred to by him in this passage. Therefore, I have examined both these judgments in order to find out whether the view taken in them is inconsistent with the dictum of the Privy Council in *Bhuboni Sahu's case*. I have found nothing whatever in these judgments to support the view that an approver can corroborate himself, but I would explain here that apart from the fact that both these cases related to accomplices simpliciter and not to approvers, the contention of the accomplices in both the cases was that they had been forced into the crime committed by them, because of the pressure of the accused. So the plea advanced in these cases was similar to Masood Mahmood's, but, unlike the instant case, both in *Kamalkhan's case* and in *Srinivas Mall's case*, the prosecution had taken care to prove that the plea of the accomplices about their being forced into the crime was true. Clearly, therefore, both the judgments turned on very different facts. Further, these judgments were distinguishable on another ground. I examined *Kamal Khan's case* earlier; it related to a conviction for bribery. And as I explained, not only is bribery a very petty offence compared to murder, but it is an offence to which society does not unfortunately attach any stigma. Similarly, the offence for which Srinivas Mail was convicted was black-marketing under the Defence of India Rules, and black-marketing, however, obnoxious is a very petty offence compared to murder, and unfortunately society attaches very little opprobrium to it. Therefore, the infirmity in the evidence of the accomplices in both these cases was very slight, and so on this ground also the view taken in these cases had no relevance to the instant case.

72. However, as rightly submitted by Mr. Batalvi, the learned Judge was also of the view that the approver's evidence did not require strong corroboration, because he had no enmity against Mr. Bhutto. But, according to the settled law, the question on enmity on the part of an accomplice is of little relevance to the question of his veracity, because an accomplice is the type of person who will willingly implicate an innocent man in order to save his own skin or in order to save a friend. And the dry submission advanced by Mr. Batalvi was considered and rejected by this Court in *Abdul Qadir v. The*

*State*<sup>446</sup>. Munir, C. J., who pronounced the judgment of the Full Court, observed at page 413:

"It may be taken as proved that both the approvers were responsible for the murder and that neither of them had any special raw reason falsely to accuse the appellant, but we cannot accept the finding of the High Court that neither of them had any motive of his own to kill the deceased. It is true that the appellant has not in his defence suggested any motive or the part of either of these accomplices to kill the deceased, out this by itself is an inconclusive circumstance and does not establish that in fact neither of them had any such motive. Motive is a factor which is peculiarly within the knowledge of the actor and a man's motive in doing a thing may not be known to his most intimate friends just as the prosecution may not know the accused's motive for a crime. All that can be said on the strength of the record of this case is that the appellant failed to prove or suggest that either of the accomplices had any reason to get rid of the deceased but the appellant's ignorance of any such motive does not exclude the possibility of a motive having existed though unknown to the appellant This circumstance, therefore, does not have any material corroborative value."

73. I am in respectful agreement with these observations and I would re-affirm the law declared by Munir, C. J.

74. In the result, as Masood Mahmood was an approver, very little turned on the question whether he harboured enmity against Mr. Bhutto or not. But the real question, which should have been examined, was whether, because he was an approver, he was under a temptation to implicate Mr. Bhutto or any other accused in the case. And as observed by Munir in his Law of Evidence (Pakistan Edition), page 1426:

"There is greater need of corroborative evidence when there is fear in the mind of the accomplice that the failure to establish the prosecution case will lead to his own prosecution."

75. That is why I observed earlier that one of the circumstances relevant to the veracity of an approver is the question whether he is likely to be prosecuted for offences other than those for which he has been granted a pardon, and on this point the evidence stares us in the face.

76. The approver admitted that he was arrested on the day on which Martial Law was proclaimed. He received the order of detention, about a week later, and his confession was recorded after he had been in detention for nearly two months. He admitted that during this period, he had been in almost solitary confinement and that

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<sup>446</sup> PLD 1956 SC (Pak.) 407

he had been interrogated by a Martial Law team. He was, therefore, cross-examined on the suggestion that he had struck a deal with the Police in order to obtain the release of one Seth Abid, who was both his first cousin and his brother-in-law, The approver admitted but only under the compulsion of persistent cross-examination, that Seth Abid "was before 5th July 1977 a fugitive from the law," and that as far as he knew his brother-in-law had returned to the country after the proclamation of Martial Law. In this background, the suggestion put to him was that Seth Abid had returned to the country and obtained a pardon as part of a deal tender which he had agreed to implicate Mr. Bhutto in the murder case. The approver denied the suggestion, and T agree with Mr. Batalvi that Mr. Bhutto's learned counsel failed to prove this unholy deal between the Police, Seth Abid and the approver. However the fact which is so patent is the prolonged detention of the approver under circumstances which would appear at first sight to be very highhanded. And as Martial Law was promulgated only to restore law and order and to hold elections, it is obvious that the manner in which the approver was treated would suggest that there were very serious charges against him. The prosecution could have taken the Court into confidence about the reasons for the approver's prolonged detention. But as it did not, the only inference which can be drawn is that the charges against the approver must have been of an extremely serious nature, and here I would refer to a document Exh. D. W. 1/1 upon which Mr. Batalvi placed very great stress. This was a statement made by Mian Abbas on 21st July 1977 to the Martial Law authorities listing all the misdeeds of Masood Mahmood. Thus, for example, according to Mian Abbas, Masood Mahmood was always dabbling in politics and harassing politicians. Further, according to Mian Abbas, Masood Mahmood was guilty of other grave crimes, but as it is possible that he may be tried for these crimes, I would only observe that these charges against Masood Mahmood are almost as grave as those in the case in which he was granted a pardon.

77. It was unfortunate that this aspect of the evidence escaped the attention of the learned Judges of the High Court, because it is obvious that the approver was under the strongest possible temptation to give false evidence in order to please the investigation agency. Therefore, his evidence required stronger corroboration than in the usual sort of murder case based on the evidence of an approver. And here, there is another circumstance, not important by itself, to which I would like to refer. Mr. Batalvi placed very great stress on Welch's evidence, and submitted that Welch was a witness of truth and a man of integrity, because he had refused to carry out the illegal order given to him by the approver for assassinating Mr. Kasuri in Quetta. Now Welch has said in his evidence that the approver had told him to assassinate Mr. Kasuri in Quetta, but he further said that he had never intended to carry out this illegal order. As he did not tell the approver that he would not carry out his orders, Mr. Awan asked him to explain why he had not told the approver that he would not obey his orders. Welch's reply was:

"Anyone who had served with Masood Mahmood could realize that the better discretion would be to keep quiet rather than to contradict. In case I opposed his

suggestion I would have forced him to take action against me so that what he told me would not leak out .... at the time when (the conversation about Masood Mahmood's order to murder Mr. Kasuri) took place if I had acted otherwise he would have dubbed me as an officer disloyal to Pakistan and would have initiated action against me for that reason .... I had no fear regarding my life but Mr. Masood Mahmood could have instigated a case against me so that I did not divulge what he talked to me and if I did it would not be believed."

78. Thus, according to the evidence produced by the prosecution, Masood Mahmood was not only an approver, but an approver who would have no hesitation whatever in bringing false charges against any one if it suited him.

79. I now turn to the approver's evidence about his role in the attempt to murder Mr. Kasuri, and the story begins with an interview with Mr. Waqar Ahmad, the Establishment Secretary who asked him (Masood Mahmood) to accept the post of Director-General, FSF. The approver said that he did not want to accept this post and was forced into accepting it. But as according to Mr. Yahya Bakhtiar, as Mr. Bhutto was not so stupid as to thrust such an important post on a person who was not willing to shoulder the responsibilities of the post, the approver's evidence began in falsehood and ended in falsehood.

80. The first limb of Mr. Yahya Bakhtiar's submission is correct, because the prosecution has not led any evidence to show that there was any dearth of applicants for this post, nor has the prosecution led any evidence to show that Masood Mahmood had some special qualifications for this post. Mr. Batalvi only relied on the approver's evidence who stated that he had been pressurized and forced into accepting the post by Mr. Waqar Ahmad, by Saeed Ahmad Khan and by Abdul Hamid Bajwa. But, whilst Abdul Hamid Bajwa is dead, Saeed Ahmad Khan did not support the approver's claim that, he had tried to persuade the approver to accept the post of Director-General, FSF. Therefore, Mr. Yahya Bakhtiar submitted that an adverse inference should be drawn against the prosecution for not examining Mr. Waqar Ahmad, and, that, in any event, the approver's evidence about what Mr. Waqar Ahmad told him was hit by the rule against hearsay evidence. And I may point out here that we had very lengthy arguments on the question whether the approver's evidence about his conversation with Mr. Waqar Ahmad was admissible or not. In my humble opinion, nothing turns on the question of the admissibility of the approver's evidence about what he was told by Mr. Waqar Ahmad. Even if we assume for the sake of argument that this evidence is not hit by the hearsay rule, as submitted by Mr. Batalvi, I am unable to understand how this would help Mr. Batalvi's submissions. As it was the prosecution's case that the approver had been pressurized into accepting the post of Director-General, the burden was on the prosecution to prove this plea. And the approver's evidence was not supported by Saeed Ahmad Khan's. Further, and this is much more important, as an approver cannot corroborate himself, I agree with Mr. Yahya Bakhtiar that the approver's evidence about

his meeting with Mr. Waqar Ahmad is not fit to be believed, as Mr. Waqar Ahmad was not examined.

81. The approver said that he was appointed Director-General on 23rd April 1974 and took charge of his duties which he described. The approver then referred to the clash in the National Assembly between Mr. Kasuri and Mr. Bhutto on the 3rd June, 1974 and said that Mr. Bhutto had sent for him "a day or two later". Mr. Bhutto then had a long meeting with the approver and I will refer to this meeting as the meeting. It is of great importance to the prosecution case, because the question whether the case against Mr. Bhutto falls under section 120-B of the Penal Code or under section 107 of the Penal Code depends on what transpired at the meeting.

82. According to Mr. Yahya Bakhtiar, the approver evidence about this meeting was a fabrication because no such meeting had taken place. He however also submitted in the alternative that even if the approver's evidence of the meeting was believed, it did not spell out the ingredients of a conspiracy within the meaning of section 120-B.

83. As Mr. Batalvi tried very hard to persuade us that the approver's evidence about the meeting was sufficient to spell out the ingredients of a conspiracy, I would observe that an agreement which comes within the mischief of section 120-B is like any other agreement under the Contract Act, except that it is illegal because of its criminal intent. Therefore in order to prove its charge of conspiracy against Mr. Bhutto, the prosecution had to prove that Mr. Bhutto had asked Masood Mahmood to join the conspiracy and that Masood Mahmood had agreed to do so. Mr. Batalvi submitted that an agreement could be proved by words or by conduct or by both. This is correct. But as he placed very great stress on the approver's conduct, I may observe that the question of the acceptance of an offer can arise only when there has been an offer, and if Mr. Bhutto did not ask the approver to be him in the conspiracy, the question of inferring the approver's counsel to joining the alleged conspiracy from his conduct cannot arise.

84. I now turn to the approver's evidence about the meeting. It reads:

"He, *inter alia*, said to me that he was fed up with the obnoxious behavior of Mr. Ahmad Raza Kasuri and that Mian Mohammad Abbas, an officer of the FSF, know all about his activities. This Officer is an accused in this case. The then Prime Minister further told me that this Officer had already been given directions through my predecessor to get rid of Mr. Ahmad Raza Kasuri. The Prime Minister went on to instruct me that I should ask Mian Mohammad Abbas to get on with the job and to produce the dead body of Mr. Ahmad Raza Kasuri or his body bandaged all over. He said to me that he would hold me personally responsible for the execution of this order. I was naturally shaken on hearing these orders and pleaded with him that execution of these orders would be against my conscience and would certainly be against the dictates of God. The

Prime Minister lost his temper and shouted saying that he would have no nonsense from me or, from Mian Mohammad Abbas. Then he raised his voice and said to me "You don't want Vaqar chasing you again, do you?" I returned to my office in this perplexed state of mind and called Mian Abbas, I repeated to him the orders of the Prime Minister verbatim. I was surprised to find that Mian Abbas was the least disturbed. He told me that I was not to worry about it. That he would see that the orders of the Prime Minister would be duly executed."

85. There is nothing in this evidence to show that the approver had been asked by Mr. Bhutto whether he would or would not join the alleged conspiracy, and, on the contrary, it is clear from this evidence that Mr. Bhutto gave a series of orders to the approver which the, approver said he had carried out because he was forced to do so. It is also not irrelevant to point out here that the approver's impression from his conversation with Mr. Bhutto was that Mian Abbas had been given similar orders and further, according to the approver, Mian Abbas had confirmed to him that he had received those orders and that he would carry them out.

86. Lengthy arguments were addressed to us on the question whether we should believe the approver's plea that he had been forced, or pressurized into carrying out Mr. Bhutto's orders. The necessity of examining this plea would arise only if an offer on Mr. Bhutto's part to the approver to join him in the conspiracy could be spelt out of the approver's evidence. But as Mr. Bhutto did not even care to find out whether the approver was willing to help him, there was no question of any meeting of minds which is the essential of any agreement, and as the approver only claims to have carried out the orders given to him, nothing turns on the question whether he carried them out reluctantly or with enthusiasm.

87. As Mr. Batalvi was conscious of this difficulty in the prosecution case, he tried very hard to persuade us to hold that the approver's consent to Mr. Bhutto's offer to join him in the conspiracy could be inferred from the approver's conduct subsequent to the meeting with Mr. Bhutto, and in this connection, great reliance was placed by Mr. Batalvi on the approver's claim that he had directed Welch to assassinate Mr. Kasuri in Quetta. But even if we assume that the approver had given any such direction to Welch, the approver's own evidence about this alleged direction does not throw any light on the question whether he had directed Welch to carry out the murder because of Mr. Bhutto's instigation or because he had decided to accept Mr. Bhutto's offer and join him in the conspiracy. And further, as I indicated, the question of inferring consent from the approver's subsequent conduct can arise only if subsequent to the meeting of the approver with Mr. Bhutto, u, Mr. Bhutto had invited him to join the conspiracy. But even the approver does not say so. What he said is to the contrary. Thus, after referring to the meeting, he said "after the Prime Minister had given me these orders, he kept on reminding me and goaded me for their execution." The word "orders" speaks for itself. The approver then went on to explain how Mr. Bhutto had told him to "take care of Mr.



Ahmad Raza Kasuri, who was likely to visit Quetta". But this evidence too cannot be read to mean that Mr. Bhutto had sought the approver's consent to the alleged illegal agreement.

88. Mr. Batalvi then referred us to the evidence of Saeed Ahmad Khan. Now, Saeed Ahmad Khan has said that "in mid 1974", Mr. Bhutto had told him to remind the approver about the mission entrusted by him (Mr. Bhutto) to the approver. And as Saeed Ahmad Khan also said that he had passed on the message to the approver and that the approver had told him that he would do the needful, the learned counsel submitted that this corroborated the prosecution case of the conspiracy. The submission is fallacious. Even if we assume that Saeed Ahmad Khan spoke the truth in his evidence, and this is an assumption which I will presently examine, this evidence cannot throw any light on the question whether the approver had committed the murder or Mr. Bhutto's orders or because he had voluntarily joined a conspiracy to commit murder.

89. Next, as Mr. Batalvi submitted that the prosecution case under section 120-B was supported by the evidence of Ghulam Hussain, the other approver, I have examined his evidence also. This approver said that Mian Abbas had sent for him in the beginning of August, 1974 and told him to assassinate Mr. Kasuri, because that "was the order given by Mr. Masood Mahmood, who was the then Director-General, FSF." This evidence does not even implicate Mr. Bhutto, but, according to the witness; Mian Abbas had called him again on 20th August, 1974 and told him that he had to carry out the assassination mission, because of Masood Mahmood's orders and "because Mr. Z. A. Bhutto had now started abusing (Masood Mahmood) because of this procrastination". I will presently show that Ghulam Hussain is a thoroughly dishonest witness, but even if his evidence is believed, though admissible it is really nothing more than hearsay upon hearsay. And, in any event, it does not throw any light on the question whether the prosecution case falls under section 120-B or under section 107 of the Penal Code. Similarly, the other evidence relied upon by Mr. Batalvi, such as the evidence of Fazal Ali and Amir Badshah, the evidence of Exh. P.W. 24/7 the road certificate for the issue of ammunition to Ghulam Hussain, etc., does not throw any light on this question, but, on the other hand, as much of it would be relevant to the question of Mr. Bhutto's guilt for instigating an attempt on Mr. Kasuri's life, I would now examine it from this angle.

90. I referred earlier to Saeed Ahmad Khan's evidence about his conversation with Mr. Bhutto "in mid 1974". The High Court was very impressed by this evidence, because it was of the view that Saeed Ahmad Khan was an independent and reliable witness. I will presently examine whether this witness was an independent and reliable witness, but even on the assumption that he was, as Masood's evidence is full of infirmities, Saeed Ahmad Khan's evidence would not be sufficient to corroborate it, but as submitted by Mr. Batalvi, it could be a link in a chain of corroboratory evidence. However, as I indicated earlier, Mr. Batalvi placed great reliance on Welch's evidence,

because the approver had said that he had directed Welch to assassinate Mr. Kasuri and Welch had supported this statement, and if true, this evidence could go a long way to support the approver's evidence on a charge against Mr. Bhutto under section 107 of the Penal Code. So I would reproduce here what the approver said in his examination-in-chief:

"In August, 1974, Mr. Ahmad Raza Kasuri was sniped at Islamabad. Before the Islamabad incident and after the Prime Minister had spoken to me, I was asked by the Prime Minister to take care of Mr. Ahmad Raza Kasuri who was likely to visit Quetta. I gave directions to Mr. Welch, the Director of FSF. at Quetta. I told Mr. Welch that some anti-State elements had to be got rid of and that Mr. Ahmad Raza Kasuri was one of them. I had also told him that he was delivering anti-State speeches and was doing damage to the interest of the country. I communicated to Mr. Welch on the telephone and I also had an occasion to remind him personally when I visited Quetta."

91. There is absolutely no ambiguity about this evidence. It means that the approver had first given his order to Mr. Welch on the phone from Islamabad and then given him a reminder in Quetta when he was himself in Quetta. But even a casual perusal of the approver's evidence would show that he was an extremely intelligent man, and the idea that so clever a man would give an order to commit a murder by telephone is so absurd that the witness realized that he had made a slip, therefore, he repudiated in his cross-examination what he had said in the examination-in-chief. Instead, he said that he had met Mr. Welch in Quetta in July, 1974, ordered him to assassinate Mr. Ahmad Raza Kasuri, and then merely reminded him about it from Islamabad by telephone. As this is an obvious attempt to improve upon the prosecution case, Mr. Batalvi relied on the fact that the version given by the approver in his cross-examination was supported by the evidence of Welch. That is true, but the learned counsel overlooked one extremely important circumstance. This was that Welch gave his evidence after the approver's evidence had been completed, and he admitted that he had "been reading the statement of Mr. Masood Mahmood in the newspapers".

92. However, even if we assume that what the approver said in his cross-examination was true, does it improve the prosecution case? Even Mr. Batalvi did not contend that Welch was an expert in carrying out assassinations of well-known politicians, and, further, the approver has admitted, but very reluctantly under the compulsion of cross-examination, that he knew Welch only as a subordinate, because he had met him a few times. He was evasive about the degree of his intimacy with Welch, but Welch was more straightforward in his evidence, and he said that he had met the approver only twice before the meeting in which the approver had directed him to assassinate Mr. Kasuri. As Welch is not an approver, it is obvious that his evidence must be preferred to that of an approver, and that means that Masood Mahmood, who was an extremely intelligent man, had directed his subordinate, who was a comparative

stranger to him, to carry out the assassination of a political leader. I find this very difficult to believe. However, even if we assume that the approver was reckless enough to entrust so delicate and secret a mission to a comparative stranger, would he not have given some instructions or some guidelines to that stranger about the manner in which Mr. Kasuri was to be murdered? It is true that Welch did not make any enquiries from the approver about the manner in which he was to carry out the delicate mission entrusted to him, but this was because, according to Welch, he had no intention of murdering Mr. Kasuri. And as Welch claims to have concealed his intentions from the approver, I am not able to believe that the approver would have given, so to say, a blank cheque to his subordinate in a mission for murder.

93. However, it is not necessary to discuss further Welch's evidence, because the approver does not even claim that he had told Welch that Mr. Kasuri was to be eliminated on the orders of Mr. Bhutto. That is very important. The approver has taken the sole responsibility in his evidence for this alleged order to Welch, but he was not the type of man who would risk his neck for anybody else, and, if he had been carrying out Mr. Bhutto's orders, he would have informed Welch accordingly. Therefore, as he accepted before Welch the sole responsibility for the murder, I do not see how Welch's evidence can lend any support to the case against Mr. Bhutto even under section 107 of the Penal Code. On the contrary, Welch's evidence casts a heavy burden on the prosecution to prove that the approver was really acting on Mr. Bhutto's orders as claimed by him.

94. Mr. Batalvi also submitted, feebly I think, that Masood Mahmood's evidence was supported by that of Ghulam Hussain's evidence about the instructions given to him by Mian Abbas for Mr. Kasuri's murder. But as I explained earlier, this approver's evidence, though admissible, is really nothing more than double hearsay, because he said what Mian Abbas had told him about what Masood Mahmood had told Mian Abbas. This evidence can help the prosecution case only if we assume that the approver, Ghulam Hussain, spoke the truth about what Mian Abbas had told him, and if we also further assume that Mian Abbas had faithfully conveyed Masood Mahmood's message to the approver Ghulam Hussain. However, even if we make these two assumptions, this would furnish very slight corroboration of Masood Mahmood's evidence, because the real question before us is whether Masood Mahmood spoke the truth when he said that he had ordered Mr. Kasuri's murder on Mr. Bhutto's orders. Therefore, even Mr. Batalvi did not contend that Ghulam Hussain's evidence could be anything more than a link in a chain of corroboratory evidence. But the plea that it could be a link in a chain of corroboratory evidence assumes that Ghulam Hussain was speaking the truth. And as he was an approver, his evidence invites suspicion and cannot be believed if it is inconsistent with other evidence.

95. Now Mian Abbas had contested the case against him, but he had first admitted his guilt and recorded his judicial confession. He had, however, retracted that

confession, but the High Court convicted him and sentenced him to death. He then filed an appeal which was admitted. However, sometime after we had commenced hearing these appeals, Mian Abbas again changed his mind, retracted the retraction of his judicial confession and pleaded guilty. In this background, Mr. Batalvi supported the prosecution case against Mian Abbas and submitted that we should convict him in view of his confession, as the confession, though retracted at one stage, was corroborated by other evidence. Learned counsel was also emphatic that the confession was genuine and he denied that it was exculpatory. No doubt, a conviction can be based, as submitted by learned counsel, on a retracted judicial confession provided it is corroborated. Further in the circumstances discussed, it is clear that the confession is a piece of evidence on which Mr. Bhutto is entitled to rely. But, the confession is completely inconsistent with Ghulam Hussain's claim about the two meetings with Mian Abbas in which he had been directed to carry out Mr. Kasuri's murder. Mian Abbas said in his confession:

"During that time on about 13th May, 1974, D.G. Sahib had called me and told me that he had to speak to me on a very important matter. In the meantime, some other Officer entered the office and he (D.G.) became quiet and asked me to go outside. On about 1st June 1974, I was called by Director-General in his office and he told me that he has posted Inspector Ghulam Hussain on some very important assignment and asked me to follow that up. This Ghulam Hussain was, sometime earlier, given reward by Director-General for his good work in the National Assembly. I called Ghulam Hussain and on my enquiry he informed me that Director-General has ordered him to do away Ahmad Raza Kasuri."

96. This confession, on which Mr. Batalvi wanted us to rely for the purpose of upholding Mian Abbas's conviction, is damaging to the prosecution case in more ways than one. Thus, for example, the approver was emphatic in his evidence that the meeting with Mr. Bhutto was a couple of days after the Assembly incident of June 1974. I may pause here to point out that the position thus taken by the approver in his evidence is not consistent with that taken by him in his lengthy confession and his equally lengthy statement under section 337 of the Criminal Procedure Code. In both these statements, although the approver said that he had been instructed by Mr. Bhutto at a meeting to assassinate Mr. Kasuri, the approver did not relate this meeting with the Assembly incident of 3rd June 1974, and Mian Abbas's confession would indicate that Masood Mahmood had decided to carry out the plan to murder Mr. Kasuri as early as 13th May 1974 but this was long before the meeting between Mr. Bhutto and the approver. Therefore, Mian Abbas's confession casts doubt on the approver's evidence, the more so, in view of the position taken by the approver in his earlier statements. Secondly, whilst the approver was emphatic that he did not know Ghulam Hussain, Mian Abbas was equally emphatic in his confession that Masood Mahmood had, before the meeting with him "on about 1st June 1974", arranged with Ghulam Hussain to carry out the actual assassination of Mr. Kasuri. And this means that the confession is

completely inconsistent with Ghulam Hussain's claim that he had been inducted into the murder plot by Mian Abbas at the meeting in the beginning of August 1974. Therefore, the question is which of these two conflicting versions of the prosecution case is to be preferred. As I have no doubt that Ghulam Hussain was not only an approver but a thoroughly dishonest witness, I have no hesitation in rejecting his evidence as false. However I will have occasion to examine his evidence again when I come to the Islamabad incident and the murder in Lahore.

97. I would now turn to Mr. Yahya Bakhtiar's submission that the conduct of the approver Masood Mahmood completely falsified his evidence, and that the learned Judges of the High Court had completely ignored this aspect of the case. In order to appreciate the submission, I would first point out that according to Masood Mahmood's evidence about the meeting with Mr. Bhutto, he was put in charge of the plans for murdering Mr. Kasuri. And although Mian Abbas was to work under him, Masood Mahmood repeatedly said that he had given only reminders to Mian Abbas to carry out the assassination plan. As according to Masood Mahmood's evidence, he had never discussed with Mian Abbas the plan for killing Mr. Kasuri, Mr. Yahya Bukhtiar submitted that the evidence of the witness was too absurd to be believed. Similarly, as it is the prosecution case that Ghulam Hussain had been selected for the task of killing Mr. Kasuri, Mr. Yahya Bakhtiar submitted that as Masood Mahmood was responsible for the execution of the assassination plans, his evidence that he did not even know Ghulara Hussain was absolutely false.

98. Taking the second limb of the submission first, however, perfect be the planning of a murder, the implementation of that plan is another matter and as this rested solely on Ghulam Hussain's ability, it is absolutely impossible for me to believe that Masood Mahmood would not have sent for Ghulam Hussain in order to assess his ability to carry out so delicate a mission. After all even if Ghulam Hussain had succeeded in murdering Mr. Kasuri, he could have left traces of the murder with consequences fatal to all the assailants, including Masood Mahmood. Thus Masood Mahmood's fate was in Ghulam Hussain's hands, and I find it impossible to believe that Masood Mahmood did not know Ghulam Hussain. And I would repeat that I have no hesitation in preferring the version given by Mian Abbas in his confession, the more so, as this is corroborated by the evidence of Ashiq Hussain Lodhi, who was a totally disinterested witness.

99. As Mr. Batalvi, however, relied on the view taken by the High Court, I may point out that the learned Judge has observed in his judgment "it is further clear from the evidence of Masood Mahmood that he did not even know Ghulam Hussain P.W. 31. Ghulam Hussain also stated clearly that he had appeared before Masood Mahmood along with other candidates on the 20th of August 1974 only at the time of his interview for promotion to the post of Inspector". I regret my inability to agree with these observations, because apart from Mian Abbas's confession on which the prosecution relied, as both Masood Mahmood and Ghulam Hussain were approvers, they could not

corroborate each other's evidence. And as Munir puts it in his inimitable language in his Law of Evidence, page 1435"

"Tainted evidence is not made better by being doubled in quantity... It is therefore a rule that one accomplice cannot corroborate or be corroborated by another accomplice, nor can an accomplice corroborate himself."

100. Additionally, as indicated earlier, the evidence of these two approvers was inconsistent with that of Ashiq Hussain Lodhi, so I would explain here that this witness was an acting Assistant Director in the FSF, and was on duty at the relevant time in the National Assembly. Now after his father's murder, Mr. Kasuri used to keep a gun-man with him in the National Assembly for his protection, therefore, Ashiq Hussain Lodhi had submitted a report about this gun-man. He was examined by the prosecution in order to prove his report which he did, and the High Court has relied on this report. But, reverting to the evidence of this witness, as he was on duty in the National Assembly and as Ghulam Hussain was also posted there, he was cross-examined on the question whether he had ever seen Masood Mahmood with Ghulam Hussain. The relevant part of his cross-examination reads:

"Mr. Masood Mahmood would give me instructions directly when he visited the National Assembly. He did send for Ghulam Hussain through me once or twice during these days. It is correct that in the end of July 1974 the Director-General sent for Mr. Ghulam Hussain through me and he was closeted with him in his room and the red light on the door was glowing throughout that period."

101. Although the witness was re-examined by Mr. Batalvi, he was not put any question about his categorical assertion that Masood Mahmood had met Ghulam Hussain in the building of the National Assembly in July, 1974. But this evidence is fatal to the highly improbable claim of the two approvers that they did not know each other.

102. However, the High Court rejected Ashiq Hussain Lodhi's evidence as false. To say the least, this is somewhat surprising, because the witness was a prosecution witness, and not only was he not declared hostile, but Mr. Batalvi had not even re-examined him on his evidence about the meetings between Masood Mahmood and Ghulam Hussain in the National Assembly Building in July, 1974. However, the learned Judges were of the view that they had to reject Ashiq Hussain Lodhi's evidence as false because of this Court's judgment in *Bagu v. The State*<sup>447</sup>. I have therefore examined this judgment. Hamoodur Rehman, C.J., observed whilst dismissing the appellant's appeal:-

"Before parting with this case, we cannot help observing that the frequency with which cases are coming up before us wherein formal witnesses, particularly foot

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<sup>447</sup> PLD 1972 SC 77

constables, are found to be obliging the defence in cross-examination with regard to matters wholly unconnected with the part the witnesses took in the investigation, is causing us some concern. We entirely agree with the observations of one of the learned Judges of the Peshawar High Court in the case of *Sikandar Shah v. The State*<sup>448</sup>, that the obliging concessions made by such witnesses in cross-examination cannot be considered to be of any value."

103. The observations about the veracity of foot constables in this passage are no doubt wide, but this Court has repeatedly pointed out that the observations in a criminal case have always to be read with the facts of that case, and the facts in *Begu's case* were that the appellant had challenged his conviction, *inter alia*, on the basis of a statement made in cross-examination by a foot constable by the name of Khuda Bakhsh. This statement had reference to the place where Khuda Bakhsh claimed to have seen the dead body of the murdered man and this statement must have been inconsistent with the ocular evidence, although the judgment does not show how it was inconsistent. Be this as it may, the learned Judges of the High Court disbelieved this statement because they were satisfied that it was false, and this Court agreed with this finding, because in turn it was satisfied that Khuda Bakhsh could not possibly have seen the dead body in the course of his duties. And when a constable, who has nothing to do with the investigations of a case, gives evidence about it, it can generally be presumed that his statement is false. But by the nature of things, such a presumption would be rebuttable. Thus, for example, a constable, who has played only a formal role in the investigation of a murder, may have seen the dead body of the victim, because it was lying near his house. Now in this situation, it would be preposterous to say that the evidence of the constable was false merely because he had played a formal role in the investigation of the murder, and so, although the observations in *Begu's case* are rather wide, they have to be understood with reference to the peculiar facts of that case.

104. Accordingly, on the true ratio of this case, it would have supported the claim of the two approvers that they did not know each other, if Ashiq Hussain Lodhi had not been on duty at the National Assembly, because only then could he have been described as a formal witness. And if he had not been on duty at the National Assembly, I would have treated his evidence with great suspicion in accordance with the ratio of *Bagu's case*. But the prosecution itself contends that he was on duty at the National Assembly in 1974, therefore, it is clear that his evidence about the meetings between the two approvers was based on the knowledge acquired by him in the official discharge of his duties, and, with due respect to the learned Judges, *Bagu's case* had no relevance whatever to the instant case. In these circumstances, the only question is whether Ashiq Hussain Lodhi was a witness of truth, and Mr. Batalvi was unable to advance any argument which could cast any doubt on the witness's veracity. I am

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<sup>448</sup> PLD 1965 Pesh. 134

satisfied that, he was a truthful witness, therefore, I have no doubt that the evidence of the two approvers that they did not know each other is both absurd and false.

105. I now turn to the first limb of Mr. Yahya Bakhtiar's submission, and here Mr. Batalvi submitted an explanation which had some merit at least of ingenuity. The prosecution case is that as Mr. Bhutto had entered into a conspiracy with Mr. Tiwana to murder Mr. Kasuri, Mian Abbas must have drawn up plans for the murder under Mr. Tiwana's supervision, therefore, on Mr. Tiwana's retirement, Masood Mahmood took his place in the conspiracy, and so it was not necessary for him to find out from Mian Abbas how he was going to carry out the assassination plan. Assuming for the sake of argument that Masood Mahmood had confidence in Mian Abbas's ability to plan and to execute the perfect murder, is it credible that Mian Abbas would not have reported to him from time to time about the progress made by him in his assassination plans? Again, according to the approver, Mr. Bhutto had been goading him repeatedly about the execution of his orders. If there had been any truth in this story, Masood Mahmood would not have dared to take the risk of incurring, Mr. Bhutto's wrath by merely giving reminders to Mian Abbas to carry out the murder as speedily as possible. However, if I am wrong, according to the prosecution, the Islamabad incident of 24th August, 1974, was the first attempt to carry out the assassination plan. As it ended in a total fiasco, nobody could thereafter have had any confidence in Mian Abbas's ability to plan and carry out the perfect murder. Therefore, assuming that there had been any truth in the approver's evidence, after the Islamabad incident, he would have taken charge of the conspiracy himself. But, despite Mr. Bhutto's goading, he says that he did nothing beyond giving fresh reminders to Mian Abbas, and if we are to believe him, he had no knowledge of the Lahore occurrence until the next day when Mr. Bhutto himself informed him about it. I agree with Mr. Yahya Bakhtiar that the approver's professed ignorance of what Mian Abbas was doing is completely inconsistent with his evidence of the role assigned to him in the conspiracy. And, in my opinion, the approver has resorted to false evidence in order to minimize his role in the murder.

106. I would also refer here to what the approver said about the Islamabad incident in his confession and in his statement as an approver. In both these statements, he has said:

"It is most likely that the incident of August, 1974 in which Mr. Ahmad Raza Kasuri was sniped at in Islamabad may have been an earlier attempt before the accomplishment of the task resulting in the death of Nawab Muhammad Khan the father of Mr. Ahmad Raza Kasuri at Lahore, instead of Mr. Ahmad Raza Kasuri."

107. I am not able to believe this statement, because the witness was one of the senior-most Police Officers in the country, and further as the empties recovered were of a prohibited bore which had been issued to the FSP the recoveries clearly pointed the



finger of suspicion at the Police force of which he was head. Therefore, it is absolutely inconceivable that he would not have made full enquiries into the incident.

108. But even in his evidence, he said that he only had a "hunch" that this incident was an attempt to implement the plot to murder Mr. Kasuri. Mr. Yahya Bakhtiar submitted that this ignorance falsified the witness's evidence. It does, and further as Masood Mahmood claims to have been put in charge of the plot to murder Mr. Kasuri I am unable to believe that he did not know whether this attempt on Mr. Kasuri's life had been made by one of his own Inspectors.

109. I now turn to Masood Mahmood's evidence about how he learnt of the murder of Mr. Kasuri's father. He was with Mr. Bhutto in Multan on the 10th of November 1974 and he said that Mr. Bhutto had telephoned him very early the next morning and told him in very colorful language that Mr. Kasuri's father had been killed instead of Mr. Kasuri. He also said that he was summoned by Mr. Bhutto shortly afterward and Mr. Bhutto had informed him in the presence of Mr. Sadiq Hussain Qureshi about the murder. The witness and Mr. Bhutto then returned to Rawalpindi. Mr. Bhutto had sent for him again in Rawalpindi and warned him to carry out the assassination plan. But he refused point blank to carry out such illegal and immoral orders, and as Mr. Bhutto could not forget this humiliation, he tried to poison him and kidnap his children from school.

110. Mr. Batalvi submitted that this evidence furnished corroboration of the approver's evidence on the charges of conspiracy and abetment. But as this argument overlooks the fundamental principle that an approver cannot corroborate himself, learned counsel submitted that the approver's evidence was corroborated by documentary evidence such as, TA and DA Bills, which proved that he was in Multan on the 10th and 11th November and had returned to Rawalpindi on 11th of November 1974 I am amazed at this submission. TA and DA Bills cannot throw any light on the question whether the approver had met Mr. Bhutto, and whilst I have no doubt that he must have met Mr. Bhutto, the real question for determination is whether his evidence about his three conversations with Mr. Bhutto was fit to be believed, as there is no reference whatsoever to these conversations in his earlier statements.

111. I am unable to believe that Masood Mahmood could have forgotten about these three conversations with Mr. Bhutto, if they had really taken place, the more so, as in the telephonic conversation, Mr. Bhutto had used language too colorful for anyone to forget. Secondly, he had spoken on the ordinary telephone, and as the words uttered by him clearly indicated his guilty mind, it is impossible to believe that Mr. Bhutto would have indulged in such an incriminating conversation on the ordinary telephone, especially as he had sent for the approver shortly thereafter. Finally, as to the approver's claim about his confrontation with Mr. Bhutto in Rawalpindi, if his evidence be true, it would mean that the witness had turned a new leaf and renounced his evil past of

crime and murder. But no man could possibly forget an episode in which, according to him, he had confronted a proud tyrant and made, him, in the words of the witness, "pipe down". Nor could any man forget attempts to kidnap his children or attempt on his life, and according to Masood Mahmood the result of his confrontation with Mr. Bhutto Was gnat attempts were made to kidnap his children and to poison him. Yet not one of these Circumstances have been referred to by the approver in his very lengthy confession and in his equally lengthy state-ment as an approver. I have no doubt that all this evidence was false and merely reflects the approver's efforts to bolster up the prosecution case, which he had damaged by falsely reducing his role in the assassination plan.

112. Finally, on the question of this approver's conduct there is another circumstance which is difficult to reconcile with the approver's evidence, as submitted by Mr. Yahya Bakhtiar, and which is also relevant to the question of Mian Abbas's guilt. This is a statement made by Masood Mahmood in his cross-examination. The approver said:-

"Mian Abbas was not only promoted to the rank of Director after January 1975 at my instance, but ... he received good reports on his working....."

113. For once I am satisfied that Masood Mahmood's statement is true, because it is corroborated by his remarks on Mian Abbas's confidential report for the year 1974. But this necessarily means that Masood Mahmood had promoted Mian Abbas after the fiasco of the Islamabad incident and after the murder of Mr. Kasuri's father. But, if we are to believe the approver, his role in the occurrence was only that of an errand boy conveying the reminders of the wrathful Prime Minister to Mian Abbas, and it was Mian Abbas, who was masterminding the conspiracy which ended in such utter disaster. Therefore, to say the least, the wrathful Prime Minister could not have cherished favorable sentiments towards Mian Abbas, who was responsible for discrediting him in the public eye, on account of a murder which had failed in its objects, because the victim was not the wrathful Prime Minister's enemy, but his father. In this background, I find it impossible to believe that Masood Mahmood would have incurred Mr. Bhutto's wrath by promoting Mian Abbas, if Mian Abbas was really the person who had masterminded the alleged conspiracy. And, it is not irrelevant to point out here that Mian Abbas has, in his confession, only stated that he had conveyed Masood Mahmood's orders and reminders to Ghulam Hussain. On the whole, this plea is far more consistent with the fact of Mian Abbas's promotion, and I, agree with Mr. Yahya Bakhtiar that the approver's conduct in promoting Mian Abbas is inconsistent with his evidence.

114. Mr. Yahya Bakhtiar then referred us to other discrepancies in Masood Mahmood's evidence and submitted that no reliance whatever could be placed on it, as this approver was a thoroughly dishonest witness. But as is obvious from this discussion of the approver's evidence, I am satisfied that he was a dishonest witness

and his evidence cannot be accepted without extremely strong corroboration, therefore, I was struck by the finding of the High Court that the empties recovered from the scene of the murder had been substituted by fake empties on Mr. Bhutto's instructions. If this finding be correct, it would furnish extremely strong corroboration of Masood Mahmood's evidence, and as even congenital liars can speak the truth, I will now examine the question whether this finding of the High. Court is correct.

115. I must however first explain what the prosecution case is about this theory of empties. Ghulam Hussain, the second approver, said in his evidence that he had, obtained 7.62 min bullets from the FSF armoury in Rawalpindi and that the two sten-guns used in the murder of Mr, Kasuri's father had been supplied by the third battalion of the FSF in Lahore. In order to corroborate this evidence, the prosecution examined three witnesses. Amir Badshah of the third battalion of the FSF in Lahore, Mohammad Amir and Fazal Ali. These three witnesses supported Ghulam Hussain's evidence, and similarly the documentary evidence produced by Fazal Ali also supported Ghulam Hussain's evidence. Next as to what happened after the murder, I will presently examine in detail the theory of the substitution of empties, but it is common ground between the learned counsel that empties had been forwarded to the Inspectorate of Armaments for examination without the sten-guns used in the occurrence, because they had not been recovered. Then, when the case was reopened after the proclamation of Martial Law, the Police reinvestigated the case in 1977. But by this time, it was not possible to identify the two sten-guns, which had been used in the occurrence, according to the prosecution. However, as the third battalion, had only 25 sten-guns, the Police forwarded all the 25 sten-guns to the Inspectorate of Armaments, which presumably compared all these sten-guns with all the empties. The report then submitted by the Inspectorate of Armaments has not been produced, but Nadir Hussain Abidi said in his evidence, that it was negative, and Mr. Batalvi admitted that this report had been withheld, because it was negative. I venture to think it would have been better if the prosecution had produced the report and as it has not, the only inference which can be drawn is that none of the empties forwarded for examination matched with any of the sten-guns of the third battalion of the FSF in Lahore. Necessarily, this report means that the weapons and ammunition used in the occurrence could not have come from the FSF armoury Rawalpindi, or from the third battalion of the FSF in Lahore, as alleged by the prosecution. But this means not only that Ghulam Hussain has given false evidence, but it also means that the other three witnesses were tutored to give false evidence. Clearly, therefore, the ballistic expert's report is fatal to the prosecution case, and, in order to overcome this difficulty, the prosecution advanced its theory that the empties had been substituted. And if this theory be true, it would at least not mean that the prosecution had deliberately concocted this evidence. Obviously, this theory of the substitution of empties is crucial to the prosecution case, but if it be true, as I will presently show, the prosecution could have produced a lot of evidence in support of this theory, instead to my astonishment only examined Niazi, the Station House Officer of the Ichhra Police Station.

116. This witness said in his evidence that he had been directed by Abdul Ahad, D.S.P., on the night of 10th November 1974 to visit the place of occurrence but not to prepare any memo. of the articles which I found at the spot as the name of the Prime Minister had been mentioned in the F.I.R. I collected 24 empty cartridges from the spot of occurrence from four different places. I indicated those places in the site plan. I recovered lead of a bullet .... I examined the empty cartridges which contained one type of figures, i.e. 661/71 inscribed on the base of each of the 24 empty cartridges ..."Next according to the witness, on the night of 11th November 1974 Abdul Ahad attended a meeting at the house of Rao Abdur Rashid, Inspector-General of police, Punjab, and Abdul Ahad had taken the 24 empty cartridges, the lead of the bullet and the cap of the deceased with him. Niazi claims to have accompanied Abdul Ahad on this visit, but to have stayed outside with the chauffeur of the car. Further, according to Niazi, Abdul Ahad had informed him after the meeting that the Inspector-General of Police had retained the empties as well as the piece of bullet. It is not clear what happened to these empties thereafter. Mr. Yahya Bakhtiar made much of the discrepancies in the evidence of the prosecution witnesses on this aspect of the case, whilst according to Mr. Batalvi nothing turned on these discrepancies. I would only observe here that, according to the prosecution, somehow the empties were taken to Rawalpindi and substituted by fake empties. On this aspect of the case also, the prosecution case rests solely on the evidence of Niazi, who said that Abdul Ahad had left for Rawalpindi on the 13th of November, 1974 and that "he obtained site plan Exh. P.W.34/2 from me. Abdul Ahad returned from Rawalpindi after two or three days .... he showed me a draft with regard to empty cartridges and lead of bullet .... he told me that he had been given the draft from the Prime Minister's House. The D.S.P. told me to make a copy of that draft. After I prepared this copy, the original was taken back ... Exh. P.W. 34/4 was prepared by me and bears my signatures and is a reproduction of the draft given to me..."

117. According to this draft, 22 out of the 24 empties had the lot number BBI/71 and the other two empties had the lot number 31/71, whilst, according to the witness, the lot number on all the empties recovered by him from the scene of the murder was 661/71. Obviously, then the question was how the witness could remember that these lot numbers were not the lot numbers of the empties which he had collected three years earlier. The witness was very reluctant to give his explanation, and it was only after persistent cross-examination that he said:-

"...while preparing the site plan I had taken down the numbers inscribed on the empty cartridges for my personal use. So far as I can recollect I had not given the numbers of the empty cartridges in the case diary. I had taken down the numbers of those empty cartridges on a piece of paper. I did not produce that piece of paper ... as explained earlier, it was for my personal use..."

118. It is very clear from this evidence that the witness had this note in his "session but as he did not produce it, its deliberate suppression leads to an adverse inference against his evidence, therefore, I am surprised at the view taken by the High Court, and I am unable to agree with it, for more reasons than one.

119. In the first place, apart from the fact that the dead (cannot answer the allegations made against them, even Niazi did not say that Abdul Abad had told him that the substitution of empties had been made on Mr. Bhutto's orders. And here I would refer to the evidence of Abdul Wakil Khan (the Deputy Inspector-General of Police at the time of murder). He said that it was known on the 11th November, 1974 that the empties were of 7.62 mm. bullets, therefore, if the finger of suspicion pointed at Mr. Bhutto because of the F.I.R., the finger of suspicion pointed at the F.S.F. also, because 7.62 mm. bullets were not issued) to the public but had been issued to the FSF. Additionally, I showed earlier how officer far more senior to Niazi, like Welsh, were afraid of Masood Mahmood, because of the fear that he would bring a false charge against them if they came in his way, and further, on the arguments advanced by Mr. Batalvi, Masood Mahmood was a terror in the days of his power. Therefore whilst it is possible that Niazi was afraid of investigating the case because Mr. Bhutto's name was involved in it, it is at least equally possible that, like Welsh, he was frightened of doing anything which would displease Masood Mahmood. In these circumstances, as Masood Mahmood had confessed to the crime, the prosecution should have led evidence to show that the substitution of empties was not effected to screen or protect the FSF, but it did not.

120. Another circumstance relevant to the question of Niazi's veracity and to which the attention of the High Court was not drawn was whether this story of the substitution of the empties was plausible. Niazi did not say why Abdul Ahad had been made to substitute the empties, but as the empties were of bullets which were in use by the FSF, the only possible object in effecting the substitution would have been to remove the possibility of suspicion against the FSF. That was also the prosecution case, but the substitution of the empties was meaningless unless the substitution was by empties of bullets in common use, and if Mr. Bhutto had ordered the substitution, there would have been no difficulty in obtaining bullets of any type, whether from Bata or across the border. But, as the substituted empties were also of bullets of 7.62 mm. this alleged substitution of empties was an exercise in futility, and this makes it somewhat difficult to believe Niazi's evidence.

121. Further, as Niazi admitted that he had executed a false recovery memo, he was, on his own admission, guilty of an offence under section 201 of the Penal Code. It is true that he was an accessory after the fact and there is authority for the proposition that the offence of an accessory after the fact is not generally regarded to be so serious as that, for example, of an accessory before the fact. But, this does not help the case of the prosecution, because Niazi is a Police Officer, who claims to have fabricated evidence

crucial to murder case, therefore if his evidence be true, he was an accomplice of a baser type and on this ground, his evidence required corroboration. But, on the other hand, if the witness's claim about the substitution of empties be false, it would mean that the witness was a thoroughly dishonest witness.

122. Mr. Yahya Bakhtiar's next submission was that Niazi's evidence was falsified by the evidence given by him in the enquiry conducted by Mr. Justice Shafi-ur-Rehman into the murder of Mr. Kasuri's father in order to appreciate this submission, I would explain here that Niazi had not said in his evidence before Mr. Justice Shafi-ur-Rehman that he had prepared a false recovery memo of the empties or that the empties had been substituted. Therefore, he was asked why he had tried to deceive Mr. Justice Shafi-ur-Rehman and his reply was that he could not speak the truth, because of the fear of Mr. Bhutto, and the learned Judges of the High Court have accepted this explanation. With the utmost respect, as the witness had made false statements before Mr. Justice Shafi-ur-Rehman, how could the learned Judges be certain that the witness was not trying to deceive them? I am aware that they had the advantage of watching the demeanor of the witness, but, in my humble opinion, prudence dictated that the witness's evidence crucial to murder case, therefore evidence should not be accepted without corroboration, and such evidence could easily have been produced if the story of the witness had been true.

123. Thus, for example, the witness said that Abdul Ahad had travelled to Rawalpindi and brought back fake empties and the false draft of the recovery memo from Rawalpindi. As this allegation is, in the words of Privy Council in *Stephen Seneviratne v. The King*<sup>449</sup>, essential to the unfolding of the narrative of the prosecution case, the primary evidence of Abdul Ahad's visit to Rawalpindi would have been his T.A. and D.A. Bills for this visit, but it was not produced. And, further, as the dead cannot answer the tales against them, the wilful failure of the prosecution to produce this documentary evidence makes it difficult for me to believe Niazi's evidence, and this apart from the fact that he was an accomplice.

124. Additionally there were also other documents which could easily have been produced by the prosecution. Thus, for example, an entry should have been made about the empties both in the *roznamcha* and in the *zimmies*, and the witness was cross-examined about the failure to produce these documents. As to the *zimmies*, he said that they had been maintained by Abdul Ahad, and as to the case diary maintained by him, he said "so far as I recollect I had not given the numbers of the empty cartridges in the case diary" As the burden was heavily on the prosecution to prove its theory of the substitution of empties, it was not enough for the witness to say that as far as he could recollect, he had not entered the numbers of the empty cartridges in the case diary. The case diary should have been produced to corroborate the witness's claim. Similarly, the

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<sup>449</sup> AIR 1936 PC 289

*zimmies* should also have been produced, as the witness merely said that he did not know whether they contained any entry about the lot numbers of the empties. The site plan prepared by the witness might also have been of assistance to the Court, but this too was withheld.

125. Mr. Yabya Bakhtiar also drew our attention to the fact that the recovery memo. of the empties had been attested by two witnesses, Abdul Ghaffar and Abdullah, and as on the plain language of section 103 of the Criminal Procedure Code, these witnesses were independent witnesses, learned counsel submitted that an adverse inference should be drawn against the prosecution for not examining these witnesses. Mr. Batalvi was not able to explain why these witnesses were not examined, but he attempted to retrieve the position by submitting that Niazi's evidence about the substitution theory was supported by that of Nadir Hussain Abidi the Director, Forensic Science Laboratory, Lahore in November 1974. This witness said that he had come to the Ichhra Police Station after, 11-00 a.m. on the 11th of November 1974 in order to give his expert opinion about the empties, and as he said that he had seen the empties lying unsealed, Mr. Batalvi submitted that the evidence of this witness corroborated the claim made by Niazi in his evidence that the empties had not been sealed at the time of their recovery. I am astonished at the submission, because Nadir Hussain Abidi had seen the empties long after they had been secured from the place of occurrence by Niazi, and as to the time when these empties were secured by Niazi, Abdul Ikram, the Moharrir Head Constable of the Ichhra Police Station said in his evidence

"On the night between 10th and 11th of November, 1974, Abdul Hayee S.H.O. left the Police Station at 3 or 4 a.m. for spot. He had made entry in the *rozncmcha* before his departure. It was made in my presence."

126. If this evidence be correct, it is obvious that Nadir Hussain Abidi saw the empties at least six or seven hours after they had been brought to the Ichhra Police Station, but apart from Niazi's evidence, the prosecution has not examined any other evidence to show how the parcel of empties had been kept at the police station during this period. Perhaps in order to overcome this lacuna in the prosecution case, Niazi, who gave evidence after Abdul Ikram, said:

"Thereafter, I left the Hospital for spot. I might have left the Hospital at 8 or 8-30 a.m. From the Hospital, I did not go to the police station before going to the spot. I reached the spot from the Hospital in 10 or 15 minutes, and remained at the spot for about an hour. So far as I remember, my staff was present at the spot when I reached there from the Hospital."

127. It is strange that Niazi's evidence should be so inconsistent with Abdul Ikram's evidence. Be this as it may, even if we give the benefit of doubt to the prosecution and assume that Niazi's evidence is correct, Mr. Yahya Bakhtiar submitted that the only

possible inference from the evidence was that the parcel of empties had been unsealed after it had been sealed in the presence of Abdul Ghaffar and Abdullah and before Nadir Hussain Abidi's arrival at the police station.

128. The submission is correct. The burden was heavily on the prosecution to prove its claim that Niazi had prepared a false recovery memo and Nazi's evidence, as I have explained, by itself, was not sufficient to discharge this burden. On the other hand, the plea that the recovery memo, prepared by Niazi was false was crucial to the prosecution case, and in the words of the Privy Council in *Stephen's case* "witnesses essential to the unfolding of the narrative on which the prosecution is based, must, of course, be called by the prosecution whether in the result the effect of their testimony is for or against the case for the prosecution". I respectfully agree with this dictum, and this means that the prosecution should have examined Abdul Ghaffar and Abdullah or at least one of them, and the failure to do so necessarily leads to an adverse inference against the prosecution. Additionally, Niazi admitted that "my staff was present at the spot when I reached (the scene of the murder) from the Hospital". Now if there had been any truth in Niazi's claim that he had collected the empties without the assistance of Abdul Ghaffar and Abdullah, the prosecution could easily have examined Niazi's own staff to corroborate his evidence, but it did not.

129. Finally, according to Mr. Yahya Bakhtiar, there was another circumstance crucial to the question of Niazi's veracity to which, the attention of the High Court was not drawn, because of a misunderstanding of the law by the learned Public Prosecutor. Niazi's statement under section 161 of the Criminal Procedure Code had been recorded by Chaudhry Abdul Khaliq and incorporated in the Police diary and in order to appreciate, Mr. Yahya Bakhtiar's submissions, I would recall here that Niazi had been asked to explain why he had not informed Mr. Justice Shafi-ur-Rehman that he had prepared a false recovery memo. In order to conceal the fact that the empties recovered from the scene of the murder had been substituted. Niazi's reply was that he had deceived Mr. Justice Shafi-ur-Rehman because of the pressures brought to bear on him under the Government of Mr. Bhutto. But the witness's statement under section 161 of the Criminal Procedure Code had been recorded after Mr. Bhutto had been removed from power, yet this statement does not contain any reference whatever to the theory of the substitution of empties, therefore, Mr. Yahya Bakhtiar naturally submitted that this omission was sufficient to shatter the veracity of the witness. And learned counsel further explained that the accused had not been able to cross-examine Niazi about his earlier statement, because they had been informed by the Public Prosecutor that Niazi's statement had not been recorded under section 161 of the Criminal Procedure Code. But as the statement had been recorded, learned counsel's further submission was that we should either reject outright Niazi's evidence, because the prosecution had illegally withheld his earlier statement in willful disregard of the mandatory provisions of section 265-C of the Criminal Procedure Code or we should allow learned counsel to cross-examine Niazi on the basis of his earlier statement.



130. Mr. Batalvi admitted that he had not supplied a copy of Niazi's earlier statement and that he had also informed the Court that the witness's statement had not been recorded under section 161 of the Criminal Procedure Code. Further learned counsel reaffirmed before us the position taken by him in the High Court, and he said that as Chaudhry Abdul Khaliq had recorded Niazi's statement in the Police diary, it was not a statement within the meaning of section 161 of the Criminal Procedure Code, therefore, the prosecution was not under any obligation to supply a copy of this statement under section 265-C of the Criminal Procedure Code. In support of this submission, Mr. Batalvi relied on the majority view in *Queen-Empress v. Mannu*<sup>450</sup> and on several other judgments, of the Indian High Courts in which the majority view in the *Allahabad case* had been followed.

131. However, there is a cleavage of opinion in the High Courts on the question whether a statement of a prosecution witness ceases to be a statement under section 161 of the Criminal Procedure Code, if it is recorded in a Police diary, instead of being recorded separately. We have heard full arguments on this question, and I am satisfied that the correct view was the minority view in the *Allahabad case*, which was that the accused cannot be deprived of his right to a copy of the statement made by a prosecution witness under section 161 merely because that statement has been reduced into writing in a Police diary, instead of being recorded separately. But the accused would not be entitled to a copy of a statement in a Police diary if the statement is only statement of the circumstances ascertained through his investigation" by a Police Officer within the meaning of section 172 of the Criminal Procedure Code. So the question in the Instant case is whether Niazi's statement, which is contained in the Police diary, is merely "a statement of the circumstances ascertained through his investigation" by Chaudhry Abdul Khaliq, or whether it is in substance a statement of Niazi as a prosecution witness, and having read the statement with the assistance of the learned counsel, we were all satisfied that the statement, though incorporated in the case diary, was in substance statement under section 161. This means that it should have been supplied to the accused in the trial Court, and as it was not, Mr. Yahya Bakhtiar would have been entitled to recall Niazi for the purpose of cross-examining him. But the abject of cross-examination is only to destroy the veracity of a witness, and I am satisfied that Niazi was not a witness of truth, and his theory of the substitution of empties was a absolutely false theory.

132. Additionally, when the many infirmities in Niazi's evidence were brought to the notice of Mr. Batalvi, he stated that he could not defend the view taken by the High Court that the prosecution had proved this alleged theory of the substitution of empties. As the Public Prosecutor has also abandoned this theory, no purpose would be served by recalling Niazi for further cross-examination.

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<sup>450</sup> ILR 19 All. 394

133. Mr. Batalvi's next submission was that although the prosecution had failed to prove its theory of the substitution of empties, it had, nonetheless, been able to prove that there was a high probability that the empties had been substituted. I am surprised at the submission, because the ballistic expert's report is fatal to the prosecution case, but if the prosecution had proved that the empties had been substituted, it might have enabled the prosecution to get round the ballistic expert's report. Therefore, the prosecution had to prove beyond reasonable doubt that the empties had been substituted, and its case cannot be advanced by showing that there was a high probability of the substitution of empties. In any event, it has totally failed to prove that the empties were substituted, because this plea rests solely on Niazi's evidence which does not inspire confidence.

134. Mr. Batalvi then invited us to hold, again on the basis of Niazi's evidence, that Abdul Ahad had delivered the empties to Rao Rashid, the Inspector-General of Police (Punjab) on the night of filth of November 1974 at his house. Now what Nazi said in his evidence was that Abdul Ahad had told him that Rao Rashid "had ordered for the production of 24 empty cartridges; lead bullet and cap of the deceased. The D.S.P. put the 24 empty cartridges and the lead bullet in the service envelope. He also had the cap of the deceased and we reached I.G.'s residence in the jeep. I and the driver kept sitting in the jeep while the D.S.P. entered the I.G.'s. residence with the articles mentioned above". Then according to the witness, Abdul Ahad returned from the I.G.'s house with the cap of the deceased but without the empties and the lead Bullet. The High Court was impressed by this evidence, but that is because the High Court accepted Niazi's evidence and held that Njazi had proved that the empties had been substituted. But, as I am pot Impressed by Niazi's evidence, and as it is no longer the prosecution case that the substitution of empties has been proved, it is difficult to believe Niazi's evidence that the Inspector-General had taken away the empties. If the empties were not substituted, why should anybody take them away? Mr. Yahya Bakhtiar therefore, submitted that Niazi's evidence was false and that in terry case it was hit by the rule against hearsay.

135. The second limb of Mr. Yahya Bakhtiar's submission is not correct, because Niazi also deposed about what he had seen and done. However, the question is whether his evidence can be believed, and apart from the fact that he gave false evidence about the substitution of empties, Abdul Wakil Khan has said that Abdul Ahad had told him that he had given the empties to Abdul Hamid Bajwa. Thus, Niazi's evidence is contradicted by Abdul Wakil Khan's, and Mr. Batalvi was not able to advance any argument to show that Niazi's evidence was fit to be preferred to that of Abdul Wakil Khan. Accordingly I would only observe that in the circumstances discussed, I would reject Niazi's evidence also as false.

136. Mr. Batalvi's next contention was that the delay in forwarding the empties indicated that they had been tampered with. So, I may explain here that according to Niazi, the fake empties were brought back by the late Abdul Ahad from Rawalpindi on 17th November 1974, and an entry was then made in the Malkhana register about the receipt of the parcel of empties, but this entry was falsely predated to 11th November 1974. Both Abdul Ikram and Bashir, constables of the police station, have said that the entry in the Malkhana register was made on the 17th November, 1974 but was falsely predated to the 11th November, 1974. Further, according to the evidence of these witnesses, the empties were forwarded only on the 23rd November 1974 to the Forensic Expert and according to Mr. Batalvi this delay of 12 days raised the possibility that the empties had been substituted.

137. Now, delay in forwarding empties is relevant only if the weapons alleged to have been used in the occurrence are sent with the empties, but as the sten-guns alleged to have been used in the occurrence were not secured until 1977, nothing turns on the delay in forwarding the empties. Secondly, I would observe here with great regret that delay in forwarding empties has become the order of the day, and in *Noor Alam v. The State*<sup>451</sup> we had occasion to consider the effect of a delay of nearly four weeks in forwarding to the expert the empties together " with the guns used in the occurrence. As the appellant was unable to show that the Police had used the delay in fabricating evidence, we held that nothing turned on the delay in forwarding the guns and the empties to the expert. I re-affirm the view taken in this case and although Mr. Batalvi's attention was drawn to it, he was not able to advance any argument to persuade us to revise our view. He only relied on judgments of High Courts which have lost their relevance because of this declaration of the law by us.

138. Mr. Batalvi then attempted to salvage the prosecution case by inviting us to accept the view of the High Court that the empties secured from the place of occurrence could only have been the empties of bullets which had been issued to the FSF. But as the learned counsel did not support the reasons given by the High Court for reaching this conclusion, it is necessary to explain the position in some detail.

139. The prosecution has proved that bullets bearing lot No. 661/71 had been issued to the FSF, and as the empties recovered from the scene of the murder had the same lot number, according to Mr. Batalvi, this furnished strong corroboration of the prosecution case. Now, according to Niazi, all the 24 empties which he had recovered on the morning of 11th November 1974, had this lot number, but the lot numbers of the fake empties given to him by Abdul Ahad on his return from Rawalpindi were different, because 22 of the fake empties had the lot number BB1/71, whilst the other two had the lot No. 31/71. Further, according to the prosecution, these fake empties had been sealed in a parcel and forwarded to the Inspectorate of Armaments, and it was this parcel of

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<sup>451</sup> PLD 1978 SC 137

fake empties which was opened in the presence of the learned Judges on the 16th of January, 1978 when they recorded Nadir Hussain Abidi's evidence. I now turn to what this witness said about the empties in this parcel;

"I have seen the base of these 24 empty shells and have found that 22 of them bear one batch mark and the rest bear different batch mark as compared to the other 22. What is inscribed on the basis of 22 empties is 661/71, but the number can be read as BB1/71 by a person who has weak eye sight and who does not examine closely."

140. According to Niazi, the lot number on 22 of these empties should have been BBI/71 and not 661/71, because 661/71 was the lot number on the empties recovered by him on 11th November 1974. But, as all but two of the empties in this parcel, had the number of the original empties, it seems to me that this story about the substitution of empties is absolutely false. And, what perhaps happened was that Niazi had secured the empties in the early hours of the morning of 11th November 1974 (as stated by Abdul Ikram) and as he had examined them in poor lighting conditions, he had misread the Nos. 661/71 as BBI/71 and when this mistake was discovered, he invented this theory of the substitution of empties both in order to cover up his negligence and in order to prop up the prosecution case.

141. I now turn to Mr. Batalvi's submissions on his theory of lot numbers. According to the prosecution, and this has also been proved, the FSF used to obtain its ammunition from the Central Ammunition Depot (hereafter called the CAD), Havelian. Next, according to a letter written by the Commandant of this depot, Col. Wazir Ahmad, Khan, on 28th August, 1977 (Exh. P.W. 39/2) more than a million rounds of ammunition bearing lot No. 661/71 had been issued to the FS.F in the year 1973, and as, according to Mr. Batalvi, bullets bearing this lot number could not have been issued by the CAD, Havelian to any other unit, organization or person in Pakistan, the submission was that this letter of Col. Wazir Ahmad Char was sufficient to save the prosecution case. I would only observe on this submission that if it is correct, it would lend some support to the prosecution case. But as Col. Wazir Ahmad Khan's letter of 28th August 1977 does not state that bullets bearing lot No. 661/71 could not have been issued to any other person, unit or organization in Pakistan, Mr. Batalvi stated that the Colonel would have said so if he had been examined in Court. Unfortunately, as he was not examined, there is absolutely no evidence in support of the learned Counsel's submission.

142. Now, on the rule laid down by the Privy Council in *Stephen's case*, the prosecution should have examined Col. Wazir Ahmad Khan to prove its submission that bullets bearing lot No. 661/71 had been issued only to the FSF, and the prosecution had filed an application on 12th December 1977 to examine Col. Wazir Ahmad Khan. No doubt, it should have mentioned this witness in its calendar of witnesses, but

perhaps because the case was being rushed through at break-neck speed, the name of the witness was inadvertently omitted. But merely because the prosecution omits to mention the name of one of many witnesses in its calendar of witnesses, it does not mean that it should be debarred from examining that witness, if the witness can be examined without causing any delay in the case. And, as the prosecution had filed its application for the examination of Col. Wazir Ahmad Khan long before it closed its case, the examination of this witness would not have caused any delay. Nor could the accused have opposed the application, nor did they, because it was in the interests of justice that Col. Wazir Ahmad Khan should be examined. Indeed, in my humble opinion, if the prosecution had been so negligent as not to file this application, it would have been the Court's duty to examine Col. Wazir Ahmad Khan under section 540 of the Criminal Procedure Code. Therefore, I am astonished that the learned Judges dismissed this application even though it was not opposed by any of the accused, and this erroneous order of the Court has damaged the prosecution case, by preventing it from showing that the empties recovered from the place of occurrence were of bullets which could only have come from the annoury of the FSF. But this is fatal to the story put up by the second approver Ghulam Hussain and the evidence of the many other witnesses examined by the prosecution in order to corroborate this approver's evidence.

143. Mr. Batalvi submitted that no adverse inference should be drawn against the prosecution for not examining Col. Wazir Ahmad Khan, because it was the Court which had illegally prevented the prosecution from examining a necessary witness. This submission is correct, but it does not help the case of the prosecution, because the failure to examine Col. Wazir Ahmad Khan has left a yawning gap in its evidence, and Mr. Yahya Bakhtiar naturally made capital out of this.

144. I now turn to the reasons for the position taken by the High Court. As the application to examine Col. Wazir Ahmad Khan had been dismissed, learned counsel for Mian Abbas, who had faithfully discharged his duty to the Court by not opposing this application, would have done better to leave well alone. Instead for some reason, which I cannot understand, he cross-examined the second approver, Ghulam Hussain, on the question of the lot numbers of the empties, and this witness promptly replied that bullets bearing the lot No. 661/71 had only been issued to the FSF. The learned Judges held, on the basis of this statement, that bullets bearing lot No. 661/71 could only have come from the armoury of the FSF and that this furnished corroboration of this approver's evidence. With due respect to the learned Judges, as I will presently show, Ghulam Hussain was thoroughly a dishonest witness. Secondly, Ghulam Hussain was an approver, and as it is the settled law that an approver cannot corroborate himself, the learned Judges erred in accepting Ghulam Hussain's evidence. Thirdly, even Ghulam Hussain did not claim that he had ever been the ComnKindant of the CAD, Havelian, and as it is clear from his evidence that he had no means whatever of knowing how the Commandanis of the CAD, Havelian distribute ammunition, the statement of the witness was either false and he had resorted to peijury in order to

improve upon the prosecution case, or he had repeated what he had heard from other persons. I am inclined to believe that the witness had deliberately made a false statement, but if I am wrong, it means that the witness was repeating what other unknown persons had told him, therefore, his evidence was hearsay and was totally inadmissible on this ground. In either view of the mailer, his statement is of no evidentiary value whatever, and I would emphasise here that hearsay evidence does not become admissible merely because it has been given in answer to a question put in cross-examination.

145. Finally, Mr. Batalvi fell back on the reports issued on behalf of the Chief Inspector, Inspectorate of Armaments, so I may explain here that the Police had forwarded the empties recovered both in Islamabad and in Lahore to the Inspectorate of Armaments for its expert opinion in 1974. The report dated 27th August 1974, Exh. P.W. 23/4 and the report dated 7th January, 1975 Exh. P.W. 32/2, both relate to the seven empties of the Islamabad occurrence. These reports are signed by one Major Fayyaz Haider "for Chief Inspector" and they state that the empties were of Communist (Chinese or Russian) origin, of a service bore, namely 7.62 mm. The other two reports relate to the 24 empties recovered in Lahore. The report dated 27th November 1974, Exh. P.W. 32/1 is once again signed by Major Fayyaz Haider "for Chief Inspector, and Mr. Batalvi relied upon it, because it states that the empties were of 7.62 mm. of Chinese origin and that they had been fired from "Rifle, LMG and SMG". The other report, which is really a letter to the FIA dated 25th August 1977, Exh. P.W. 33/1 is signed by one Major Sarfraz Naeem "for Chief Inspector". It states that the 24 empty cartridges and the pieces of bullet, which had been forwarded by the Police for examination, were from bullets of 7.62 mm., and that the lot number of 22 empty cartridges was 661/71 and of the other 2 empty cartridges 31/71.

146. According to Mr. Batalvi. these reports supported the prosecution case, because weapons and bullets of 7.62 mm. calibre were not available to the public except through illegal purchases in Bara. Even if this submission be correct, it would only mean that there was a probability that the weapons used in the occurrence could have come from the FSF. and I do not see how the prosecution can prove its case by relying on probabilities. Additionally, the question is whether the contents of these reports and letter have been proved, because unless the contents have been proved, they do not advance the prosecution case at all. Mr. Batalvi relied on the fact that no objection had been taken to these documents when they had been produced by Lt.-Col. Zawar Hussain and Major Sarfraz Naeem. That is true, but the failure to object to the admission of a document would only preclude the accused from challenging the execution of the document. But the question whether the contents of the document are correct is another matter. Therefore, as the expert, who carried out the tests, namely, the Chief Inspector, Inspectorate of Armaments, was not examined, section 45 of the Evidence Act is fatal of Armaments, was not examined, section 45 of the Evidence Act is fatal to Mr. Batalvi's submission. But, according to Mr. Batalvi, it was not necessary for

the prosecution to examine the Chief Inspector, because his reports stood proved under section 510 of the Criminal Procedure Code as it now stands.

This section reads:

"510. *Report of Chemical Examiner, Serologist, etc.* - Any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government or any Serologist, fingerprint or fire-arm expert appointed by Government, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may, without calling him as a witness, be used as evidence in any inquiry, trial or other proceeding under this Code.

Provided that the Court may, if it considers necessary in the interest of justice summon and examine the person by whom such report has been made."

147. For the purpose of this discussion, it is sufficient to state that the privilege conferred by this section is limited to the reports of the Chemical Analyzer and the Assistant Chemical Analyzer appointed by the Government. Therefore, the burden was on the prosecution to show that the Chief Inspector of Armaments had been appointed by the appropriate Government as the Chemical Analyzer or the Assistant Chemical Analyzer under this section. Learned counsel made no attempts to meet this argument, but appeared to rely on the fact that responsible Police Officers had forwarded the empties for examination to the Chief Inspector, Inspectorate of Armaments. It is true that the Police Officers investigating the two cases had sent the empties to the Inspectorate of Armaments, but the prosecution had first sought the assistance of Nadir Hussain Abidi, the Director of the Forensic Science Laboratory of Lahore, and as Mr. Batalvi did not contend that Nadir Hussain Abidi was a Chemical Analyzer or an Assistant Chemical Analyzer within the meaning of section 510 of the Criminal Procedure Code, the mere fact that the Police sought the advice of the Chief Inspector, Inspectorate of Armaments cannot possibly lead to the conclusion that this officer was the Chemical Analyzer appointed under section 510. And, on the contrary, Major Fayyaz. Haider has, in his first report about the Lahore empties (Exh. P.W. 32/1), informed the Police "please in future refer such cases to Chief Inspector of Explosives (Civil) Karachi". Thus the report itself suggests that the Chief Inspector of the Inspectorate of Armaments was not competent to issue certificates under section 510 of the Criminal Procedure Code and here Mr. Yahya Bakhtiar referred us to a judgment reported in *Mohammad Ashraf v. The State*<sup>452</sup> from which it is clear that the Chemical Analyzer under section 510 used to be the Inspector of Explosives. Therefore, Mr. Batalvi had to produce, the relevant notification to show that someone else had been

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<sup>452</sup> PLD 1959 Pesh. 176

notified, as the Chemical Analyzer or the Assistant Chemical Analyzer under this section. But he did not.

148. It is true that none of the accused cross-examined Lt.-Col. Zawar Hussain and Major Sarfraz Naeem on the question whether the Chief Inspector's reports, which they produced, were by the Chemical Analyze appointed under section 510. But it was not for the accused to guide and advise the prosecution so as to ensure their own conviction. And further, any such question would have been barred either by the rule against hearsay or the rule that a party must always produce in support of its plea the best evidence available to it. So, if, for example; either of these witnesses had said that the Chief Inspector of the Inspectorate of Armaments had been appointed by the Government as its Chemical Analyzer, this statement could only have been made on the basis of what they had learnt from others or from a perusal of the relevant notification. And, if the statement was based on what the witnesses had learnt, even from their Chief Inspector, the answer would not have been evi-dence, because it was hearsay. And, on the other hand, if the answer had been made on the basis of a notification issued by the appropriate Government, it was the duty of the public prosecutor to produce this notification. And, further, as Mr. Batalvi did not attempt to produce this notification even before us, and in view of Major Fayyaz Haider's direction to the Police in his report, Exh. P.W. 32/1, that they should in future "refer such cases to Chief Inspector of Explosives (Civil) Karachi", I have no doubt that the Chief Inspector, Inspectorate of Armaments had not been authorized at the relevant time to issue reports under section 510.

149. Additionally, as this section has seldom come up for construction before the Courts, I would observe here that it is an exception to the general principle enunciated in section 45 of the Evidence Act with regard to the experts specified in the section, and all that the section enacts is that a Court may use as evidence the report of the expert. even though the expert has not been examined as a witness. This, however, does not mean that the Court has to go by the *ipse dixit* of the expert, and because the discretion conferred on the Court by this section is a judicial discretion, it must be exercised judicially, therefore, to take an obvious example, a Court will be failing in its duty, if it relies upon a report which does not contain the reasons given by the expert for the findings given by him in his report. unless the point is too clear to leave any room for doubt in the Court's mind. Similarly, I venture to think that the Public Prosecutors would be well advised to examine the expert despite the privilege conferred by this section, in cases where the expert's opinion is crucial to the prosecution case, or in cases where the opinion turns on some controversial or complicated matter, and, in the instant case, whilst I do not doubt the correctness of the reports submitted, the question is whether we should go by the expert's *ipse dixit*. For obvious reasons, the report and the letter about the empties from Lahore are so cryptic that I for one would like to know more about the tests carried out by the Chief Inspector which led him to reach the conclusions which he did. Secondly, Mr. BataLvi submitted that according to the report,



Exh. P.W. 33/1, even the piece of metal recovered from the body of the deceased was from a bullet of 7.62 mm., and he rightly placed great reliance on this finding. Now, whilst I would not, for a moment, doubt the Chief Inspector's opinion about this piece of metal merely because I find it difficult to understand how such a finding can normally be given from a piece of metal, an expert relied upon by the prosecution, namely Nadir Hussain Abidi, has said about this piece of metal "I could not say anything about the metallic piece as it was in a mutilated state". This witness was the Director of the Forensic Science Laboratory of Lahore, and if he could not give an opinion on the piece of metal, in my opinion, the prosecution was required to examine the Chief Inspector not for the purpose of proving the reports, because they had been proved, but in order to convince the Court that the conclusions reached in these reports were the correct conclusions, In any event, as tire prosecution has failed to prove that the Chief Inspector was the Chemical Analyzer or the Assistant Chemical Analyzer within the meaning of section 510, it cannot use the Chief Inspector's reports as evidence under this section, therefore as the prosecution wanted to rely upon them as expert opinion, the prosecution should have summoned the Chief Inspector to give evidence in Court about the opinion expressed by him in his reports and as it did not, the reports are of no help to its case.

150. I now turn to the question of motive. I have already indicated my views on this question and Mr. Batalvi's attention was drawn to this Court's judgment in *Abdul Qadir's case*. He, therefore, relied on this Court's judgment in *Abdur Rashid v. Umid Ali*<sup>453</sup> and in *Mst. Razia Begum v. Hurayat Ali*<sup>454</sup> and submitted that the prosecution case was very strong, because it had proved that only Mr. Bhutto had a motive for killing Mr. Kasuri and also proved that Masood Mahmood had no motive whatever to implicate Mr. Bhutto falsely. But the two judgments of this Court relied upon by Mr. Batalvi do not help him, because the question whether motive could furnish corroboration of an approver's evidence did not arise for consideration in those cases. However, as rightly submitted by Mr. Batalvi, the High Court has placed great reliance on the evidence of motive, so I would examine it in some detail.

151. I would begin with a passage from Munir's Law of Evidence (Pakistan Edition) to which the attention of the High Court was unfortunately not drawn. The learned author observes at page 1442:

"It has already been noticed that circumstantial evidence to be corroborative of the evidence of the accomplice must show or tend to show that the accused committed the offence. Therefore, mere question of motive for the commission of the offence ... is not sufficient corroboration."

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<sup>453</sup> PLD 1975 SC 227

<sup>454</sup> PLD 1976 SC 44

152. I agree with these observations and I would clarify that what the learned author meant was that motive by itself could never furnish corroboration of the evidence of an accomplice. This does not mean that motive cannot be a link in a chain of corroboratory evidence, but by the nature of things, it can only be a weak link in a chain of corroboratory evidence, and that was the view taken by successive Division Benches of the Lahore High Court in *Jit Singh v. Emperor*<sup>455</sup> in *Jiwan Singh v. Emperor*<sup>456</sup> and in *Kartar Singh v. Emperor*<sup>457</sup>. As, unfortunately, the attention of the High Court was not drawn to the earlier case-law of their own High Court, I would observe here that the view taken by the Lahore High Court in these judgments is similar to the view taken by all the High Courts of the sub-continent, and, unless we are so presumptuous as to think that we have the monopoly of wisdom, there must be good reasons Why all the judges who went before us took the view that motive was a very weak form of corroboratory evidence. In my humble opinion, the reasons for this view are obvious. In the first place, evidence of motive seldom comes from disinterested witnesses. Secondly, the victim of an offence may have enemies other than the accused who are tried for the offence. Thirdly, and this is most important, as human beings differ in their reactions to the same provocation, evidence of motive has hardly any corroborative value, unless it is the evidence of a witness, who has heard the accused say that he will take his revenge against the victim of the offence. But even in such cases Court should be very careful about relying on evidence of motive. Thus for example, in the instant case, the High Court has relied on an intelligence report in which it was stated "that Ahmad Raza Kasuri was in a desperate state and had been heard saying that he will take revenge of the murder of his father personally". However, it is nobody's case that Mr. Kasuri had ever even thought of making an attempt on Mr. Bhutto's life.

153. With these observations, I turn to the evidence of Mr. Kasuri, who was examined by the prosecution to prove the motive for his father's murder. A casual perusal of the witness's cross-examination would show that there were times when he had fallen out with Mr. Bhutto, and there were times when he had expressed blind admiration for Mr. Bhutto. He had joined Mr. Bhutto's party with great enthusiasm, then left it with a bang, joined another party, left that party with a bang, and there he actually rejoined the party of Mr. Bhutto, after his father's murder. As his rejoining the Pakistan People's Party casts doubts on his evidence about the reasons for his suspicion that Mr. Bhutto was the murderer of his father, Mr. Batalvi submitted that there was a love-hate relationship between two men. As this cryptic observation hits the point, I would not burden the record by going through the witness's evidence, and I would only observe that the element of hatred in the witness's relationship with Mr. Bhutto was on the ascendant when he gave evidence in the trial Court. Therefore, he cannot, by any stretch of imagination, be, described as a disinterested witness.

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<sup>455</sup> AIR 1925 Lah. 526

<sup>456</sup> AIR 1934 Lah. 23

<sup>457</sup> AIR 1936 Lah. 400

154. Mr. Kasuri has also admitted in cross-examination that he had many enemies amongst the Punjab politicians, and I am compelled to observe that it would have been much better if he had readily admitted that he had other enemies. He did so very reluctantly, and because of his own statements in the past, and I would only refer here to his privilege motion to the Speaker of the National Assembly dated 29th November, 1974. In this privilege motion, he has stated that between 22nd May, 1971 and the Islamabad incident of August 1974, 13 attacks had been made on his life with deadly weapons. It is true that the witness claimed in his evidence that all these attacks on him had been instigated by Mr. Bhutto, but complaints had been registered all over the country for these attacks, and Mr. Batalvi could not refer us to any documentary evidence whatever to show that Mr. Bhutto had been implicated in these complaints. In this background of hatred and enmity against the witness, it would be absurd to contend that the National Assembly incident of 3rd June, 1974 had given Mr. Bhutto a motive to murder Mr. Kasuri, therefore, Mr. Batalvi advanced a much more sophisticated argument.

155. This was that Mr. Kasuri had criticized Mr. Bhutto in Parliament and out of Parliament, and as Mr. Bhutto was a very vindictive man, he wanted to silence his critics by eliminating them. In support of this argument, we were referred to several speeches by Mr. Kasuri in the National Assembly, and it would be sufficient to refer to one of those speeches. In a speech in February 1973 Mr. Kasuri criticized Mr. Bhutto in a very strong language, compared him to Hitler and compared the episode of the arms-haul from the Iraqi Embassy with the burning of the Reichstag. Obviously, Mr. Kasuri was a very bold critic of Mr. Bhutto. But the question is whether this would furnish motive to one parliamentarian to eliminate another parliamentarian? In my humble opinion, institutions, which have existed for generations, and parliamentary Institutions have flourished in the sub-continent for almost a century, develop their own traditions and what might be described as their own rules of the game. And one of the rules of the game among our politicians is that they will abuse each other in very offensive language without taking it to heart. This trend was noted long ago by Sir Maurice Gwyer, C.J., in his classic judgment in *Niharendu Dutt Majumdar v. Emperor*<sup>458</sup>. Perhaps a case more to the point is my own judgment in *Ali Hussain Jamali v. Government of Sindh*<sup>459</sup>. There Mr. Bhutto was criticised in language in words as virulent as any used by Mr. Kasuri in his speeches. Therefore, it seems to me that the reaction of politicians to mutual abuse is very different from say that of a village rustic. Unlike the latter, a politician does not reach for his gun when he is criticized, and, although Mr. Bhutto had professed to boycott his examination under section 342 of the Criminal Procedure Code, this is what he had said when he was questioned about his reactions to Mr. Kasuri's speeches, criticizing him in extremely strong language. In this connection, Mr. Bhutto had referred to an incident in Parliament in which Mr. Wali Khan had told Mr. Pirzada"

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<sup>458</sup> AIR 1942 FC 22

<sup>459</sup> PLD 1974 Kar. 283

I will break your neck and I will shoot your Prime Minister or President." And what Mr. Bhutto meant was that utterances such as those by politicians did not mean anything, they did not even mean that the politicians, who showered such compliments on each other, really hated each other. This was also the stand he took in his statement before us, and I would agree with the[ proposition that seasoned parliamentarians tolerate criticism which might seem to be absolutely intolerable and offensive to persons in others walks of life, therefore, I cannot accept Mr. Batalvi's submission that Mr. Bhutto had a motive for killing Mr. Kasuri, because Mr. Kasui was criticizing him violently.

156. Mr. Batalvi then submitted that Mr. Bhutto was a very vindictive man, and in support of this plea he referred us to Saeed Ahmad Khan's cross-examination by Mr. Bhutto's learned counsel. I am unable to understand why this witness and Masood Mahmood were cross-examined in the very unfortunate manner in which they were. Be this as it may, in his reply to a question put by Mr. Awan, Saeed Ahmad Khan said:

"a shady journalist by the name of Nasrullah published a weekly "AWAM" had made virulent attacks against the Prime Minister and his family members. I was ordered by Mr. Bhutto that as his family lived in Multan, I should have them set right."

He then said that he asked the D.I.G. Multan to warn the members of Nasrullah's family to tell Nasrullah "not to make such personal attacks on Mr. Bhutto and his family". Further according to the witness:

"After two days of this I got a call from the Prime Minister ... and he virtually put me on the mat that these half measures are of no use and that his instructions had not been complied with."

As Saeed Ahmad Khan, who was a very clever witness, refrained from saying what instructions Mr. Bhutto had given him, and as he did not tell us how Nasrullah's family had to be harassed, this evidence does not lend any support to Mr. Batalvi's submission that Mr. Bhutto was the type of man who had his critics assassinated.

157. Mr. Batalvi then referred us to Mian Abbas's statement (Exh. D.W. 1/1) to the Martial Law authorities to which I referred earlier and submitted that this statement proved that Mr. Bhutto was the type of man who was so vindictive that he would eliminate his critics. I examined this statement earlier and I pointed out that it implicated Masood Mahmood and was very damaging to the veracity of that witness. Additionally, this statement was made by Mian Abbas after Mr. Bhutto had been overthrown, yet it does not contain a word against Mr. Bhutto, and as we cannot read into this document what it does not state, I am unable to accept Mr. Batalvi's submission that this document shows that Mr. Bhutto was a vindictive man.

158. Additionally, this document, Exh. D.W. 1/1, was produced after Mr. Bhutto's examination under section 342 of the Criminal Procedure Code, and as I have referred to it, I would observe here that I must not be understood to have accepted Mr. Batalvi's submission that this document was admissible against Mr. Bhutto. Lengthy arguments were advanced by Mr. Batalvi on the question of admissibility of this document, but as it does not lend any support to the prosecution case, I consider it unnecessary to examine these arguments.

159. Mr. Irshad Qureshi had however cross-examined the approvers on the allegation that Mr. Bhutto had ordered the assassination of politicians who had criticized him, and as far as I can see, this cross-examination had reference to the rule laid down by the Privy Council in *Makin v. Attorney-General for new South Wales*<sup>460</sup> that the prosecution can always produce evidence to anticipate a defence which the accused was likely to make. And, as the defence which any politician would have made on the type of charge faced by Mr. Bhutto would have been that politicians do not get excited by the mutual abuse they indulge in, I would have thought that Mr. Irshad Qureshi's cross-examination was relevant. Unfortunately, the manner in which some of it was conducted was totally illegal. Sometimes Mr. Irshad Qureshi was permitted to cross-examine after Mr. Bhutto's learned counsel had completed his cross-examination, although the sole object of Mr. Irshad Qureshi's cross-examination was to prove Mr. Bhutto's guilt. Obviously this part of the evidence of the witnesses has to be ruled out. And if it is ruled out, there is no evidence whatever to show that Mr. Bhutto had ordered the assassination of his critics nor were we referred to any such evidence.

160. However, as in his arguments on the 16th September 1978 Mr. Batalvi had referred us to the murder of six political leaders who were critics of Mr. Bhutto. It was pointed out to him that such vague allegations did not amount to evidence to show that Mr. Bhutto was a person who had his critics assassinated. Mr. Batalvi's reply was that the prosecution was debarred from producing evidence on these lines. But if the prosecution cannot produce such evidence. I do not see how Saeed Ahmad Khan's evidence about Mr. Bhutto's orders to harass the family of the journalist Nasrullah or for that matter Mian Abbas's statement, Exh. D.W. 1/1, can be used as evidence against Mr. Bhutto. However, as this question of the evidence which the prosecution could have laid to rebut Mr. Bhutto's plea of innocence is a complicated question, I would refrain from deciding it, and I would only observe that it was for the Public Prosecutor to conduct the case in the manner in which he thought proper, and the result of the manner in which the case has been conducted is that there is no evidence in support of the submission of Mr. Batalvi and Mr. Irshad Qureshi that Mr. Bhutto got his critics murdered, because he was a vindictive man, who could not tolerate any criticism.

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<sup>460</sup> 1894 AC 67

161. I would now turn to Mrs. Kasuri's evidence and examine how it supports the prosecution case of motive against Mr. Bhutto. Mr. Kasuri stated that his differences with Mr. Bhutto had begun even before the National Assembly had been convened, because he had objected to the boycott of the Session of the National Assembly which was to have met in Dacca in March 1971. And he further said that Mr. Bhutto had turned against him, because he was the only member of his party who had gone to Dacca to attend that Assembly Session. But, although the witness claimed hostility only on the part of Mr. Bhutto, he was compelled to admit in cross-examination that other leaders, like Mr. Khar, Mr. Mairaj Khalid and Dr. Mubashar Hassan, were also hostile to him. But, whilst the witness was not cross-examined on the particulars of this hostility, he was cross-examined at great length on the enmities between him and the local politicians of Kasur district and especially two local leaders, Chaudhry Yaqub Maan and Mr. Akbar Toor. Thus, for example, the witness said that on the 2nd of May 1971, he had been illegally prevented from presiding over a meeting of his party at the Habib Mahal Cinema in Kasur and had been violently attacked. He then said:

"The names of ... those persons ... had been mentioned by me in the relevant F.I.R. A case had been registered with Police Station Kasur City about this incident, but I cannot say who was the complainant. I do not know if one Mohammad Sharif had also been injured...I was not in a position to say who was responsible for fracturing my hand in that melee."

The witness further said that:-

"A cross case naming Mohammad Sharif, myself and others was registered at the Police Station, Kasur city. It was done at the behest of the Administration. This cross case had been registered after the other case. I do not remember if I ever asked for my enlargement on bail in the cross case. I was summoned by the Court in this cross case ... I do not recollect if I ever appeared in the Court in the cross case. I do not know if a challan was submitted in the case initiated by Mohammad Sharif. I am not aware of the fate of these two cases. Neither did I make any inquiry about this."

162. Mr. Kasuri also admitted in cross-examination that on the night of the 4th and 5th August, 1971 "an attack was launched at my house at Kasur and because of wrong identification they injured my brother Khizar". I would point out here that in this attack Khizar had received more than a hundred injuries, but as according to the witness Khizar was attacked only because of wrong identification, it is obvious that the assailant harbored intense enmity against him. Reverting however to his evidence, he further said "that I am not aware who lodged the F.I.R. I am not aware if Yaqub Maan and Naseer Khan were named in that F.I.R. as the assailants. The latter is my first paternal cousin". I would pause to point out here that Khizar was very lucky to have survived a hundred injuries, and as such attacks could not have been a regular occurrence in the

witness's family, it is not possible to believe that the witness did not know whether his own cousin Naseer Khan had been named in the F.I.R. lodged for this terrible attack on his brother.

Mr. Kasuri was then cross-examined about a criminal case which was pending against him on 15th October 1977 when he was cross-examined in Court. He said "Khudian is within my constituency. It is a fact that I held a public meeting at Khudian on 8th April 1972 ... just as the meeting started pistol shots were heard and they were followed by a pandemonium.

I saw Akbar Toor firing but I am not aware as to how many other persons were doing the same. An F.I.R. was lodged with the Khudian Police Station about this incident. Akbar Toor was mentioned in that F.I.R. as the principal assailant, but I do not remember the names of the co-accused. I might have been the complainant in this case.

I have already stated that in the state of mind in which I was after the firing, I do not remember anything. The case is still pending in the Court of a Magistrate at Kasur."

163. In view of these and other admissions by Mr. Kasuri, I am unable to understand Mr. Batalvi's submission that the prosecution had prove beyond doubt that Mr. Kasuri had no enemies except Mr. Bhutto in 1974. Secondly, in view of Mr. Kasuri's admissions in cross-examination, no Police Officer, who was investigating the murder case, could possibly have reached the conclusion that Mr. Kasuri did not have differences with local politicians in 1974, but unfortunately, as I will presently show, two senior Police Officers advanced this claim in their evidence. Thirdly, Mr. Yahya Bakhtiar submitted that Mr. Kasuri was a very aggressive man and it was he who went round attacking people and that the evidence which I have just quoted did not state the true position about this Khudian incident. Learned counsel therefore referred us to the further cross-examination of this witness, and it reads:

Question. - I put it to you that as a result of the incident in that meeting only one F.I.R. was lodged land that was by Mohammad Akbar Toor because you and your supporters were the assailants?

Answer. - It is a fact that Mohammad Akbar Toor did get a case registered and I got myself bailed out. I cannot say if his was the only F.I.R. lodged regarding this incident. It is a fact that there is only one case which is pending regarding this at Kaasm and I am an accused person in that case.

164. I would observe here that it was unfortunate that the witness tried in his answers to avoid admitting that he was the accused in this case.

165. Finally, the witness admitted another violent attack on him Chaudhry Yaqub Maan which proves an enmity far more bitter than any differences of opinion with Mr. Bhutto. Mr. Kasuri said about this occurrence:

"It is correct that at 4 p.m. on the 16th of January 1972 Ch. Yaqub Maan who was accompanied by others assaulted me. The other assailants included his son and some others. They were armed with revolvers, lathis, and sharp-edged weapons. I was injured by them. I sustained bullet injuries on my legs."

The witness further said:

"I remained in the Mayo Hospital for over a week, and as I could not stand the atmosphere of the hospital, I returned home, although my injuries had not yet healed and I continued visiting the hospital for over a month to get my wounds dressed."

166. The F.I.R. lodged by Mr. Kasuri for this occurrence Exh. P.W.1/13-D also furnishes an interesting commentary on Mr. Batalvi's submission that Mr. Kasuri had only one enemy and that was Mr. Bhutto. Not only has Mr. Kasuri not named Mr. Bhutto in this lengthy F.I.R. but he has referred in detail to the vendetta, which was being pursued against him, by Chaudhry Yaqub Maan. He has then stated in the F.I.R. that he was sitting in the Family Planning Office in Kasur when Chaudhry Yaqub Maan and his party came, armed with revolvers and hatchets, and attacked him, and Chaudhry Yaqub Maan shouted to his followers that Mr. Kasuri should not be spared. Further, according to the F.I.R. an attempt was made to abduct him and take him away in the boot of a car belonging to the party of Chaudhry Yaqub Maan in order to kill him. But he successfully survived these attacks and lived to lodge the F I R. Like the assault on the witness's brother, which had caused more than a hundred injuries, the lurid description of the occurrence in this F.I.R. suggests that the local enmities against the witness were extremely violent.

167. Another piece of evidence on which Mr. Yahya. Bakhtiar relied was the admission of Mr. Kasuri that he had remained on bail in the cases filed against him, and as these cases too involve very serious criminal charges, learned counsel's submission was that if Mr. Bhutto had really been after Mr. Kasuri's life, he would have seen to it that the bail granted to Mr. Kasuri was cancelled. I would only observe on this submission that it was not disputed before us that the State had not sought cancellation of the bail granted to Mr. Kasuri, and if Mr. Bhutto was really after this witness's blood, even without Mr. Bhutto's knowledge, his minions would have sought cancellation of the bail granted to their master's enemy. But no such attempt was made by any one. Additionally, the cases in which Mr. Kasuri was granted bail related to occurrences of 1971 and 1972, and it would appear from Mr. Kasuri's evidence that no progress had



been made in those cases, even though Mr. Bhutto had been in power for at least five years after the institution of those cases. I am conscious of the delays in the subordinate Courts, but the delays in the cases filed by for and against Mr. Kasuri would appear to beat all records. Obviously, something was rotten in the State of Denmark and there was much more to it than Mr. Bhutto, otherwise the cases against Mr. Kasuri would not have remained pending for so many years.

168. Mr. Batalvi however made much of the fact that the F.I.R. had been lodged very promptly and that Mr. Kasuri had named Mr. Bhutto in it. Learned counsel thought that this furnished corroboration of the evidence of the approvers, but I regret my inability to accept the argument, because Mr. Kasuri has not named any assailants in his F.I.R. He has only pointed the finger of suspicion at Mr. Bhutto. And, the question whether this suspicion was justified or not, has to be decided by an objective test, so that if, the suspicion was not justified, nothing would turn on the fact that the F.I.R. was lodged promptly. Indeed, in cases in which the F.I.R. merely voices the suspicion of the complainant, the fact that it is lodged promptly, might mean that the complainant had no time to consider whether his suspicion would beat the scrutiny of reason. On the other hand, the position is quite different in cases in which the F.I.R. names the assailants and the eyewitnesses. In such cases, at least when there is enmity between the parties, delay in lodging the F.I.R leads to an adverse inference against the prosecution, because of the obvious possibility that time was taken to concoct evidence or implicate innocent person, whilst the question of drawing an adverse inference does not arise where an F.I.R. of this nature is lodged promptly. Therefore, the prompt lodging of an F.I.R. is a circumstance in favor of the prosecution when the F.I.R. has named the assailants or the eye-witnesses, but I see no analog between such F.I.Rs. and the F.I.Rs. which merely record the suspicions of the complainant.

169. Additionally, the murder in Lahore was within three months of the Islamabad incident and Mr. Kasuri had not even pointed the finger of suspicion at Mr. Bhutto in his F.I.R. for the Islamabad incident. Further, according to Mr. Yahya Bakhtiar, Mr. Kasuri's statement under section 161 of the Criminal Procedure Code for this incident had been recorded by Agha Muhammad Safdar, D.S.P. and Mr. Kasuri had in this statement suspected other persons for the attempt on his life. This statement from the Bar was made on the basis of a copy of this section 161's statement which had been supplied in the High Court by the Public Prosecutor to Mr. Awan, the learned counsel for Mr. Bhutto. But as this statement has not been brought on the record, I would point out here that it appears to have been reproduced seriatim by Mr. Justice Shafi-ur-Rehman in paragraph 16 of his report about his inquiry into the murder of Mr. Kasuri's father. I will presently examine the question of the admissibility of this report. But according to the report Mr. Kasuri had suspected Chaudhry Yaqub Maan for the attempt on his life in Islamabad and he had also said that he suspected:

"Any person or persons who knew that he had been criticizing the policies of the present Government, on his own accord, did this act for earning goodwill of the party in power."

170. Mr. Kasuri has, however, denied having made any statement to the Police. Therefore, Mr. Batalvi submitted that if the appellant wanted to rely on this statement, he should have examined Agha Muhammad Safdar, D.S.P., to prove that it had been recorded. I would have been inclined to agree with this submission but for one circumstance. This is that the learned Public Prosecutor had supplied a copy of this statement to Mr. Awan on an application by the accused in the High Court. As this statement could only have been supplied either under section 162 or under section 265-C of the Criminal Procedure Code, I would agree with Mr. Yahya Bakhtiar that we should presume that the copy thus supplied to Mr. Bhutto's learned counsel was a true copy of Mr. Kasuri's statement. But a presumption under section 114 of the Evidence Act is rebuttable, and Mr. Kasuri's evidence would be sufficient to rebut this presumption.

171. However, whatever be the position if the matter had stood here, Muhammad Waris had conducted the investigation in the murder case from January 1975 until the case was filed as untraced, and as it was his duty to investigate into the local enmities of Mr. Kasuri and of his family, he was cross-examined on the question whether Mr. Kasuri's statement for the Islamabad incident had been recorded under section 161 of the Criminal Procedure Code. His reply was "I do not remember if a statement of Ahmad Raza Kasuri forms part of that record under section 161, Cr. P.C. or in the *Zimnies* but I did see it. The motive given of the assault at Islamabad had been given by Ahmad Raza Kasuri in his statement there". In view of this evidence, the burden shifted to the prosecution to prove that Mr. Kasuri's statement had not been recorded under section 161, Cr. P.C. and if its plea be true it would, no doubt, have been able to discharge this burden by examining Agha Muhammad Safdar, D.S.P. It could even have asked the Court to examine Agha Muhammad Safdar as a court witness. As it did not, the only reasonable inference from the evidence is that Mr. Kasuri's statement was recorded.

172. Mr. Batalvi attempted to overcome this difficulty by referring us to Mr. Kasuri's speech in the National Assembly on the 24th of August, 1974. Mr. Kasuri referred in this speech to the attempt which had been made on his life, but he said that he would not voice his suspicion against anyone for the incident. As this speech was made within a few hours of the Islamabad incident, Mr. Batalvi wanted us to hold that no statement could have been made by Mr. Kasuri voicing his suspicions against anyone for the Islamabad incident as any such statement, be it to the police or to anyone else, would have been inconsistent with his speech in the National Assembly. I am not impressed by the argument. As Mr. Kasuri had not seen the assailants, he could only voice his suspicions and whilst a statement to the police was the proper place for voicing these

suspicious, the National Assembly was not the proper place for voicing mere suspicions. Therefore, I see no inconsistency between Mr. Kasuri's speech and the contention of Mr. Yahya Bakhtiar that Mr. Kasuri had made a statement to the police in which he had voiced his suspicion against the sycophants of Mr. Bhutto and against his cold enemy Chaudhry Yaqub Maan.

173. Accordingly, on the evidence I would hold that Mr. Kasuri had made a statement to the police which has been suppressed by the prosecution. This necessarily leads to an adverse inference against the prosecution and casts doubt on the suspicions voiced by Mr. Kasuri against Mr. Bhutto for the Islamabad incident. But as this hardly helps the case of Mr. Bhtitto, Mr. Yahya Bakhtiar submitted that he was entitled to produce secondary evidence of this disputed statement as that statement had been deliberately withheld by the prosecution. The submission is correct., On the plain language of section 65 of the evidence Act, the accused was entitled to produce any secondary evidence of Mr. Kasuri's police statement. But as any secondary evidence would not, for example, mean hearsay evidence, Mr. Yahya Bakhtiar submitted that Mr. Kasuri had made a statement similar to his police statement in his evidence before Mr. Justice Shafi-ur-Rehman; but as the prosecution would not produce that statement either, learned counsel submitted that the narration of Mr. Kasuri's evidence in paragraph 16 of Mr. Justice Shafi-ur-Rahman's report was secondary evidence of Mr. Kasuri's statement within the meaning of section 65 of the Evidence Act, therefore, Mr. Bhutto was entitled to rely on it, and he invited us to bring Mr. Justice Shafi-ur-Rahman's report on the record as evidence in this case or at least paragraph 16 of that report. The argument assumes that Mr. Justice Shafi-ur-Rahman has reproduced in paragraph 16 of his report a statement made before him by Mr. Kasuri, and if this assumption had been correct, I would have allowed Mr. Yahya Bakhtiar's request, but the burden was on him to convince us that Mr. Kasuri had made a statement before Mr. Justice Shafi-ur-Rahman as claimed by him.

174. Mr. Yahya Bakhtiar was not able to refer us to any evidence in support of his submission that Mr. Justice Shafi-ur-Rahman had recorded Mr. Kasuri's statement but he thought that his submission was supported by the observations of his Lordship in para. 16 of the report. I have examined them. Mr. Justice Shafi-ur-Rahman has in this para. referred to the Islamabad incident and observed:

"The case (F.I.R. 346, P. S., Islamabad) was registered. Possible motives then disclosed by the complainant and noted by the investigating officer, D.S.P. were the following four. Mr. Justice Shafi-ur-Rahman has 'then set out' the four motives...".

175. The question is of the meaning of the words 'then disclosed by the complainant and noted by the Investigating Officer...' I cannot read these words to mean that the statement which followed them was a reproduction of the evidence recorded by Mr.

Justice Shafi-ur-Rahman. Therefore, learned counsel's submission fails. But I am disturbed by the question whether the D S P referred to in the observation can be anybody other than Agha Muhammad Safdar. However, as this was not Mr. Yahya Bakhtiar's case, it is not necessary to speculate on this possibility, and I would also reject learned counsel's prayer for bringing the record on the record of this appeal.

176. However, the lengthy argument advanced by Mr. Yahya Bakhtiar on this point was only intended to prove that Mr. Kasuri had, for example, in his police statement, suspected one of his local enemies for the incident. Now even if he had, this suspicion could not prove that it was one of his local enemies who had fired on him, and on the other hand, even if Mr. Kasuri had not voiced such a suspicion, this could not by itself rule out the possibility that one of his local enemies had fired at him because of the evidence about his local enmities. Therefore, nothing turned on the police statement of Mr. Kasuri.

177. I would now turn to Mr. Yahya Bakhtiar's submission that Mr. Kasuri's conduct, after his father's murder, falsified his evidence and proved that he had falsely leveled allegations against Mr. Bhutto for the murder. Now, it is not in dispute that Mr. Kasuri had rejoined Mr. Bhutto's party after the case of his father's murder had been filed as untraced, and as no person with any self-respect would join or rejoin a party headed by his father's murderer, the submission has force. But the learned Judges of the High Court rejected this submission. They further held that Mr. Kasuri's conduct in rejoining Mr. Bhutto's party was strong evidence of Mr. Bhutto's guilt, because he had forced Mr. Kasuri to rejoin his party, and this conclusion that Mr. Bhutto had forced Mr. Kasuri to rejoin his party is based on the evidence about a conversation between Mr. Kasuri and Saeed Ahmad Khan in 1975 and on intelligence reports (Exhs. P.W. 3/2-F, 3/2-H, 3/2-I and 3/2-J). I will, therefore, examine this evidence, but I would first refer to a couple of circumstances which escaped the attention of the learned Judges of the High Court.

178. In the first place, the learned Judges have given a finding that Saeed Ahmad Khan had interfered in the investigation of the murder case in order to destroy evidence of the murder. This finding necessarily means that the witness was an accomplice, and as he was an accomplice, his evidence cannot be accepted without corroboration. Secondly, like the approver, Masood Mahmood, the witness had been detained by the Martial Law authorities for several months, and, as once again the prosecution has not taken the Court into confidence about the charges for which the witness was detained, it is obvious that the charges against him must have been very grave, Therefore, I would repeat here the warning given by Munir that:-

"There is greater need of corroborative evidence when there is fear in the mind of the accomplice that the failure to establish the prosecution case will lead to his own prosecution."

And I would further observe that the witness was obviously a very shrewd and intelligent man, so he did not need any tutoring from the prosecution. He was clever enough to know in which direction the wind was blowing and to trim his evidence accordingly. Therefore, his evidence cannot be accepted without strong corroboration.

179. The other circumstance to which the attention of the learned Judges was not drawn was that whilst circumstantial evidence can be of strong corroborative value, it has no corroborative value if it is reasonably capable of an innocent construction. As observed by Munir in his Law of Evidence (Pakistan edition), page 1439:

"A circumstance cannot furnish corroboration of the story of an accomplice against an individual accused, if it has either no criminal significance apart from details of the accomplice's story which are not themselves proved by independent evidence, or if the circumstance is susceptible of an innocent explanation which the Court accepts as probable."

180. This passage is based on the observation of Beaumont, C.J., in *Shankarshet's case* to which I referred earlier, and, in my humble opinion, any other view would be inconsistent with the fundamental principle of our criminal jurisprudence that the burden of proving the guilt of an accused beyond reasonable doubt always remains on the prosecution.

181. I now turn to the evidence of the conversation between Saeed Ahmad Khan and Mr. Kasuri about Mr. Komi's rejoining the Pakistan People's Party which impressed the learned Judges very much. And, I may first point out that Mr. Kasuri had resigned from the Pakistan People's Party in 1973 and in this background, Saeed Ahmad Khan said:-

"As far as I recollect, it was somewhere in the middle of 1975, when there was a rift brewing between Ahmad Raza Kasuri and the Tehrik Chief Air Martial (Retd.) Asghar Khan, I was instructed by the Prime Minister that I should try to win over Ahmad Raza Kasuri and bring him back to the P.P.P. fold. I told him that I did not know Ahmad Raza Kasuri personally, but I will ask Mr. Bajwa to initiate the matter and I was told by Mr. Bhutto that Mr. Bajwa had already been instructed in the matter."

This is all that the witness said about his conversation with Mr. Bhutto. I now turn to what he told Mr. Kasuri about this conversation. He said:

"In the first meeting I asked him (Mr. Kasuri) that since he had parted company with Air Martial Asghar Khan .... he might consider joining the Pakistan People's Party, as he claimed to, be a Founder Member. On this, Ahmad Raza Kasuri turned round and said that 'how could he join the party of which the Chairman was Mr. Z. A. Bhutto who had been responsible for the murder of his father and

was after his blood'. I told him that it was all the more reason that he should make up with Mr. Bhutto and put his life in jeopardy as he knew that he was a marked man."

182. Mr. Yahya Bakhtiar submitted that Saeed Ahmad Khan would not have talked in such a derogatory tone about Mr. Bhutto, and as even walls have ears, and as according to Mr. Batalvi, Mr. Bhutto was a dictator, I am unable to believe that Saeed Ahmad Khan would have dared to tell Mr. Kasuri that Mr. Bhutto was after his life. It is true that Mr. Kasuri has corroborated Saeed Ahmad Khan's evidence, but as was aptly put by Mr. Batalvi, Mr. Kasuri had a love-hate relationship with Mr. Bhutto, and it is very obvious from his cross-examination that the element of hatred in this relationship was on the ascendant when he gave evidence. In these circumstances, I am not able to believe the evidence of these two witnesses on the question of Mr. Bhutto's conduct and guilty mind, and what is relevant to the question of Mr. Bhutto's guilty mind is not what Saeed Ahmad Khan told Mr. Kasuri, but what according to Saeed Ahmad Khan Mr. Bhutto had instructed him to do. I quoted the relevant part of Saeed Ahmad Khan's evidence earlier, and it is clear that even if Saeed Ahmad Khan told Mr. Kasuri that Mr. Bhutto was after his blood, Saeed Ahmad Khan was adding a touch of melodrama on his own, because there is not a word about any such threat in Saeed Ahmad Khan's evidence about what Mr. Bhutto had told him.

183. However, even if we assume for the sake of argument that Mr. Bhutto initiated the efforts to get Mr. Kasuri back into his party, why had Mr. Kasuri rejoined the party? It is true that Saeed Ahmad Khan claims to have advised him to overcome his feelings. But the question was not merely of the witness's overcoming his own feelings, but of desecrating his father's memory. And if all that he aimed to do was to save himself from harassment, he could have retired from politics for a few years. There was no compulsion on him to remain in politics, and as I do not doubt that he was a man of honor, my assessment of his conduct is that he had rejoined Mr. Bhutto's party, because as he got over the shock of his father's death, he realized that suspicion was not evidence and that he was not justified in suspecting Mr. Bhutto for the murder. And, on the other hand, on his part, even if Mr. Bhutto was keen to get the prodigal back into the fold, how can this possibility lead to the inference that this was because his conspiracy had led to the murder of the prodigal's father? Even if we assume that it was Mr. Bhutto, who was keen to get Mr. Kasuri back into his party, there is another and very simple explanation of Mr. Bhutto's conduct which was suggested by Mr. Batalvi's own arguments. In order to prove the motive for the occurrence, Mr. Batalvi had taken us through the speeches made by Mr. Kasuri on the floor of the National Assembly, and even a casual perusal of these speeches, makes it apparent that Mr. Kasuri was a young politician of ability, therefore, even if Mr. Bhutto wanted to get him back into the party, it would mean that he wanted to strengthen his party by getting hold of a very able orator and to weaken the Opposition by depriving it of a very bold critic. And in my humble opinion, this explanation would be a much more reasonable explanation of Mr.

Bhutto's conduct, on the footing that he wanted Mr. Kasuri back in his party, than any other explanation.

184. I now turn to the intelligence reports which led the High Court to conclude that Mr. Kasuri was intimidated into rejoining Mr. Bhutto's party. And, I would first refer to a short report dated 29th July 1975 by Saeed Ahmad Khan, Exh. P.W. 3/2-E, which escaped the attention of the High Court. Saeed Ahmad Khan has written in this report:

"Mr. Ahmad Raza Kasuri, MNA, has had number of meetings with me, the last one being at Rawalpindi on 28th July 1975. He has realized that his future lies with the Pakistan People's Party of which he claims to be a member. On the Qadiani issue, he says that the attitude of Air Marshal Asghar Khan has been lukewarm .... Mr. Ahmad Raza Kasuri has requested for an audience with the Prime Minister at his convenience."

185. I see nothing in this report to support the view that Mr. Kasuri was reluctant to rejoin Mr. Bhutto's party. The next intelligence report, Exh. P.W. 3/2-F is by Abdul Hamid Bajwa and is dated 4th August 1975. It merely states that Abdul Hamid Bajwa was trying to detach Mr. Kasuri from the Tehrik-e-Istaqlal.

186. The intelligence report dated 29th September 1975, Exh. P.W. 3/2-I, by Saeed Ahmad Khan is very revealing. It reads:

"Mr. Ahmad Raza Kasuri, MNA, now claims to have sobered down and become stable. His rough edges have been chiseled out, his political horizon has become clearer and is a progressive being.

Mr. Ahmad Raza, has categorically stated that he wishes to return to the fold and would carry out Prime Minister's directives and can be used in any way desired by the Prime Minister. He is prepared to take a head-on confrontation with Khar in the Punjab. He is quite conscious of the, fact that his lone vote in the National Assembly for the Government could not be of much consideration, but as a demagogue and a Student Leader with a feudal lobby, he, cats be a common denominator, and can be utilized as such .... There is a case pending against him. Sardar Izzat Hayat and Zafar Ali Shah, member of the Rawalpindi Bar and others in the Court of Malik Muhammad Rafique, 1st Class Magistrate, Rawalpindi, on the charge of having removed the Pakistan Flag from the car of State Minister, Jamaladar, and the next date fixed for hearing is 20th of October, 1975. He obliquely hinted that this case may not be pursued and his harassment and that of Sardar Izzat Hayat may be stayed.

He is still anxiously waiting for audience with the Prime Minister."

187. The intelligence report dated 21st November, 1975, Exh. P.W. 3/2-J, is by Abdul Hamid Bajwa and states:-

"Ahmad Raza Kasuri said he did feel that he is very much sobered now and wanted to cooperate with the Government, but he suspected that some third agency, which did not like these moves, wanted to create gulf .... Ahmad Raza Kasuri said that he may be given some guidance by the Prime Minister and he will act accordingly, but so far he has not been granted audience."

188. I would also refer here to another intelligence report by Saeed Ahmad Khan dated 5th December 1975, Exh. P.W. 3/18-D, which escaped the attention of the learned Judges. It states:-

"As per instructions I met Sardar Izzat Hayat formerly of Tehrik-e-Isteqlal on 4th December, 1975. He was most anxious that Mr. Ahmad Raza Kasuri, MNA may be given an audience with the Prime Minister .... He has assured me that Ahmad Raza has sobered down his edges founded off and is keen to rejoin the P.P.P. together with his band of supporters and workers .... he is determined to rehabilitate himself and work as a close associate of the Prime Minister.

Ahmad Raza Kasuri is being pestered by the opposition parties to join them ... but again begs that he may not be kept on tenter hooks any more but be brought to the fold of the P.P.P. without further delay, and assures of complete loyalty to the Chairman. The irritants created by vested interests at the move of Ahmad Raza joining the party be kindly set aside, since the negotiations with him have now been carried on for the past six months with no results so far."

189. These reports speak for themselves and they were merely marked as seen by Mr. Bhutto. It was only on the last of these reports of 5th December 1975 that Mr. Bhutto noted "I will see Ahmad Raza Kasuri in Pindi", but despite this noting, Mr. Bhutto kept putting off Mr. Kasuri, so in his letter dated 30th January to Mr. Bhutto (Exh. P.W. 1119-D) Mr. Kasuri wrote "earlier I have requested over half a dozen times to your M.S. for an interview with you, but to this date I have not received any reply from him. I wonder whether Major-General Imtiaz Ali ever made it known to you? Even on this letter Mr. Bhutto wrote "I will see him when it is convenient". In these circumstances, it cannot reasonably be argued that Mr. Bhutto had coerced Mr. Kasuri into rejoining his party, and as it was Mr. Kasuri, who went on asking for an interview by letters and through other sources, I find it difficult to understand the submission that Mr. Kasuri was reluctant to join the party.

190. Mr. Batalvi, however, relied on Mr. Kasuri's explanation for his almost desperate efforts to rejoin the party of Mr. Bhutto. This was that he (Mr. Kasuri) had put on an act to fool Mr. Bhutto "out of expediency to save my life" Mr. Batalvi also relied on the fact



that the High Court had accepted this explanation of the witness. However, the High Court was also of the view that the conspiracy to murder Mr. Kasuri had continued after 11th November 1974. But Mr. Batalvi was not able to defend the view taken by the High Court. This is for the obvious reason that Masood Mahmood said in his evidence that he had told Mr. Bhutto on the night of 11th November 1974 that he would have nothing further to do with the attempts to kill Mr. Kasuri, and as there is no evidence whatever to show that Mr. Bhutto had made any attempt to instruct anyone else to kill Mr. Kasuri, it would follow, if Masood Mahmood spoke the truth, that the alleged conspiracy had come to an end. And as Mr. Batalvi wanted us to accept Masood Mahmood's evidence, he did not contend that the conspiracy had continued after the 11th November 1974. Necessarily, this means that Mr. Kasuri's apprehensions about his life were not justified, and this casts further doubt on the alleged conversation between him and Saeed Ahmad Khan about which I have already indicated my views. However even if we assume that Mr. Kasuri had put on an act, it would mean that he had successfully deceived Mr. Bhutto and at least Abdul Hamid Bajwa for nearly two years, and if he was such a consummate actor, he was also capable of deceiving the Court, therefore, it would not be safe to rely on his evidence on this ground. Additionally, as I suggested earlier, even if we assume that the witness's explanation was true, all he had to do was to retire from politics. Therefore, this alleged apprehension of his life was no justification for his pestering Mr. Bhutto for an interview or for going round the country singing praises of Mr. Bhutto. And as I showed earlier, his own letter proved that he had repeatedly sought an interview with Mr. Bhutto which was granted very reluctantly by Mr. Bhutto. Here, Mr. Yahya Bakhtiar drew our attention to Mr. Kasuri's report dated 8th June 1976, Exh. P.W. I/20-D, in which Mr. Kasuri had expressed blind admiration for Mr. Bhutto. Similarly, Mr. Kasuri admitted, but only in cross-examination, that he used to address meetings of a group known as the Tehrik-i-Fikr-i-Quaidi-Awam, and the object of this group was "propagating the thoughts of Mr. Bhutto". As no man with any self-respect would go round the country propagating the thoughts of a man, who was his father's murderer, in my opinion, Mr. Kasuri had voluntarily rejoined the party, because he realised, after he got over the shock of his bereavement, that he had many other enemies, therefore, his suspicions about Mr. Bhutto were not justified. It is true that the witness gave another explanation in the witness box, but in doing so, he did himself less than justice, and as far as I can see, he was merely carried away by the highly charged atmosphere of the time when he gave his evidence.

191. As even Mr. Kasuri's conduct is thus inconsistent with his suspicion about Mr. Bhutto, to say the least, it is difficult to understand Mr. Batalvi's submission that the prosecution had proved beyond reasonable doubt that Mr. Kasuri had no enemy in 1974 except Mr. Bhutto. However, learned counsel's submission was based on the evidence of two Police Officers, Mohammad Asghar and Mohammad Waris. As I pointed out, Mobammad Asghar was the Senior Superintendent of Police, Lahore till the end of 1974 and had supervised the investigation of the murder of Mr. Kasuri's

father, whilst, Mohammad Waris took over the investigation of the case on 2nd January 1975. Both these officers conducted their investigations when Mr. Bhutto was in power, and they said that pressure was exercised on them because Mr. Bhutto had been implicated in the F.I.R. and that this pressure had prevented them from investigating the case properly. If this claim be true, it would follow that there was no pressure whatever on them not to investigate into the local enmities of Mr. Kasuri, and Mohammad Waris had admitted that he had been directed to investigate the disputes of the Kasuri family and local rivalries and hatreds against the witness. Accordingly, the evidence of these two witnesses has to be examined in this background.

192. Mohammad Asghar said in his evidence that he could not remember whether a case had been registered at the instance of Mr. Kasuri against Chaudhry Yaqub Maan. Apart from Mr. Kasuri's evidence to which I have referred, Mohammad Waris admitted that four cases had been filed by Mr. Kasuri against Chaudhry Yaqub Maan, therefore, to say the least, the evidence of Mohammad Asghar does not inspire confidence, as it is difficult to believe that having investigated the case, he did not know of the bitter hatred between Mr. Kasuri and Chaudhry Yaqub Maan. Mr. Batalvi, however, relied on the following statement of Mohammad Asghar:

"I knew about the differences of Ahmad Raza Khan Kasuri with Yaqub Maan, but there was no enmity..."

193. It is impossible to reconcile this categorical assertion of the witness that there was no enmity between Mr. Kasuri and Chaudhry Yaqub Maan with Mr. Kasuri's evidence about Chaudhry Yaqub Maan's attacks on him, and especially with the lurid description about Chaudhry Yaqub Maan's attack on him which is contained in the F.I.R. lodged by Mr. Kasuri on 17th January 1972. Therefore, at first sight, the statement of the witness appears to be a deliberate attempt to deceive and misguide the Court. I have, however, used the words at first sight because to my astonishment, I find that this statement of the witness was made in reply to questions put to him in cross-examination by Mr. Awan on behalf of Mr. Bhutto. As a witness may be taken by surprise by questions put in cross-examination, it is possible that Mohammad Asghar had not investigated the local enmities of Mr. Kasuri in 1974, and so when he was suddenly questioned about them he gave an impromptu reply recklessly and with the sneaking hope that it would also bolster up the prosecution case. But if he had investigated the local enmities, and these are the only two possibilities, then it is clear that he deliberately gave false evidence in Court. In either view of the matter, no reliance can be placed on his evidence.

194. I am unable to understand Mr. Awan's cross-examination of Mohammad Asghar for another reason also. Apart from the fact that the witness was likely to give a damaging reply, the evidence of a Police Officer about enmities in a criminal case may be relevant at the investigation stage, but that stage was long over when the witness

was examined. And as Mr. Kasuri had admitted that his cases against Chaudhry Yaqub Maan were pending in the criminal Courts, the witness's opinion on the question whether the enmity between Mr. Kasuri and Chaudhry Yaqub Maan had come to an end was his personal opinion, and as the question of giving expert opinion did not arise, I cannot understand the questions put by Mr. Awan to the witness, and because Mr. Kasuri's cases were pending, the only way of proving that the differences between the two parties had or had not come to an end was by the evidence of the parties concerned, or by evidence that the cases had been settled, if they were compoundable. But it is clear from the evidence which I have quoted that the cases registered for the occurrences in Kasur and Khudian must have been under section 307 of the Penal Code, therefore, the only way of proving that the enmities reflected in these cases had come to an end was by the evidence of the parties themselves. And as Chaudhry Yaqub Maan was not examined, whilst Mr. Kasuri stated that the cases were pending, Mohammad Asghar's opinion was completely irrelevant.

195. I now turn to Mohammad Waris's evidence; unlike Mohammad Asghar, this witness had stated in his examination-in-chief:

"The investigation conducted by me into the alleged family disputes of Ahmad Raza Kasuri, the alleged disputes with local persons and those about the distribution of family property led to no worthwhile results, whatsoever. Only minor differences were discovered which in my opinion could not form the motive for this offence."

196. At the risk of being tedious, I would repeat that the opinion of this witness is not relevant, because the question whether enmities between the parties to criminal litigation have come to an end or not, is not a matter of expert opinion. Secondly, whilst it is likely that the family disputes of the Kasuri family had come to an end, as stated by the witness, his categorical assertion that the differences with other "local persons also were minor differences" is completely inconsistent with Mr. Kasuri's evidence and either Mr. Kasuri has given false evidence or Mohammad Waris has given false evidence. So Mohammad Waris was cross-examined by Mr. Awan, and he admitted that Mr. Kasuri had filed four complaints against Chaudhry Yaqub Maan. But he merely said "I, however, found as a result of my investigation that the dispute amongst Yaqub Maan's party and Ahmad Raza Kasuri had come to an end and the cases had, therefore, been closed". In view of the F.I.R. recorded by Mr. Kasuri for the occurrence of 17th January 1972 in Khudian, this statement is, to say the least, astonishing and is not supported by a shred of evidence. The witness was further cross-examined and it was only then that he said "I was told that out of them two cases were pending in some court in January 1975". As at least two of the cases filed by Mr. Kasuri were under section 307 of the Penal Code they could not have been settled, and, it was the duty of the witness, as he was investigating the murder, to find out whether they had been disposed of or not. I have no doubt that he had made the investigations and he knew

very well that they were still pending, therefore, it is clear that this witness sought to misguide the Court by trying to suppress the evidence of the local enmities of Mr. Kasuri, and no reliance can be placed on his evidence either.

197. In the circumstances, discussed, the prosecution case about the motive for the murder fails for more reasons than one. In the first place, Mr. Kasuri's evidence is nothing more than a statement of his reasons for suspecting Mr. Bhutto. Secondly, Mr. Kasuri was not a disinterested witness and his bias is apparent from the contradictions in his evidence and from his efforts to withhold evidence of his enmities with people like Chaudhry Yaqub Maan. Thirdly, as the criminal cases arising out of these local enmities and hatreds are still pending, I am loath to make any observations about them. But as Mr. Bhutto's appeal cannot be decided without some reference to these local enmities and hatreds, I would emphasize that my observations have reference only to this appeal, and for the purpose of this appeal I am satisfied from the evidence of Mr. Kasuri that the local enmities and hatreds against him were far more violent than the alleged enmity between him and Mr. Bhutto. Accordingly, in these circumstances, Mr. Kasuri's evidence is too weak to furnish any corroboration of Masood Mahmood's evidence.

198. It would be convenient to turn now to the evidence in support of the allegation that Mr. Bhutto had prevented investigations of the murder with the result that the case was filed as untraced. The star witness in support of this allegation was Niazi whose evidence I have already examined in detail, so I would turn to the evidence of Abdul Wakil Khan and Mohammad Asghar and Saeed Ahmad Khan.

199. As Abdul Wakil Khan was the Deputy Inspector-General of Police in 1974, he had very little to do with the investigations and, contrary to what Mohammad Asghar said, Abdul Wakil Khan denied even attending the conference called by the Inspector-General of Police in his house on the night of 11th November 1974. But he said that one or two days after the occurrence Abdul Hamid Bajwa had met him at the Police Station, Civil Lines, Lahore, and Mohammad Asghar was also present. Next, according to the witness:

"Mr. Bajwa enquired from me as to why the name of the then Prime Minister had been recorded in the F.I.R. .... Mr. Bajwa suggested that a report could be recorded on the statement of any other person saying that the fire was opened by some unknown persons and the accused had fled away and the name of the Prime Minister thus could have been avoided."

200. The witness also said that Abdul Ahad had told him about a fortnight after the murder that Abdul Hamid Bajwa had taken away the empties for some time and as according to the witness Abdul Hamid Bajwa was closely associated with the FSF, he

merely told Abdul Ahad that he should not have handed over the empties to Abdul Hamid Bajwa and left it at that.

201. As Abdul Wakil Khan has given evidence about what Abdul Ahad had told him, and as Abdul Ahad is dead, the prosecution can rely on Abdul Wakil Khan's evidence about what he had been told by Abdul Mid only if it can bring its case under section 32 of the Evidence Act. Now, the High Court was of the view that the statements attributed to Abdul Ahad the witnesses, fell within the mischief of clause (3) of section 32 of the evidence Act, because those statements if true "would have exposed (Abdul Ahad) to a criminal prosecution" The view taken by the High Court assumes that Abdul Ahad had concealed evidence within the meaning of section 201 of the Penal Code and this view, is based on the further conclusion reached by the High Court that empties had been substituted as claimed by Niazi. With due respect to the learned Judge, I am not, able to agree with their conclusions.

202. In the first place, even on the footing that Abdul Wakil Khan's evidence about Abdul Ahad's statements was admissible, the question was whether this evidence was fit to be relied upon, and whilst Abdul Wakil Khan said that Abdul Ahad had told him that Abdul Hamid Daiwa had taken away the empties; Niazi has said that Abdul Ahad had told him that the Inspector-General of Police had taken away the empties. Mr. Batalvi was silent on the question of which of these conflicting versions was correct, and this discrepancy in the prosecution case only illustrates the danger of relying on hearsay evidence. Secondly, the statements attributed to Abdul Ahad were relied upon by the High Court because of the finding that empties had been substituted, but Mr. Batalvi did not defend this finding of the High Court. He only relied on a theory of high probabilities, but as I have shown there is not a shred of evidence in support of this theory, because Niazi was a dishonest witness. Therefore, on the footing that what Abdul Hamid Daiwa said to Abdul Wakil Khan was true, the question is whether this statement would have exposed the deceased to a criminal prosecution 7 Even Mr. Batalvi did not contend that the mere taking of the empties by the deceased would have brought him within the mischief of section 201 of the Penal Code. I have also examined the other sections such as 202, 203, etc., which deal with accessories after the fact, but I do not think the conduct of the deceased would have come under these sections. In any case, as Mr. Batalvi was not able to refer us to any section under which the deceased would have been guilty, his statement or statements (about which the prosecution evidence is so discrepant) do not fall within the ambit of clause (3) of section 32 of the Evidence Act. Therefore, I would hold that the statements attributed to him are pure hearsay and were wrongly admitted in evidence.

203. In view of this conclusion, it is not necessary to examine the further question whether the alleged removal of the empties by Abdul Hamid Daiwa was on Mr. Bhutto's orders because unless it was, on the plain language of section 8 of the Evidence

Act, the conduct of Abdul Hamid Daiwa cannot be used against Mr. Bhutto as a piece of evidence either by itself or to furnish corroboration of the evidence of the approvers.

204. Finally, reverting to Abdul Wakil Khan's evidence, he also said that Saeed Ahmad Khan had come over from Rawalpindi in January 1975 and convened a conference in which he had transferred the investigation of the case to Mohammad Waris. Therefore, the witness had directed Abdul Ahad and Mohammad Waris to proceed to Rawalpindi and take instructions from Saeed Ahmad Khan which they had done. Abdul Wakil Khan also said that Saeed Ahmad Khari had said at this meeting that the case was not being properly investigated and that he had been sent from the Prime Minister's Secretariat to look into the case". Merely, because the Prime Minister sent his representative to say that the case should be properly investigated cannot mean that Mr. Bhutto had acted illegally, and further as Mr. Batalvi conceded there was no impropriety whatsoever in Saeed Ahmad Khan's conduct, it is clear that Abdul Wakil Khan's evidence fails to lend any support to Mr. Batalvi's submission that Mr. Bhutto was interfering with the investigation in the murder of Mr. Kasuri's father.

205. I now turn to Mohammad Asghar's evidence and I have explained why his evidence about the local enmities of Mr. Kasuri is not fit to be relied upon. Apart from this evidence, like Abdul Wakil Khan, Mohammad Asghar said that Abdul Hamid Bajwa had criticized him for mentioning Mr. Bhutto's name in the F.I.R and had made unnecessary enquiries about the empties. Even if we assume that this evidence is admissible and reliable, it does not help the prosecution case because it is not sufficient to establish that there was any illegal interference with the investigations, much less that it was illegal interference on Mr. Bhutto's orders. But according to the witness the Inspector, General of Police had tried to interfere, and this allegation had reference to the claim of the witness and of Niazi that the Inspector General of Police had called a meeting at his house on the night of the 11th November 1974. Further, according to the witness "the I.G. had ordered me to remove the dead body of Nawab Mohammad Ahmad Khan from his house and bury it somewhere". Apparently, this was the only interference on the part of the Inspector-General of Police. But the Inspector-General has not been examined, and as I am reluctant to believe that an Inspector-General of Police could be so stupid as to have passed the order attributed to him, I am not inclined to believe Mohammad Asghar's evidence, the more so, as I have found his evidence about the local enmities of Mr. Kasuri to be totally unreliable.

Mohammad Asghar, however, said and this is what Mr. Batalvi relied on:

"As S.S.P., Lahore I did not have a free hand in the investigation of the case, because during that investigation instructions were being issued by Mr. Abdul Hamid Bajwa and Mr. Saeed Ahmad Khan, which we had to obey."

206. Nothing turns on the fact that "instructions" were given to the witness, but the question is whether these instructions were legal or illegal. And as the witness did not give any particulars whatever of these instructions in his examination-in-chief, he was cross-examined about them, because he had taken a totally different position before Mr. Justice Shafi-ur-Rehman. The witness was compelled to admit that he had not advanced any such allegations before Mr. Justice Shafi-ur-Rehman, and his explanation was:

"Permit me to explain and say that there was lot of pressure being brought to bear upon me..."

But the question, as I said, was of the details of this pressure, so Mr. Awan went on questioning the witness about the details of this and the witness said:

"We start investigations of 'blind' murder cases on the basis of the motive. In this case the motive was clearly mentioned by Mr. Ahmad Raza Kasuri in the F.I.R. The case could be investigated only by interrogating Mr. Bhutto who had been named in the F.I.R. Neither myself nor my subordinates were in a position to interrogate the then Prime Minister. The question of satisfaction or dissatisfaction is, therefore, irrelevant."

207. Next, as to what prevented the witness from interrogating Mr. Bhutto, the answer given very reluctantly and after repeated efforts to evade a clear reply, was:

"I have already stated that pressure was exerted on me, but I have not stated that I accepted the pressure. The only pressure on my mind was that I was not in a position to interrogate Mr. Bhutto."

208. Thus on the witness's own admission, although he began by asserting very vehemently that pressures had been brought to bear on him, he had to confess that the only pressure which prevented him from discharging his duties was his own timidity in seeking an interview with the Prime Minister in order to interrogate him. But is even this story plausible? Even Mr. Batalvi did not contend that the F.I.A. had reopened the investigation in 1977 by questioning Mr. Bhutto, and if investigation could start in the case in 1977 without questioning Mr. Bhutto, I am not able to understand why Mohammad Asghar could not commence investigations in the case without first examining Mr. Bhutto.

209. Additionally, the proper investigation of the case required that he should question Mr. Kasuri, his mother and his aunt who were with him at the time of the murder. But Mr. Kasuri said categorically in his evidence "the Police did not contact either me or my mother or my aunt in connection with investigation of any nature". It was for Mohammad Asghar to explain why he could not interrogate Mr. Kasuri and his family, but he has given no explanation. Similarly, it was his duty to investigate into the

local enmities of Mr. Kasuri, but there, as I have explained, the evidence given by him is unfit to be relied upon. Again, assuming that he was too timid to record the statement of Begum Kasuri and her sister, his explanation that it was a blind murder is not true, because the empties recovered from the scene of the murder made it clear that the weapons used by the assailants were of 7.62 mm. caliber, and thus the recoveries pointed the finger of suspicion at the FSF. But as Mohammad Asghar has not explained why he did not commence investigations against the FSF, we can only speculate about the motives for his failure to supervise the investigations properly. Mr. Batalvi of course wanted us to hold that the hand of Mr. Bhutto was behind everything. But as Masood Mahmood has confessed his guilt, we would be substituting evidence by conjecture, if we were to accept Mr. Batalvi's submission. Therefore, whilst the evidence of this witness proves that what went wrong with the investigations was the failure to touch the FSF, his evidence cannot furnish any corroboration whatsoever of Masood Mahmood's evidence for the simple reason that the witness would not state why he had not instituted an investigation into the possible role of the FSF in the murder.

210. I would now turn to Mohammad Waris's evidence. This witness took over the investigations on 2nd January, 1975 and he repeated what the other two witnesses had said about the advice given by Saeed Ahmad Khan and Abdul Hamid Bajwa that as the Prime Minister's name had appeared in the F.I.R. "we should proceed with wisdom and caution", and that the Prime Minister had been falsely implicated. The witness also said that on Saeed Ahmad Khan's orders, he and Abdul Ahad had made enquiries about weapons of 7.62 mm. caliber from the Joint Army Detection Organization and learnt that they had been supplied to units in the Army and to the Frontier Corps, and they had also discovered that weapons of 7.62 mm, caliber were available for sale in Bara. I see no impropriety whatever in the information thus collected by the witness nor in the orders given to him to collect such information. Similarly I see no impropriety whatever in the direction given to the witness by Saeed Ahmad Khan and Abdul Hamid Bajwa to enquire into the local enmities of Mr. Kasuri and indeed, in my opinion, proper investigation of the case was not possible without an inquiry into these local enmities. The real question however was why no attempt was made, to use the words of the witness: "to join any employee of the FSF in the investigation of the case" and the witness said that he failed in his duty to conduct such investigations, because of the pressure brought on him by Saeed Ahmad Khan. But even this evidence does not furnish any corroboration of the prosecution case against Mr. Bhutto or any corroboration of the evidence of Masood Mahmood, because the witness has implicated Saeed Ahmad Khan, and not Mr. Bhutto. Therefore, the prosecution can succeed only if it can prove that Saeed Ahmad Khan had, on Mr. Bhutto's orders, prevented Mohammad Waris from investigating the case properly, so I would now turn to Saeed Ahmad Khan's evidence.

211. Saeed Ahmad Khan said that Mr. Bhutto had directed him in January 1975 to look into the case because his (Mr. Bhutto's) name was "being taken before a judicial



enquiry being held at Lahore by Justice Shafi-ur-Rehman". Accordingly, the witness went to Lahore, convened a meeting of high officers, as directed by Mr. Bhutto, and found to his dismay "that nothing had been done worthwhile in the investigation of this case, although over one and a half months had passed since the time of the murder". Accordingly, the witness transferred the investigation to Mohammad Waris, and as I pointed out earlier, it is nobody's case that the transfer of the investigations to Mohammad Waris by itself amounted to illegal interference in the investigations. Next, according to the witness, he came to know that the bullets used in the murder were of 7.62 mm. caliber which were in the official use of the FSF, and his impression was that the Police were not investigating the case because the FSF appeared to be involved in the murder. He therefore, returned to Rawalpindi and informed both Mr. Bhutto and Masood Mahmood that 7.62 mm. caliber bullets had been used in the murder, but the witness said both Mr. Bhutto and Masood Mahmood put him off and Mr. Bhutto told him to find out whether bullets 7.62 mm caliber were available in the country. Accordingly, the witness said that he had directed Mohammad Asghar and Abdul Ahad to make enquiries from Bara as well as from the Joint Army Organization. I pointed out earlier that the direction by the witness to make those enquiries was in no way improper and so ever, if the witness's evidence be true, it does not implicate Mr. Bhutto in any way. But, according to the witness, when he discussed with Mr. Bhutto, his apprehension that the bullets used in the occurrence implicated the FSF, Mr. Bhutto snubbed him "and said in so many words keen out the FSF". This conversation, if true, would certainly be a piece of evidence against Mr. Bhutto, but reverting to the witness's evidence, he said that he had also made enquiries from the Defence about arms and ammunition of 7.62 mm. caliber and the Defence Secretary had informed him by a letter that arms and ammunition of this caliber had been issued to the Frontier Corps, the FSF and to Army units.

212. The witness then said about the Defence Secretary's letter:

"On receiving letter Exh. P.W. 3/3-C I got perplexed because in it was mentioned that the Chinese weapons are in the use of the F.S.F. and I had been given positive instructions by the Prime Minister that F.S.F. be kept out. I had no other alternative but to go back to the Prime Minister and I met him and showed him this D. O. letter of the Defence Secretary and enquired as to whether this letter to be produced before the tribunal. On that Mr. Bhutto got infuriated and said, "Have I sent you to safeguard my interests or to incriminate me? This letter will certainly be not produced before the tribunal. You are trying to become over-clever and if you don't behave you will suffer the consequences which your progeny will not forget."

As Mohammad Waris had not associated "any employee of the FSF in the investigation of the case", on account of Saeed Ahmad Khan's orders, if Saeed Ahmad Khan's evidence about these conversations with Mr. Bhutto be true, it would furnish strong

corroboration of Masood Mahmood's evidence. And as the High Court has believed this evidence, Mr. Yahya Bakhtiar submitted that the view of the High Court was based on a patent misreading of the evidence, because the learned Judges had ignored all the infirmities in Saeed Ahmad Khan's evidence.

213. In support of this submission, learned counsel reminded us that the witness had been dismissed from service in the 1969 Martial Law. As it is not known why the witness was dismissed, this does not help Mr. Bhutto's case, but the witness was compelled to admit in crossexamination that he was demoted by Mr. Bhutto in 1977 and was under a cloud thereafter. As the witness also admitted that his brother had been removed from service on Mr. Bhutto's orders, it is clear that he was a disgruntled witness. However, reverting to Mr. Yahya Bakhtiar's submission, he invited us to reject the evidence of the witness on the further ground that it was riddled with discrepancies. It is true that the evidence of the witness is riddled with discrepancies; however, I would not burden the record by setting them out, because the evidence of the witness cannot be accepted without corroboration for another very obvious reason. This is because both Mohammad Asghar and Mohammad Waris have said in evidence that Saeed Ahmad Khan had illegally interfered in the investigations, and if this evidence be true, it would mean that Saeed Ahmad Khan had helped to conceal and destroy evidence in a murder case within the meaning of section 201 of the Penal Code. And as the High Court has accepted the evidence of these two witnesses, it follows that Saeed Ahmad Khan was an accomplice, therefore, his evidence cannot be accepted without corroboration. But his evidence of his two conversations with Mr. Bhutto in which Mr. Bhutto told him to keep the FSF out of the investigations is not supported by any evidence whatsoever. Again, as submitted by Mr. Yahya Bakhtiar, the witness was detained for some months under Martial Law, and one of the prosecution witnesses, Khizar Hayat, admitted that the Martial Law Authorities had seized more than a thousand files about him and that one or more investigations were being conducted into his activities. This is another circumstance which reacts against his veracity.

214. However, the witness's claim was that his detention by the Martial Law Authorities had made him realize what a sinner he had been, and like Masood Mahmood, he claims to have made a clean breast of everything. Now, as his lengthy statement under section 161 of the Criminal Procedure Code was recorded after the witness had undergone this spiritual purification it would follow he would not omit any material circumstance in this statement. Additionally, not only was the witness an extremely experienced Police Officer, he was also an advocate, and as he had practised law, it would be ridiculous to contend that he did not know the crucial importance to the prosecution case of the two conversations with Mr. Bhutto in which Mr. Bhutto had warned him to "keep the FSF out", but as there is no reference whatsoever to those alleged conversations in his earlier statements, I am unable to believe the witness's evidence about these two conversations, and I regret my inability to agree with the view

of the High Court that there were "no inconsistencies or contradictions" between his earlier statements and his evidence in Court.

215. But Saeed Ahmad Khan was not the only witness who had made material omissions in his earlier statements. So did Masood Mahmood, and as I will presently show, there were also material omissions in the earlier statements of Ghulam Hussain and Fazal Ali. Therefore, Mr. Batalvi submitted that Courts should not make much of discrepancies between the evidence of a witness in Court and his Police statement, because the Police usually recorded such statements in a very cursory manner. Learned counsel even produced judgments in support of this extraordinary submission. The point is elementary, so I would only observe that statements under section 161 of the Criminal Procedure Code do not have to record the minor details of a witness's evidence, but it is the duty of the Police Officer to record every material particular of a witness's statement, and if he does not, it is the prosecution which must suffer, and material omissions in Police statements cannot be explained away on the ground that those statements were recorded hurriedly. Any other view would defeat the provisions of sections 161, 162 and 265-C of the Criminal Procedure Code, which have been enacted in order to enable the accused to discredit the veracity of prosecution witnesses, if their evidence in Court is different in material particulars from Police statement, Further, as the improvements in Saeed Ahmad Khan's evidence are; relied upon the evidence of an approver, I would quote here Munir dictum in his Law of Evidence, page 1445:

"Evidence of witness whose statements to the Police differ from their evidence in the Court of enquiry or trial should not be accepted as good corroboration of an accomplice."

216. So the question. whether Saeed Ahmad Khan's evidence can be relied upon must be judged in the light of this dictum. Secondly, as Saeed Ahmad Khan's Police statement was recorded by a Police Officer (Chaudhry Abdul Khaliq) far junior to him in service, it is impossible to believe that Chaudhry Abdul Khaliq would have not recorded Saeed Ahmad Khan's statement about these conversations with Mr. Bhutto, if Saeed Ahmad Khan had mentioned them. Thirdly, even a lay man would have appreciated the relevance of these alleged conversations with Mr. Bhutto, therefore, as it is not the prosecution case that Chaudhry Abdul Khaliq was a congenital idiot, and as it is clear from his evidence that he was an intelligent man, I am unable to believe that he would not have recorded properly Saeed Ahmad Khan's statement, the more so, in view of the importance of the case. Accordingly, in the circumstances discussed I am satisfied that Saeed Ahmad Khan deliberately made false statements in Court when he said that Mr. Bhutto had told him twice to keep the FSF out of the investigations. And this further means that the prosecution has failed to prove that Mr. Bhutto had illegally interfered in the investigations of the murder case.

217. I would now, in the light of this discussion, re-examine Saeed Ahmad Khan's evidence about his meeting with Mr. Bhutto "in mid-1974" in which Mr. Bhutto said:-

"That he had given some work to Mr. Masood Mahmood ... about Ahmad Raza Kazuri, 'remind him'."

As I suggested earlier, this evidence could be a strong link in a chain of corroboratory evidence if it was by an independent and reliable witness, and that was Mr. Batalvi's submission. But the difficulty in his way was the finding of the High Court that the witness had illegally interfered with the investigations of the murder case. This finding necessarily means that the witness was an accomplice and as an accomplice cannot be an independent witness, Mr. Batalvi submitted that the High Court had erred grievously in holding that Saeed Ahmad Khan had illegally interfered with the investigations. Learned counsel submitted that Saeed Ahmad Khan was convinced of Mr. Bhutto's innocence and because of this conviction, he had merely given directions to Mohammad Waris and others for the proper investigation of the case. Now, as I indicated earlier, I would agree with the submission to the extent that there was nothing improper in the transfer of the investigations by the witness from Niazi to Mohammad Waris or in the directions given by the witness to Mohammad Waris to investigate the local and family disputes of Mr. Kasuri and to collect information about the availability of weapons of a prohibited bore in the country. And if the matter had rested here, I would have taken the view that Saeed Ahmad Khan was an independent but unreliable witness. But unfortunately, for Mr. Batalvi's submissions, the matter does not end here, because of Mohammad Waris categorical assertion that Saeed Ahmad Khan had prevented him from joining "any employee of the FSF in the investigation of the case". And, as it was this direction which prevented proper investigation of the case, it is clear that Saeed Ahmad Khan was an accomplice and in view of this and the other infirmities in his evidence, his evidence of his conversation with Mr. Bhutto "in mid-1974" can, at the highest, only be a very weak link in the chain of corroboratory evidence, therefore, once again I regret my inability to agree with the view taken by the High Court on this point also.

218. Saeed Ahmad Khan had also produced the intelligence reports prepared by him and by Abdul Hamid Bajwa, and Mr. Batalvi submitted that these reports furnished corroboration of the prosecution case and of Masood Mahmood's evidence, because they were consistent only with Mr. Bhutto's guilt. Further as learned counsel placed very great reliance on three of these reports, Exh. P.W. 3/2-L, Exh. P.W. 3/2-Q and Exh. P.W. 28/ about the surveillance on Mr. Kasuri after his father's murder, it is necessary to examine them, the more so, as the High Court has also placed very great reliance on them. ' The first of these reports is by Abdul Hamid Bajwa and is dated 29th October 1974. This report states that Mr. Kasuri had kept a gun-man for his protection in the National Assembly; that his father had been the holder of fire-arms including a prohibited bore revolver; and, that he intended to request the Speaker of the National

Assembly to allow him to retain "these weapons as souvenir". The second report, Exh. P.W. 3/2-Q, is also by Abdul Hamid Bajwa and is dated 9th December 1974. It states that Mr. Kasuri was in a very bitter and angry mood and was making aggressive speeches against Mr. Bhutto. But it is not irrelevant to mention here that the report also refers to a cocktail party given by a petty official of an Embassy with a list of the persons, who had attended that party. Finally, the last report is by Ashiq Hussain Lodhi about Mr. Kasuri's gun-man to which I referred in detail earlier. Now, after examining these reports, the learned Judges of the High Court held that they proved Mr. Bhutto's-

"Witch-hunting against Ahmad Raza Kasuri even after the Lahore occurrence ... There could be no other object of collecting information about the security measures taken by Ahmad Raza Kasuri and about the description of his gun-man. Similarly, there could be no other motivation for gathering information about his intention to obtain arms license...

The conspiracy to murder Ahmad Raza Kasuri is thus proved not only by what transpired at Quetta as well as the incidents at Islamabad and Lahore but also by the subsequent conduct of the principal accused ...."

219. Now, as I pointed out, it was not Mr. Batalvi's case that the conspiracy against Mr. Kasuri continued after 11th November, 1974, but he was emphatic that this surveillance on Mr. Kasuri was strong evidence of Mr. Bhutto's guilt. Therefore, I would repeat that circumstantial evidence can furnish evidence of the guilt of an accused only when it, is not reasonably capable of an innocent construction. And taking first Ashiq Hussain Lodhi's report about Mr. Kasuri's gunman, the Judgment itself refers to Saeed Ahmad Khan's report dated 7th December 1974, Exh. 3/2-M, and further observes that according to this report:

"Ahmad Raza Kasuri was in a desperate state and had been heard saying that he will take revenge of the murder of his father personally."

220. As Mr. Kasuri had a motive for taking revenge and was heard hurling threats against Mr. Bhutto, in my humble opinion, the obvious and simple explanation of the enquiry about Mr. Kasuri's gun-man was the fear of the Police Officers that Mr. Kasuri might implement his threats of taking revenge against Mr. Bhutto through his gun-man, therefore, I cannot agree with the sinister implication placed on this report by the learned Judges. In any event, even if I am wrong, as it is clear that the surveillance maintained round the clock on Mr. Kasuri was capable of an innocent interpretation, it cannot according to the settled law, furnish any corroboration of the approver's evidence, nor can it be construed against Mr. Bhutto as evidence of his guilt.

221. I now turn to the intelligence reports of Welch about Mr. Kasuri's visit to Quetta between the 13th and the 16th of September 1974 and the ensuing correspondence.

Learned counsel placed great stress on this evidence and the High Court was also of the view that this evidence corroborated Masood Mahmood's evidence by showing that Mr. Bhutto was keeping a round the clock watch on Mr. Kasuri in order to have him murdered. Welch's first intelligence report, Exh. P.W. 2/1, was written the day after Mr. Kasuri arrival in Quetta. It states that Mr. Kasuri had come with Air Marshal Asghar Khan and other members of the Tehrik-i-Istaqlal and that they all stayed at Imdad Hotel, but that Mr. Kasuri did not reside "in the reserved room". The report then states that Mr. Kasuri and his party had met their local followers and that they had also addressed a public meeting largely attended by students. The report then goes on to state that Mr. Kasuri had made a highly inflammatory speech and attacked Mr. Bhutto in very harsh terms. But what is relevant is that this report was sent to Masood Mahmood and there is nothing in it to show that, it was even placed before Mr. Bhutto. The next report, Exh. P.W. 4/1, was written on 18th September 1974 and is again addressed only to Masood Mahmood. It informs Masood Mahmood how Mr. Kasuri had suddenly left for Quetta and gives the details of the manner in which Mr. Kasuri and his party had been watched wherever they went in the Province. It is to be noted that this report also is only addressed to Masood Mahmood and there is no evidence whatever to show that it was ever placed before Mr. Bhutto.

222. Next, as to the correspondence which followed, Mian Abbas by his letter dated 25th September 1974, Exh. P.W. 2/2, enquired from Welch where Mr. Kasuri had stayed if he "did not stay at the Imdad Hotel (in the room) which was reserved for him". Welch replied to this letter after a delay of nearly six weeks (vide Exh. P.W. 2/3) and informed Mian Abbas that Mr. Kasuri had "occupied some other room reserved for members of the party in the hotel".

223. Although neither the intelligence report nor the ensuing correspondence contained any indication to show that the surveillance on Mr. Kasuri in Quetta had been ordered by Mr. Bhutto, learned counsel invited us to hold that Mr. Bhutto was behind all this surveillance, because otherwise Masood Mahmood had no motive to harass Mr. Kasuri. But as the question is of the surveillance maintained by Welch, it was for Welch to explain why he kept such a close watch on Mr. Kasuri and he said in his examination-in-chief:

"I was responsible for maintaining the forces under my command and I was also responsible for keeping an eye on the political leaders and their activities and also anti-Government elements. I also used to submit intelligence reports on the activities of the aforementioned persons."

224. Although Mr. Yahya Bakhtiar's arguments extended into months, he did not attempt to refer us to any law under which the Police was entitled to harass members of the Opposition in this manner by keeping a round the clock watch on their activities. This means that whilst the surveillance kept on Mr. Kasuri was absolutely illegal. It was part of the surveillance against the party of Air Marshal Asghar Khan. And, as I pointed

out earlier, one of the reports submitted by Abdul Hamid Bajwa, Exh. P.W. 3/2-Q, contained information not only about Mr. Kasuri, but about other persons, including some unknown persons, who had attended a cocktail party given by a minor official of a foreign embassy. Therefore, surveillance against all and sundry was the order of the day and whilst this may mean, as was said on a historic occasion sixty-five years ago, that lights were going out, it does not mean that a surveillance had been kept on Mr. Kasuri for the purpose of murdering him.

225. Additionally, there is another difficulty in the way of accepting learned counsels submission which escaped the attention of the High Court. I pointed out that the intelligence reports of Welch had been sent to Masood Mahmood and there was no indication whatever to show that they had been placed before Mr. Bhutto. Similarly, there is no indication whatever to show that the exchange of correspondence between Mian Abbas and Welch had been seen by Mr. Bhutto. And, further, even Masood Mahmood, who had scant regard for truth, did not say that he had called for intelligence reports about Mr. Kasuri's visit to Quetta on Mr. Bhutto's orders. On the other hand, the prosecution produced a score of intelligence reports which contained Mr. Bhutto's initials and endorsements but as Welch's intelligence reports do not contain any such endorsements, it is clear that they had not been seen by Mr. Bhutto. Learned counsel of course wanted us to hold that Mr. Bhutto's hand was behind everything done by Masood Mahmood, but as this is precisely the point which the prosecution has to prove, it cannot be proved by Masood Mahmood's own evidence.

226. The only other circumstance which can lend support to the prosecution case under section 8 of the Evidence Act is the allegation that Mr. Bhutto was responsible for preventing the publication of the report of Mr. Justice Shafi-ur-Rehman. And if this allegation be true, it would certainly be a piece of evidence against Mr. Bhutto under section 8 of the Evidence Act. Now, it is true that Mr. Justice Shafi-ur-Rehman's report was not published, but there is no evidence to show that reports by tribunals were being published by Mr. Bhutto's regime or by the governments which preceded him, and unfortunately if we could take judicial notice of such matters, there is evidence to the contrary. In order to overcome this lacuna in the evidence produced by the prosecution, Mr. Batalvi's submission was that the Chief Minister of the Punjab (Mr. Ramay) had sought Mr. Bhutto's advice on the question of the publication of Mr. Justice Shafi-ur-Rehman's report, but as the report was never published, this was sufficient to prove that the publication of the report had been prohibited by Mr. Bhutto. The first limb of the submission is correct. By his letter dated 7th March, 1975, Exh. P.W. 35/3, the then Chief Minister of the Punjab asked Mr. Bhutto for his advice on the question whether Mr. Justice Shafi-ur-Rahman's report "should be published". This is strange because the report related to the maintenance of law and order in the province which was a provincial subject. Be this as it may, as the prosecution had to prove that Mr. Bhutto had prevented Mr. Ramay from publishing this report, it had mentioned Mr. Ramay in its calendar of witnesses, but it did not examine him on the ground that he

had turned hostile. This allegation was denied by Mr. Yahya Bakhtiar. His submission is supported by the fact that Mr. Ramay had been convicted under the Defence of Pakistan Rules during Mr. Bhutto's regime but his conviction was set aside as illegal by the Lahore High Court in *Begum Shaheen Ramay v. The State*<sup>461</sup>. Therefore, if the question whether a witness has turned hostile or not is to be decided by the ipse dixit of counsel, I would have had no hesitation in preferring Mr. Yahya Bakhtiar's ipse dixit. But the question cannot be decided by the ipse dixit of counsel, the more so, as Mr. Batalvi could not deny the statement that Mr. Ramay had formed a political party of his own and had left Mr. Bhutto's party long ago. And this means that the prosecution has failed to give any explanation for its failure to examine Mr. Ramay. No doubt the prosecution was not required to examine him but without examining him, it could not prove its plea that Mr. Bhutto had prohibited the publication of Mr. Justice Shafi-ur-Rehman's report. Therefore, this plea fails and there is no other circumstance pertaining to Mr. Bhutto's conduct which can be of any help to the prosecution case.

227. I now turn to the Islamabad incident as according to Mr. Batalvi it furnished strong corroboration of the prosecution case of a conspiracy and this was also the view of the High Court which observed:

"The incident at Islamabad also lends full support to the evidence of conspiracy. This incident was in aid of the execution of the unlawful act for which the conspiracy was hatched."

228. With due respect to the learned Judges, even on the assumption that the prosecution has proved the Islamabad incident, it would only mean that the attempt on Mr. Kasuri's life was a step taken "in aid of the execution of the unlawful act". But the fact that an attempt was made on Mr. Kasuri's life cannot by itself throw any light on the question whether this crime was committed, because Masood Mahmood was carrying out Mr. Bhutto's orders or whether it was committed because he had voluntarily entered into an agreement with Mr. Bhutto to murder Mr. Kasuri. Secondly, it is the prosecution case that the attempt on Mr. Kasuri's life had been made in the presence of at least two other persons, yet the prosecution examined only Ghulam Hussain in order to prove this occurrence. But Ghulam Hussain was an approver, and even a cursory perusal of Munir's Law of Evidence should have warned the investigation agency that an approver cannot corroborate himself. I cannot, therefore, understand the conduct of the prosecution in not examining the two other witnesses, who are alleged to have been present at the occurrence. Mr. Batalvi however, relied on the finding of the High Court that the evidence of the approver Ghulam Hussain "has been corroborated by Fazal Ali, P.W. 24, who supplied the weapons used in this incident...".

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<sup>461</sup> PLD 1977 Lah. 1414



229. I will presently explain why, in my humble opinion, Fazal Ali's evidence does not inspire confidence, but it is clear from the passage relied upon by learned counsel and from the observations in paragraph 384 of the Judgment that the High Court was of the view that Ghulam Hussain was a very reliable witness. No doubt if his evidence is reliable, then it would prove the occurrence provided it is corroborated by independent evidence. And here, unlike the other approver, Masood Mahmbod, Ghulam Hussain was not in detention facing other unknown charges when he became an approver, therefore, at first sight, his evidence would appear to stand on a higher footing than that of Masood Mahmood. But, I observed earlier that in my opinion, Ghulam Hussain's evidence is unfit to be relied upon, therefore, as I am unable to agree with the High Court's appreciation of evidence, it would be necessary to examine Ghulam Hussain's evidence in some detail.

230. I discussed earlier Ghulam Hussain's evidence in so far as it was discrepant with that of Ashiq Hussain Lodhi and the confession of Mian Abbas, and I reached the conclusion that Ghulam Hussain had deliberately and falsely stated that he did not know Masood Mahmood, and this means that his evidence too, like Masood Mahmood's, began in falsehood. But I would proceed to examine directly his description of his attempt to kill Mr. Kasuri in Islamabad on 24th August, 1974. The witness stated that he had collected arms and ammunition from Fazal Ali, who was in charge of the Armoury of the FSF, for carrying out the nefarious mission which he had undertaken. Next, according to the witness, he telephoned Mr. Kasuri and made an appointment "to meet him at one O'clock at the gate of the MNA Hostel, in Islamabad. He said to me that he would be at the gate....." So the witness said that:

"I left Rawalpindi for Islamabad at 12-30 p.m. in my Jeep. H.C. Allah Bakhsh and Foot Constable Molazim Hussain accompanied me. Driver Mian Khan was at the wheel."

The witness had a pistol with him whilst Molazim Hussain had a loaded sten-gun. When they reached the hostel, the witness saw Mr. Kasuri's car parked between the MNA Hostel and the National Assembly building, and Mr. Kasuri was sitting in his car with other persons who were standing outside and talking to him. The witness went on to say:

"I proceeded towards the Assembly Building after instructing my companions not to open fire on the car of Ahmad Raza Kasuri as a stranger was standing near him. I also told them that I would do the needful myself after having crossed the car."

The witness further said that he went and parked his jeep near the Assembly Building and kept his vigil on Mr. Kasuri, and during this period of waiting, he began to have qualms of conscience. He then said:

"I remained in these thoughts and meanwhile it was already 3-00 p.m .... I took a decision on the spot not to murder Mr. Ahmad Raza Kasuri. At that time, I saw his car emerge from the MNA Hostel. I decided not to murder him but to save my life also. The Head Constable had gone to have tea, I directed the driver to proceed and to drive the jeep in front of Ahmad Raza Kasuri's car. I ordered Molazim Hussain to fire in the air as and when I ordered him. The car at that time was proceeding towards the residence of Ahmad Raza Kasuri."

231. Next, according to the witness, as there, was a lonely intersection within less than a mile from the Assembly Building, he decided to stage the incident at this lonely intersection. He parked his jeep had the blind of the rear window of the jeep rolled up, and as Mr. Kasuri's car came within firing range, he ordered Molazim Hussain to open fire-

"The moment the car reached the intersection; Molazim Hussain complied with the orders and when he fired the first burst, Mr. Ahmad Raza Kasuri glanced towards the left and sped on."

So everything ended happily and as Mr. Kasuri escaped unscathed, the witness's claim that he had ordered Molazim Hussain to fire in the air also lent a touch of melodrama to his evidence.

232. As Mr. Yahya Bakhtiar invited us to reject as false the approver's claim that he had suddenly developed qualms of conscience about carrying out an assassination carefully planned by him, it is relevant to observe that the witness had said both in his confession and in his statement as an approver, that in the Lahore incident too he had directed Arshad Iqbal and Rana Iftikhar to fire in the air as Mr. Kasuri's car went past the roundabout, because he had developed similar qualms of conscience, therefore, to say the least, the story of the approver is somewhat implausible. But as implausible things do happen, I will assume that the approver had developed qualms of conscience about executing a murder planned by him. However, even on the footing that he had suddenly suffered from qualms of conscience, he could have fired the sten-gun in the air himself and by telling Molazim Hussain to do what he could have done himself; he merely created evidence against himself. This is difficult to believe, because the witness also said that he knew he was being watched by another party, and that is also the prosecution case. Again, as it is the prosecution case that another party was following the approver in order to see that he carried out his assignment, it is a bit odd that the Police were allowed to recover the empties of the bullets which Molazim Hussain is supposed to have fired. As the empties were of 7.62 mm. caliber, it is obvious that they would have implicated the FSF, so it is very strange that the FSF party, which was following the approver, did not remove the empties and left them for the regular Police to come and collect them. As the circumstantial evidence also thus casts doubt on the

approver's evidence, Mr. Batalvi was asked why the prosecution did not examine Molazim Hussain or Mian Khan, the driver of the jeep, in order to corroborate the approver's evidence. Learned counsel's rely was astonishing. He said that it would have been an exercise in futility to examine these two witnesses, because they were accomplices, and the evidence of an accomplice could not be corroborated by the evidence of an accomplice.

233. The submission is entirely fallacious. In the first place, as an approver's evidence cannot be accepted without corroboration, the question whether Molazim Hussain and Mian Khan were accomplices cannot be decided by the approver's apse dixit, and, on this short ground, learned counsel's submission fails. It is true that Molazim Hussain had carried out the approver's order to fire in the air, but that would not make him an accomplice in an attempted murder, and the offence committed by Molazim Hussain in firing at a passing car in order to scare the occupant of that car would be a petty offence. But, as I explained, the infirmity in the evidence of accomplices depends upon the offence in which they have participated and the degree of their complicity in it, therefore, there was absolutely no comparison between the taint in the evidence of Ghulam Hussain, who was an approver in a murder case, and the infirmity in Molazim Hussain's evidence. The infirmity in the latter's evidence was so alight that his evidence would have furnished corroboration of Ghulam Hussain's evidence. In any event, the driver of the car had nothing whatever to do even with the order to fire in the air as Mr. Kasuri's car went past. It is true that he did not make a protest to Ghulam Hussain about the order to fire in the air, but, as I explained, an involuntary spectator, who watches a crime, does not become an accomplice merely because he does not object to the commission of the crime. Therefore, Mian Khan's evidence would have been free from all taint whatever. Yet as the prosecution did not examine him, speaking for myself, I am not able to believe the approver's evidence.

234. It is true that someone had fired at Mr. Kasuri but this does not help the case of the prosecution because Mr. Kasuri had other enemies like Chaudhry Yaqub Maan, and in this background of intense local hatred against Mr. Kasuri, the fact that the prosecution has proved the occurrence at Islamabad does not by itself furnish any corroboration of Ghulam Hussain's evidence. However, according to learned counsel, the approver's evidence was corroborated by that of Fazal Ali, and as that was also the view of the High Court, I may explain here that Fazal Ali gave evidence that he had supplied pistols and a sten-gun with ammunition to the approver shortly before the occurrence. I will presently examine Fazal Ali's evidence, but at this stage, I will assume that his evidence was true. This would only mean that he had supplied arms to Ghulam Hussain which could have been used in the occurrence, because the arms and ammunition supplied were of a prohibited bore, namely, 7.62 mm. caliber. But, unfortunately for the prosecution, it is, clear from the documentary evidence that weapons of this caliber were available in Bara and had been supplied by the CAD, Havelian to then Frontier Corps, and to Army units also. Accordingly, even if we accept

Fazal Ali's evidence, it only means that Ghulam Hussain could have) been the assailant who had fired at Mr. Kasuri. But, it is not enough for the prosecution to prove that there was a possibility that Ghulam Hussain had made this attempt on Mr. Kasuri's life. The prosecution had to prove beyond reasonable doubt that Ghulam Hussain was the assailant, and this could only have been proved by evidence to establish that the arms and ammunition used in the occurrence could only have come from the FSF. Now, the weapons used in the occurrence were not recovered, but as the empties were, the prosecution should have led evidence to prove that the empties were of bullets which belonged to the FSF and were not available with anybody else in the country. In order to prove this, the Public Prosecutor had filed an application to examine Col. Wazir Ahmad Khan of the CAD, Havelian, but as the High Court dismissed that application, the prosecution has failed to prove that the ammunition used in the occurrence belonged exclusively to the FSF. Therefore, even if Fazal Ali's evidence is accepted, it only proves that Ghulam Hussain might have been responsible for the incident of 24th August, 1974, but as the possibility that the assailant could have obtained the ammunition from sources other than the FSF cannot be ruled out, it follows that Fazal Ali's evidence is not sufficient to corroborate the approver's evidence of his role in the alleged incident.

235. Further according to the approver, he made his next and last attempt on Mr. Kasuri's life on the night of 10th November 1974. This was nearly three months after the Islamabad incident, and it is obvious that if Mr. Bhutto had really been pressing and goading Masood Mahmood to carry out his orders, Ghulam Hussain would not have remained inactive for such a long period, so I would now examine how he attempted to overcome this obvious lacuna in the prosecution case.

236. Ghulam Hussain said that he tried to keep a surveillance on Mr. Kasuri for two or three days after the Islamabad incident also, but as he learnt that Mr. Kasuri had left Islamabad, he informed Mian Abbas, and on Mian Abbas' orders, he returned to Fazal Ali the arms and ammunition which had been borrowed from him by substituting "live cartridges for the bullets used in the occurrence." Then according to the witness:-

"Mian Abbas ordered me to depute Head Constable, Zaheer and Liaqat, from the Commando Camp, to go to Lahore and search for Mr. Ahmad Raza Kasuri. I complied with the orders. I rejoined my work in the Commando Camp.

Mian Mohammad Abbas sent for me a day before Eid in October, 1974. He said to me that my men who had been sent to Lahore were enjoying holidays and had done nothing."

The witness said that he offered to go to Lahore after the Eid, but on Mian Abbas's orders he left for Lahore on the 16th October, 1974 and returned ten days later having successfully located Mr. Kasuri's residence in Lahore.

237. Zaheer and Liaqat had been sent to Lahore without any arms or ammunition and the only task entrusted to them was to trace Mr. Kasuri's address in Lahore. Now, Ghulam Hussain claims to have met Mian Abbas three or four days after the Islamabad incident, and Zaheer and Liaqat had immediately thereafter left for Lahore to trace out Mr. Kasuri's address. This means that they left for Lahore in the first few days of September, 1974, but they had not been able to trace Mr. Kasuri's address when Mian Abbas reached Lahore on the 16th of October, 1974. As Mr. Kasuri's address could have been ascertained from a telephone directory, the idea that two constables were sent to Lahore to find out Mr. Kasuri's address is absurd, and the idea that these two constables were not able to trace Mr. Kasuri's address for six weeks, is, in my humble opinion, absolutely absurd. I also find it impossible to believe that it would have taken Ghulam Hussain ten days to discover Mr. Kasuri's address in Lahore. And, on the other hand, if all that Mian Abbas wanted to ascertain was Mr. Kasuri's Lahore address, as claimed by Ghulam Hussain, Mian Abbas could have obtained this address from the Lahore Director of the FSF by an enquiry on the telephone. In these circumstances, Mr. Yahya Bakhtiar invited us to reject this part of the witness's evidence as absolutely false, and he submitted that it had escaped the attention of the High Court that the witness's evidence was inconsistent with his own earlier statements. We have examined the witness's confession and his statement under section 337 of the Criminal Procedure Code and as submitted by Mr. Yahya Bakhtiar, they do not contain a word about the mission entrusted to Liaqat and Zaheer nor about the witness's alleged trip to Lahore in October for the purpose of tracing Mr. Kasuri's Lahore address. Therefore, I am satisfied that this part of the witness's evidence was false, and, at first sight, this false evidence would seem to have been introduced by the witness in order to lend a touch of melodrama to his evidence. But having thought over the matter, I am satisfied that the witness deliberately gave false evidence in order to corroborate the false claim of Masood Mahmood that Mr. Bhutto had been goading him (Masood Mahmood) to expedite Mr. Kasuri's murder.

238. I would now turn to the witness's alleged visit to Lahore in November, 1974, when he claims to have carried out the mission entrusted to him by killing Mr. Kasuri's father instead of Mr. Kasuri. The first difficulty in the way of accepting this evidence is that according to the T.A. and D.A. Bills produced by the prosecution, the witness was in Karachi at the relevant time, therefore, Mr. Batalvi invited us to hold that these T.A. and D.A. Bills had been fabricated at the instance of Mian Abbas lit order to give a cover to Ghulam Hussain for his nefarious mission to Lahore. At the risk of being tedious, I would repeat that when the prosecution invites the Court to reject its own documentary evidence as false, the burden of proving this plea is very heavily on the prosecution. And as the plea is that Ghulam Hussain had not visited Karachi, I would have thought the best evidence in support of this plea would have been the evidence of the Director of the FSF in Karachi that Ghulam Hussain had not been in Karachi at all in the month of November, 1974. Mr. Batalvi could not explain why such evidence was not

produced. And, on the other hand, as rightly submitted by Mr. Yahya Bakhtiar, the story that Ghulam Hussain was officially supposed to be in Karachi, whilst he was planning the murder in Lahore, is not to be found in the earlier statements of the witness and this makes it even more difficult to believe the approver's plea. Learned counsel also drew our attention to an admission made by the approver very reluctantly in his cross-examination. The approver was cross-examined about the place of his residence in Lahore in November, 1974 and he said:-

"I stayed throughout this period at Shah Jamal though on paper I was supposed to be putting up in a hotel."

239. If the witness was supposed to be staying in a hotel, the prosecution would have had no difficulty in producing; documentary evidence in support of the approver's claim, the more so, as a hotel keeper would have no difficulty in producing his bills, but he would not generally be in a position to identify his customer by sight after the lapse of three years. Once again, Mr. Batalvi did not explain why this evidence was not produced, but he appeared to rely on the fact that the three accused, who had pleaded guilty, had supported the approver's evidence in their confessions. I am not impressed by the evidence of these accused for more reasons than one. In the first place, as I will presently show, their description of the murder in their confessions is totally discrepant with the approver's description of the occurrence, but in order to support the prosecution case, they, repudiated their confessions in their statements under section 342 of the Criminal Procedure Code and stated that everything had happened in the manner described by Ghulam Hussain. Now it would be an under-statement to say that I am not impressed by this desperate attempt of ascendants to corroborate the evidence of an approver. It is true that it is not the case of a solitary accomplice and I am aware of the second part of Illustration B to section 114(e) of the Evidence Act, but this is one of those cases in which zero multiplied by zero would remain zero.

240. Learned counsel then stated that Ghulam Hussain's claim to be in Lahore was proved by an encounter between Ghulam Hussain and Abdul Wakil Khan in Lahore in November, 1974. Ghulam Hussain said that he was giving in one of the jeeps of FSF a couple of nights before the murder, when they were stopped on Canal Road by Abdul Wakil Khan, because their jeep had no number plate. Abdul Wakil Khan demanded their explanation for driving about without a number plate. Ghulam Hussain said that he gave his identity to Abdul Wakil Khan, who verified the position by talking on the wireless in his vehicle to Mr. Malhi, the local Director of the FSF, Lahore, and the approver further stated that Abdul Wakil Khan treated the chapter as closed with a warning to the witness, because Mr. Malhi had assured Abdul Wakil Khan that the person in the jeep, namely, Ghulam Hussain, was an official of the FSF.

241. The question is whether this evidence is fit to be believed. So I would first examine what Abdul Wakil Khan said. He said:

"During my posting as D.I.G., Lahore I used to patrol the area extensively during night. I remember that a few days before this occurrence when I was on patrol duty during night I came across a jeep without number plate going ahead of me on the Canal Road. I chased, overtook that jeep and stopped it. One person came out of the jeep and saluted me. I questioned about his identity. He told me that he was an Inspector in the F.S.F. and told me that he was going to the Headquarters in Shah Jamal. I asked him as to why he was driving the jeep without a number plate. He could not give me any satisfactory answer. I then contacted Mr. Malhi, who was then Director, FSF at Lahore through wireless control car through the Control and enquired if the Inspector belonged to the FSF. He confirmed that he and the jeep did belong to the FSF."

242. As Abdul Wakil Khan could not remember the name of the Inspector to whom he had spoken, a learned Judge asked the witness whether the name of the Inspector was Ghulam Hussain. This was very unfortunate, as the witness was being examined-in-chief. Be this as it may, despite the fact that the name of Ghulam Hussain was mentioned by the Court, Abdul Wakil Khan replied:

"The Inspector at that time had given his name, which I don't remember now and that name had been conveyed to Mr. Malhi..."

243. As this attempt to corroborate Ghulam Hussain's evidence failed, when Mr. Irshad Qureshi cross-examined Abdul Wakil Khan or behalf of the accused, who had pleaded guilty, he put a leading question, as he was entitled to do, to the witness as to whether the name of the Inspector whom the witness had met on that night was Ghulam Hussain. Once again Abdul Wakil Khan's reply was:

"I cannot recollect the name of the Inspector even though it has now been suggested to me as Ghulam Hussain."

244. In view of the very clear evidence, I am astonished that we were invited to accept Ghulam Hussain's evidence as true. As despite repeated suggestions, Abdul Wakil Khan could not recall that the name of the Inspector he had met on that night was Ghulam Hussain, I can only take this to mean that the Inspector whom Abdul Wakil Khan met was not Ghulam Hussain. In any case, as Abdul Wakil Khan had immediately contacted Mr. Malhi and corresponded with him about the incident, the prosecution could have examined Mr. Malhi or at least produced Abdul Wakil Khan's correspondence with Mr. Malhi to prove that this chance encounter was between Abdul Wakil Khan and Ghulam Hussain, the approver, but it did not. Secondly, the driver of Ghulam Hussain's jeep, Ashraf, could have been examined, the more so, as it is not the prosecution case that he had any role whatever in the conspiracy to murder Mr. Kasuri or even that he knew anything about it. But once again Mr. Batalvi could not explain

why the prosecution did not examine this driver, Ashraf and he wanted us to accept an approver's ipse dixit. In the circumstances, have no doubt that Ghulam Hussain deliberately gave false evidence when lie claimed to be the person who had had this chance encounter with Abdul Wakil Khan on Canal Road, Lahore.

245. Mr. Yahya Bakatiar referred us to other discrepancies in the evidence of Ghulam Hussain in support of his submission that Ghulam Hussain was never in Lahore in November 1974, and I am satisfied beyond doubt that he was in Lahore on the night or this alleged encounter with Abdul Wakil Khan. But, Manzoor Hussain, the driver of Masood Masood, claims to have driven Ghulam Hussain from Lahore to Rawalpindi on the 12th of November 1974. As this evidence raises the possibility that Ghulam Hussain could have been in Lahore a day or two earlier, Mr. Yahya Bakatiar invited us to reject this witness's evidence on the ground that he was a chance witness. This criticism has reference to an admission by Manzoor Hussain that he had gone to the headquarters of the FSF in Shah Jamal Colony, Lahore in order to get petrol for his car and I agree with learned counsel that the story of getting petrol was false. But does this mean that the witness did not go to the FSF headquarters, or, does it mean that he had invented a pretext for visiting the local headquarters of the force to which he belonged. After all, a sensational murder had taken place and there would be nothing unnatural in the witness's inventing a pretext in order to visit his local headquarters and find out the latest gossip about the murder.

246. Mr. Yahya Bakhtiar then pointed out that this witness had been dismissed by Masood Mahmood and had filed an appeal against his dismissal which was allowed shortly before the witness gave evidence. According to Mr. Batalvi, the fact that this appeal was allowed was not material because it was only a coincidence. It is possible that it was a coincidence, and as Manzoor Hussain had found employment after his service in the FSF had been suspended, I do not see what advantages he would have gained by the fact that his appeal was allowed. In these circumstances, I do not think we would be justified in interfering with the finding of the trial Court on a pure question of fact. But this only means that Ghulam Hussain was in Lahore on the 12th of November, 1974, whilst, the prosecution has to prove that he was in Lahore on the 10th November, 1974.

247. However, Mohammad Amir, who was working as a chauffeur in the FSF at the relevant time has said that he had driven the jeep on the day of the occurrence and that Ghulam Hussain and the accused who have pleaded guilty were in The jeep. The High court has believes this evidence and though a "well have been taken, I do not think we would be justified in interfering with the finding of the trial Court which had the advantage of watching the demeanor of the witness. Therefore, I would hold that the prosecution has proved Ghulam Hussain's presence in Lahore on the 10th of the November 1974 But, this does not mean that he was in Lahore therefore the 10th of November, 1974, nor does this mean that the T.A. and D.A. Bills of the witness were



false or forged as submitted by Mr. Batalvi. And, for reasons which I will presently give, I am satisfied that Ghulam Hussain was in direct touch with Masood Mahmood, therefore, what may have happened was that after completing his work in Karachi, he flew to Lahore or a couple of days surreptitiously, knowing that no action would be taken against him because of his protector, Masood Mahmood.

248. Ghulam Hussain has described in his evidence how he with the other accused spent the day trying to trace Mr. Kasuri, and Mr. Yahya Bakhtiar pointed out that these details were not contained in the earlier statements of this approver. That is true, but, as submitted by Mr. Batalvi, it was not necessary to record every detail in those earlier statements, therefore, nothing turns on this criticism, and I would begin my examination of this approver's evidence with his statement that he had traced the house of Mr. Bashir Ahmad where Mr. Kasuri was attending a wedding party, and that thereafter he had, if I may be permitted to say so, held a meeting at the Ichhra Police Station of "the Gang of Four", consisting of himself and the three accused who had pleaded guilty.

249. It was at this meeting that the approver finalized the details of the plot to assassinate Mr. Kasuri. There was a road leading from Mr. Bashir Ahmad's house to the Shadman Roundabout and Mr. Kasuri's car was parked on this road. I will refer to the side of the roundabout which faced this road, as the front side of the roundabout, and the opposite side of the roundabout as the opposite side of the roundabout. The distance from the front side of the roundabout to Mr. Bashir Ahmad's house was about 50/60 yards, and the plan of assassination was that Arshad Iqbal and Rana Iftikhar would fire at Mr. Kasuri as he drove past the roundabout.

250. After finalizing this plan, the approver Ghulam Hussain claims to have returned to the roundabout with Arshad Iqbal and Rana Iftikhar. He then said:-

"After making sure that the car of Ahmad Raza Kasuri was there and so was Mr. Ahmad Raza Kasuri, Sufi Ghulam Mustafa went to his Shah Jamal office. I posted Rana Iftikhar at the intersection facing the road which branched towards the left as coming from the house where the wedding was taking place. There was a hedge around the roundabout at that intersection, which was about shoulder-high. The distance between Rana Iftikhar and Arshad Iqbal was about nine or ten steps. I posted these two persons in the area around which there was a hedge so that they could be hidden from the lights of the oncoming cars. I directed Arshad Iqbal to open fire in the air the moment Ahmad Raza Kasuri's car was about to pass by him. Iftikhar was given the orders to open fire at the first car which came before him after Arshad Iqbal fires in the air. I had directed Arshad Iqbal to fire in the air for more than one reason. He was facing the Shamianas and if he had fired at the car people in the Shamiana might be hit. Secondly, there was a danger of people sitting in the cars or those walking on the

roads being injured... There was a road which branched off from the road in front of Iftikhar, It was not lit and I started pacing. I came to the intersection a number of times to keep Arshad Iqbal and Iftikhar on guard and also to find out whether the people had started leaving the place where wedding was taking place. At about mid-night I heard the sound of firing. The second and third burst followed after very short intervals. I hurriedly reached the intersection from the branch road which I was pacing. I was pacing the road which branches of towards the right from the road in front of Rana Iftikhar at the time when the bursts were heard..."

251. It is clear from the approver's evidence about the occurrence that he had played no part whatsoever in it. No doubt this was because in his own words, he had "started pacing" on an unlit road from which it was not possible for him to see the roundabout, therefore, his description of the occurrence is hearsay, and I am not able to understand how Mr. Batalvi expected us to rely on it. Further, unfortunately for the prosecution, Mr. Kasuri has also not been able to give a clear idea of the manner in which the firing had taken place. But, Mr. Yahya Bakhtiar referred us to Abdul Hamid Bajwa's report dated 28th November 1974, Exh. P, W. 3/2-K, which reads:

"Raza claims that four persons had been deputed to kill him, who fired from automatic weapons, which they did, while hiding near the Shadman Roundabout. They were not in any vehicle."

252. Although this report would suggest that Mr. Kasuri could have given a better description of the firing than he did, Mr. Yahya Bakhtiar cannot be permitted to rely upon this report, because it was not put in cross-examination to Mr. Kasuri. Besides, it is possible that Mr. Kasuri was not able to see clearly what was happening, because he had to concentrate on driving away as fast as possible, and this could not have been easy, as the lights of his car had gone off. But, his mother and his aunt would have been in a better position to describe how the firing had taken place, yet the prosecution did not examine these two ladies, nor has it explained why it did not examine them. The result o is that the only eye-witness account of the occurrence is contained in the confessions of Arshad Iqbal and Rana Iftikhar. Both these accused have supported Ghulam Hussain's evidence about the directions given by Ghulam Hussain to them about how they were to fire at Mr. Kasuri's car as it went past the roundabout. Rana Iftikhar then said in his confession, Exh. P.W. 10/2:

"At about 1 O'clock Ahmad Raza Kasuri's car came there whereupon Inspector Ghulam Hussain fired with his pistol and we fired with sten-guns and the car went away..."

Arshad Iqbal said in his confession, Exh. P.W. 1013;

"I and Rana Iftikhar ... were sitting in the Shah Jamal Roundabout, Inspector Ghulam Hussain fired at the car of Ahmad Raza Kasuri with his pistol and we according to the programme opened incriminate firing but the car went away safe and sound..."

253. As both the accused categorically stated that Ghulam Hussain was the first to fire, their evidence cannot be reconciled with Ghulam Hussain's claim that he had taken no part whatever in the occurrence, because he had "started pacing" in an unlit road from where the firing was not even visible. In view of this glaring contradiction between the confessions and the evidence of the approver Ghulam Hussain, the contention advanced in the trial Court was that Ghulam Hussain's evidence should be rejected on this ground. But in repelling this objection, the High Court observed:-

"The argument clearly ignores the statement of Ghulam. Hussain in cross-examination that he did not remember whether he fired the pistol. This statement does not exclude the possibility of his having fired it."

254. As Mr. Yahya Bakhtiar stated that these observations were based on a misreading of the approver's evidence, it is necessary to examine what the approver said in his cross-examination on the question whether he had participated in the occurrence by firing a pistol. But, I would first observe that it was not *Ghulam Hussain's case* that he was a professional assassin, so I find it difficult to believe that he could not remember whether he had participated in the only murder carried out by him in his life. Be this as it may, he did say first in answer to the questions put in cross-examination "I do not remember if I fired the pistol". After saying this, he immediately stated that he was "at a distance of 30 yards from the intersection where the firing took place". Then he said "I think I had no hand-grenade at the time of occurrence. I did not fire on the car when it passed on the road in front of me. I did not fire my pistol when I was pacing the street". In order to clarify what the witness meant, he was put the further question which I would quote here "Did you fire your pistol before you heard the bursts of the sten-guns and while you were pacing the street"? As the witness answered "No", with due respect to the learned Judges, I am compelled to observe that Mr. Yahya Bakhtiar's submission is correct, and the opinion of the trial Court is based on the misreading of evidence.

255. Mr. Yahya Bakhtiar then referred us to the glaring contradictions between Ghulam Hussain's evidence and his confession, Exh. P.W. 10/11-1, dated 11th August 1977 and his statement as an approver dated 21st August 1977, Exh. P.W. 10/11. I will presently examine these statements in greater detail, but here I would only observe that in both the statements, he said that he had posted Arshad Iqbal and Rana Iftikhar inside the roundabout and "told them that on recognizing the car, Arshad Iqbal will fire in the air and from the other side Rana Iftikhar will fire so that commotion is created and our

honor is also saved". Of course this version of the occurrence is not fit to be believed, the more so, as the witness was emphatic in his evidence in the High Court that a party of the FSF had been detailed to assassinate him if he failed to assassinate Mr. Kasuri. But, Mr. Yahya Bakhtiar was right when he said that the approver's version of the directions given by him to Arshad Iqbal and Rana Iftikhar in these two statements cannot be reconciled with the approver's claim in his evidence that he had directed these two accused to shoot at the car to kill. It was unfortunate that the learned Public Prosecutor did not draw the High Court's attention to the position taken by the approver in his earlier statements. But the approver was cross-examined on this aspect of the case, and I find it somewhat difficult to understand the evasive answers given by him in his cross-examination. He, however, threw the blame on Mian Abbas and said:

"Between the 18th and 19th of August, 1977, when I had already applied for being made an approver on the 13th, when Mian Mohammad Abbas came to know about it he sent me a message through a convict. He said that if my application was accepted and I was made an approver; I should adopt a method by which I could get pardon and also at the same time try to save him also. Since he had begged of me, I made my statement in a way that he should not be implicated to a very large extent."

256. Then, in answer to the next question by learned counsel for the accused, the approver said that he "had not made a full statement before the Magistrate and that I would like to make a full and correct statement before this Court. It is not correct that I have made an incorrect statement before the Magistrate to save Mian Mohammad Abbas". As the witness has given two completely contradictory answers, we can only speculate on the reasons which led him to give false evidence. Mr. Batalvi, therefore, drew our attention to the fact that the witness had filed an application in Court that he would make a full disclosure in Court, meaning thereby that he had not made a full disclosure even in his statement as an approver. As the witness admitted that he had not made a full disclosure even in his statement as an approver, I can only observe that he was very lucky that the pardon granted to him was not cancelled. Be this as it may, an approver is presumed to be dishonest, and if an approver admits that he, has not made a full disclosure of the facts in his statement under section 337 of the Criminal Procedure Code, how can any reliance be placed on his evidence?

257. However, as the approver had first said that he had not made a full disclosure in his statement as an approver, because of approaches made by Mian Abbas, I have examined his confession and his statement as an approver in order to find out whether the explanation thus given by the approver was true or false. And I have to observe that not only was the approver's explanation false, but the discrepancy between the two statements casts doubt on the entire investigation of the case. Omitting the minor discrepancies between the two statements, Ghulam Hussain has said in both his earlier statements that Mian Abbas had ordered him to assassinate Mr. Kasuri and that despite

his protests, he was compelled to carry out Mian Abbas's orders because of the fear that his life would not be safe otherwise. Again in both his statements, the approver said that Mian Abbas had procured for him the arms and ammunition used in the Islamabad incident and similarly that in November 1974, Mian Abbas had ordered him to take 500 rounds of ammunition from the Commando Camp, for the purpose of assassinating Mr. Kasuri in Lahore. As both these statements implicate Mian Abbas to the hilt, it is clear that the witness had deliberately given false evidence when he said that he had not spoken the whole truth in his earlier statements because he had been approached by Mian Abbas. Further, not only was this explanation absolutely false, but the real explanation reacts even more against the veracity of the witness. I say this because in his confession, what he said about his meeting with Mian Abbas in which Mian Abbas had ordered him to kill Mr. Kasuri was as follows:-

"After about three days whilst Mian Abbas was in his office, he called me again and ordered me that under the orders of D. G. Masood Mahmood, Ahmad Raza Kasuri is to be finished as he is personal enemy of Prime Minister Zulfikar Ali Bhutto."

258. But about the same meeting, he merely said in his statement as an approver that Mian Abbas had ordered him to take two sten-guns and 400 rounds from Fazal Ali because "Ahmad Raza Kasuri is to be finished". So the person whom Ghulam Hussain wanted to favor was not Mian Abbas, but the other approver, Masood Mahmood.

259. The other explanation given by the approver, Ghulam Hussain, for suppressing the truth in his earlier statements was that these were not full statements. This explanation is absolutely false, because the question was not whether the earlier statements were short or long. The question was why the approver had said in his earlier statements that he had directed the two accomplices to fire in the air, whilst he said in his evidence that he had directed them to fire at the car of Mr. Kasuri. And as the witness was unable to explain this patent contradiction between his earlier statements and his evidence in Court, he resorted to false and dishonest explanations. But the matter does not end here, because as I have shown, the approver deliberately tried in his statement, as an approver, to reduce the complicity of the other approver, Masood Mahmood, in the murder. And, as he said that he had been approached by Mian Abbas, whilst he was in custody, it is obvious that he had made a false allegation against Mian Abbas, in order to cover the fact that Masood Mahmood had made an approach to him. Therefore, the only inference which I can draw from Ghulam Hussain's evidence is that he and Masood Mahmood were in league.

260. I now turn to Mr. Yahya Bakhtiar's submission that the High Court had ignored the discrepancies between Ghulam Hussain's evidence about the occurrence and the circumstantial evidence. And as learned counsel wanted to rely on the site plan prepared by Inam Ali Shah, Exh. P.W. 34/5-D, I have to explain first that whilst this site

plan was according to scale and was produced by Niazi, Niazi said that it was not correct. But as I have shown, Niazi was not an honest witness, and the Court had no means of knowing whether Niazi's opinion about Inam Ali Shah's site plan was true or false as the prosecution did not examine Inam Ali Shah. In these circumstances, the proper course would have been to examine Inam Ali Shah as a Court-witness. But as this was not done, we have to go by Niazi's evidence, unsatisfactory though it be, and as there is so controversy about the photographs of Mr. Kasuri's car, Exh. P.W. 36/1-4, I would first examine Mr. Yahya Bakhtiar's submission that the bullet marks on the car were inconsistent with Ghulam Hussain's claim that Rana Ifikhar had fired at the car from behind the hedge of the roundabout as it drove past him.

261. There are two bullet marks on the mudguard of the car, but it is not possible from the photographs to say whether this was the rear mudguard or the front mudguard. What is, however, very clear, is that the assailant had fired with his gun pointing towards the tyres of the car and the shots missed the tyres by a few inches only. Whilst, this was excellent marksmanship, the point raised by Mr. Yahya Bakhtiar was that these shots could only have been fired by an assailant, who was lying on the ground. In order to explain the submission, I would recall here that Rana Iftikhar had, according to Ghulam Hussain's evidence, fired from behind the shoulder-high hedge of the roundabout. But, as the hedge was shoulder-high, it would have been very difficult for Rana Iftikhar to hold his gun in such a manner that it was aimed almost towards the road. Therefore, this suggests, I deliberately use the word suggests, that there was a third assailant who was lying down on the road outside the roundabout, so as not to be seen, and had fired from that lying down position. And, here, Niazi's site plan, unreliable though it be, becomes relevant. According to this site plan, there were empties at four points, marked A, B, C and D. The points A and D were outside the hedge and point A was on the front side of the roundabout on the intersection of the roundabout and the road leading to Mr. Bashir Ahmad's house, whilst point D was on the back side of the roundabout. But, it is not possible to say from the site plan how far these heaps of empties were from the hedge of the roundabout. There were also empties at two points within the roundabout which have been marked as B and C by Niazi in his site plan. Next, according to Niazi, the distance between points B and C "was about ten steps", but the distance between points A and E and points A and C was at least three or four times the distance between the points B and C. Similarly, the distance between the points A and D appears to be about five times the distance between the points B and C. And this means that the distance between the points A and D would be about fifty steps. Now, according to Inam Ali Shah's site plan, the diameter of the roundabout was about 190 feet, therefore, this would suggest that Inam Ali Shah had drawn his site plan correctly. Be this as it may, I would only go by Niazi's site plan, but the prosecution cannot be heard to say that the distance even in Niazi's site plan are not correct.

262. Mr. Yahya Bakhtiar's submission was that the empties at points A and D were the empties of bullets fired by persons who were outside the hedge of the roundabout, but as Arshad Iqbal and Rana Iftikhar were supposed to have stood behind the hedge and fired, this proved firstly that there were four assailants, who had fired at Mr. Kasuri's car, and secondly, that the assailants, who were outside the hedge had fired from a lying down position. The submission assumes that when empties are ejected from a sten-gun, they are always thrown backwards by the recoil effect in the absence of some mechanism to control the ejection of the empties. Now as it is nobody's case that the sten-guns used in the occurrence had any mechanism for controlling the ejection of the empties, it would follow that they were thrown backwards by the recoil effect, but slightly towards the right. This, however does not mean that the empties could not be thrown in front of the marksman, because if the marksman fires high in the air, the empties would be thrown by the recoil effect in front of him, not behind him. And, as Arshad Iqbal was supposed to have fired high in the air, it is likely that the empties at point A were the empties of the burst fired by him, even though he was himself standing behind the hedge when he fired. This hypothesis, however, according to Mr. Yahya Bakhtiar, left one problem unsolved. This was the question of the bullet which hit the bonnet of the car. According to learned counsel, as Arshad Iqbal had fired high in the air, the bullets fired by him could not possibly have hit the bonnet of the car, therefore, there was another assailant near him who was outside the hedge. Mr. Batalvi did not attempt to throw any light on this problem, and the difficulty in the way of the prosecution is that it has granted a pardon to an accomplice, who had not seen the occurrence, therefore, the prosecution is not able to explain the discrepancies between Ghulam Hussain's evidence and the circumstantial evidence. However, even if for the sake of argument, we give the benefit of doubt to the prosecution and assume that the bullet which hit the bonnet of Mr. Kasuri's car had been fired by Arshad Iqbal, this still would not explain the empties at point D, nor the bullet marks on the mudguard of Mr. Kasuri's car.

263. In order to overcome the difficulty about the empties at point D, Mr. Batalvi advanced an astonishing submission. According to Ir. Batalvi whenever a sten-gun was fired, the empties were invariably ejected in front of the marksman and not behind him. As the argument appeared to be somewhat unusual, a demonstration was organized through the courtesy of Brig. Zaidi, Chief Inspector, Inspectorate of Armaments. And after watching this demonstration, I am completely, satisfied that if Rana Iftikhar fired in the manner he is alleged to have fired, the empties of the bullets must have been ejected behind him, though at an angle. It is of course possible that an odd empty could have been thrown in front of Rana Iftikhar, but this cannot explain a heap of six or seven empties.

264. I am aware that Ghulam Hussain has given evidence to the contrary which perhaps influenced the High Court. This witness said in his cross-examination to Mr. Irshad Qureshi:-

"an empty is always ejected from a sten-gun in such a way that it is thrown outside towards the right and in front of the muzzle,"

265. This statement is false and is a piece of deliberate perjury, and it was unfortunate that the High Court did not have an opportunity of watching a demonstration of firing practice as we had.

266. Mr. Batalvi then attempted to persuade us to believe that the empties at point D had come from shots fired by Arshad Iqbal, and as according to learned counsel, the empties at point A were also from the warning burst fired by Arshad Iqbal, learned counsel's further submission was that after firing his warning burst, Arshad Iqbal had run across the roundabout and fired again at the car. But no one has said that Arshad Iqbal had run across the roundabout, and fired again at Mr. Kasuri's car, therefore, as rightly submitted by Mr. Yahya Bakhtiar, the contention of Mr. Batalvi is merely a hypothesis, which is not supported by any evidence. However, even if we assume that Arshad Iqbal, after firing his warning shot, could have run across the roundabout, and fired again at Mr. Kasuri's car as it drove past, the difficulty in the way of accepting this hypothesis is Niazi's site plan. Even if we assume that Arshad Iqbal had run across the roundabout and fired from behind the shoulder-high hedge, an odd empty could have been thrown outside the hedge, but as according to the site plan, a heap of empties were lying outside the hedge, it is clear that even on the hypothesis propounded by Mr. Batalvi, Arshad Iqbal could have fired for the second time, at Mr. Kasuri's car only if he had jumped over the shoulder-high hedge and then fired at the car. But it is impossible to believe that Arshad Iqbal could have run across the roundabout, jumped over the hedge, taken his position and fired at Mr. Kasuri's car before it drove past. Secondly, the question whether he had run across the roundabout and had fired for the second time at Mr. Kasuri's car are questions of fact and questions of fact have to be proved by evidence. Therefore, as rightly submitted by Mr. Yahya Bakhtiar, Mr. Batalvi's hypothesis cannot be accepted, because it is based on conjecture and is not supported by evidence. And here, the learned counsel overlooked Arshad Iqbal's confession. Brief though it be, this confession is totally inconsistent with Mr. Batalvi's hypothesis, and I have no doubt that a third assailant had fired from near point D and hit the mudguard of Mr. Kasuri's car.

267. Mr. Batalvi then advanced another ingenious argument in order to save the prosecution case. He said that if any person had stood outside the hedge near point D, he would have been within the range of the shots fired by Rana Iftikhar. But, as Rana Iftikhar is supposed to have fired over the shoulder-high hedge, an assailant outside the hedge would be in danger of being hit by Rana Iftikhar's shots only if he was standing. But, he would be reasonably safe if he was crouching under the shelter of the hedge, therefore, once again Mr. Batalvi's submission assumes that we should give the benefit of doubt to the prosecution by holding that this third assailant was stupid enough to



stand in a position of danger when he could easily have taken shelter under the shoulder-high hedge.

268. Mr. Yahya Bakhtiar advanced many arguments also to show that the circumstantial evidence completely falsified Ghulam Hussain's evidence, but it would be sufficient to refer to only one other argument of the learned counsel. This was that the empties at points B and C were empties of shots fired by different persons as according to Niazi, the distance between the two heaps of empties was about ten paces. Mr. Batalvi's reply to this submission was that Rana Iftikhar could have moved from near point B to near point C as he was firing. The argument sounds plausible, but the difficulty is that there is no evidence to show that Rana Iftikhar had changed his position, whilst he was firing, and this difficulty has arisen because the prosecution granted a pardon to an accomplice, who had not seen the occurrence, therefore, as the benefit of doubt cannot be given to the prosecution, there appears to be force in Mr. Yahya Bakhtiar's submission that there were not three but four assailants. However, it is quite unnecessary to decide this point because I have no doubt whatever that there were three assailants, and this means that Ghulam Hussain deliberately and fraudulently concealed evidence about the identity of this third assailant. And, further in my opinion, no reliance whatever can be placed on his evidence because he has given false evidence on every material particular.

269. Mr. Batalvi's next submission was that Ghulam Hussain's evidence as well as the prosecution case generally was supported by the evidence of Fazal Ali and Amir Badshah and by documentary evidence, such as, the road certificate, Exh. P.W. 24/7, the entry in the stock register of the Armoury of the FSF, Exh. P.W. 24/8, and outer evidence, such as, the site plan and the recovery memo. of the empties at Islamabad incident. Now, I find it difficult to believe that the evidence of a witness so thoroughly dishonest as Ghulam Hussain can be corroborated. But, as the High Court was of the view that this approver's evidence received very strong corroboration from the evidence of Faial Ali, I will now examine Fazal Ali's evidence.

270. Fazal Ali was incharge of the Armoury of the FSF and as Ghulam Hussain was running a Commando Course for the FSF, he used to collect arms and ammunition from Fazal Ali against receipts, and he had collected arms and ammunition for the Islamabad incident from Fazal Ali in August 1974. Now this was all that he said in his statement as an approver, but as this statement could not possibly furnish any corroboration of Masood Mahmood's evidence against Mr. Bhutto or Mian Abbas, he said in his evidence in the High Court that the arms and ammunition collected by him for the Islamabad incident had not been collected against the usual receipts and entries in the stock registers on the Armoury. He further said that Fazal Ali had first refused to supply anything without compliance with the usual formalities, therefore, he had informed Mian Abbas who had called Fazal Ali over and after meeting Mian Abbas, Fazal Ali gave him arms and ammunition without proper receipts or entries in the stock

registers. As Fazal Ali has corroborated this part of Ghulam Hussain's evidence, Mr. Batalvi submitted that it furnished very strong corroboration of the approver's evidence. So I will examine Fazal Ali's evidence in detail.

271. Fazal Ali stated that Ghulam Hussain had come to him in August, 1974 with a chit from Mian Abbas for one sten-gun, two magazines, etc., and asked Fazal Ali to supply the same. Now as Ghulam Hussain was running a Commando Camp, the mere fact that Mian Abbas had directed him to collect ammunition from the Armoury of the FSF, would not implicate even Mian Abbas in any crime, whatever, therefore, what Fazal Ali said for the first time in Court was that Ghulam Hussain had asked for the arms and ammunition "on a kmcha receipt" which was to be returned when the arms and ammunition were returned, and that Ghulam Hussain had said that no entries of this issue of arms and ammunition to him were to be made in the stock register on Mian Abbas's orders. But. Fazal Ali refused to carry out this order, therefore, Ghulam Hussain reported him to Mian Abbas, so according to Fazal Ali, Mian Abbas sent for him. Fazal Ali then said:

"As soon as I entered the Office room of Director Mian Muhammad Abbas, he asked me as to why I had not obeyed his orders. I informed him that since the orders were not according to the standing order, I had not issued the weapons and ammunition. The Director shouted at me saying if I did not want to serve any more and that I would be discharged from service and that I would not reach my home. He again ordered me to issue the weapons and ammunition forthwith otherwise my services would be terminated. I issued the weapons and the ammunition on the receipt given to me by Ghulam Hussain, I did not make any entry in the register about it and had issued the same only on the receipt. Two days before the end of the same month, Ghulam Hussain, Inspector, returned the entire weapons and ammunition."

272. Mr. Batalvi placed very great reliance on this passage in Fazal Ali's evidence, but he did not seem to realize that the witness has not implicated Mr. Bhutto. Secondly, before I continue with the witness's evidence, I have to point out that what the witness stated in this passage was not contained in his statement to the Police, although this statement was recorded on 18th September, 1977.

273. Now this omission in Fazal Ali's Police statement was so material that it was fatal to his veracity, the more so, as Ghulam Hussain had also similarly improved upon his statements in the High Court. Therefore, Mr. Batalvi did not attempt to argue that the omission in Fazal Ali's earlier statements would not be fatal to the witness's veracity, but he invited us to follow the view taken by the High Court and I will do so. However, in view of Mr. Yahya Batkhtiar's submissions, it would be convenient first to examine another attempt by Fazal Ali to corroborate Ghulam Hussain's evidence.

274. Ghulam Hussain said that he had to wind up the Commando Camp which he was running shortly after the murder in Lahore, so he had to return to the Armoury "the remaining ammunition, live as well as spent from the camp" As to the spent ammunition, he should have had 1500 empties, but he was 51 short, because 7 had been fired at Islamabad, 30 at Lahore and the rest had been lost in training exercises at the Commando Camp. However, although he knew that the empties would not be accepted because they were 51 short, he took them to Fazal Ali, who refused:-

"To accept the consignment without the 51 spent cases being supplied to him. The shortage was in the sten-gun empty cases and I reported the whole matter to Mian Muhammad Abbas. He asked me to report back to him after three or four days during which he would be able to make some arrangements."

275. Then according to the witness, when he went back to Mian Abbas after three or four days, Mian Abbas gave him a Khaki envelop-

"Which contained 51 empty cases of sten-gun ammunition and I went to Fazal Ali and gave him all the ammunition on the basis of road certificate Exh. P.W. 24/9 which bears my signatures."

276. There is not a word about these 51 empties in the earlier statements of the approver, and the reasons for this attempt to improve upon the prosecution case become apparent from perusal of Fazal Ali's evidence to which I turn.

277. As Fazal Ali said that Ghulam Hussain had come to him two or three days before the 25th of November, 1974 to return the ammunition issued to him on 9th May, 1974 as the Commando Camp was being closed. However, according to the witness, as the spent ammunition was short by 51 SMG empties, he refused to accept the ammunition brought by Ghulam Hussain unless he accounted for the missing empties, and so Ghulam Hussain went away and returned on the 25th of November, 1974. As he had brought the correct number of empties with him, he (Fazal Ali) checked them and accepted them. This evidence is an improvement on the earlier statement of the witness. Next, according to Fazal Ali, eight or ten days before the 25th of November, 1974, he had been summoned by Mian Abbas to his office and told to bring:

"25-30 fired cartridges of SMG, LMG. I returned to the armoury and took 30 empties of SMG, LMG to the Director. The Director ordered me to place those empties on the table as he was busy in his work ... I was summoned again after 2 or 21 hours by the Director Mian Muhammad Abbas and told me to take away the empties. I counted those empties. These were thirty and I deposited them again in the armours."

278. As Fazal Ali had refused to receive the empties from Ghulam Hussain 8 or 10 days before the 25th November, this statement, if true, would furnish strong corroboration of the prosecution case at least against Mian Abbas, so Mr. Yahya Bakhtiar submitted that this part of the evidence of the witness was also false and that it was a case of preconcerted perjury between Ghulam Hussain and Fazal Ali which cast doubt on the entire case.

279. I would, however, first examine the view of High Court which reads:

"It is true that the statement made in Court regarding the directions of Mian Mohammad Abbas to give the required weapons to Ghulam Hussain P.W. 31 on a chit without recording the same in his register and the threats given by him in this connection do not find any mention in the statement under section 161, Cr. P.C., Exh. P.W. 39/9-D; but P.W. 24 positively stated that he had given all the details of facts to the Investigating Officer though he had not read his statement nor had he signed it. In answer to a question that he had made improvement upon his statement under section 161, Cr. P.C. to bring the present statement in line with the prosecution version and that he had done this dishonestly, he stated that he had already taken an oath before he started making a statement and had stated what had really happened. The statement of Mohammad Boota P.W. 39 is clearly explanatory of the omissions in Exh. P.W. 39/9-D which were put to P.W. 24. While proving the statement Exh. P.W. 39/9-D he stated that "so far as Fazal Ali's stand is concerned, I would like to point out that his statement was also recorded in a case under section 307, P.P.C. which was being investigated contemporaneously with the present case and a few things deposed by him which are incorporated in his statement in the other case were not reduced to writing in the present case .... "307, P.P.C. case related to the attack on Ahmad Raza Kasuri at Islamabad."

This statement explains the above mission."

280. I take these observations to mean that the learned Judges were of the view that there were no material omissions in the earlier statements of Fazal Ali, because what had been omitted in his earlier statement in the murder case had been referred in his earlier statement for the Islamabad case. But as I showed, the material omissions also related to the question of the 51 empties which Ghulam Hussain said he was not able to count for. Therefore, if I may say so, a cloak and dagger story was put up by Fazal Ali in his evidence both in order to inculcate Mian Abbas and in order to support the theory of the substitution of empties which Niazi had propounded for the first time in his evidence in Court. Now although this cloak and dagger story was not irrelevant to the Islamabad case, it was more relevant to the murder case, and as there is not a word about it in Fazal Ali's earlier statement in the murder case, I am unable to believe that he could have referred to this cloak and dagger story in his earlier statement in the

Islamabad case. Therefore, I am satisfied that the witness made this improvement in his evidence in order to bolster up the prosecution case against Mian Abbas and also in order to lend a semblance of truth to Niazi's evidence.

281. I now turn to the improvements made by Fazal Ali in his evidence about the role played by Mian Abbas in the issue of arms and ammunition to Ghulam Hussain in August, 1974. The learned Judges were of the view that the material particulars of this incident would be contained in Fazal Ali's earlier statement in the Islamabad case. I agree with the view, but it was the prosecution which placed such great stress on the Islamabad incident in the murder case; the accused were entitled to assume that Fazal Ali's statement in the murder case would contain the material particulars about all the matters about which he had been summoned to give evidence in the murder case. Further, although the learned counsel for the accused went on cross-examining Fazal Ali about the material omissions in his earlier statement in the murder case, the learned Public Prosecutor did not inform the Court that the witness's Police statement for the Islamabad incident had been recorded separately. In these circumstances, with all respect to the learned Judges, I do not see how the learned counsel for the accused could possibly have thought that the witness's statement to the Police had been recorded twice in two separate cases. And, on the other hand, if Fazal Ali had, in his earlier statement in the Islamabad case, referred to the illegal orders given to him by Mian Abbas in August, 1974 for supplying arms and ammunition to Ghulam Hussain, I have no doubt that the Public Prosecutor would have drawn the Court's attention to this statement. Any other view would mean that he was grossly negligent in the conduct of the prosecution, but any such assumption would be most unjustified as the learned Public Prosecutor has been very zealous in the conduct of his case. Thirdly, and this is most important, with due respect to the learned Judges, they had no means of knowing what Fazal Ali had said in his earlier statement in the Islamabad case, because that statement was not produced before them, therefore, they erred in holding that there were no material omissions in the witness's statement. But it is the improvements thus made by the witness in his evidence which implicate Mian Abbas and corroborate Ghulam Hussain's evidence against Mian Abbas. Therefore, on the dictum laid down by Munir, the prosecution cannot rely on these improvements for the purpose of corroborating an approver's evidence.

282. I have also to observe here that I am disturbed by the manner in which this witness made improvements in his evidence which were parallel to the improvements made by Ghulam Hussain in his evidence. How could two witnesses, who were both Police Officers, make parallel improvements in their evidence? I am disturbed by this coincidence, and it lends some support to Mr. Yahya Bakhtiar's submission that it is a case of pre-concerted perjury between the two witnesses.

283. Mr. Batalvi then drew our attention to the documentary evidence produced by the witness and he submitted that this evidence furnished strong corroboration of the

prosecution case. The argument has reference to the evidence about the manner in which the FSF used to receive ammunition from the CAD, Havelian, and as Fazal Ali was incharge of the Armoury, he produced the stock registers of the Armoury and other documents such as road certificates, which, *prima facie*, proved the contention of the prosecution that the FSF Armoury had received bullets bearing lot number 661/71 from the CAD Havelian, and that bullets with this lot number had been issued to Ghulam Hussain. I would, however, point out here that Mr. Yahya Bakhtiar criticized the entries in the stock registers, and I would have examined his submission if the question had been of the corroboration of a witness on the ground that he was an interested witness. But the question here is of the corroboration of the evidence of an approver, and as I explained the evidence of an approver cannot be accepted, unless it is corroborated in material particulars against the accused. But even on the assumption that the stock registers and the documentary evidence produced by Fazal Ali are beyond challenge, this would only corroborate Ghulam Hussain's evidence about the manner in which he had obtained ammunition from the FSF Armoury. Now as I have no doubt that he was responsible for the murder, how does this further the prosecution case either against Mr. Bhutto or against Mian Abbas? Additionally, Ghulam Hussain used to draw the ammunition from the FSF Armoury because he was running a Commando Camp, therefore on this ground also I am not impressed at all by the documentary evidence produced by Fazal Ali.

284. Mr. Batalvi then submitted that Ghulam Hussain's evidence was corroborated by that of Amir Badshah, who was incharge of the third battalion of the FSF in Lahore, and of Mohammad Amir. But neither of these witnesses implicate Mr. Bhutto in any way, because "they do not claim to have met him or seen him or carried out any order on his behalf. Similarly, Mohammad Amir's evidence does not implicate Mian Abbas in any way. But Amir Badshah said in his evidence that he had supplied sten-guns, pistols and cartridges in September, 1974 to Sufi Ghulam Mustfa, one of the appellants before us, on the orders of Mian Abbas without making any entry in the stock registers maintained by him, because that was the order of Mian Abbas. The witness also said that the arms and. ammunition supplied by him had been re-turned to him a few days after the murder of Mr. Kasuri's father. This evidence, if true, would have furnished corroboration of Ghulam Hussain's evidence against Mian Abbas, but the question is whether it is true, and here the ballistic expert's report, which was withheld by the prosecution, is fatal to its case. As the report was negative, it means that Ghulam Hussain's evidence about the manner in which he had collected sten-guns and/or the manner in which he had collected ammunition for the murder is false. Therefore, on this short ground, no reliance can be placed on Amir Badshah's evidence.

285. The evidence thus produced by the prosecution appears impressive because of the number of witnesses examined and the documents produced, but the question is whether it is sufficient to prove the guilt of h the two appellants who had challenged

their convictions in appeals in this Court, and I would first briefly recapitulate the evidence against Mr. Bhutto.

286. The prosecution case against him rests on the evidence of Masood Mahmood, and for the many reasons which I have given, the evidence of this witness cannot be accepted without strong corroboration, therefore, the prosecution relies on three important witnesses, Welch, Saeed Ahmad Khan and Mr. Kasuri. But Welch has only said that Masood Mahmood had told him to assassinate Mr. Kasuri. This statement cannot be stretched to mean that Masood Mahmood had told Welch to assassinate Mr. Kasuri on Mr. Bhutto's orders. As Mr. Batalvi was conscious of this difficulty, he submitted that Masood Mahmood had no motive to implicate Mr. Bhutto falsely, therefore, the order given by him to Welch to kill Mr. Kasuri must have been given on Mr. Bhutto's orders. In the first place, if we were to accept this argument, we would be substituting evidence by conjecture. Secondly, Masood Mahmood was not only an approver, but he was an approver under a very strong temptation to please the investigation agency by giving false evidence. And for generations, the law has been that an approver is the type of a man, who will in the words of Munir: -

"Be unscrupulous enough to accept suggestions of others to inculpate a person unconnected with the crime in place of his real accomplice for whom he may have a soft corner."

287. This Court's judgment in Abdul Qadir's case is one of the many authorities in which this dictum has been followed. In this background evidence of motive would not be sufficient to corroborate the approver's evidence. In any case, Mr. Kasuri had, in the words of Mr. Batalvi, a love-hate relationship with Mr. Bhutto, and the element of bias in the witness's evidence is apparent from a perusal of his cross-examination. In any event, the local enmities and hatreds against this witness were so intense that, in my humble opinion, his evidence cannot furnish any corroboration of an approver's evidence. But as Saeed Ahmad Khan too was an accomplice, putting the prosecution case, at its highest, his evidence can only be a link in a chain of corroboratory evidence, and I have rejected as false his claim that Mr. Bhutto had told him to see that no investigations were made into the activities of the FSF. Therefore, the only part of this witness's evidence which is relevant is his statement that Mr. Bhutto had told him to give a reminder to Masood Mahmood to carry out the task entrusted to him in connection with Mr. Kasuri. In the circumstances, this too is a very weak piece of corroboratory evidence, therefore, Mr. Batalvi naturally relied on the evidence of the other Police Officers that they had been prevented on account of fear of Mr. Bhutto from investigating the murder properly.

288. I have shown how Mohammad Asghar stated again and again that pressure was brought to bear upon him, but persistent cross-examination proved that the only pressure on him was his own reluctance to record Mr. Bhutto's statement under section

161 of the Criminal Procedure Code. I also regret to say that I am not impressed by the evidence of this witness, which began with a bang and ended with a whimper. However, Mohammad Wars admitted that he did not investigate the case properly, and he explained that he had failed to examine the role of the FSF in the murder, because of the pressure brought to bear upon him by Saeed Ahmad Khan, therefore, the prosecution had to prove that Saeed Ahmad Khan had brought this pressure on Mohammad Wars on account of Mr., Bhutto and notion account of the head of the FSF (namely the approver) who would have been affected by these investigations. But there is no such evidence, and this apart from the fact that Saeed Ahmad Khan was both an accomplice and unreliable witness.

289. I am aware that reports on the progress of the investigations in the murder case were regularly put up to Mr. Bhutto, but any one implicated in a murder case would follow the progress of the case with the utmost interest and obtain information about it if he was in a position to do so, therefore, Mr. Bhutto's conduct in taking interest in the case is as consistent with his guilt as with his innocence. As I explained, the conduct of an accused cannot furnish any corroboration of the prosecution case unless it is reasonably inconsistent with any interpretation other than the guilt of the accused and by this test all the other submissions of Mr. Batalvi about Mr. Bhutto's conduct failed except for one observation which I would make. As Mr. Bhutto was following the progress of the case, he must have known that no attempt was being made to make an enquiry into the affairs of the FSF, although the recovery of the empties indicated that such an enquiry was necessary. Would this failure to give directions for a proper enquiry furnish corroboration of the prosecution case? Whilst the question thus raised had disturbed me, the short answer is that it is a question of fact and we do not know what Mr. Bhutto did, because no question was put to him in this behalf in his examination by the Court, therefore, this plea also fails.

290. I am aware that Mr. Batalvi had also placed great stress on the documentary evidence, but even if this is accepted, it would furnish corroboration only of Ghulam Hussain's evidence about how he planned and carried out the murder. But as an accomplice is always in a position to give a convincing account of the crime in which he has participated, Abinger, C.B., observed more than a hundred and fifty years ago:-

"That corroboration, ought to consist in some circumstance that affects the identity of the party accused."

291. And this dictum has been followed without exception by all the High Courts of the sub-continent and as far as I know by all the superior Courts of the common law countries. Therefore, I am astonished at the arguments advanced by Mr. Batalvi on this aspect of the case. No doubt they might have been relevant if Masood Mahmood and Ghulam Hussain had merely been hostile witnesses, but as they are approvers, their evidence cannot be accepted unless it is corroborated in material particulars against the



accused, who have denied their guilt, therefore, learned counsel's reliance on the documentary evidence was totally misconceived. And as I have referred here to Ghulam Hlissain, I might observe that this witness implicated Mr. Bhutto only by double hearsay, if I may say so, and further he was a thoroughly dishonest witness, therefore, it would be a waste of time to refer to his evidence here. But this is all the evidence against Mr. Bhutto. Accordingly, in the circumstances discussed, I am satisfied that the prosecution has failed to prove his guilt and I would allow it.

292. Mr. Yahya Bakhtiar also submitted that the trial had been vitiated by grave procedural irregularities and by bias, but it will be convenient to examine first the question whether Mian Abbas's conviction can be supported by the evidence against him. But as I pointed out, this appellant had changed the position taken by him after we had admitted his appeal. Long after arguments had commenced in the appeals, his learned counsel informed us that he (Mian Abbas) had changed his mind and pleaded guilty to the charges against him. Therefore, he withdrew from the appeal with our permission and as Mr. Batalvi's submission was that Mian Abbas's appeal should be dismissed as withdrawn, I will first examine this submission.

293. Mr. Batalvi was not able to refer us to any provision under the Criminal Procedure Code under which an appeal could be withdrawn after it had been admitted to regular hearing. And further although the Code contains provisions for withdrawing other types of criminal proceedings, section 423 reads:

"423. Powers of Appellate Court in disposing of appeal. - (1) The Appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and, in case of an appeal under section 411-A, subsection (2) or section 417, the accused, if he appears, Court may if it considers that there is no sufficient ground for interfering, dismiss the appeal or may-

(a)-----

(b) in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court or sent for trial, or (2), alter the finding, maintaining the sentence, or, with or without altering the finding reduce the sentence, or (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence, but, subject to the provisions of section 136, subsection (1) not so as to enhance the same;

(c) -----

(d) -----

(2) -----

294. The section prescribes that an appeal which has been admitted can be dismissed only after perusing the record of the case, and that, in my opinion, imposes an obligation on the Court not to dismiss an appeal unless the Court is satisfied from the perusal of the record that the conviction of the appellant was according to law. This was also the view of the Judicial Committee in *King-Emperor v. Dahu Raut*<sup>462</sup>. And as this judgment was followed by a Full Bench of the Lahore High Court in *Ishar Das v. Nur Din*<sup>463</sup>, I am surprised at Mr. Batalvi's submission.

295. I would, therefore, turn to the case against Mian Abbas. As I indicated earlier, this appellant had first recorded his judicial confession, but this was hardly inculpatory. In any event, little turns on this confession because it was retracted, and, so the prosecution had to prove its case against this appellant.

296. Mr. Batalvi, therefore, relied on the evidence of Masood Mahmood and Ghulam Hussain and submitted that the evidence of these approvers was amply corroborated by other evidence. But I showed earlier how these two approvers falsely claimed that they did not know each other. Further Ghulam Hussain had altered his statement as an approver in order to exculpate Masood Mahmood whilst he was in custody. That an accused should alter his evidence whilst in custody in order to oblige another accused who was in custody, is to say the least, a startling fact which does not improve the case of the prosecution. Therefore, once again, the evidence of these approvers cannot be accepted without very strong corroboration. And as Mr. Batalvi placed great stress on the documentary evidence produced by Fazal Ali and on other documentary evidence such as the site plan, recovery memo, etc., I would repeat that this evidence only corroborates the approver's description of how he carried out the murder. It does not furnish any corroboration of his evidence against the accused. It is true that at first sight the evidence of Fazal Ali; Amir Badsha's and Muhammad Amin appeared to furnish strong corroboration of Ghulam Hussain's evidence against Mian Abbas. But for the reasons which I have given earlier, Fazal Ali's evidence does not inspire confidence. Similarly, although Amir Badshah's evidence would appear at first sight to furnish strong corroboration of Ghulam Hussain's evidence against Mian Abbas, it is inconsistent with the ballistic expert's report because that report was negative. No doubt the documentary evidence relied upon by Mr. Batalvi is sufficient to prove that the bullets used in the occurrence had the lot number 661/71 and as I explained this means that Ghulam Hussain probably used ammunition belonging to the FSF. But as the ballistic expert's report was negative, this necessarily means that the sten-guns used

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<sup>462</sup> AIR 1935 PC 89

<sup>463</sup> AIR 1942 Lah. 298

in the occurrence were not the sten-guns of the third battalion, therefore, the evidence of Amir Badshah and Muhammad Amir is false and once again it seems to be a case of pre-concerted perjury.

297. Mr. Batalvi then pointed out that Ghulam Hussain's T.A. and D.A. Bills for the month of November, 1974 had been paid immediately, and, according to learned counsel, this could only have been on account of Mian Abbas's orders and so the prompt payment of these bills corroborated Ghulam Hussain's claim that he carried out the murder at Mian Abbas's orders. But as the prosecution can rely on the conduct of an accused only if it is incompatible with his innocence, the argument of learned counsel assumes that a prompt payment of a man's dues is only capable of a sinister interpretation. I cannot agree with this assumption, but even if we give the benefit of doubt to the prosecution and assume that there was a sinister significance in the prompt payment of Ghulam Hussain's bills, this only means that he had a protector in the FSF whose goodwill enabled him to recover his dues immediately, and, so the question is whether this protector was Mian Abbas or Masood Mahmood. Now it was for the prosecution to prove that this protector was not Mian Abbas the moreso, as Mian Abbas had to obey Masood Mahmood's orders and Mr. Batalvi was not able to refer us to any evidence in support of his submission except Ghulam Hussain's evidence which cannot be accepted without corroboration. On the other hand, I showed earlier that when the approvers were in custody, the approver, Ghulam Hussain, had helped Masood Mahmood by trying to exculpate Masood Mahmood in his statement as an approver. In these circumstances, the only inference I can draw from the evidence is that it was Masood Mahmood's patronage which ensured the immediate payment of Ghulam Hussain's bills.

298. Mr. Batalvi also relied on Mian Abbas's letters to Welch about Mr. Kasuri's visit to Quetta in September, 1974. So, I would recall here that Air Marshal Asghar Khan's party had booked accommodation at the Imdad Hotel, Quetta and they had all stayed there. But, Welch had further stated in his report that Mr. Kasuri had not spent the night in the room which had been booked for him in the Imdad Hotel. As the report did not state where Mr. Kasuri had spent night, Mian Abbas asked Welch by his letter dated 25th September 1974, to clarify the position and Welch replied six weeks later by his letter dated 7th November 1974 that Mr. Kasuri had spent the night in "some other room reserved for members of the party in the hotel". Mian Abbas's explanation of this correspondence was that it was a routine enquiry on Masood Mahmood's orders and as the intelligence reports had been sent only to Masood Mahmood, it seems to me obvious that the enquiries were made by Mian Abbas on Masood Mahmood's orders. Additionally, Masood Mahmood did not even claim that he had taken Mian Abbas into confidence about his plans to assassinate Mr. Kasuri in Quetta, therefore, I see nothing sinister in the enquiry made by Mian Abbas, and the very fact, that Welch replied to Mian Abbas after a delay of nearly six weeks, corroborates Mian Abbas's claim that the

enquiry was a routine enquiry. Therefore, nothing turns on this exchange of correspondence and I am not impressed by this submission of Mr. Batalvi, either.

299. In the circumstances discussed, it is clear that the evidence of the approvers against Mian Abbas is not corroborated by any independent evidence which could implicate Mian Abbas, therefore, I would set aside his conviction and allow his appeal.

300. I now turn to the appeals of the three accused, who had pleaded guilty. They never retracted their confessions and they stood by them; even when they appeared before us. Additionally, these confessions are corroborated by the evidence of Mohammad Amir, but it is not necessary to discuss this corroboratory evidence because a conviction can be based on a judicial confession if the Court is satisfied that it was genuine and voluntary and I am satisfied that the confessions of the three appellants in the instant case were genuine and voluntary. The appeals of these appellants against their convictions must therefore be dismissed and the only question is whether they are entitled to the benefit of the lesser penalty under section 301 read with section 302 of the Penal Code.

301. Taking first the case of Arshad Iqbal and Rana Iftikhar, not only had they fired at Mr. Kasuri in order to kill him, but it is clear from the circumstantial evidence that they had fired in a reckless manner, and indeed Arshad Iqbal has admitted in his confession that they had fired indiscriminately at Mr. Kasuri's car. It is true that they took a somewhat different position in the High Court and said in their statements under section 342 of the Criminal Procedure Code that everything had taken place in the manner described by Ghulam Hussain in his evidence. But as I explained, the glaring discrepancy between Ghulam Hussain's evidence and the confessions of these two appellants was that, according to the appellants, Ghulam Hussain too had fired a pistol, whilst Ghulam Hussain denied having fired a pistol, because he was at some distance from the place of occurrence. The appellants have not explained why they abandoned their own version of Ghulam Hussain's role in the occurrence, but it is obvious that they were trying to help the prosecution case. As this cannot possibly be treated as a mitigating circumstance, no grounds have been made out for interfering with the sentence passed against these two appellants. It is true that Sufi Ghulam Mustafa, the other appellant, had not taken any part in the actual murder, but as he and Ghulam Hussain had planned the strategy of the murder, if I may say so, the sentence of death passed against this appellant is legal sentence and I see no grounds whatever for interfering with it.

302. I now turn to Mr. Yahya Bakhtiar's submission that Mr. Bhutto's trial was vitiated by bias, and because it was vitiated by bias, we should, in accordance with the law declared by this Court in *Muhammad Ismail Chowdhury v. Abdul Khaleque Sowdagar*

and another<sup>464</sup> set aside Mr. Bhutto's conviction and remand the case for a fresh trial. As I am in respectful agreement with this Court's view in Muhammad Ismail Chowdhury's case I would only observe that the question of remanding the case would have required examination if I had rejected learned counsel's submission that the prosecution had failed to prove Mr. Bhutto's guilt. But as I am of the view that the prosecution has failed to prove Mr. Bhutto's guilt beyond reasonable doubt, the question of remanding the case for a fresh trial does not arise, and I am relieved of the painful necessity of examining learned counsel's submissions on the question of bias, except for one argument, because the contention was that the High Court had declared bad law.

303. This argument has reference to an application filed by Mr. Bhutto under section 561-A of the Criminal Procedure Code for the transfer of his case for trial "by another Bench, or Judge preferably the Sessions Judge, Lahore". This application was dismissed by the learned Judges on 9th January, 1978 and in dismissing it, the learned Judges observed in paragraph 1.3 of their order:-

"It is a rare phenomenon for a counsel or a party to apply for transfer but Judges do not mind if facts are brought to their notice in respectful language to enable them to consider the advisability of hearing a matter. It is to such information that reference has been made in the judgment of his Lordship the Chief Justice in *M. H. Khondkar v. State*<sup>465</sup>; and the judgment in *Yusaf Ali Khan v. The State*<sup>466</sup>.

304. It was, however, clarified in *Khondkar's case* that the plea must be "wholly justified on factual grounds" and that "mere apprehension in the mind of a litigant that he may not get justice, such as is based on inferences drawn from circumstantial indications, will not justify the raising of the plea. The facts adduced must be such that the conclusion of bias follows necessarily therefrom."

305. No exception can be taken to the statement of the law in this passage. However, in order to understand Mr. Yahya Bakhtiar's submission, I may explain here that in *Khondkar's case*, the question was whether a person could file an application in a High Court for the transfer of his case on the ground that the Judges who were hearing the case were biased against him. Largely on the basis of the view taken by the Lahore High Court, S. A. Rehman, J., and Kaikaus, J., were of the view that an allegation of bias or partiality could not be made against a Judge of a superior Court, and, therefore, the application of the petitioner for the transfer of his case was not competent. Cornelius, C. J., did not agree with this proposition and observed:-

"It is open to a litigant to raise in the face of a Court an allegation of bias in that Court, and this is true whether it may be by a superior or a subordinate Court."

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<sup>464</sup> PLD 1960 SC 301

<sup>465</sup> PLD 1966 SC 140

<sup>466</sup> PLD 1977 SC 482

306. As Hamoodur Rehman and Fazle Akbar, J., agreed with the view of the Cornelius, C. J., it is clear that according to the law declared by this Court a litigant can file a transfer application on the ground of bias provided he does not scandalize the Court or malign it unnecessarily or falsely, and this view was unanimously followed in *Yusaf Ali Khan's case*. However, in paragraph 301 of the judgment under appeal, the learned Judges observed:-

"Now no Court much less a superior Court can allow litigant to challenge before it its fairness, integrity and impartiality, or to scandalize it, and to go on repeating with impunity, scandalous and libelous attacks on Judges which are calculated to lower the authority of the Judges and to malign them..."

307. Although Mr. Yahya Bakhtiar only criticized the first part of this passage ending with the words "fairness, integrity and impartiality", I would clarify here that I agree with the view of the High Court that a litigant cannot be permitted to scandalize Judges and Courts. But there is a difference between filing a transfer application which scandalizes Judges and a transfer application which is filed in the manner prescribed in *Khondkar's case* and in *Yusaf Ali Khan's case*. Therefore, I agree with Mr. Yahya Bakhtiar that the observations criticized by him are not good law. I am also surprised at these observations, because they are inconsistent with the observations of the learned Judges in their order of 9th January, 1978.

308. I now turn to Mr. Yahya Bakhtiar's submission that the trial was vitiated by procedure irregularities and illegalities which had prevented Mr. Bhutto from conducting his defence properly. As these irregularities have been listed in the judgment of my Lord the Chief Justice, it is not necessary for me to refer to them, and so I would only observe that a conviction can be quashed on the ground of irregularities in the trial if the irregularities have "occasioned a failure of justice". But as I am of the view that Mr. Bhutto's conviction is illegal, it follows that these irregularities or the alleged irregularities have not led to a miscarriage of justice, therefore, it is not necessary to examine Mr. Yahya Bakhtiar's submissions.

309. However, one of Mr. Yahya Bakhtiar's submissions was that the trial of Mr. Bhutto had proceeded in his absence in breach of the provisions of section 540-A of the Criminal Procedure Code, and as this section has seldom come up for construction before the superior Courts, I would make a few observations on it. In my humble opinion, one of the fundamental principles of the Criminal Procedure Code is that a criminal trial should always be held in the presence of the accused. But this principle was a principle evolved by the common law Courts for the proper administration of justice, and a rule evolved by Judges should not be permitted to lead to injustice. And the principle that a criminal trial cannot proceed in the absence of the accused can lead to injustice. Thus, for example, in petty cases it is the accused who seek to be relieved of

the obligation to be present at their trial. Or an accused may deliberately resort to delaying tactics, therefore, the rigid and inflexible application of this principle caused injustice and the Legislature stepped in to rectify the position. Section 540-A in so far as it is relevant prescribes:-

"At any stage of an inquiry or trial ... where two or more accused are before the Court, if the Judge is satisfied, for reasons to be recorded, that any one or more of such accused is or are incapable of remaining before the Court, he may, if, such accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused."

310. The power thus conferred on the Court is a wide power, but like all powers conferred on the Courts, it must be exercised judicially. With this observation, I would turn to Mr. Batalvi's submissions. Mr. Bhutto, had fallen ill during the course of the trial and I have no doubt that his illness was genuine. Further, as submitted by Mr. Batalvi, the Court had granted a couple of adjournments, but as Mr. Bhutto's illness continued, the Court decided without any written order to proceed with the case in Mr. Bhutto's absence as he was represented by his Advocate. Mr. Yahya Bakhtiar submitted that the Court had acted illegally in proceeding under this section without passing an order. Secondly, he submitted that the Court had erred in assuming that Mr. Bhutto was "Incapable of remaining" before it on account of his illness. Now, I do not agree with the submission of Mr. Yahya Bakhtiar that the incapacity envisaged by the section would not include the incapacity caused by illness. However, illness is a calamity beyond the control of the accused, and because it may render an accused "Incapable of remaining" in Court, this does not mean that the Court should exercise its discretion against him and proceed with the trial in his absence. As the discretion conferred by the section is a judicial discretion, it must be exercised judicially. And in exercising it, the Court must take into account the right of the accused to be present at his trial, the rights of the other accused who may object to delays in the trial, and also the right of the public in the speedy administration of justice..

311. Now, as I indicated, according to Mr. Yahya Bakhtiar, the High Court had erred in proceeding with Mr. Bhutto's trial in his absence because he was too sick to give instructions and because his illness was a calamity beyond his control which entitled him to an adjournment. This submission would have required examination if I had been of the view that Mr. Bhutto's defence had suffered on account of his absence from the trial, but as in my opinion, the prosecution has failed to prove his guilt, it follows that no prejudice was caused to Mr. Bhutto by the fact that the Court decided to proceed with the case in his absence. In these circumstances, it is not necessary to examine Mr. Yahya Bakhtiar's Submission, but I would clarify that I am not examining his submission only because I am of the view that Mr. Bhutto's defence was not prejudiced because of his absence during a part of his trial.

312. Mr. Yahya Bakhtiar also criticized the construction placed by the High Court upon sections 164, 337 and 342 of the Criminal Procedure Code. But I am not impressed by his submissions on this aspect of the case and I agree with the observations in the judgment of my Lord the Chief Justice on the proper construction of these sections.

313. Mr. Yahya Bakhtiar had also filed an application for examining witnesses, but I would dismiss this application on the short ground that the prosecution has failed to prove Mr. Bhutto's guilt.

314. Finally, Mr. Yahya Bakhtiar criticized the personal observations made against Mr. Bhutto in paragraphs 610 to 616 of the High Court's judgment and submitted that they should be expunged. I have read these observations. They are not supported by any evidence and I have to state with very great regret that they are totally irrelevant to the question of Mr. Bhutto's guilt. Accordingly, I would expunge them.

315. In the result, I hold that the prosecution has failed to prove beyond reasonable doubt the guilt of Mr. Bhutto and of Mian Abbas, and I would, therefore, allow their appeals and order their release. But, for the reasons given herein, I would dismiss the appeals of the other three appellants.



**G. SAFDAR SHAH, J.** - By this judgment, I propose to dispose of Criminal Appeals bearing Nos. 11, 12 and 13 of 1978, all of which are directed against the judgment of a Full Bench, comprising five Judges of the Lahore High Court, dated March 18, 1978, in Criminal Original Case No. 60 of 1977.

2. The five appellants herein were tried by the Lahore High Court, on the original side, for conspiracy to assassinate Ahmad Raza Kasur; a member of the then National Assembly of Pakistan and in pursuance thereof making a murderous assault on him by firing on his car with automatic weapons on the night between November 10 and 11, 1974, in consequence of which his father Nawab Muhammad Ahmad Khan was killed. Upon the mass of oral and documentary evidence produced during the trial, all of them were found guilty, accordingly convicted and sentenced as under:-

(1) Each to five years' R. I. under section 120-B read with section 115, P. P.C.;

(2) Zulfikar Ali Bhutto, Mian Muhammad Abbas and Ch. Ghulam Mustafa each to seven years' R. I. under section 107/109, P. P.C. ;

(3) Arshad Iqbal and Rana Iftikhar Ahmad each to seven years' R. I. under section 307/34, P. P.C.; and

(4) Zulfikar Ali Bhutto, Mian Muhammad Abbas and Ch. Ghulam Mustafa each to death under section 302/301/109/111, P. P.C., whereas Arshad Iqbal and Rana Iftikhar Ahmad were awarded similar sentence under section 302/301/34, P.P.C., with further direction that so far as appellant Zulfikar Ali Bhutto is concerned, he would pay Rs. 25,000 as compensation to the heirs of deceased Nawab Muhammad Ahmad Khan under section 544-A, Cr. P. C: failing which he was to undergo rigorous imprisonment for a period of six months. All the said sentences of imprisonment were ordered to run concurrently and are to take effect in case the sentence of death awarded to the appellants is not carried out.

3. The background of the case leading to the carrying out of murderous assault on Ahmad Raza Kasuri, in which his father lost his life has been clearly brought out in the judgment of my Lord the Chief Justice. Therefore, it would be unnecessary to cover the same ground again except when it is absolutely necessary. The prosecution case in the High Court was that Ahmad Raza Kasuri was one of the founder members of the Pakistan People's Party (hereinafter referred to as the P.P.P.), which was founded in 1967 and of which Zulfikar Ali Bhutto was the Chairman. In the General Elections held in 1970, Ahmad Raza Kasuri was elected as a member of the National Assembly of Pakistan on the ticket of the P.P.P. from Kasur Constituency No. NA-63. In the events that happened, the said General Elections, instead of paving the way for achieving a better consolidation and integration of the two wings of the country, ended up in the

cessation of the Eastern Wing now a sovereign and an independent country, named Bangla Desh. On the happening of the said traumatic event in the political life of the Nation, Zulfikar Ali Bhutto whose P.P.P. had captured the majority of seats in the National Assembly, was called upon by the then Chief Martial Law Administrator and the President, General Muhammad Yahya Khan to form the Government. In December, 1971, Zulfikar Ali Bhutto was handed over the power by General Muhammad Yahya Khan as President of Pakistan as well as the Chief Martial Law Administrator and soon thereafter formed his Government in the Centre and in the two Provinces of the country, namely, the Punjab and the Province of Sindh, where his party was returned in majority. Ahmad Raza Kasuri, who seems to have become disenchanted with Zulfikar Ali Bhutto because of his alleged role which ultimately led to the break-up of the country, started bitterly criticizing the person and policies of the latter which strained their relations with the result that Zulfikar Ali Bhutto developed a personal hatred against him. On January 17, 1972, a murderous attack was made on the life of Ahmad Raza Kasuri at Kasur and in that behalf a criminal case was registered. In the year 1973, Kasuri left the P.P.P. and joined another political party by the name of Tehrik-e-Istaqlal, whereafter his criticism of Zulfikar Ali Bhutto became more violent. On June 3, 1974, on the floor of the National Assembly an unpleasant incident took place between Kasuri and Zulfikar Ali Bhutto during the course of which the latter admonished Kasuri to keep quiet, adding "I have had enough of you; absolute poison. I will not tolerate your nuisance."

4. The prosecution case is that as a result of the said incident, Zulfikar Ali Bhutto, in order to do away with Ahmad Raza Kasuri, entered into a conspiracy with approver, Masood Mahmood, the then Director-General of the Federal Security Force (hereinafter called FSF) to get Kasuri eliminated through the Agency of FSF. Masood Mahmood, in order to carry out the object of the said conspiracy, brought in appellant Muhammad Abbas his Director of Operation and Intelligence, who in turn directed approver, Ghulam Hussain to organize the assassination of Ahmad Raza Kasuri. In order to enable Ghulam Hussain to carry out the said order, Mian Muhammad Abbas not only arranged for him the supply of arms and ammunition from the armoury of the FSF but also directed appellant Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad to render to Ghulam Hussain all necessary assistance. It is said that in pursuance of the said directions of Mian Muhammad Abbas all the necessary arrangements were completed and consequently on the night between November 10 and 11, 1974, the car of Ahmad Raza Kasuri was fired upon at the roundabout of Shadman-Shah Jamal Colony, Lahore, with automatic weapons by Rana Iftikhar Ahmad and Arshad Iqbal as a result of which his father was killed, while approver Ghulam Hussain supervised the attack, being present in the nearby lane.

5. On August 24, 1974, a similar attack was made on Ahmad Raza Kasuri at Islamabad with automatic weapons by approver, Ghulam Hussain assisted by some members of the FSF. A case was registered in that behalf but it was filed as untraced by

DSP, Agha Muhammad Safdar although he had recovered from the scene of occurrence five crime empties of the same caliber, namely, 7.62 mm. as were used in the Lahore incident.

6. In the High Court, the prosecution produced 41 witnesses and a large Lumber of documents to prove that:-

(i) there existed between Zulfikar Ali Bhutto and Ahmad Raza Kasuri strained relations and enmity resulting in the threat extended to the latter on the floor of the Parliament on June 3, 1974 by Zulfikar Ali Bhutto;

(ii) the conspiracy entered into between Zulfikar Ali Bhutto and Masood Mahmood, in which approver, Ghulam Hussain and the other appellants joined subsequently, to murder Ahmad Raza Kasuri through the Agency of the FSF;

(iii) attack on Ahmad Ram Kasuri firstly at Islamabad on August 24, 1974 and later at Lahore on November 10/11, 1974, in which his father was murdered;

(iv) subsequent conduct of Zulfikar Ali Bhutto and his subordinates particularly of Saeed Ahmad Khan and his Deputy, late Abdul Hamid Bajwa with a view to interfering with the investigation of the case so that the possibility of detection of actual culprits may be excluded; and

(v) preparation of incorrect record of the investigation in 1974-75 by the Police under the direction of Saeed Ahmad Khan and his Deputy, the late Abdul Hamid Bajwa, with the object of shielding Zulfikar Ali Bhutto who was then holding the high Office of the Prime Minister of Pakistan.

7. All the five appellants herein pleaded not guilty at the trial. Appellant Mian Muhammad Abbas, who had made a confessional statement during the investigation of the case, retracted his confession before the trial opened saying that his said statement was obtained from him under duress as well as promise. He asserted that he did not have good relations with Masood Mahmood; that he had no knowledge of the conspiracy in question and had given no directions to approver, Ghulam Hussain or to other officials of the FSF for the supply of arms and ammunition. He also filed in the High Court a written statement to show that Masood Mahmood was annoyed with him. However, he admitted to have exchanged certain correspondence with M. R. Welch, Director, FSF, stationed at Quetta, and explained that the same was exchanged in routine. He summoned certain defence witnesses to show that he had twice tendered his resignation as Director, FSF as he had no desire to be a party to the alleged criminal activities of the said Force.

8. During the hearing of these appeals, however, Mian Muhammad Abbas has filed a written statement admitting therein the case of the prosecution but pleading that he had acted under duress due to the pressure brought to bear upon him by Masood Mahmood, the then Director-General of the FSF.

9. The remaining appellants, namely, Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad have stuck to their confessional statements made by them under section 164, Cr. P.C. acknowledging the role attributed to them by the prosecution. They have, however, pleaded that they had no option in the matter as by the oath administered to them on joining service in the FSF, they had simply carried out the orders of their superior, namely, Mian Muhammad Abbas, as also that they were pressurized and threatened by the latter as well as approver, Ghulam Hussain with dire consequences.

10. After reviewing the entire evidence produced before it, the High Court held that the prosecution had succeeded to establish that there existed strained relations between Zulfikar Ali Bhutto and Ahmad Raza Kasuri which furnished a motive to get him eliminated; that Zulfikar Ali Bhutto had entered into a conspiracy with Masood Mahmood in which conspiracy the other appellants joined later to execute the object of the conspiracy under the superintendence of Ghulam Hussain, approver; that the attack on Ahmad Raza Kasuri at Islamabad was a part of the same conspiracy; that the subsequent attack made on him at Lahore as a result of which his father was killed also was in furtherance of the same conspiracy; and that the initial investigation in the case was not honest as efforts had been made at various levels to divert the course of investigation with the object of screening the real offenders. The High Court accordingly found all the appellants guilty of the various charges, accordingly convicted them and sentenced them as aforesaid. Finally, the High Court observed that in view of the facts and circumstances of the case, there existed no extenuating circumstances in favor of the appellants as Zulfikar Ali Bhutto was then the Prime Minister of the country and it was his duty to uphold the life and liberty of the citizens of Pakistan, and not to use the Federal Security Force for eliminating his political opponents as also that the rest of the appellants were under no obligation to obey the unlawful orders of their superiors, and consequently the said plea could not afford them a valid defence in law.

11. During the course of elaborate and protracted arguments, spread over a period of about two months, Mr. Yahya Bakhtiar, the learned counsel for appellant Zulfikar Ali Bhutto has assailed the judgment of the High Court on three main grounds, namely:-

(a) that the case against his client is false, fabricated and politically motivated due to an International conspiracy to physically and politically eliminate him;

(b) that the trial stands vitiated as the Presiding Judge of the Bench, namely, Mr. Justice Mushtaq Hussain was biased against the appellant; consequently the

same was not conducted fairly in that the evidence was not recorded faithfully during the trial; objections raised by the defence counsel as to the admissibility of evidence were frequently not recorded and were often illegally overruled; and that as a result of the combined effect of the said prejudicial orders, the appellant was forced to boycott the trial from the 10th of January, 1978 onwards as a measure of protest; and

(c) that the prosecution had failed to prove its case beyond reasonable doubt; that the inadmissible evidence had been allowed to be brought on the record and taken into consideration against the appellant whereas admissible and relevant evidence had been shut out to his prejudice; and that the prosecution witnesses, particularly the two approvers, Masood Mahmood and Ghulam Hussain were not worthy of credit and that in any case their evidence, has remained uncorroborated as required by law.

12. The learned counsel, therefore, contended that on these grounds the appellant was entitled to acquittal or a re-trial by an impartial Bench or Court.

13. Mr. Yahya Bakhtiar, the learned counsel has also raised about twenty legal objections against the impugned judgment of the High Court. All these objections have been dealt with in the judgment of my Lord the Chief Justice, and considering that in respect of most of them, I have respectfully agreed with his views, it would be better to avoid the duplication of the process except where it would be necessary for me to deal with those objections in respect of which regrettably I have not been able to share his Lordship's views. Now proceeding from this premise, first I must confess that due to the voluminous and difficult nature of the case, in which elaborate, intricate and extensive arguments have been addressed by the learned counsel for the parties from the bar, to untangle some of the knotty legal problems, I was driven into a state of anxiety as to the methodology of writing this judgment. After a great deal of thought which I have been able to give to this problem. the plan which propose to follow is to go directly into the heart of the prosecution case in order to see if it can be said to have proved the essential features of it against the appellant beyond any reasonable doubt. In my view, the essential fundamentals of the case of the prosecution are: (a) the motive for which Mr. Zulfikar Ali Bhutto wanted the assassination of Ahmad Raza Kasuri; (b) the alleged conspiracy entered into between Mr. Zulfikar Ali Bhutto and Masood Mahmood for carrying out the said object; (c) the corroboration of the evidence of Masood Mahmood by Saeed Ahmad Khan; and (d) the correspondence exchanged. between M. R. Welch, Director, FSF, Quetta, on the one hand and Masood Mahmood and appellant Mian Muhammad Abbas on the other.

14. Now this being, the plan of my proceeding with the case, first I should have dealt with the motive. But on a second thought it would be proper for me to deal with another feature of the case which seems to me to be the starting point in the chain of

events which ultimately led to the formation of conspiracy between Mr. Zulfikar Ali Bhutto and Masood Mahmood in order to get Ahmad Raza Kasuri assassinated through the Agency of F&S. Now this feature relates to the meeting held between Masood Mahmood and Mr. Vaqar Ahmad in April, 1974 during the course of which the latter told Masood Mahmood that he was to meet with Mr. Bhutto on April 12, 1974 when the latter was going to offer him an appointment which he must accept. However, Mr. Vaqar Ahmad was not produced by the prosecution in the High Court, therefore, an objection was taken on behalf of appellant Bhutto, that Masood Mahmood could not possibly depose to the truth of what Mr. Vaqar Ahmad had told him in the said meeting, as his evidence in that respect would be hearsay, but the said objection was rejected with the result that the High Court relied on the evidence of Masood Mahmood against Mr. Bhutto. To this finding of the High Court, Mr. Yahya Bakhtiar has taken serious objection. In order to see the force of his objection, let us proceed to examine the evidence of Masood Mahmood, in so far as it relates to what Mr. Vaqar Ahmad had told him in the meeting held in April, 1974.

15. The evidence of Masood Mahmood that being a member of the Police Service of Pakistan he attained the rank of Deputy Inspector-General, and in 1969 was selected as Deputy Secretary General, CENTO with Headquarters at Ankara. On his return from Ankara in 1970, at his own request, he was posted as Deputy Secretary, Ministry of Defence, later promoted as Joint Secretary and Additional Secretary and then appointed to what he has called a punishment post, *viz.*, Managing Director, Board of Trustees Group Insurance and Benevolent Fund in the Establishment Division. On being appointed to that post, he attempted to meet with Mr. Vaqar Ahmad, the then Secretary Establishment, but did not succeed. Sometime in early April, 1974, however, Mr. Vaqar Ahmad called him and told him that he was to meet appellant Bhutto on April 12, 1974, but before that he should first come and see him. Mr. Vaqar Ahmad was very good to him in the said meeting. He told him that Mr. Bhutto was going to offer him an appointment which he must accept. He then dilated on the state of his domestic affairs saying that his wife was not keeping good health; his children were small; he himself was a heart patient; he had yet to clear the loans obtained by him from the bank as well as the Government in connection with the construction of only house which he possessed; that under the revised Service Rules an officer of Grade 21 (which he was) and above could be retired from service at any time; and that he actually read out to him the relevant Rules. All this conversation, therefore, left him with the impression that his job, was at the mercy of the Prime Minister and Mr. Vaqar Ahmad.

16. Now this being the evidence of Masood Mahmood, it should be obvious that what Mr. Vaqar Ahmad had told him in the meeting held in early April, 1974, was evidently hearsay, and not admissible in evidence under section 60 of the Evidence Act, which runs as under:-

"60. *Oral evidence must be direct.* - Oral evidence must, in all cases whatever, be direct; that is to say-

if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds;

Provided .....

Provided also .....

17. It is evident that the object of this section, which deals with oral evidence, seems to be, as confirmed by the views of eminent authors like Monir, and N. D. Basu, to exclude the kind of evidence which is called "hearsay". The word "must" appearing in the opening part of the section imposes a duty on the Court to insist upon the production of direct evidence. N. D. Basu has, in the 4th Edition of his Law of Evidence cited a favorite passage found in several works in the last century, viz. "it seems agreed that what another has been heard to say is no evidence, because the party was not on oath, also because the party who is affected thereby had not an opportunity of cross-examining". Kent, C. J., in *Coleman v. Southwick*<sup>467</sup> as quoted by Basu; at page 908 of his Law of Evidence (9th Edition), has summarized the rule of hearsay as follows:-

"why not produced S to testify what he told the defendant, instead of resorting to a by-slander who heard what he said ..... hearsay testimony is from the very nature of it attended with all such doubts and difficulties, and it cannot clear them up. 'A person who relates a hearsay is not obliged to enter into any particular; to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to recover any ambiguities; he entrenches himself in the simple assertion that he was told so, and I bases the entire burden on his dead or absent author' ..... The plaintiff by means of these species of evidence would be taken by surprise and be precluded from the

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<sup>467</sup> 9 John, p. 50

benefit of cross-examination of S as to all those material points which have been suggested as necessary to throw full light on his information.

18. Monir at page 692 of his Law of Evidence (1974 Edition) has, under the heading "Reasons for the exclusion of hearsay", this to say on the subject. "The rejection of hearsay is based on its relative untrustworthiness for judicial purposes owing to (i) the irresponsibility of the original declarant, whose statements were neither on oath, nor subject to cross-examination; (ii) the depreciation of truth in the process of repetition; and (iii) the opportunities for fraud, its admission would open; to which are sometimes added; (iv) the tendency of such evidence to protract legal inquiries; and (v) to encourage the substitution of weaker for stronger proofs."

19. The underlying principle in section 60 of the Evidence Act seems to be to reject all hearsay evidence in proof of any fact which in its nature is susceptible of direct evidence by a witness who can speak from his own knowledge, for being under the moral and legal sanction of oath, and being aware of running the risk of perjury, he offers himself for cross-examination by the defendant in support of the truth or his evidence. It is true that by the plain language of the section, the evidence of a witness who says that he had been told 'so and so' by B would be admissible in evidence in proof of the fact that the said statement had actually been made to him by B but the same would be inadmissible in proof of the contents of the said statement unless B himself appears as a witness and affirms the truth of what he had told him. For example if the fact in issue in a case is as to whether A had struck B, the evidence of C who had not seen the occurrence that D, who had actually seen the occurrence, had told him that A had struck B would be admissible under section 60 of the Evidence Act only in proof of the fact of what C had told him but the same would be inadmissible in proof of the truth of the said statement. As another example, suppose A files a suit against B for the recovery of Rs. 5,000 .... which according to him he had given on loan to B. The loan transaction being oral, A produces C in evidence who says that D had told him that the said loan had been advanced by A to B in the presence of D. Now the evidence of C of what D had actually told him would be admissible in evidence under section 60 of the Evidence Act only in proof of the fact that the said statement had been made to him by D but the same would be inadmissible in proof of the contents of the said statement unless D himself appears in the witness-box, affirms the truth of what he had told C and subjects himself to cross-examination by B. This to my mind seems to be the only sensible construction of section 60 of the Evidence Act. If the section is construed differently, it would follow that the statement of a witness, who has not appeared in the witness-box, and tendered himself for cross-examination by the other side, would be brought on the record of the case through the mouth of another witness, with the result that a flood gate of mischief would have been opened through which a mass of hearsay evidence would be allowed to inundate the field of all conceivable judicial proceedings.



In *Khurshid Ahmad v. Kabool Ahmad and others*<sup>468</sup> referred to by Monir at page 692 of the Law of Evidence, the scope of section 60 had fallen for consideration in the following circumstances: In a case of double murder the details of which may not be given, one Yasin Rajput a member of the local Union Council, was examined by the prosecution in the trial Court as a witness. The evidence given by him was that as member of Shahpur Chakar Union Council, within the area of which the said murders had taken place, he came to the scene of occurrence in the evening and learnt from complainant Khurshid and another Khurshid (PW. 11) that the accused were responsible for the crime. The High Court, however, discovered that neither the complainant nor Khurshid Ahmad (PW. 11) were asked, while giving evidence, as to whether they had met or spoken to Yasin Rajput at all that evening, and consequently the High Court held the evidence of Yasin to be hearsay and thus inadmissible. In *Santa Singh v. State of Punjab*<sup>469</sup> more or less a similar situation had arisen for consideration. In that case the precise question which had fallen for consideration was whether the sketch map of the place of occurrence, prepared by the Draftsman, after ascertaining from the witnesses where exactly the assailant stood at the time of the commission of the offence, and then measuring the distance between the two places shown to him and putting them down on the plan, was hit by the rule of hearsay? The Court consisting of five learned Judges was divided in its opinion, but the majority answered the said question in the negative thus:-

"it is not unusual to have a plan drawn by a draftsman and this is not done to evade the provisions of section 162 of the Criminal Procedure Code. If the draftsman is asked to prepare a sketch map of the place of occurrence, and if after ascertaining from the witnesses where exactly the assailant and the victim stood at the time of the commission of the offence, the draftsman measures the distance between the two places thus shown to him and puts it down on the plan, and further, if the witnesses corroborate his statement that they showed him the places, the evidence is legal and admissible. Even if the Court rules out under section 162, Criminal Procedure Code as inadmissible what the witnesses told the Head Constable and the Sub-Inspector, there is no such bar to the evidence given by the draftsman. Nor is the evidence hearsay when the eye-witnesses have been called and they say that they showed the different spots to the draftsman and in so far as the distance is concerned the draftsman himself measured them as he swears in the witness-box that the distances shown in the sketch are correct:"

20. The minority judgment in that case, however, excluded from consideration the sketch map on the ground that the evidence of the Draftsman taken with what he had noted on the map could only be treated as evidence of the prior statements of the

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<sup>468</sup> PLD 1964 Kar. 356

<sup>469</sup> PLD 1956 SC Ind. 527

witnesses recorded in the course of the investigation by the Police and was, therefore, inadmissible either as substantive or corroborative evidence amplifying the evidence given by the eye-witnesses in Court. Now this finding of their Lordships is no doubt weighty enough. But evidently the same was reached on the basis of another distinct principle and not under section 60 of the Evidence Act. In this view I would rather go by the majority judgment in which the true scope and connotation of section 60 of the Evidence Act had specially fallen for consideration. It should be noted, however, that in that case the Draftsman and all the witnesses had appeared in Court and corroborated each other. Therefore, their Lordships held that the sketch map prepared by the Draftsman, with the help of the witnesses, was not hit by the rule of hearsay evidence. Respectfully I agree with that conclusion. Assuming for the sake of argument, however, that the Draftsman alone had appeared in the witness-box in support of the sketch map prepared by him with the aid of witnesses, would the majority judgment have been the same? Perhaps the answer ought to be in the negative. In that case the evidence of the Draftsman, in which he had deposed that the sketch map had been prepared by him with the aid of witnesses on the spot, would be tantamount to hearsay evidence and thus inadmissible under section 60 of the Evidence Act.

21. Now bearing these principles in mind, it should be clear that the evidence of Masood Mahmood in regard to what Vaqar Ahmad had told him in the meeting held in April, 1974, would be admissible in evidence under section 60 of the Evidence Act only in proof of what he had told him as a fact, but not in proof of the truth of the said statement of Vaqar Ahmad. In my view this evidence of Masood Mahmood seems to clearly on all fours with the evidence of Yasin Rajput and of the Draftsman in the above Karachi and Indian Supreme Court cases, respectively, and so being in the nature of hearsay would be inadmissible under section 60 of the Evidence Act.

22. Mr. Ijaz Hussain Batalvi, the learned Special Public Prosecutor, has attempted to support the finding of the High Court. He contended that the said evidence of Masood Mahmood was not hit by the rule of hearsay, and thus was admissible under section 60 of the Evidence Act. In support of his contention he relied on two judgments of the Privy Council: (1) *Sm. Bibhabati Devi v. Ramendra Narayan Roy and others*<sup>470</sup> and *Subramaniam v. The Public Prosecutor*<sup>471</sup>. In the First case, which is popularly known as the Sanyasi's case, the true scope and purport of section 60 of the Evidence Act had fallen for consideration. The facts of the case were that Ramendra Narayan Roy, the respondent-plaintiff before the Privy Council, filed a suit against the appellant in the Court of First Subordinate Judge, at Dacca, for declaration that he was the second son of late Rajah Rajendra Narayan Roy of Bhowal; that his possession, in respect of one-third of his share of the properties described to the schedule may, therefore, be confirmed in his name or, if from the evidence, and under the circumstances, his possession could

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<sup>470</sup> AIR 1947 PC 19

<sup>471</sup> PLD 1958 C 100

not be established, then possession thereof should be given to him. The appellant defendant in the written statement filed by her denied, *inter alia*, the identity of the respondent-plaintiff, as also that the suit was within time. After a very long trial lasting for 608 days, the learned trial Judge decreed the suit, of respondent. On appeal by the appellant-defendant, a Special Bench of the Calcutta High Court. affirmed the decree and dismissed the appeal. The-appellant-defendant finally went in appeal to the Privy Council, where one of the contentions raised on her behalf were, and this is the contention with which we are concerned in the present case, that the learned trial Judge had erred by accepting the evidence of four witnesses (referred to as the 'Maitra group') as their evidence was hearsay, and not admissible under section 60 of the Evidence Act. Now the need to produce the said four witnesses in the trial Court had arisen because the respondent-plaintiff was alleged to have, due to a type of syphilis, died at the family rented house called 'Step Aside' at Darjeeling in April, 1909. The claim of the respondent-plaintiff was that he was taken for dead about dusk, between 7-00 and 8-00 o'clock on the evening of 8-5-1909; that arrangements were at once made for his cremation; that his body was taken in a funeral procession to the old *sasan*, and placed in position for cremation, when a violent storm of rain caused the party to take shelter; that, on their return, after the rain had abated, the body was no longer there; that thereafter another body was procured and taken to 'Step Aside', and was the subject of the procession and cremation the following morning. He maintained that while the funeral party was, on the evening of 8-5-1909, sheltering from the storm, he was found to be still alive by four *sanyasis* (ascetics), who were nearby and had heard certain sounds from the *sasan* and who released him, looked after him, and took him along on their wanderings; that when he recovered from an unconscious state, he lost all memory of who he was; that some eleven years later he recalled that he came from Dacca but not who or what he was; that in December, 1920, or January, 1921 he reached Dacca, and took up a position on the Buckland Bund, a public walk on the bank of the River Buriganga at Dacca; that thereafter followed a period of gradual recognition or suspicion of him as the Second Kumar by certain people, which culminated in the removal from his body of the ashes, with the result that his relatives recognized him and his sister accepted him as the Second Kumar. In order to prove this seemingly fantastic story, the respondent-plaintiff produced in the trial Court the witnesses of the 'Maitra Group' who supported him. The pivotal point on which the fate of his case evidently hinged in the trial Court was the precise time of his 'death' at Darjeeling in May, 1909. If it could be proved that his 'death' had taken place at dusk, between seven and eight o'clock, on 8-5-1909, his evidence would be credible but in case he was proved to have 'died' shortly before midnight; and that the following morning his body was taken in funeral procession and was cremated with the usual rites at the new *sasan* at Darjeeling, then his story would be unacceptable and by would be non-suited.

23. Now the evidence of witnesses of the 'Maitra Group' was that "one day they were seated in the common room of the (Lawis Jutilee) Sanitorium before dinner that would be about 8-00 p. m. - chatting, each does not recollect all the rest, but each recollects the

day, and the fact they used to be in the common room before dinner. They recollect the day, nor the date of anything, but the day when a certain thing happened. When they were so seated, and there were others too, a man came with the news that the Kumar of Bhowal was just dead, and he made a request for men to help to carry the body for cremation. Principal Maitra has a distinct recollection of this request the news broke in upon the talk they were having, and the thing has stuck in his memory". It is clear from the judgment however, that the man who came to the common room and broke the news of the 'death' of Second Kumar to the witnesses of the 'Maitra Group' was not examined. Therefore, an objection was taken to their evidence under section 60 of the Evidence Act, but this objection was repelled by the Privy Council as under:-

"18. Their Lordships are of opinion that the statement and request made by this man was a fact within the meaning of Ss. 3 and 59, Evidence Act, 1872, and that it is proved by the direct evidence of witnesses who heard it, within the meaning of S. 60; but it was not a relevant fact unless the learned Judge was entitled to make it a relevant fact by a presumption under the terms of S. 114. As regards the statement that the Kurnar had just died, such a statement itself would not justify any such presumption, as it might rest on mere rumor, but, in the opinion of their Lordships, the learned Judge was entitled to hold, in relation to the fact of the request for help to carry the body for cremation, that it was likely that the request was authorized by those in charge at Step Aside, having regard to 'the common course of natural events, human conduct and public and private business', and therefore to presume the existence of such authority. Having made such presumption, the fact of such an authorized request thereby became a relevant fact, and the evidence of the Maitra group became admissible. Accordingly, this contention fails."

24. Now the ratio of this dictum would seem to be based on two assumptions:- (1) that according to the Hindu custom cremation would, when possible, follow immediately after the death, of which notice was taken at the end of para. 17 of the judgment; and (2) upon the presumption drawn by the learned trial Judge, under section 114 of the Evidence Act, in favor of the evidence of the witnesses of Maitra group, to the effect that it was likely that the request was authorized by those in charge of the plaintiff's house, having regard to "the common course of natural events, human conduct and public and private business, and therefore, to presume the existence of such authority. Having made such presumption, the fact of such authorized request thereby became a relevant fact, and the evidence of the witnesses became admissible."

25. The said judgment is evidently distinguishable. All that had allegedly transpired between Mr. Vaqar Ahmad and Masood Mahmood was no doubt made by the High Court as a relevant fact, as the High Court has relied on the evidence of Masood Mahmood, but the High Court has not drawn any presumption in favor of the said evidence to the effect that having regard to "the common course of natural events,

human conduct and public and private business", Mr. Vaqar Ahmad could have made to Masood Mahmood the said statement. In fact the High Court could not have drawn in favor of the said evidence of Masood Mahmood any such presumption under section 114 of the Evidence Act, as the offer of a post made to Masood Mahmood by Mr. Bhutto, respecting which Mr. Vaqar Ahmad had informed Masood Maahmood, was something out of the common course of the business of the Government for normally Masood Mahmood could have been appointed to any post by an order made in that behalf by the competent authority or by the issuance of a notification to that effect.

26. The second judgment relied upon by Mr. Ijaz Hussain Batalvi also is distinguishable. In that case, which was an appeal from the Supreme Court of the Federation of Malava, the appellant before the Privy Council was apprehended by members of the Security Forces during a search operation of the terrorists. On being apprehended, the Security Forces found the appellant wounded on the head back, neck, right arm and right hand and wearing a belt containing 20 rounds of ammunition. The possession of this ammunition, for which he could not offer any lawful excuse, was an indictable offence under Regulation 4 (1) (b) of the Federation of Malaya Emergency, Regulations, 1951, and on conviction there under he could be sentenced to death. It seems that after his apprehension, the appellant was admitted to a hospital for treatment; was questioned by a Police Inspector, and he replied, among other things, that while walking along a certain road he was accosted by three Chinese terrorists armed with pistols; that they took him forcibly to a camp having about a hundred armed terrorists; that he was made to stay there for about a month and, was given training whereafter he was given a rifle and ammunition; that he was thus detailed with twelve others, to go and collect food for the inmates of the camp; and that after some days they camped at the spot where they were attacked by security forces and he was apprehended. During his trial, however, he gave a full statement, saying "...when I was just walking down a small hill, where there was 'lallang' at the sides, a Chinese came oat and asked me to halt; I did not know then that he was a Communist; he came from behind me. I asked him why are you stopping me? I want to return home. He spoke in Malay and I replied in Malay. He then asked me, Do you know who I am? and so saying he drew out a revolver from behind him; to all appearance he was a civilian; he pointed that pistol at me and said 'I am a Communist' and it was then I knew that he was one. He asked me to produce my I. Card; when he looked at my I.C. he spoke something in his own language and 2 others came out; the 3 then surrounded me; of the other 2 one had a pistol and the other had a rifle about a yard long; they told me I could not return home; two of them had knives like sickles."

27. He then described how he was forced to accompany the terrorists, one of whom walked in front and two behind, who told him he was being taken to their leader."

28. At this stage, the learned Presiding Judge cautioned the counsel for the appellant that hearsay evidence was not admissible and unless the bandits were called in

evidence, the conversation of the appellant with the bandits would be inadmissible. Since the learned Presiding Judge thus shut out the appellant, from giving evidence, an objection was taken in that behalf before the Privy Council and their Lordships held:-

"In ruling out peremptorily the evidence of conversation between the terrorists and the appellant the trial Judge was in error. Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and inadmissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made. In the case before their Lordships statements could have been made to the appellant by the terrorists which, whether true or not, if they had been believed by the appellant, might reasonably have induced in him an apprehension of instant death if he failed to conform to their wishes."

29. It is clear to me that this dictum of their Lordships, in so far as it relates to the construction of section 60 of the Evidence Act, seems just to have re-affirmed the principle enunciated in the earlier case of *Sm. Bibhabati Dev. v. Ramendra Narayan Roy and others viz.*, that the evidence of a witness as to the truth of the statement made to him by a person who is not himself called as a witness would be hearsay, if the object of the evidence is to establish the truth of what is contained in the said statement. However, if the object should only be to prove that the said statement was made as a fact then the evidence of the witness would be admissible under section 60 of the Evidence Act. Now this dictum, instead of being of any help to the learned counsel, rather goes against him. The High Court has not only accepted the evidence of Masood Mahmood, in proof of the truth of what Mr. Vaqar Ahmad had told him, in the meeting, held in April, 1974, but has relied on the same against Mr. Zulfikar Ali Bhutto. With respect, this was impermissible. However, if the effort of the learned counsel has been to show that the evidence of the appellant in the case before the Privy Council was held admissible in proof of the truth of what the terrorists had told him, he is mistaken. In this respect the ratio of the judgment is absolutely clear to admit of any doubt whatever. What was held in that case was "the fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness ..... In the case before their Lordships statements could have been made to the appellant by the terrorists which, whether true or not, if they had been believed by the appellant, might reasonably have induced in him an apprehension of instant death if he failed to conform to their wishes".

30. The appellant in that case was tried under Regulation 4 (1) (b) of the Federation of Malaya Emergency Regulations, 1951, for having been found in possession of 20

rounds of ammunition for which he could not offer any lawful excuse. In defence, however, he had relied on section 94 of the Malaya Penal Code, corresponding to section 94, P.P.C., contending that being under, duress at the hands of the terrorists, who had threatened to kill him, he cannot be said to have been guilty of the offence with which he had been charged. During the course of giving his evidence, however, he was shut out by the learned trial Judge on the ground that what the terrorists had told him was inadmissible in evidence. Now this order of the learned trial Judge was clearly wrong, because what the terrorists had told the appellant was admissible in evidence as a fact, but even that part of his evidence was ruled out by the learned Judge. It was in this background that their Lordships of the Privy Council held "that the learned trial Judge directed himself and the assessors that there was no evidence of duress because at the actual moment of capture the terrorists had left and the learned Judge thought that duress, if it had existed, had ceased to exist. But threats previously made could have been a continuing menace at the moment the appellant was captured, and this possibility was at least a Matter for consideration by a jury or by a Judge and assessors. The terrorists or some of them may have come back at any moment". Having recorded this finding, their Lordships proceeded to observe that what the terrorists had actually told the appellant was indeed evidence within the meaning of that expression and the same should have been placed before the jury for consideration even though "it may have failed on ground of credibility or other grounds to establish the existence of duress, but it would be incorrect to say that there was no evidence".

31. It should thus be, clear that in that case, the learned trial Judge had evidently misconstrued the relevant provisions of the Law of Evidence, perhaps corresponding to section 60 of our own Evidence Act, with the result that he substantially deprived the accused, amongst others, to establish his defence under section 94 of the Penal Code of Malaya. In these circumstances, the judgment relied upon by the learned counsel, has no relevancy to the facts of this case.

32. Finally, reference may be made to a judgment of the Lahore High Court in the case of *Kakar Singh v. The Crown*<sup>472</sup>, in which the facts were as follows:

33. In that case Kakar Singh convict was sentenced to death for the murder of his wife. In the High Court, it was argued on his behalf that in view of the facts and circumstances of the case the learned trial Judge was wrong to convict him for murder not realizing that his case fell within the four corners of Exception I to section 300 of the Penal Code. In support of this assertion the learned counsel for the appellant relied on the statement of Hira Singh (P.W. 6) according to whom he had met the appellant soon after the commission of the crime and "I asked him (appellant) what had happened and he said 'what had to be'. He also said that the deceased had said to him 'let Corkhi come and have intercourse with me and I will then prepare your food. If you do not, I will not

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<sup>472</sup> AIR 1924 Lah. 733

prepare your food'. In rejecting the said contention of the appellant the High Court observed "it is obvious that this contention cannot be allowed to prevail. A statement made by an accused person immediately after the occurrence of an offence is no doubt relevant as showing the existence of any state of mind, but as laid down in section 60 of the Evidence Act, oral evidence must in all cases whatever be direct and if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it."

34. While it may be accepted that the appellant gave Hira Singh this account as the reason of his action, it cannot be held that Hira Singh's statement proves that the woman used these words. It may amount to proof that the appellant immediately after the occurrence was in a state of excitement due to something either said or, done by the deceased, but what was said or done cannot be regarded as having been proved. I respectfully agree with this conclusion. In point of fact the said finding recorded by their Lordships of the Lahore High Court more than half a century ago is in accordance with the finding recorded by the Privy Council in the above two judgments: *AIR 1924 Lah. 733*; *AIR 1947 PC 19*; *PLD 1958 PC 100*. Evidently, therefore, the contention raised by the learned Special Public Prosecutor has no force in it and the same is rejected.

35. I would now take up the motive for which Zulfikar Ali Bhutto is said to have entered into conspiracy with Masood Mahmood in order to get Ahmad Raza Kasuri assassinated through the Agency of FSF Since the evidence of the prosecution in proof of the motive in this case is purely circumstantial in nature. It would be instructive to keep in mind the well settled principles relating to the appreciation of circumstantial evidence. Now Pike most things, circumstantial evidence has its merit and demerit. In his treatise on circumstantial evidence, at pages 46 and 47, Sir Alfred Wills, has cited two old cases, namely: *Rex v. Patch and Rex v. Smith*, in which circumstantial evidence was commented upon thus;

"When circumstances connect themselves with each other, when they form a large and a strong body, so as to carry conviction to the minds of a jury, it may be proof of a more satisfactory sort than that which is direct. So where the proof arises from the irresistible force of a number of circumstances, which we cannot conceive to be fraudulently brought together to bear upon on point, that is less fallible than under some circumstances direct evidence may be.

36. Similarly in the Law of Evidence, Monir at page 23 of the First Volume of 1974 Edition has observed that "circumstantial evidence is, however; the best sort of evidence because, as the saying goes, "men may lie but circumstances will not". Having said this, however, the learned author puts in a word of caution that "ordinarily, circumstantial evidence cannot he regarded as satisfactory as direct evidence. The circumstances may lead to particular inferences and the relationship to true facts may be more apparent than real. The value of circumstantial evidence has to be assessed on consideration that it must be such as not to admit of more than one solution, and that it must be



inconsistent with every proposition or explanation that is not true. If these conditions are fulfilled, circumstantial evidence may approximate to truth and be preferred to direct evidence. For proof by circumstantial evidence four things are essential:-

- (i) That the circumstances from which the conclusion is drawn be fully established.
- (ii) That all the facts should be consistent with the hypothesis.
- (iii) That the circumstances should be of a conclusive nature and tendency.
- (iv) That the circumstances should, to moral certainty, actually exclude every hypothesis but the one proposed to be proved."

37. In *Lal Shah v. The State*<sup>473</sup> this Court had the occasion to consider the legal effect of circumstantial evidence in a case of murder, and recorded the following findings:-

"The value of circumstantial evidence has to be assessed on consideration that it must be such as not to admit of more than one conclusion, and, in order to find the guilt of a person accused of a criminal charge, the facts proved must be incompatible with his innocence and incapable of any explanation upon any other reasonable hypothesis than that of his guilt. The test has not been satisfied in this case. The pieces of circumstantial evidence analyzed therein before are not of such nature that they lead to the inevitable conclusion that the appellant and nobody else was responsible for the murder of Mst. Bahishta, having regard to the nature of the evidence, a reasonable doubt does arise as to the guilt of the appellant for the alleged murder. He is, accordingly entitled to a benefit of doubt. We, therefore, allow the appeal, set aside his conviction and sentence and direct that he shall be set at liberty forthwith."

38. In *Mst. Sairan alias Saleema v. The State*<sup>474</sup> which also was a murder case, this Court reiterated the same principle, namely, that circumstantial evidence be so construed as to be incompatible with the innocence of the accused. In a Full Bench judgment of the Lahore High Court in the case of *M. Ata Muhammad Khan and others v. The Crown*<sup>475</sup> of which the two former Chief Justices of this Court, namely, Monir and Rehman were the members, had taken the same view observing that if circumstantial evidence cannot be explained on any other reasonable hypothesis only then it can form the basis for the conviction of the accused.

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<sup>473</sup> 1970 SCMR 743

<sup>474</sup> PD 1970 SC 56

<sup>475</sup> (AIR 1950 Lah. 191

39. Now bearing these principles in mind, let us proceed to examine the evidence, of Ahmad Raza Kasuri. He deposed in his rather lengthy examination-in-chief, the bulk of which being not really relevant must be ignored, that he was a founder member of the PPP; in the General Elections of 1970, he was elected on the PPP ticket MNA from Constituency No. NA-63, Kasur; after the General Elections, appellant Bhutto became power-hungry with the result that the only choice left for him was either to accept his constitutional role, as the leader of the Opposition in one Pakistan, or be the Prime Minister of half Pakistan; as a sign of his hunger for power, he agreed with the five points programme of Sheikh Mujibur Rehman, but the only point on which he did not agree with him was on the question of sharing power, being a member of the inner circle of the PPP, he could read through the heinous design of Mr. Bhutto when he gave a statement at Peshawar in February, 1971, to the effect that the PPP would not attend the forthcoming session of the National Assembly of Pakistan, scheduled to be held at Dacca on March 3, 1971 saying "we would be treated as double hostages and that we would be going to slaughter house"; on February 28, 1971, in Iqbal Park, Lahore, Bhutto addressed a public meeting, and threatened all those intending going to Dacca saying that their legs would be broken, and that whoever wanted to go to Dacca should better go on a single fare; that on March 14, 1971, while addressing a public meeting at Nishtar Park, Karachi, Bhutto proclaimed that just as Sheikh Mujibur Rehman was in majority in East Pakistan, he was in majority in West Pakistan, and so power in the two wings of the country be transferred to them, respectively. This statement was published in the Vernacular Press as "*Idhar ham udher turn.*"

40. Defying the policy of Bhutto, however, he was the only MNA-elect belonging to the PPP who went to Dacca to attend the proposed session of the National Assembly of Pakistan, because he thought that this was the only way to save the integrity and solidarity of the country. On this serious differences arose between him and appellant Bhutto, and he fell from his favor. Later when the permanent Constitution of Pakistan was framed in August, 1973, he was one of the few members of National Assembly who refused to vote for it or sign the Constitution as it was neither Islamic, nor democratic, nor contained the elements of fairplay. In due course when Bangla Desh came into existence, he refused to recognize it as he thought that Pakistan had been split on account of the Indian aggression and foreign conspiracy. Similarly, he opposed the framing of all black laws by the PPP Government, specially the FSF Act, as he thought that the said Force was going to be used to stifle the voice of all democratic people. To all this, Bhutto took exception as he was allergic to criticism. On June 3, 1974, when Bhutto was addressing the Parliament, eulogizing the framing of the permanent Constitution unanimously, he interrupted him and said that he and eight other members had neither signed nor approved the Constitution. On this Bhutto lost his temper, and pointing his finger at him said, "I have had enough of you. Absolute poison. I cannot tolerate you any further." On the very next day, he came to know that some "*Goondas*" were looking for him because of the said altercation between him and Bhutto and consequently he moved a privilege motion in the National Assembly in that

connection. On August 24, 1974, while driving along the Embassy Road, Islamabad, his car was fired upon in broad daylight by someone from a blue jeep but somehow he escaped. He reported the matter at Islamabad Police Station, vide F.I.R. (Exh. PW. 1/1) but no action was taken thereupon nor indeed was he contacted by any Police officer.

41. After the said incident, he moved another privilege motion before the Committee of the Full House, but the same could not be entertained, as the House was not sitting as the National Assembly of Pakistan. However, as a first step he left the PPP in June, 1973, and joined another political party, namely, Tehrik-e-Istaqlal, in which party he was soon promoted as a member of the Working Committee. In September, 1974, he went to Quetta to attend the meeting of the Working Committee of Tehrik-e-Istaqlal and stayed in Imdad Hotel where rooms had been booked for him as well as the Chairman of the party, Retired Air-Marshal Asghar Khan. During his stay at Quetta, a local leader of Tehrik-e-Istaqlal made arrangements for his security. But even so he used to slip away from the room during the night because he knew that he was a marked man.

42. On November 10, 1974, he went to attend the wedding ceremony of one Syed Bashir Shah in Shadman Colony, Lahore, he was accompanied by his parents and maternal-aunt. After the function was over he started for his house, but on reaching the roundabout of Shadman-Shah Jamal Colony, his car was fired upon by automatic weapon. His car was hit, but he nevertheless accelerated away from the ambush. After a while he noticed that his late father was resting his head on his shoulder. He moved his hand towards him and felt that his hand was soaked with blood and realized that his father had been hit. He was, therefore, gripped by panic and drove straight to the United Christian Hospital, Lahore. On arrival at the Hospital, his father was taken to the operation theatre. In the meantime his brothers, namely, Major Sahibzada Ali Raza Khan, Sher Ali Khan, Advocate, and Khiaar Hayat Khan, along with his family friends Messrs Ayyaz and Javed Zafar Khan arrived in the hospital. His brother, Major Ali Raza Khan rang up S.S.P., Lahore, M. Asghar Khan who soon arrived at the hospital, followed by Abdul Wakeel Khan, D.I.G. and Mr. Pervaiz Massod, Deputy Commissioner, Lahore, along with a large contingent of police.

43. Upon arrival at the hospital, he was questioned by these officials whom he told that the attack had been made on him on the instructions of appellant Bhutto. However, the draft of the F.I.R. which they proposed to prepare was meant to say that the attack had been made on him on account of political differences. But to this he did not agree. At about 3-00 a.m., when the doctor came out of the operation theatre, and broke the news that his father had died, he lost his temper, therefore, the said officials agreed to take down whatever statement he wished to make about the occurrence. Consequently, he dictated his version to Javed Zafar Khan whereafter he signed the same and handed it to S.S.P., M. Asghar Khan on the basis of which F.I.R. (Exh. PW. 1/2) was recorded at the Ichhra Police Station. After recording the said F.I.R., however, no action was taken

by the Police in the matter, nor indeed was he contacted by any Police official except that few of them had come to his house to offer condolences on the death of his father.

44. After the said incident, he started taking all possible precautions for his security, and to that end employed an ex-Army Hav. Sher Baz Khan as body guard who used to accompany him to the National Assembly and during the night sleep outside his room in the Government Hostel, Islamabad, armed with a licensed pistol. On November 29, 1974, he moved a privilege motion (Exh. PW. 1/7) in the National Assembly but this motion was ruled out of order. In due course a Commission was appointed by the Government of the Punjab headed by Mr. Justice Shafi-ur-Rehman of the Lahore High Court to enquire into the murder of his father. He appeared, before the said Commission as a witness and maintained that the attack made on his car at Lahore with automatic weapons was organized on the order of Mr. Bhutto, as a result of which his father was killed.

45. The witness also recalled the antecedent history of his political differences with Mr. Bhutto to show that Mr. Bhutto alone had the motive to assassinate him. He deposed that on May 2, 1971, when Mr. Bhutto came to Kasur to address the workers of PPP in Habib Mahal Cinema, the pro-Bhutto elements attacked him as a result of which his hand was fractured. An F.I.R. was accordingly registered in that connection at the City Police Station, Kasur, on the same day. But on the very day, appellant Bhutto suspended his primary membership of the PPP. Faced with this saturation in a Press Conference, held by him on 3-5-1971, he announced the formation of his own independent group within the PPP, namely, 'Raza Progressive Group'. However, when Mr. Bhutto, took over as the President and Chief Martial Law Administrator on December 20, 1971, he was again attacked at Kasur as a result of which he suffered three bullet injuries in his legs, as also that his brother Khizar Hayat too was injured. In consequence of these injuries he was admitted to Kasur Hospital but later removed to Mayo Hospital, Lahore, where he was operated upon. Of this incident also an F.I.R. was registered at the City Police Station, Kasur.

46. After this incident, he made temporary peace with accused Bhutto on account of political strategy. He was of the view that since Bhutto was the Chief Martial Law Administrator and was witch-hunting his political opponents by securing their quick punishments from Military Courts, it was advisable to reconcile with him. After the lifting of Martial Law on April 21, 1972, however, he again slowed his 'teeth' to Bhutto, and revived his old role of criticizing him both inside and outside the National Assembly. At this Bhutto, formally expelled him from the PPP in October, 1972. In June 1973, he joined Tehrik-e-Istaqlal. On April 6, 1976, he again rejoined the PPP because of the instinct of self-preservation, as he was a marked man. Sometime in September, 1975, Saeed Ahmad Khan (PW. 3) and late Abdul Hamid Bajwa started visiting his house in Lahore as well as his room in the Government Hostel Islamabad. Saeed Ahmad Khan would tell him "you know Mr. Bhutto more than myself. You have worked with me.

You are a marked man and the danger has not finished as yet. You are a young parliamentarian. You have a very bright future in the politics of Pakistan. You have not only put yourself on stake but also your entire family on the stake and why don't you patch up". These visits continued for some time. Thereafter Abdul Hafeez Pirzada also visited his house at Lahore in October, 1975, and tried to persuade him to patch up his differences with appellant Bhutto. It was in this background that he rejoined the PPP in April, 1976. And then met Mr. Bhutto on January 7, 1977, i.e. on the very day when the National Assembly was dissolved.

47. Lastly he said that his was a very happy family. They had no disputes over lands. Furthermore, he produced on the record of the case copies of the various privilege motions moved by him in the National Assembly, *viz.* Exhs. P.W. I/8, P.W. 1/9, P.W. 1/10 and P.W. 1/11 in proof of the fact that he had been a virulent critic of appellant Bhutto's policies as well as of his person.

48. Mr. Kasuri was cross-examined by Mr. Irshad Ahmad Qureshi, Mr. D. M. Awan, and Mr. Qurban Sadiq, who represented the appellants herein the High Court. The effort of Mr. Irshad Ahmad Qureshi seems to have been to prove through the witness that he (Mr. Kasuri) had no enmity with appellants Arshad Iqbal, Rana Iftikhar and Ghulam Mustafa; that he was a virulent critic of the policies of appellant Bhutto; that he had opposed on the floor. of the National Assembly the passing of the Federal Security Force Act; that before the passing of the said Act the said Force had been used to expell the members of the Assembly by force; that on the passing of the Fourth Constitutional Amendment Bill, Maulana Mufti Mahmood, Maulana Shah Ahmad Noorani and he had been manhandled by the said force and thrown out of the House. It should be noted that Arshad Iqbal, Rana Iftikhar and Ghulam Mustafa, who are the clients of Mr. Irshad Ahmad Qureshi, had confessed their guilt and that was why the learned counsel had attempted to support the case of the prosecution.

49. In the lengthy cross-examination of the witness by Mr. D. M. Awan, Advocate, for appellant Bhutto, the witness admitted that he had passed his LL. B. Examination in 1965; that as student of the University Law College, Lahore, he was expelled from the College by the then Governor of West Pakistan, as he had opposed the promulgation of the University Ordinance; that in June, 1966, he met appellant Bhutto for the first time soon after he relinquished the office as Minister for Foreign Affairs of Pakistan; that he joined the party of appellant Bhutto, namely PPP because he was impressed with its manifesto; that in the General Elections of 1970, appellant Bhutto visited his Constituency Kasur sometime in August, and on the ticket issued to him he was elected as MNA; that in May, 1971, on the visit of appellant Bhutto to his Constituency, a public meeting was held by the PPP in Habib Mahal Cinema, but he was not allowed to preside over the said meeting, although he was the Chairman of the local People's Party; that according to his impression the said situation was created for him by Mr. Meraj Khalid, the then President of the PPP Lahore District; Mr. Ghulam Mustafa Khar

and Doctor Mobashar Hassan, as they had been instructed in that behalf by appellant Bhutto; that in the meeting in question he was not only prevented from participation by pro-Bhutto elements, but was attacked and injured respecting which incident he lodged an F.I.R. at the Kasur City Police Station; that in respect of the same incident a cross-case had been lodged against him and one Muhammad Sharif for causing injuries to the other side; that in the said case he was summoned to the Court, but was not sure whether he ever attended the Court or not. In answer to a question, whether the said Muhammad Sharif was his supporter? initially, he denied the suggestion, but subsequently agreed. Continuing with his narration he deposed that no action was taken on the F.I.R. lodged by him in connection with the said incident, but admitted that he had made no efforts to rectify the situation, because appellant Bhutto was in league with the then President of Pakistan, namely, General Yahya Khan, and he thought that his efforts would be futile.

50. In August, 1971, an attack was made on his house during the night in which his brother Khizar Hayat Khan received over 100 injuries, in that connection an F.I.R. was lodged at the Kasur City Police Station under section 365/148, P.P.C. In answer to a question if in the said F.I.R. Yaqub Maan and his (Kasuri's) cousin, namely, Nasir Khan were mentioned as the assailants, he pleaded ignorance. He volunteered, however, that Yaqub Maan was obliged to him as he had managed to get him the PPP ticket for contesting elections to the Provincial Assembly; that, therefore, his relations with Yaqub Maan were very cordial, but their relations started deteriorating due to the unfavorable attitude of appellant Bhutto towards him and his family; that this change in the attitude of Yaqub Maan became visible soon after appellant Bhutto took over as the President and Chief Martial Law Administrator of the country, as it was soon thereafter i.e. in January, 1972) that he was attacked by Maan and his partymen with firearms, *lathis* and sharp-edged weapons as a result of which he suffered three bullet injuries in his leg; that in a meeting held by him at a place called Khudian, pistol shots were fired at him by someone respecting which incident also an F.I.R. was lodged at the Police Station; that in connection with the same incident one Akbar Toor had lodged an F.I.R. against him; that the said case against him was still pending in a Court in which he had secured bail for himself; and that while addressing the Vehari Bar Association, he was similarly attacked just as he was again attacked at Mirpur, Azad Kashmir, while addressing a meeting.

51. In regard to the incident at Islamabad of August 24, 1974, in which he was fired upon from a blue Jeep, by some unknown persons, he admitted that in the F.I.R. lodged in that respect he had not ascribed to any one the motive nor indeed had mentioned therein that the attack in question had been made on him at the behest of appellant Bhutto. In regard to the incident of Lahore, however, in which his father was killed, he was questioned if in the F.I.R. of the occurrence he had blamed appellant Bhutto, he replied (after having been shown the portion marked 'A' to 'A') that this was his way of stating that Mr. Bhutto had a hand in the murder of his father; as also that the said

incident was in continuation of the process which started with the attack on him in May, 1971, at Kasur, at the behest of appellant Bhutto. In answer to a question as to why in spite of the said enmity between him and appellant Bhutto he thought it fit to reconcile with the latter? he replied that he had done so as a matter of expediency because Mr. Bhutto was the President and Chief Martial Law Administrator of Pakistan as also that Saeed Ahmad Khan (P.W. 3) started visiting him in the middle of 1975, and persuaded him to get back into the fold of PPP, saying it was in his own interest to do so, as he was a marked man. He admitted, however, that in order to seek an interview with appellant Bhutto he might have written him a letter in that connection but he was not sure. He admitted that in April, 1976, i.e. after about a month of his interview with appellant Bhutto, he re-joined the PPP; that he continued to remain a member of and attended the meetings of Tehrik-i-Fikr-i-Quaid-e-Awam, an Organization meant for propagating the political philosophy of appellant Bhutto, up to April, 1977, but again this was in line with his policy of expediency so as to present a posture of reconciliation between him and appellant Bhutto, as well as due to the instinct of self-reservation. He admitted, however, that although he was no more a member of the PPP, he was sent out as a member of the Parliamentary delegation to various foreign countries; that on return he submitted a report (Exh. PW. 1/20-D) to appellant Bhutto, saying therein that his stature in the foreign countries had emerged as a scholar statesman. But again this was in line with his policy of expediency to show that he had reconciled with appellant Bhutto which, however, was not the case. He admitted, however, that for the General Elections of 1977, he had applied for the grant of PPP ticket for election to the National Assembly of Pakistan, but his application was turned down, and instead the ticket from his Constituency was awarded to one Sardar Ahmad Ali. In answer to a suggestion made to him that it was due to the said refusal of appellant Bhutto which annoyed him and consequently brought about a radical change in his attitude, towards the latter, he answered in the negative. Similarly, in answer to another suggestion that his opinion about appellant Bhutto to the effect that soon after the General Elections of 1970 he became power-hungry, and that he was prepared to go to the extent of dividing Pakistan, than submit to the majority rule of Sheikh Mujibur Rehman, was based on the statements made by appellant Bhutto himself at Peshawar and Lahore in February, 1971, and at Karachi in March, 1971, he replied in the affirmative. He further admitted to have written to appellant Bhutto letters Exhs. P.W. 1/18-D, P.W. 1/19-D, but explained that he had done so only as a matter of expediency and due to the instinct of self-preservation, just as he had applied to him for the grant of a PPP ticket to enable him to contest the General Elections of 1970, for a seat to the National Assembly of Pakistan.

52. Mr. Qurban Sadiq Ikram, the learned counsel for appellant Mian Abbas cross-examined Mr. Kasuri mainly to show that at no time he had mentioned the name of appellant Bhutto as the Architect of the conspiracy to assassinate him. He admitted that Mian Muhammad Abbas had no ill-will or enmity against him, nor indeed was he ever known to him. The learned counsel questioned him in regard to the incident at

Islamabad, suggesting that the occurrence in question had not taken place at all, but he denied the suggestion. He admitted, however, that he had lodged the F.I.R. about the said incident, as also that he was examined by an Inspector of FIA on 14-9-1977. In answer to a question whether in his said statement he had mentioned that on account of appellant Bhutto's statements made at Peshawar and Karachi in 1971, he read into the heinous design of the latter and consequently started attacking his policies, he replied that he had done so, because he had handed to the Investigating Officer the official proceedings of the National Assembly of Pakistan, dated February 19, 1973 in which the said allegation were made by him. In answer to another question whether in the said statement he had made any mention of the PPL strike at Lahore due to which he started developing differences with appellant Bhutto, he again replied in the affirmative, saying that in that connection too he had shown to the Investigating Officer his scrap book containing the Press cuttings in which the said fact was mentioned. Similarly he was questioned whether in his said statement he had mentioned that appellant Bhutto had, when he visited him at Gole Bagh, Lahore, with a view to persuade him to terminate his hunger strike, got annoyed and took out a pen saying that he was going to resign the Party Chairmanship in his favor, he again replied that he had done so, as he had shown his scrap book to the Investigating Officer containing the Press statements to that effect. He was further questioned whether in his 161 Cr. P.C. statement, recorded on 14-9-1977, he had mentioned that when the S.S.P. Lahore arrived at the hospital he told him that the attack on him had been launched on the instructions of appellant Bhutto, but the S.S.P. and the other officials present tried to put him off saying that the name of appellant Bhutto should not be mentioned, he replied that "I did not mention this. There was no occasion to say so because the police ultimately agreed to record the F.I.R." However, on the same question being repeated to him subsequently, he replied "the first opportunity that I ever had of stating the facts relating this occurrence was before Mr. Justice Shafi-ur-Rehman during the judicial inquiry. I made and also filed two written statements before him, whatever I have stated in these statements, which are on the record of the judicial inquiry, contained the correct version of the incident",

53. Now this is all the evidence of Ahmad Raza Kasuri. His evidence would seem to provide sufficient material not only to have a peep into his personality, it also reveals the set pattern of his politics leading to certain irresistible conclusions. As a young politician, having been elected as a member of the National Assembly of Pakistan, on the PPP ticket, in 1970, seemingly without much effort, as the PPP had swept the polls in West Pakistan by a very great majority, he seems to have become ambitious, and in the process earned for himself political enmity in his home town Kasur. It is his evidence that due to political enmity, on many occasions, he was attacked by Yaqub Maan and his party, in which he was fired upon and injured, as also that an attempt was made on his life during the dark hours of the night at his house in which his brother received as many as 100 injuries. In the F. I. Rs. of the occurrence (Exh. P.W. 1/30-D, Exh. P.W. 1/1) and in his statement (Exh. PW. 23/1) recorded in connection with the incident at Islamabad, however, he had not mentioned the name of appellant



Bhutto, nor indeed even alluded to the fact that it was h who had engineered the said attacks on him. It is true that in the F.I.R. (Exh. PW. 34/1), relating to the occurrence at Lahore, he has mentioned the name of appellant Bhutto, but the said document ha to be scrutinized with caution. Now by the scrutiny of the said document, what the witness would be found to have said therein is that the attack in question had been made on him due to political reasons, a in the National Assembly of Pakistan his party, namely, Tehrik-e-Istaqlal, had been stoutly opposing the Government policies; that as Information Secretary of the said Party he had been the virulent critic of appellant Bhutto; and that in 1974, Bhutto had, on the floor of the National Assembly, threatened him to the effect that he was fed up with him and that he could not tolerate him anymore. Now from this the learned Special Public Prosecutor wished me to hold that appellant Bhutto had been directly named in the F.I.R., but with respect I have not been able to agree with him.

54. In the F.I.R. all that the witness had expressed was his suspicion to the effect that because he had remained the most virulent critic of the person and policies of appellant Bhutto the attack had been made on him due to political reasons-adding, however, that "it should be remembered that Mr. Bhutto had threatened him on the floor of the Assembly that he was fed up with him and that he could not tolerate him any more". It should, therefore, be obvious that but for the words reproduced by me in the parenthesis, the witness had unambiguously asserted that he had been attacked due to political reasons. Now by keeping this version of his in juxtaposition with what he added subsequently, namely, "it should be remembered that Mr. Bhutto had threatened him on the floor of the Assembly, etc." it should be clear that he was only expressing his opinion or suspicion that perhaps the attack on him had been made at the behest of appellant Bhutto, and not that Mr. Bhutto alone was accused by him.

55. Be that as it may, if the said threat was to be the reason to create in his mind the suspicion that the attack made on him at Lahore was engineered by appellant Bhutto, surely by the same logic the earlier attack made on him at Islamabad on August 24, 1974 (within about three months of the said threat extended to him) also must have been made at the instance of appellant Bhutto. But neither in the F.I.R. nor in the privilege motion moved by him in the National Assembly on the same day he had mentioned his name nor even the motive due to which he was attacked. I am, therefore, at a loss to understand as to how in connection with the subsequent attack made on him at Lahore in November, 1974, the witness could have possibly assumed that the same had been master-minded by appellant Bhutto?

56. Having said this, however, I am not excluding the possibility that Mr. Bhutto could have a motive to do away with Ahmad Raza Kasuri, because he had remained the most vocal critic of his person and policies. In order to examine this possibility it would be necessary to scrutinize the evidence of Kasuri and the documentary evidence. Now by the scrutiny of the evidence of Kasuri, as well as the bulk of documents brought, on

the record of the case, it is clear to me that in the initial stages of his contact with appellant Bhutto, when the latter made an exit as Foreign Minister from the Government of Field Marshal Muhammad Ayub Khan, Mr. Kasuri seem to have been enamored with the political style of Mr. Bhutto, and made it a point to cultivate his patronage. In this respect reference may be made to documents Exhs. PW. 1/15, PW. 1/16, PW. 1/17-D and PW. 1/18. Now Exh. PW. 1/15, dated September 13, 1967, is the reply to Kasuri's letter by appellant Bhutto in which the latter acknowledged receipt of the letter of Mr. Kasuri of September 10, 1967, and said that having remained out of the country for a long time he could not establish contact with him. However, since he was now back in the country, he would contact him and other friends in order to launch a new party in the near future in which respect he will have to do a great deal in his own region. Exh. PW. 1/16 is the reply to Kasuri's another letter, dated October 5, 1968, by Mr. Bhutto acknowledging therein his earnest work for the party. Exh. P.W. 1/17-D is the copy of the telegram sent by Mr. Kasuri to appellant Bhutto reminding him, about his three previous letters (including letter Exh. P.W. 1/18), in which he had said that he, as well as the other candidates from his area, were anxiously awaiting his reply. This letter, which seems to reveal the very high esteem in which Kasuri was holding Mr. Bhutto, says that:

"As a dedicated follower of you I strongly feel that you will not disappoint me at this time and, therefore, you will surely grant me a day's visit to our area. Your one visit will change the complete picture of the elections. I can assure you that all the candidates of PPP for National as well as Provincial will win the elections. In this respect all the candidates of the area join me to request you to please grant us one visit to our area. When you next come to Lahore, you can easily give us time in the last week of this month. Sir, this is extremely important and is really urgent. You have visited the Constituency of other people so many times. You could at least give me a second visit. You had promised to do so when the elections were near and since now elections are near I request you to make a visit to Kasur and adjoining areas.

I hope you will grant this second visit to Kusur as requested above.

Please, please I request you my leader whom I have loved the most and my leader will see it to that I win.

I am keenly waiting for your reply. As soon as I will get the date of your visit I will immediately proceed to arrange for the welcome.

With all my love, regards, prays and wishes for your health, happiness and success all over and everywhere.

Yours sincerely,

57. Mr. Kasuri was pointedly, cross-examined by the counsel of appellant Bhutto to the effect, if in the initial stages of his contact with the latter, he was enamored by his person, and political philosophy, and held him in high esteem, but he denied the suggestion saying that he was only impressed with the manifesto of the PPP. Exh. P.W. 1/18, however, reveals a different position. As there he seems clearly to have expressed for Mr. Bhutto almost reverential feelings, and admitted as if he had all the charismatic qualities of a political leader of his own dreams. Furthermore, he is urging upon Mr. Bhutto to pay a visit to his region as the same would pave the way to success of all the candidates of the PPP in the ensuing General Elections and in that respect the hope of Mr. Kasuri seems prophetically to have realized, as almost all the candidates from his region, including himself, were elected on the PPP's ticket, although Kasuri was a novice in the field of politics, and had no political background of any consequence. In this view it is rather intriguing as to why in his cross-examination he denied the suggestion that in the initial stages of his contact with appellant Bhutto he virtually adored the latter.

58. His evidence would reveal that the hitherto cordial relations existing between Mr. Kasuri and appellant Bhutto took a turn in the opposite direction soon after the General Elections of 1970, as a result of which the Awami League of Sheikh Mujibur Rehman in East Pakistan and appellant Bhutto's PPP in West Pakistan swept the polls with larger majority. However, the parting point between Sheikh Mujibur Rehman and appellant Bhutto seems to have been reached when the former insisted on the implementation of what has come to be known in the political history of Pakistan, as his six-points programme to which Mr. Bhutto did not fully subscribe. This unfortunate difference of opinion between the two most popular leaders of the time started creating a gulf of misunderstanding between the people of East and West Pakistan with the result that Mr. Bhutto publicly announced the conditional boycott of the Session of the National Assembly scheduled to be held at Dacca.

59. It is in the evidence of Mr. Ahmad Raza Kasuri that he disagreed with the said policy of Mr. Bhutto, and started criticizing him publicly. This attitude of Mr. Kasuri, seems to have made him unpopular with the general rank and file of the PPP, because it was thereafter that his political meetings and Press conferences were disturbed all over the country, and he was frequently subjected to physical assaults. In this respect reference may be made to the privilege motion (Exh. PW. 1/7), dated November 29, 1974, moved by him on the floor of the National Assembly of Pakistan, in which he has given the graphic details of the various attacks made on him by the rank and file of the PPP, because he had "been vigorously opposing the doctorial, fascist and anti-people policies of this regime from beginning", as also that he had "opposed the recognition of Bangla Desh. I was one of the Parliamentarians who initiated the recent anti-Ahmadies agitation in the country. In short, I have opposed this regime both inside and outside

the House, because I sincerely feel that Mr. Bhutto and Pakistan are not synonymous and cannot go together". Recalling the recent murder of his father Nawab Muhammad Ahmad Khan, "as a result of the Government planned strategy to eliminate all those people who have the courage and fortitude to oppose this, "one man democracy in Pakistan", he proceeded to give the details of 15 incidents in which he had been attacked between the period May, 1971 and November, 1974. The first attack was made on him on May 2, 1971, at Habib Mahal Cinema, Kasur, when Mr. Bhutto came to address the PPP workers there, resulting in injuries to score of people as well as to himself in which his arm was fractured. Of this incident a case was registered at the Kasur City Police Station. The second attack was made on him by the PPP workers in June, 1971 at the Karachi Railway Station in which again many people were injured. The third attack was made on him in April, 1971, in his house, during the night, by unknown persons (who had their faces muffled), but instead of him his brother Khizar Hayat Khan was caused more than 100 injuries, respecting which incident a case was registered at the Kasur City Police Station. The fourth attack was made on him in August, 1971, at Habib Hotel, Peshawar, when he was addressing a Press conference respecting which again a case was registered by him at the local Police Station. The fifth attack was made on him in October, 1971 during a Press conference at the house of a friend at Karachi, when the PPP workers ransacked the house. This matter also was reported by him at the Ferozabad Police Station, Karachi. The sixth attack was made on him at the Old University Campus, The Mall, Lahore, but the police present there refused to register a case. The seventh attack was made on him in January, 1972, by the PPP workers, and one MPA, at Kasur with firearms in which he received bullet injuries and his brother Khizar Hayat Khan also was injured. This matter was also reported at the local Police Station. The eighth attack was made on him in April, 1972, when he was addressing a public meeting at Khudian. Of this incident also he laid information at the Khudian Police Station. The ninth attack was made on him in December, 1972, when he led a procession along with retired Air-Marshal Asghar Khan, on The Mall, Lahore, but the police did not arrest any of the assailants. The tenth attack was made on him in July, 1973, when he was addressing the members of the Vehari Bar Association. The eleventh attack was made on him during the month of Ramazan, 1973 in Gowalmandi, Lahore, where he had gone to attend an Iftar party, hosted by the workers of Tehrik-e-Istaqlal. The twelfth attack was made on him in December, 1973, at Mirpur, Azad Kashmir, with firearms while he was addressing a huge public meeting. The thirteenth attack was made on him again in December, 1973, at Islamabad, but instead the FSF jeep which was meant to overrun him actually overrun another MNA, namely, Chaudhry Muhammad Iqbal, who later died. The fourteenth attack was made on him in January, 1974, when some unknown person fired at his house at Kasur. Of this incident also a report was made to the local administration, and the matter also discussed by him on the floor of the National Assembly of Pakistan, which forms part of the debates of January, 1974. Thereafter in June, 1974, on the floor of the National Assembly when appellant Bhutto, was addressing the House, the witness interrupted him at which Mr. Bhutto, pointing his finger at him, said "I have had enough of you. Absolute poison. I

have had enough of this man. I will not tolerate your nuisance". Soon thereafter, i.e. on August 24, 1974, he was fired upon from a blue colored jeep with automatic weapons at Islamabad but somehow he escaped. And lastly, he was ambushed at the Roundabout of Shah Jamal, Shadman Colony, Lahore, between the night of November 10/11, 1974, and fired upon with automatic weapons, as a result of which his father was killed. In this connection he moved a privilege motion in the National Assembly of Pakistan and made an emotionally charged speech demanding that appellant Bhutto should resign and submit himself before the process of law, because he had mentioned his name in the F.I.R.

60. It would thus be seen that within the period of about three years, Kasuri had been attacked as many as 15 times at every place in the country (including in his own house) whenever he tried to address a Press conference, a public meeting or led a procession. It is true that during all that period he had been the most vocal critic of the person and the policies of Bhutto's government, as his attitude is amply reflected in the various speeches made and the privilege motions moved by him on the floor of the National Assembly, but the question is whether for all his said predicaments, Mr. Bhutto alone can be said to have been responsible? I am afraid the evidence on record is not susceptible to bear any such conclusion. On the contrary, the evidence would show that Ahmad Raza Kasuri, right from the days when he was a student, and expelled from the University " Law College, Lahore, by the then Governor of West Pakistan, has been man of strong views, not inconsiderable courage and used to the employment of strong and provocative language in expressing his views. He violently opposed the confrontation of Mr. Bhutto with Sheikh Mujibu Rehman, as according to him the latter alone had the right to form the National Government, because the electorate of the country had given him the majority. But in the process perhaps the rank and file of the PP seems to have unfortunately resented his confrontation with appellant Bhutto, whose political star at that time was on the ascendancy, and who was held by the PPP workers in every high esteem. In order to silence his voice, therefore, it is not unlikely that the PPP workers took it upon themselves to teach him a lesson, and consequently attacked him at every place in the country at which he attempted to voice his views against the person or policies of appellant Bhutto.

61. It is also clear from his evidence, as well as from the privilege motion (Exh. PW. 1/7), dated November 29, 1974, moved by him on the floor of the National Assembly, that: (1) he was one of the Parliamentarians who had initiated the anti-Ahmadies movement in the country; and (2) soon after the General Elections of 1970, he earned for himself in his home town Kasur, the enmity of Mr. Yaqub Maan, a prominent member of the PPP and MPA of the Punjab. It is in his own evidence that Yaqub Maan and his partymen had attacked him more than once with fire-arms and caused him bullet injuries. Furthermore, Yaqub Maan had thrown him a challenge through the newspapers, asking him to resign his seat as MNA or face the worst possible consequences. Now from this evidence of the witness, as well as from the documentary

evidence produced by him on the record of the case, can it be said with any certainty that appellant Bhutto alone had the motive to assassinate him? The legal position is well settled that the evidence of the prosecution, especially when it is wholly circumstantial, must be so construed as to eliminate the possibility of any reasonable doubt about the innocence of the accused. Now bearing this principle in mind, it would be evidently ridiculous to contend, less to believe that the fifteen attacks made on the witness during the course of about three years, in every part of the country, including the territory of Azad Kashmir, were engineered by appellant Bhutto. The fact that he was attacked at every place from Peshawar to Karachi, whenever he criticized appellant Bhutto or his policies, would rather show that it was the random work of the rank and file of the PPP, who seems to have become allergic to him because he had rebelled against the party and its Chairman. The broad day-light attack made on him by Mr. Yaqub Maan and his partymen at Kasur, as a result of which he suffered three bullet injuries, and the other attack made on him at his house during, the night by unknown persons, as a result of which, his brother Khizar Hayat suffered as many as hundred injuries, would seem to support the said conclusion. In point of fact, this is how the witness himself had understood the position, as in none of the F. I. Rs. lodged in the said cases nor indeed in the privilege motions moved by him in the National Assembly he accused appellant Bhutto or even voiced his suspicion against him. It should be significant to note that in the F.I.R. lodged by him in respect of the Islamabad incident of August 24, 1974, he again neither accused nor named appellant Bhutto. From this it would follow that if there was the slightest doubt or suspicion in his mind about the complicity of Mr. Bhutto in that plot, obviously he would have readily accused him, as he had already been subjected to about fourteen attacks by the PPP workers at various places in the country.

62. In his cross-examination, the witness has admitted that in regard to the two attacks made on him in the Habib Mahal Cinema, Kasur, and a place called Khudian, counter cases were registered against him in one of which the Court had released him on bail; that he had written to appellant Bhutto letters Exhs. P.W. 1/19-D and P.W. 1/20-D, but said he had done so only as a matter of expediency, in order to present A posture of reconciliation that he had remained a member and attended the meetings of Tehrik-i-Fikr-i-Quaid-e-Awam, an organization meant for propagating the political philosophy of appellant Bhutto up to April, 1977, but again said that this was in line with his policy of expediency; that he had rejoined the PPP in April, 1976, only as a matter of expediency; that for the General Elections held in 1977, he had applied for the grant of a PPP ticket to enable him to contest the elections for a seat to the National Assembly, but had done so as a matter of expediency; and that his said application was turned down, and the ticket from his Constituency granted to Sardar Ahmad Ali with the result that he was ignored.

63. Now as regards his letter Exh. PW. 1/20-D, dated June 8, 1976, written to appellant Bhutto, the same commences with the words "I take this opportunity to

express my deep gratitude for nominating me as a member of Pakistan Delegation that participated in this year's "Spring Session" of Inter-Parliamentary Union held at Mexico City, Mexico", and proceeds to say, amongst other things, "we found that your image as a 'Scholar Statesman' is emerging and getting wide acceptance". It is interesting to note, however, that notwithstanding the admission made by him in the opening part of his letter, the witness denied in cross-examination to have been nominated for the said Spring Session of the Inter-Parliamentary Union by Mr. Bhutto held at Mexico City saying that he had been actually nominated by the Speaker of the National Assembly. Now this prevarication on the part of the witness is obviously frustrating, but understandable. His effort in the witness-box seems to have been to show that appellant Bhutto being his enemy would not nominate him as a member of the said Delegation, but unfortunately for him his letter Exh. PW. 1/20-D exposed design and clearly made him appear ridiculous. Seen in this context, the other assertions made by him namely, that he had written to appellant Bhutto letters Exhs. PWs. 1/19-D and 1/20-D only as a matter of expediency; that he remained a member and attended the meetings of Tehrik-i-Fikr-i-Quaid-e-Awam until April, 1977, for the same reason; that for the General Elections held in 1977, he had applied for the grant of a PPP ticket for similar reason cannot be believed as on the very face of them, they seem to be absurd. From the evidence brought on the record of the case, the witness appear to be highly sensitive in nature, is capable of taking strong stand on issues even at the risk of danger to his person and possesses not inconsiderable courage forcefully to express his views on any issue, to which he does not subscribe, regardless of the consequences. It is, therefore, impossible to believe that if appellant Bhutto had anything to do with the murder of his father, or had engineered the various attacks made on him almost in every part of the country, he would reconcile with him, or fail to accused him in the F. I. Rs. lodged by him at the various Police Stations, or in the privilege motions moved by him in the National Assembly. It is clear to me that after having rebelled against the PPP, and having failed in his effort because no serious notice seems to have been taken of his antics by the Establishment, he recanted and started making efforts to regain the confidence of appellant Bhutto. The fact that he was nominated as a member of the Parliamentary Delegation to Mexico by appellant Bhutto should not suffice to negate his claim that he was his enemy. But the subsequent two letters Exhs. P.W. 1/19-D and P.W. 1/20-D written by him to appellant Bhutto would seem to portray an altogether different position. Enough has been said about his letters Exh. P.W. 1/20-D. dated June 8, 1976. But in the subsequent letter Exh. PW. 1/19-D, dated January 30, 1977, the witness addressed appellant Bhutto as "My dear Prime Minister" and proceeded to express himself thus:-

"Earlier I have requested over half a dozen times to your M. S. for an interview with you, but to this date I have not received any reply from him. I wonder whether Major-General Imtiaz Ali ever made it known to you? I am taking this liberty to write to you and to request you personally to kindly grant me an

interview at your earliest convenience. I have to discuss many matters, which concern the party and the Government.

You will be happy to know that I have gone back to Law profession as a whole time. Pray for my success and well-being.

I met Mr. Abdul Hafiz Peerzada on 25th of this month in Lahore and had a detailed talk with him. I hope he must have informed to you about that.

I trust this letter finds you and Begum Bhutto in best of health, hapiness, and prosperity.

With warm regards.  
Yours Sincerely,  
Ahmad Raza Kasuri

64. Now a casual look at the said letter Would show: (1) that the witness stood on no formality with appellant Bhutto; (2) that he claimed a share of his personal attention even in regard to his private affairs such as "You will be happy to know that I have gone back to Law profession as a whole time. Pray for my success and well-being"; (3) that he had met Mr. Abdul Hafiz Peerzada at Lahore and had a detailed talk with him about which he hoped Mr. Peerzada had informed Mr. Bhutto; and (4) that he requested for an interview with Mr. Bhutto saying "Earlier I have requested over half a dozen times to your M. S. for an interview with you, but to this date have not received any reply from him. I wonder whether Major-General Imtiaz Ali ever made it known to you?". This AI being the tenor of his said letter, the question is as to under what compulsion he had written the same? Lt is very well to say that he had written it as a matter of expediency. But this ipse dixit of the witness seems to be clearly absurd in view of the language employed by him in the said letter. It is obvious to me that by writing the said letter, in which he complained that he had already asked for an interview for more than half a dozen times, the effort of the witness clearly was to curry favor with appellant Bhutto, in which respect he finally succeeded, because Mr. Bhutto noted on the margin of the letter "I Will see him when it is convenient. Please return this letter after you have noted my remarks".

65. The evidence would show that Mr. Bhutto finally granted to the witness an interview in March, 1976, and he rejoined the PPP in April, 1976. On the dissolution of the National Assembly of Pakistan, on January 7, 1977, in view of the forthcoming General Elections, scheduled to be held in March, 1977, the witness again met appellant Bhutto; thereafter he made an application for the grant of a PPP ticket to enable him to contest election for a seat to the National Assembly but the same was rejected and instead the ticket from his Constituency was awarded to Sardar Ahmad Ali. Now if appellant Bhutto had anything to do with the murder of his father, surely the witness



should have, declined to contest election on a PPP ticket, even if the same had been offered to him, much less to have aspired for the same by making a formal application in that behalf. The type of person, which according to the evidence, he is, he should have rather exploited the opportunity offered him by the General Elections to expose appellant Bhutto not only for his alleged dictatorial designs, but also that he was responsible for the assassination of his father. This in my view ought to have been the only natural and honorable course open to the witness, more so when during the period of about three years between May, 1971, and November, 1974, he had been subjected to about fourteen attacks by the PPP workers.

66. Notwithstanding this position, which emerges from the evidence of the witness, he seems to have maintained in the High Court, and the High Court has believed him, that by rejoining the PPP he was a helpless agent inasmuch as Saeed Ahmad (PW. 3) and his assistant late Abdul Hamid Bajwa both had pressurized him in that behalf saying that he was a marked man by appellant Bhutto, and so he should go back to the fold of the PPP in his own interest, as well as in the interest of his family. Saeed Ahmad has in his evidence supported the said claim of Mr. Ahmad Raza Kasuri mainly relying on documentary evidence in that behalf. Ignoring his oral evidence for the present, however, with which I would be dealing separately, it would be proper straightaway to proceed with the examination of the various documents produced by him on the record of the case. The first document in the series is Exh. PW. 3/2-C, and is dated June 3, 1975. This document, which is written by late Abdul Hamid Bajwa, and is addressed to Secretary to the Prime Minister, says that "Ahmad Raza Kasuri, MNA, had stated that he is out for a forward block, in TIP. In fact, he is thinking of forming an independent political party. He has discussed this topic with his close associates and will decide, of doing so, this evening". The document seems to have come to the notice of appellant Bhutto on June 6, 1975, as it bears his initials without any comment. It is evident that the document in question is neither here nor there, except for the fact that it does reveal the interest taken by late Abdul Hamid Bajwa in respect of the political activities of Mr. Ahmad Raza Kasuri.

67. The next document in the series, which has been twice exhibited as Exh. PW. 3/2-E, and Exh. PW. 3/16-D, is dated July 29, 1975. The document in question was written by Said Ahmad Khan to Secretary to the Prime Minister intimating therein that:-

"Mr. Ahmad Raza Kasuri, MNA, has had number of meetings with me, the last one being at Rawalpindi on 28th July, 1975. He has realized that his future lies with the Pakistan People's Party of which he claims to be a founder member. On the Qadiani issue he says that the attitude of Air Marshal Asghar Khan, has been lukewarm and that there may be a secret understanding between him and the head of the Qadiani community at Rabwah.

Mr. Ahmad Raza Kasuri has requested for an audience with the Prime Minister at his convenience."

68. Now on document Exh. PW. 3/16-D, appears the endorsement of appellant Bhutto to the effect that "He must be kept on the rails, he must repent and he must crawl before he meets me. He has been a dirty dog. He has called me a mad man. He has gone to the extent of accusing me of killing his father. He is a lick. He is ungrateful. Let him stew in his juice for some time", and bears his initials. However, since the said endorsement does not appear on document Exh. PW. 3/2-E, an objection was taken by the prosecution in the High Court that document Exh. PW. 3/16-D (produced on behalf of appellant Bhutto) was forged and so not admissible in evidence. The High Court has in para. 565 of its judgment agreed with the objection of the prosecution by holding that:-

"This document was exhibited subject to objection by the learned Special Public Prosecutor because it was urged by the learned Defence Counsel that its original was not forthcoming. I agree with the arguments of the learned Special Public Prosecutor that since the conditions of section 65 of the Evidence Act for leading secondary evidence, have not been proved, this document is inadmissible in evidence. I also agree that the first endorsement is clearly a forgery. There is no indication that the first endorsement was addressed to or was required to be seen by anybody. It is not possible to reconcile it with the second endorsement. 'Please file'."

69. The evidence, however, shows that on October 15, 1977, an application was filed on behalf of appellant Bhutto in the High Court to the effect that the original of Exh. PW. 3/16-D and two other documents may be summoned. from the custody of the Government. On October 17, 1977, however, late Mr. M. Anwar, the learned Special Public Prosecutor, informed the Court that by the search carried out in the relevant quarters, the said documents were not traceable. After the said statement was made by Mr. M. Anwar, Exh. PW. 3/16-D and the other two documents sought to be produced from the Government record were produced on the record of the case from the custody of appellant Bhutto to which, however, the said objection was taken by the prosecution. Now regardless of the question whether the said document was forged or not, with which I would deal subsequently, it is clear to me that by making a proper application for the production of the original thereof from the custody of the Government, and the statement made in the High Court by late Mr. M. Anwar that the said document was not traceable, a case had been clearly made out for the production of a copy of it under section 65 (c) of the Evidence Act. With respect, therefore, it is difficult to agree with the finding of the High Court that "since the conditions of section 65 of the Evidence Act for leading secondary evidence, have not been proved, this document is inadmissible in evidence". As regards the finding that document Exh. PW. 3/16-D was forged, all that the High Court has said is "I also agree that the first endorsement is clearly a forgery.

There is no indication that the first endorsement was addressed to or was required to be seen by anybody. It is not possible to reconcile it with the second endorsement. "Please file". Mr. Yahya Bakhtiar, the learned counsel for appellant Bhutto has taken serious objection to this finding of the High Court. He argued that according to the invariable practice of appellant Bhutto, relating to the affairs of the PPP, a copy of every document used to be made and filed on the record of the Party in its Central Office at Rawalpindi. Therefore, a copy of Exh. P.W. 3/16-D, which was one such document, was accordingly fled on the, record of the said Central Office and produced in evidence, only after late Mr. M. Anwar made a statement in the High Court that in spite of the search carried out in the relevant quarters, the original thereof could not be found. As to the other finding of the High Court, *viz*, that the first endorsement on Exh. P.W. 3/16-D was not meant to be seen by anybody and the same was forged, the learned counsel contended that the finding is incorrect. He argued that the said endorsement was not only meant to be the repository of the spontaneous and natural reaction of appellant Bhutto, to all the scurrilous attacks made on him by Ahmad Raza Kasuri, but the same was quite reconcilable with his second endorsement, namely, "Please file", as the a latter endorsement was meant to convey to his Private Secretary the instructions that the document was to be filed at the proper place.

70. Mr. Ijaz Hussain Batalvi, the learned Special Public Prosecutor, however, supported the said finding of the High Court on an additional ground, saying, that the two endorsements appearing thereon were evidently made by using different inks and so the first endorsement was clearly forged. I am afraid, there is no force in the latter contention of the learned counsel. A casual look at the two endorsements in question would show that they were made in the same ink, although I agree that this fact by itself would be inconclusive. Be that as it may, by the scrutiny of the various documents on record, a clear and an unequivocal answer to the question under consideration can be readily found, and so I would presently proceed with the examination of the relevant documents.

71. The first relevant document, after Exh. P.W. 3/16-D, in which mention has been made of the fact that Mr. Ahmad Raza Kasuri wished to have an audience with appellant Bhutto, is Exh. P.W. 3/2-F, dated August 4, 1975. Now this document is a note written by late Abdul Hamid Bajwa to Secretary to the Prime Minister and says, among other things, that "While discussing about his having audience with the Prime Minister, Ahmad suggested to him that, in his interest, he should first prepare ground, for such a move. The ground, as suggested by Ahmad would be by issuing one or two statements, indicating A. M. (R) Asghar Khan's attitude towards Ahmadis. Ahmad Raza Kasuri promised to think over it and have more discussions on this issue". The fact, however, is that the said document does not seem to have been brought to the notice of appellant Bhutto, as it does not bear his signature/initials. Not only this but in the document in question, late Mr. Bajwa (as it is agreed that "Ahmad" was his pseudonym) seems to have discouraged Mr. Kasuri from seeking an audience with appellant Bhutto,

suggesting to him that he should first prepare the ground for such a move by issuing one or two statements indicating therein the attitude of A. M. (R) Asghar Khan towards Ahmadis, Now from this attitude of late Mr. Bajwa, it is clear to me that he was evidently conducting himself in accordance with the views of appellant Bhutto, namely, "He must be kept on the rails, he must repent and he must crawl before he meets me, etc." already recorded by him on Exh. P.W. 3/16-D, on July 29, 1975. In this respect there can be no two opinions, for if appellant Bhutto had been really keen somehow to get Mr. Kasuri back into the fold of the PPP, and which indeed is the case of the prosecution, Mr. Bajwa ought to have readily jumped at the opportunity no sooner Mr. Kasuri expressed his desire for an audience with appellant Bhutto.

72. Exhibit P.W. 3/2-H, dated September 15, 1975, is a note submitted by Saeed Ahmad Khan to Secretary to the Prime Minister. In the note in question what Saeed Ahmad Khan has said is that in consequence of a message received by him through a link that Mr. Kasuri had expressed the desire to see him, he detained late Mr. Bajwa "to contact him and to remind him that he should prepare the ground to indicate his bonafides or rejoining the PPP. Mr. Ahmad Raza Kasuri told Bajwa that his very silence over the past few months ought to indicate his *bona fides*, particularly, when he seems to enjoy reputation of an emotional political being. He further said that he would be of immense use to the Chairman in the ensuing General Elections, in view of the differences amongst the top leaders' of the PPP in the province of the Punjab ..... He also said that he could ask for an interview with the Prime Minister in his capacity as MNA directly. He has been told to do so". This document again does not seem to have been brought to the notice of appellant Bhutto, as it neither bears his signature nor his initials. However, the one thing which has been made clear therein is that when Saeed Ahmad Khan asked late Mr. Bajwa to contact Mr. Kasuri, he told him to remind Mr. Kasuri that he should first prepare the ground to indicate his *bona fides* for rejoining the PPP. Now by taking into consideration the said instructions given to late Mr. Bajwa by Saeed Ahmad Khan, would it not be reasonable to presume that he too was conducting himself in accordance with the views of appellant Bhutto, as expressed by him on the margin of Exh. P.W. 3/16-D, almost one-and-a-half month earlier? Inevitably the answer should be 'yes'. If the task entrusted to Saeed Ahmad Khan by appellant Bhutto was somehow to get Mr. Kasuri back into the fold of the PPP, surely, it would have been unnecessary for him to instruct Mr. Bajwa to remind Mr. Kasuri that he should first prepare the ground to indicate his *bona fides* before rejoining the PPP. Similarly, it seems to me that when Mr. Kasuri is said to have expressed his intention that "he could ask for an interview with the Prime Minister in his capacity as MNA directly" he too was aware of the said views of appellant Bhutto, as otherwise, it would have been clearly unnecessary for him to have expressed himself in that manner.

73. In Exh. P.W. 3/2-1, dated September 29, 1975, which is another note written by Saeed Ahmad Khan to Secretary to the Prime Minister, it is said, among other things, that "Mr. Ahmad Raza Kasuri, MNA, now claims to have sobered down and become

stable. His rough edges have been chiseled out, his political horizon has become clearer and is a progressive being Mr. Ahmad Raza, has categorically stated that he wishes to return to the fold and would carry out Prime Minister's directives and can be used in any way desired by the Prime Minister. He is quite conscious of the fact that his lone vote in the National Assembly for the Government could not be of much consideration, but as a demagogue and a Student Leader with a feudal bobby, he can be a common denominator, and can be utilized as such. He is still anxiously waiting for audience with the Prime Minister". Now this document again does not seem to have been brought to the notice of appellant Bhutto, as it does not bear his signature,/initials, but someone in his Office made a note on the margin of it: "Keep it in Ahmad Raza Kasuri's file". It should, therefore, be obvious that the way in which the said note of Saeed Ahmad Khan was treated in the Office of appellant Bhutto; was in accordance with his views already expressed by him on document Exh. P.W. 3/16-D, as otherwise why the same should not have been brought to his notice? - Especially when according to the prosecution, he was keen to get Mr. Kasuri back into the fold of the PPP. I am clearly of the view that the concerned officer in the Office of appellant Bhutto was aware of his said views, and consequently ordered that the said document be filed.

74. The next note in the series is Exh. VW. 3/2-J, dated 25-11-1975, written by late Mr. Bajwa to Saeed Ahmad Khan; who in turn forwarded it to Secretary to the Prime Minister. What has been said in the note in question is that, he (Mr. Bajwa) met with Mr. Kasuri "after the National Assembly session". He enquired from him "as to what happened on Friday last. Ahmad Raza Kasuri said that the floor of the House was in his possession when some people, which he thought would be FSF fellows in mufti, pounced upon him. Raza Kasuri told theta that the Speaker had neither named him to remove from the House nor he had created any scene. Even then they did not listen to him and he was thrown out". He further asked him "as to why did he beat the staff on duty. Ahmad Raza Kasuri said that he did not beat anybody, he only defended himself ..... Ahmad Raza Kasuri said he did feel that he is very much sobered now and wanted to cooperate with the Government, but he suspected that some third agency, which did not like these moves, "wanted to create gulf". He, therefore, told him that "if he felt like that why was he not over, cautious and why did ha permit any such agency to take any advantage ..... Ahmad Raza Kasuri said that he may be given some guidance by the Prime Minister and he will act accordingly, but so far he has not been granted audience". Now this note of late Mr. Bajwa was brought to the notice of appellant Bhutto on November 26, 1975; as it bears his initials. However, in spite of the request of Mr. Kasuri, for an audience, conveyed therein, appellant Bhutto seems to have, showed indifference in the matter without commenting upon the said request in one way or another. It should, therefore, be obvious that by his said attitude, appellant Bhutto was conducting himself strictly in accordance with the views already expressed by him on the margin of document Exh. P.W. 3/16-D, about four months earlier.

75. The last note in the series is Exh. P.W. 3/18-D, dated December 5, 1975, written by Saeed Ahmad Khan to Secretary to the Prime Minister. Unlike his other notes, his said note commences with the words "As per instructions," and proceeds to mention that he met Sardar Izzat Hayat Khan, formerly of Tehrik-e-Istaqlal, on 4-12-1975. He was most anxious that Mr. Ahmad Raza Kasuri, may be given an audience by the Prime Minister, as soon as possible. Ahmad Raza has already asked for an interview in writing, and both of them are at a loss to understand as to why this request is not being acceded to. They are of the view that some interested PPP leaders have been trying to stall this meeting for personal reasons lest Mr. Ahmad Raza Kasuri, on his rejoining the PPP, may find an important place; being a dedicated worker, full of enthusiasm and a good public speaker. He assured him that Kasuri has sobered down, his edges rounded off, and is keen to rejoin the Pakistan People's Party together with his band of supporters and workers, mostly from the Tehrik-e-Istaqlal, and to regain the lost confidence of the Chairman. He is determined to rehabilitate himself and work as a close associate of the Prime Minister under whose guidance and support, he may, be able to substantially win back the confidence of the people in Punjab through redoubled and untiring efforts. Lastly, he told him that "Ahmad Raza Kasuri is, being pestered by the opposition parties to join them and even Zahoor Butt, the T.I.P. Convener, in United Kingdom, has approached him for rejoining the Tehrik, but he realizes that he has been used as a guinea pig in, the past by Air-Marshal Asghar Khan and others, and is not prepared to consider joining the band wagon of disgruntled, and frustrated lot, but again begs that he, may not be kept on tenter hooks any more but be brought to the fold of PPP without further delay, and assures of complete loyalty to the Chairman. The irritants created by vested interests at the move of Ahmad Raza joining the Party be kindly set aside, since the negotiations with him have now been carried on for the past six months, with no results so far".

76. Now this note is self-evident. Sardar Izzat Hayat seems to have pleaded the case of Ahmad Raza Kasuri with zest and vigor. After assuring Saeed Ahmad Khan that Ahmad Raza Kasuri has sobered down and his edges rounded off, he is keen to rejoin the PPP to regain, the lost confidence of the Chairman, in order to rehabilitate himself as also to work as a close associate of the Prime Minister, under whose guidance and support he may be able to substantially win back the confidence of the people in Punjab through redoubled and untiring efforts, he pleads his case to the effect that Ahmad Raza Kasuri begs not to be kept on tenter hooks anymore, but be brought to the fold of PPP without further delay. He assures the Chairman of his complete loyalty. This note was put up to appellant Bhutto on 6-12-1975, and he recorded on it the note. I would see Ahmad Raza Kasuri at Pindi. 'Please return the file after you have noted'. Notwithstanding this endorsement, however, appellant Bhutto seems to have kept Mr. Kasuri waiting for an interview for another three months, as he finally saw him only in March, 1976.

77. Now this note submitted by Saeed Ahmad Khan would show that he had been instructed by appellant Bhutto to meet with Sardar Izzat Hayat Khan, as the note in question starts with the words "As per, instructions." It is a fact, however, that in none of his other notes submitted by him to appellant Bhutto had he used the said words, and thus it would seem to render his claim doubtful, that the various meetings held by him and his assistant, namely, late Mr. Bajwa with Mr. Ahmad Raza Kasuri were held in pursuance of the instructions of appellant Bhutto.

78. Be that as it may, the tenor of the note in question and the way in which Sardar Izzat Hayat Khan came to plead the case of Mr. Ahmad Raza Kasuri, for the grant of an interview to him, ought to leave no doubt in one's mind that it was Mr. Kasuri who was anxious to reconcile his differences with appellant Bhutto and not the latter who consistently seem to have spurned his advances.

79. Now I have dealt with the said documents on the assumption that there is no objection to their being admissible in evidence. Saeed Ahmad Khan was the Chief Security Officer to appellant Bhutto, whereas Abdul Hamid Bajwa was his assistant. There is no satisfactory evidence on record, however, to show the nature and scope of the duties of Saeed Ahmad Khan. But according to his own evidence orders were issued in the end of 1972, to the Intelligence Bureau, Inter-Services intelligence Directorate, and to the concerned branches operating in all the provinces to the effect that Daily Intelligence Reports should be supplied to him on the basis of which he was required to submit to appellant Bhutto his own assessment. Now this claim of Saeed Ahmad Khan seems to be true because the same is supported by the periodical notes submitted by him and his Assistant late Mr. Bajwa to Secretary to the Prime Minister, conveying therein the substance of their personal dialogue with Mr. Ahmad Raza Kasuri. The fact that Mr. Kasuri himself has corroborated the said evidence of Saeed Ahmad Khan should inevitably attract to the contents of the said documents the provisions of section 32 of the Evidence Act (in the case of late Mr. Bajwa) and section 114 thereof (in the case of Saeed Ahmad Khan) which in relevant parts respectively read as under:-

"32. Cases in which statement of relevant facts by person who is dead or cannot be found, etc. is relevant. When it relates to cause of death; or is made in course of business;-----".

"114. *Court may presume existence of certain facts.* - The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case".

80. I am, therefore, of the view that the High Court was right in relying on the said documents, as also on documents Exhs. P.W. 3/2-K and P.W. 312-Q (both of which were the reports submitted by late Mr. Bajwa to Secretary to the Prime Minister, and

seem to contain what he had actually heard or observed personally), but with respect, the High Court was clearly in error to rely on documents Exhs. P.W. 3/2-N and P.W. 3/2-O, which were secret reports and consequently inadmissible in evidence, as the informant of them or the source thereof was not produced in evidence: See *Islamic Republic of Pakistan through Secretary, Ministry of Interior and Kashmir Affairs, Islamabad v. Abdul Wali Khan, M.N.A., former President of Defunct National Awami Party*.<sup>476</sup>

81. The High Court also has relied on a number of other documents which are either in the nature of source reports or else reports submitted by Saeed Ahmad Khan and his assistant late Mr. Bajwa to Secretary to the Prime Minister. As regards the source reports, they were clearly inadmissible in evidence. but the rest of the reports in which Saeed Ahmad Khan and his assistant late Mr. Bajwa had reported the substance of their dialogues with Mr. Kasuri would be free from any such objection. Notwithstanding this position, however, I have decided not to refer to the said reports in any detail because all that is contained therein would simply show that Mr. Kasuri was kept under surveillance, but this would in no way support the prosecution. Now if the case of the prosecution is accepted that the basic object for which appellant Bhutto had commissioned Saeed Ahmad Khan and his assistant late Mr. Bajwa to brainwash Mr. Kasuri with a view to making him rejoin the PPP, then the conduct of appellant Bhutto seems clearly to be inconsistent with the said hypothesis on the one hand Saeed Ahmad Khan and late Mr. Bajwa both seem to have diligently worked on Mr. Kasuri in that behalf but on the other appellant Bhutto consistently spurned their suggestion to the effect that he should grant to Mr. Kasuri an interview. Enough has already been said in this connection. But this much may again be said that if the object of appellant Bhutto was to get Mr. Kasuri back into his party, surely he ought to have welcomed the very first suggestion made to him by Saeed Ahmad Khan in his note Exh. P.W. 3/16-D to the effect that Mr. Kasuri should be granted an interview.

82. The High Court has no doubt on the basis of the said documents as well as the evidence of P.Ws. held against appellant Bhutto observing that he alone had the motive to assassinate Ahmad Raza Kasuri. But with profound respect, the said finding cannot be sustained. By going through the judgment of the High Court with care, it would be seen that the said evidence of the prosecution was accepted as a matter of course, without subjecting it to critical analysis, in line with the well-established legal principles relating to the safe administration of criminal justice namely, that all circumstantial evidence must be so construed as to be incompatible with the innocence of the accused or with any other reasonable hypothesis: See *Mst. Sairan alias Saleema v. The State*.<sup>477</sup> I am, therefore, of the humble opinion that the High Court does not seem to have with respect scrutinised the contents of documents Exhs. P.W. 3/16-D; P.W. 3/2-H, P.W. 3/2-I, P.W. 3/2-J and P.W. 3/18-D, with that amount of care which in the peculiar

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<sup>476</sup> PLD 1976 SC 57

<sup>477</sup> PLD 1970 SC 56



circumstances of the case ought to have been given to them. From the bulk of documents only these five documents appear to be relevant, because in each one of them a suggestion was made by Saeed Ahmad Khan, or his assistant late Mr. Bajwa that appellant Bhutto should grant to Mr. Kasuri an interview. The very first document in the series is Exh. P.W. 3/16-D, dated 29-7-1975 (also exhibited as P.W. 3/2-E), on the margin of which, Mr. Bhutto, making full use of the Billingsgate's language, made the endorsement: "he must be kept on the rails, etc.", and spurned the said suggestion. Now this note being the very first in the series, it is hardly unnatural that in view of the virulent attacks made on his person and policies by Mr. Kasuri for quite a long time, he (Mr. Bhutto) unburdened himself of the load of disgust which he evidently carried against the latter by his said spontaneous and natural reaction. However, he does not seem to have shut the door in the face of Mr. Kasuri for all times to come, as he made it clear therein that "Before he meets me, he must be kept on the rails, he must repent and he must crawl". In this respect he seems to have shown consistency because the four subsequent requests conveyed to him for the grant of an interview to Mr. Kasuri, in documents Exhs. P.W. 3/2-H, P.W. 3/2-1, P.W. 3/2-J and P.W. 3/18-D, he showed complete indifference with a view evidently to make Mr. Kasuri "repent", and "stew in his own juice for sometime". It is, therefore, clear to me that the endorsement appearing on Exh. P.W. 3/16-D was entirely genuine, as the same is corroborated in ample measure beyond any reasonable doubt not only by the said four documents, but also by the consistent conduct shown in that behalf by appellant, Bhutto.

83. This conclusion would also show that the application made in the High Court on behalf of appellant Bhutto on 15-10-1977 with a view to seeking the production of the original of Exh. P.W. 3/16-D, and two other documents, was entirely *bona fide*. It is true that after late Mr. M. Anwar informed the High Court that the original of the said document was not available, a photo copy of it was produced on the record of the case by appellant Bhutto from his own custody, and the same exhibited as P.W. 3/16-D. To this conduct of appellant Bhutto, the learned Special Public Prosecutor raised a somewhat faint objection during the arguments saying that the former very well knew that the original document was, not available in the Prime Minister's Secretariat, implying; thereby that he had removed the same on or about July 5, 1977, when he was taken in custody by the Armed Forces of Pakistan. This accusation was denied by the learned counsel for appellant Bhutto and also by the latter himself when he appeared, in this Court and argued his case on certain specified features. Regardless of the truth of the matter, however, respecting which I am not called upon to give any finding, this much is clear to me that since the original of Exh F.-W. 3/16-D was said to be not available, a photo copy of it (which according to Saeed Ahmad Khan bore his signatures), became admissible in evidence under section 65 (c) of the Evidence Act, and consequently the same should have been exhibited without any objection.

84. Now in the 'Synopsis and Analysis of Evidence', supplied by the learned Special Public Prosecutor, reliance also has been made on the evidence of Masood Mahmood

(P.W. - 2), on documents EXhs. P.W. 2/1, P. W. 2/Z, P.W. 2/2, P.W. 2/8, P.W. 2/9 and P.W. 2/10, as also on the evidence of Abdur Rashid (P.W. 22) who produced in his evidence the reports of the National Assembly of Pakistan, and the various privilege motions moved therein by Mr. Ahmad Raza Kasuri which appear, on the record of the case as Exhs. P.W. 22/1 to P.W. 22/9. In the context of the present discussion, however, I have decided to ignore the evidence of Masood Mahmood and Exh. P.W. 2/9 and Exh; P.W. 2/10 which are his T.A. Bills, as I would be dealing with. his evidence in a great detail soon after the close of the present discussion on ihctive. Similarly, Exhs. P.W. 22/1 to P.W. 22/9, which contain the speeches of Ahmad Raza Kasuri, made in the National Assembly, need not detain us as the same subject has already been covered substantially. But as regards the other documents, naively, Exhs. P.W. 2/1, P.W. 2/Z, P. W 2/2. and P.W. 2/8, it would be necessary to deal with them at this stage. And I proceed to do so presently.

85. Exhs. P.W. 2/1, dated September 14, 1974, and P.W. 2/Z, dad September 18, 1974, both are Intelligence Reports submitted by P.W. M. R. Welch, Director FSF, Quetta, to P.W. Masood Mahmood as Director-General of the said Force. The contents of these reports have been held, by the Highl Court against appellant Bhutto to which, however, serious objection has been taken by the learned defence counsel. He argued: (1) that the reports in question being in the nature of source reports were clearly inadmissible in evidence: and (2) that the High Court has misconstrued them to the great prejudice of the appellant. There seems to be force in the said contention. Apart from the fact that by their very tenor, these documents seem to be of the type which are usually sent in routine (as confirmed by Mr. Welch himself) by the various Intelligence Agencies to the Heads of, various organizations including the Chief Executive, Mr. M. R. Welch has not said in his evidence that the information conveyed therein was based on his own knowledge nor indeed did the prosecution produce in Court the informant or the source responsible for collecting the said information. In this view of the matter, the reports in question were inadmissible in evidence and so they could not have been treated as evidence in the case See *Islamic Republic of Pakistan v. A bdul Wali Khan*.

86. Be that as it may, the said reports would seem "to be innocuous." A perusal of them would shorn that it was not Mr. Ahmad Raza Kasuri alone, as observed by the High Court, whose activities at Quetta were kept under surveillance by the local FSF but the entire party of Tehrik-e-Istaqal headed by its Chairman, Air-Marshal Asghar Khan was similarly treated. In Exh. P. W: 2/-1, which is a composite report about the activities of some of the important members of the party of Air-Marshal Asghar Khan, it is said, amongst other things, that in a tea party held in Cafe China, Mr. Ahmad Raza Kasuri, Doctor Ishtiaq Hussain Qureshi and Air-Marshal Asghar Khan addressed the gathering of about two hundred guests, and in their respective speeches criticized the Government of appellant Bhutto in their own fashion except for Mr. Ahmad Raza Kasuri, of course; who bitterly attacked the person and policies of appellant Bhutto in his usual style, saying that his Government was oppressing the people of Baluchistan;

that he was splitting up the country; that he was using the FSF to *lath-i-charge* and shoot the people; that women had been disgraced by him and the Army had been used against the people. In so far, as Exh. P.W. 2/Z is concerned, it again relates to the activities and movements of Mr. Ahmad Raza Kasuri, Mr. Feroz Islam, Air-Marshal Asghar Khan, Muhammad Saeed, Mahmood Ali Kasuri and Mr. A. B Awan to the effect that whereas Mr. Kasuri and Mr. Feroz Islam suddenly left Quetta by a PIA Flight at 11-30 a.m. on September 16, 1974, for Lahore, the rest of the gentlemen left by another Flight of PIA, for Rawalpindi at 12-15 hours on September 17, 1974. Throughout their stay at Quetta, the party was protected by ten selected men provided by Mr. Khudai Noor, a local leader of Tehrik-e-Istaqlal, as also that the time of their movements were not disclosed and they spent little or no time in the Hotel rooms reserved for them. The Police also kept the party under surveillance by the Police Special Branch, Military Intelligence and the Intelligence Bureau, and that its members were followed by the said agencies when they traveled to Kuchlaq and Pishin. Relying on the contents of the said two documents, especially those of Exh. P.W. 2/Z, the High Court has held that since the movements and activities of Mr. Kasuri had been kept under a close watch by the men detailed by Mr. Welch, including, the fact whether he slept in the room reserved for him in the Imdad Hotel or not, the evidence of Masood Mahmood was believable that on the instructions given to him by appellant Bhutto to assassinate Ahmad, Raza Kasuri at Quetta, he had entrusted the execution of the said assignment to Mr. Welch. With profound respect to the High Court, however, proper notice does not seem to have been taken by it of the Contents of the said documents. In reaching the conclusion that the movements of Mr. Ahmad Raza Kasuri alone had been kept under strict surveillance by the men of Mr. Welch, the High Court specially relied on a passage appearing in Exh. P.W. 2/1 to the effect: "He is however, not residing in the reserved room", not realizing that in Exh. P.W. 2/Z, which is separated by an interval of only four days from Exh. P.W. 2/1, a similar information was conveyed. about the other members of the party headed by Air-Marshal Asghar Khan that "The time of their movements were not disclosed and they spent little or no time in the hotel rooms reserved for them". Had the High Court taken notice of the said passage, appearing in Exh. P.W. 2/Z, surely its finding ought to have been different.

87. This leaves us with two other, documents, namely, Exh. P.W. 2/2, dated 25-9-1974 and Exh. P.W. 2/3 dated 19-9-1974 Exh. P.W. 2/2 is a letter written by Mian Muhammad Abbas to Mr. Welch, inviting his, attention to the Intelligence Report (Exh. P.W. 2/1), submitted by him to P.W. Masood Mahmood, and questioned him "If Ahmad Raza Kasuri did not stay at the Imdad Hotel which was reserved for him, where else did he stay during his sojourn at Quetta?" On receipt of the said letter, Mr. Welch seems to have slept over the matter for almost two months, as he replied the same (vide Exh: P.W. 2/3) only on November 17, 1974, saying "The gentleman in question had reserved a particular room in. the Imdad Hotel but seldom stayed in his reserved room during the night. He occupied some other room reserved for members of the Party in the Hotel". It should, therefore, be obvious that the manner in which Mr. Welch treated

the said letter written to him by Mian Muhammad Abbas, and the complete indifference shown by the latter in that respect, there existed no plan to assassinate Mr. Ahmad Raza Kasuri at Quetta. It is true that P. Ws. Masood Mahmood and Mr. Welch both seem to have supported the case of the prosecution in their evidence in the High Court. But their evidence is clearly inconsistent with the said documentary evidence upon the plain language of which, however, they have attempted to put a sinister interpretation which it cannot even remotely bear.

88. On the contrary, due to the sustained hostility shown by him against the person and the Government of appellant Bhutto, during the last three years, it seems to me to have been entirely natural for the Government to keep a watch on the activities of Mr. Ahmad Raza Kasuri during his stay at Quetta, as according to Masood Mahmood himself the Province of Baluchistan was then in a state of insurgency. By the type of speech made by him at Cafe China, Quetta, Ahmad Raza Kasuri seems to have confirmed the apprehension of the Government, as the object of his said speech clearly was to incite the people, as also to create in the minds of the people and the students of Baluchistan hatred against the Government. This to my mind is one way in which the said correspondence exchanged between Mr. Welch on the one hand, and P.W. Masood Mahmood and Mian Muhammad Abbas on the other, can be construed and when so construed, it can as well be explained on the hypothesis that the object to keep a watch on his activities at Quetta was meant to prevent him from getting in touch with the insurgents or to create a law and order situation for the Government.

89. It is well-settled that if the evidence in a case is satisfactory, convincing and inspiring, the existence or proof of the motive would not be necessary. However, if the evidence is circumstantial only, then the question of motive becomes important because in that case the guilt of an accused is not proved by the evidence of witnesses who saw the crime, but only inferentially from the circumstances of the case. N. D. Basu has in the Law of his Evidence (Fourth Edition), 1950, at page 129, referred to quite a few leading cases and said "If it is clear and certain that a crime has been committed, it is not an essential part of the Public Prosecutor's case to prove that there was a motive for the crime. If he can prove the case without any motive, he is entitled to a verdict. But when the evidence is circumstantial only, and the guilt of the prisoner is only inferential and is not proved as a matter of fact by the evidence of witnesses who saw the crime, then the question of motive becomes of vital importance to the prosecution. If motive is displaced, or even made reasonably doubtful, it is enormously in favor of the prisoner. Similarly, where a murder is charged and the evidence is wholly circumstantial, then it is peculiarly proper to look at the motive. And in all cases you will naturally seek for the motive. And where the proof is circumstantial, and there be doubt about the circumstances, then it becomes most important to examine into the motive".

90. Now in the present case all the evidence in regard to the motive is not only circumstantial but the main stay of the case of the prosecution seems to depend on the

evidence of P.W. Masood Mahmood, who is a self-confessed criminal; but in order to save his own 'precious' skin, volunteered to become an approver and succeeded in that behalf. It is his own case that appellant Bhutto was his enemy; that attempts had been made on his life at the behest of appellant Bhutto by getting his food poisoned on a number of occasions; that attempts also were made by him to get his children kidnapped from the Aitchison College, Lahore; and that he had entered into a conspiracy with him to assassinate Ahmad Raza Kasuri under compulsion and duress, as he and Mr. Vaqar Ahmad both had made him realize that his job was at their mercy to lose which, however, he could not afford as his children were small, his wife was suffering from Chronic Asthema; and that he owed money to the Banks as well as the Government for the construction of the only house which he had made. While I would be dealing with his evidence, soon after the close of the present discussion, it would suffice to say for the present that the type of witness he is, as instead of resigning his job or else getting himself retired honorably, as he had already completed the required period of service of 25 years, he preferred to succumb to the alleged design of appellant Bhutto with a view to assassinating Mr. Ahmad Raza Kasuri whose late father Nawab Muhammad Ahmad Khan, according to him, was the close friend of his own father. Perhaps it was because of this realization that this Court in the case of *Abdul Qadir v. The State*<sup>478</sup> made the following observations in regard to the evidence of motive in a case in which the prosecution had relied on the evidence of an approver:-

"It may be taken as proved that both the approvers were responsible for the murder and that neither of them had any special reason falsely to accuse the appellant, but we cannot accept the finding of the High Court that neither of them had any motive of his own to kill the deceased. It is true that the appellant has not in his defence suggested any motive on the part of either of these accomplices to kill the deceased, but this by itself is an inconclusive circumstance and does not establish that in fact neither of them had any such motive. Motive is a factor which is peculiarly within the knowledge of the actor and a man's motive in doing a thing may not be known to his most intimate friends just as the prosecution may not know the accused's motive for a crime. All that can be said on the strength of the record of this case is that the appellant failed to prove or suggest that either of the accomplices had any reason to get rid of the deceased but the appellant's ignorance of any such motive does not exclude the possibility of a motive having existed though unknown to the appellant. This circumstance, therefore, does not have any material corroborative value."

91. The evidence in this case would show that appellant Bhutto not only denied that he had any motive to assassinate Mr. Ahmad Raza Kasuri, but Mr. Kasuri and Mr. Masood Mahmood both were extensively cross examined on his behalf to show that there existed quite a few other possible motives due to which Mr. Kasuri was first

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<sup>478</sup> PLD 1956 SC (Pak.) 407

attacked at Islamabad and later at Lahore by unknown persons. From the analysis of the evidence on record, this latter possibility has been clearly established. But with respect, the High Court seems to have believed the prosecution evidence as a matter of course, without subjecting it to critical analysis with a view to excluding every other reasonable hypothesis compatible,) with the innocence of appellant Bhutto.

92. The High Court also has relied on the evidence of P.W. Saeed Ahmad Khan in support of the prosecution case, namely, (1) motive; and (2) the 'subsequent' conduct of appellant Bhutto. His evidence on motive, to which reference has been made in paras. 462 and 463 of the High Court's judgment, is that in the month of December, 1973, on the orders of appellant Bhutto, he opened a file in respect of Mr. Ahmad Raza Kasuri that thereafter Mr. Kasuri was kept under strict surveillance, his movements were checked and his telephone was tapped by the Intelligence Bureau. Leaving his evidence in respect of the 'subsequent' conduct of appellant Bhutto, to be discussed at the proper stage, it seem to me that his evidence in respect of the motive is not only untrue but is entirely ambivalent in nature, and as such explainable on the basis of another reasonable hypothesis. It is his evidence that in accordance with the chart of duties laid down for him by the Cabinet Secretary, he was "obliged to carry out such assignments as were given to me from time to time by the Prime Minister. I had, therefore, only a very limited role to play". However, the answers given by him in cross-examination would seem to reveal that as Chief Security Officer to appellant Bhutto he had taken upon himself the role of Major Domo, with the result that he started interfering in places and situations which were evidently outside the scope of his authority. He admitted that he had submitted to appellant Bhutto a report on the activities of the then Minister of Interior, Khan Abduct Qayum Khan, but Bhutto sent the same to the former and thus compromised his position. Similarly in letter Exh. P.W. 3/15-D, written by him to appellant Bhutto, on October 6, 1972, he confessed to another lapse saying therein, amongst other things, "I am sure, you will kindly appreciate that I have been working single-handedly, round the clock, and I have mentioned your august name at times to elicit information required to produce meaningful results in quick time. To err is human and if I have inadvertently been indiscreet. and have misinterpreted you, you have every right to tear me to shreds on your own, but not, Sir, before your two Intelligence Chiefs, who would certainly not like to see me near you professionally, and otherwise, because I have wittingly or unwittingly entered their protested domain, and treaded their toes. As it is, they have started giving me a cold-shoulder ..... I promise you, Sir, with all emphasis at my command that I can lay down my life for you, but I only need a little encouragement from you and a word of cheer, in return. I certainly need your guidance at every step. I again apologize profoundly for any lapse on my part and can assure you that I will be careful in future and will not give you a chance for annoyance".

93. From this conduct of Saeed Ahmad Khan, it is clear to me that he was in the habit of throwing his weight around with a view to showing his importance, as also, to

use his own words, appearing in Exh. P.W. 3/15-AD, "to elicit information required to produce meaningful results in quick time". It is, therefore, conceivable that he had opened the dialogue with Mr. Ahmad Raza Kasuri on his own initiative to show "meaningful results" in order to justify the importance of his position. The detailed discussion of the various notes written by him, and his assistant late Mr. Bajwa, to Secretary to appellant Bhutto, would not only support his conclusion, but the contents thereof being clearly inconsistent with his evidence would make any reliance on his word uncalled for, as by the said documents, he has been clearly belied. I am, therefore of the humble view that if the High Court had, and I say so with respect, scrutinized his evidence, in the light of the said various notes, there ought to have been no difficulty to disbelieve him, as his evidence from the dock was wholly incompatible with the contents of the said documents.

94. Finally, the question of motive may as well be looked at from another angle. Assuming for the sake of argument that appellant Bhutto, in order to put an end to the biting criticism of Mr. Ahmad Raza Kasuri against him, had commissioned Mr. Saeed Ahmad Khan and his assistant late Mr. Bajwa to brain-wash Mr. Kasuri with a view to making him rejoin the PPP, even then his said conduct could be explained on the basis of more than one reasonable hypothesis. The evidence on record, which has already been discussed in great detail, would show that Mr. Ahmad Raza Kasuri who was once a political protégé of appellant Bhutto, rebelled against him due to the unfortunate difference of opinion between appellant Bhutto on the one hand and late Sheikh Mujibur Rehman of the then Province of East Pakistan on the other, with the result that Mr. Kasuri started bitterly attacking his person and policies at every available opportunity. Would it not be reasonable to presume, therefore, that an articulate politician, which he undoubtedly was, appellant Bhutto ought to have seen to it that Mr. Kasuri should rejoin the PPP? If one of the basic rules in politics ought to be to win the maximum possible support of the electorate, then, to that end, which politician would not employ suitable contrivances, strategies and tactics in any society in which governments are formed and removed by the will of the people? And again which politician would not like to keep his public image un-stultified, or be spared the unmitigated criticism of his person and policies? If these be the norms of politics, surely no sinister construction ought to have been placed upon the said conduct of appellant Bhutto, because his object could as well be to put an end to the virulent attacks which he used to make against his person as well as policies.

95. Mr. Yahya Bakhtiar, the learned counsel for appellant Bhutto also relied: (1) on paragraph 15 of the judgment of Shafi-ur-Rehman, J. of the Lahore High Court, delivered by him as an Inquiry Tribunal in connection with the murder of late Nawab Muhammad Ahmad Khan (and which was brought on the record of the case in this Court as Exh. S.C. 1); and (2) on the alleged 161, Cr. P.C., statement of Mr. Ahmad Raza Kasuri (Exh. P.W. 23/1) recorded by D.S.P., Agha Safdar in connection with the attack made on him at Islamabad on August 24, 1974. He argued that in these two documents,

Mr. Ahmad Raza Kasuri not only did not mention the name of appellant Bhutto but he clearly put the blame on many other quarters for the assassination of his father. I am afraid, I do not incline to consider this contention; firstly, because the said judgment of the Tribunal is inadmissible in evidence in these proceedings; and secondly, because the said 161, Cr. P.C. statement of Mr. Ahmad Raza Kasuri has not been proved according to the requirement of the Evidence Act. It is true that a proper application was filed on behalf of appellant Bhutto in the High Court to the effect that Agha Safdar should be called in evidence to prove the said document but the said application was rejected for the reasons into the propriety of which, it would be unnecessary to go as by an order of this Court also it has been decided not to summon any witness nor indeed to take additional evidence.

96. Mr. Ijaz Hussain Batalvi, the learned Special Public Prosecutor, however, contended that in order properly to appreciate the evidence in this case the Court should keep in view the social realities of the time when late Nawab Muhammad Ahmad Khan was assassinated. He argued that according to the evidence in this case appellant Bhutto alone had the motive to assassinate Ahmad Raza. Kasuri, as none of the other appellants had any enmity with him nor indeed with appellant Bhutto; that no suggestion was made to P.W. Masood Mahmood in his cross-examination to the effect that he had any motive of his own against Mr. Kasuri; that P.W. Masood Mahmood was allowed to continue as Director-General, FSF, until July 5, 1977 (when he was taken in custody by the Martial Law Authorities) and yet no effort was made by the then Government of appellant Bhutto to find out if he had any motive against Mr. Kasuri; that during appellant Bhutto's Government, many political murders had taken place but no one was brought to book for those crimes, much less punished; that the crime empties in this case were not sealed by the Investigating Officer but surprisingly he had sealed the F.I.R. of the occurrence; that the empties in question were not sent to the Fire-Arms Expert until August 23, 1974; that according to the Investigating Officer, Malik Muhammad Waris, the crime empties were taken from him by late Sheikh Abdul Ahad who took them to the house of the Inspector-General of Police, Punjab, and finally retained them only on August 23, 1974; that the investigation in the case came to a grinding halt within 24 hours of the murder of Nawab Muhammad Ahmad Khan; and that according to the judgment of Shafi-ur-Rehman, J. of the Lahore High Court, the investigation in this case had been improperly conducted, the motive for the two incidents of Islamabad and Lahore was the same as also that the motive was political; and that if the suggestion of the defence is accepted that Mr. Masood Mahmood could have a motive of his own, it would be tantamount to lighten his burden as in that case half of the case of the prosecution would stand proved. From this, the learned counsel wished the Court to hold that the prosecution has succeeded to prove that appellant Bhutto alone had the motive to assassinate Mr. Ahmad Raza Kasuri.

97. I am afraid, there is no force in this contention. Frankly, I was not able to understand him when he said that for the proper appreciation of the evidence in this



case the social realities of the time, in which late Nawab Muhammad Ahmad Khan was assassinated, should be kept in view, as this expression does not find any place in the Evidence Act. Enough has been said in the earlier part of this judgment to show that even the high probabilities of a case cannot be canvassed against an accused, and that in accordance with the requirement of section 3 of the Evidence Act, it is the burden of the prosecution to prove its case against an accused beyond any reasonable doubt.

98. Be that as it may, the learned counsel has not been right to contend that even if the suggestion of the defence is accepted, that Mr. Masood Mahmood also could have a motive of his own to assassinate Mr. Ahmad Raza Kasuri, then half of the prosecution raise would stand proved. This question was considered by this Court in *Abdul Qadir v. The State* and it was held therein, amongst other things, that "All that can be said on the strength of the record of this case is that the appellant failed to prove or suggest that either of the accomplices had any reason to get rid of the deceased but the appellant's ignorance of any such motive does not exclude the possibility of a motive having existed though unknown to the appellant". As regards the rest of the points urged by him, they evidently relate to the alleged 'subsequent' conduct of appellant Bhutto, but in view of the peculiar facts of this case reliance on them seems to be misconceived. It is true that according to the evidence of P.Ws. Abeul Wakil Khan, D.I.G. Police, Lahore Range, Muhammad Asghar Khan, S.S.P., Lahore, and Malik Muhammad Waris, the Investigating Officer in this case, all the said things, of which the learned counsel has complained, had taken place with a view to diverting the course of investigation into the wrong channels. But all the three of them have put the blame mainly on Saeed Ahmad Khan. Enough has already been said about the evidence of Saeed Ahmad Khan to show that he was a busy body and used to poke his nose in everything which even remotely concerned appellant Bhutto. Upon the analysts of his said evidence, I have disbelieved him, for except for his own evidence to the effect that all the said things had been done by him on the order given to him by appellant Bhutto, there is no evidence on record to support him, nor indeed does his evidence find any corroboration from an independent source.

99. The learned counsel, however, argued that P.W. Saeed Ahmad Khan was an independent witness, therefore, there would be no need to seek the corroboration of his evidence. I am afraid, there is no force in this contention. Apart from the fact that I have already dealt with some of his evidence (and would be dealing with the rest of it at the proper stage) to show that he was not a truthful witness, he seems to me to be an accomplice (to the discussion of which topic, however, I would be adverting subsequently) and so in the absence of any corroboration of his evidence, it would be dangerous to believe him - especially when by the examination of his relevant evidence I have already held that he used to poke his nose in every affair which even remotely concerned appellant Bhutto, only to show the importance of his own office.

100. The learned counsel nevertheless relied on paras. 491-539 of the High Court's judgment to show that from the bulk of oral and documentary evidence discussed therein it has been amply proved that appellant Bhutto alone had the motive to assassinate Mr. Ahmad Raza Kasuri. The perusal of the said paras. would show that all the evidence discussed therein relate to the alleged 'subsequent' conduct of appellant Bhutto and the High Court, believing it to be true, has held the same against him. Now the said evidence partly consists of the testimony of P.Ws. Abdul Wakil Khan, D.I.G. Police, Lahore Range, Muhammad Asghar Khan, S.S.P., Lahore, and Malik Muhammad Waris, the Investigating Officer which has already been dealt with, whereas the rest of the evidence consists of the alleged part played by late Mr. Bajwa with a view to diverting the course of the investigation into wrong channels; the various notes written by Mr. Bajwa and Mr. Saeed Ahmad Khan to Secretary to the Prime Minister, and the various privilege motions moved by Mr. Ahmad Raza Kasuri in the National Assembly. Enough has been said by me respect of the privilege motions moved by Mr. Kasuri in the National Assembly. But what would seem to be necessary to deal with here is Exh. P.W. 3/2-A, which is a note of late Abdul Ahad, D.S.P., written to late Mr. Bajwa forwarding therewith a copy of the F.I.R. relating to the Lahore occurrence; Exh. P.W. 3/2-A/1, which is a note recorded by Mr. Bajwa on the said document observing "What prevented them to register case immediately it was known that attempt to murder was made. This statement would have formed part of the case diary in that case and not in the F.I.R." Exh. P.W. 3/2-B, a note written by Saeed Ahmad Khan to Secretary to the Prime Minister, saying therein that although the F.I.R. of the occurrence had been sealed, yet a good deal of publicity had been given to it and further that the incident involving firing in the heart of the town, not far away from the Police Station, could have been detected immediately by the Police and the case registered *suo motu*; Exh. P.W. 3/2-B/1, which is an endorsement of appellant Bhutto to the effect "I agree with you"; Exh. P.W. 3/3-B, which is a report of J.A.D.O. (Joint Armed Forces Detection Organization) in which the visit of Malik Muhammad Waris to the Directorate General, I. S. I. has been mentioned, as also that the type of ammunition used in connection with the incident at Lahore was available in Darrah Adam Khel as well as with underground elements in the settled Districts; Exh. P.W. 3/3-A, a letter written by Mr. Saeed Ahmad Khan to the Defence Secretary, in connection with the said type of ammunition and requesting for a clarification as to which Army Units were in possession of the same; Exh. P.W. 3/3-C, which is the reply of the Defence Secretary to the said letter of Saeed Ahmad Khan intimating therein that the said ammunition (of the Chinese origin) was once used by the Army Units, but now the same was only used by the FSF, Frontier Corps Units and the Army Corps Tank Crews; Exh. P.W. 3/3-D, which is a note written by Mr. Saeed Ahmad Khan to the Director-General of Information and Broadcasting Division, proposing that publicity be given to the statements made before the Inquiry Commission headed by Shafi-ur-Rehman, J. of the Lahore High Court, by the S.S.P., Lahore, and Malik Muhammad Waris; Exh. P.W. 3/3-E, which is a note of appellant Bhutto on the said document, and in which he approved the said suggestion; Exhs. P.W. 3/3-F, P.W. 3/3-G and P.W. 3/3-H which show that publicity was already given to the

said statements of the P.Ws.; Exh. P.W. 3/3-I, which is a note written by Saeed Ahmad Khan to Secretary to the Prime Minister, pointing out therein that Shafi-ur-Rehman, J. had in his judgment criticized the lapses in the investigation of the case at the initial stage, but expressed satisfaction with the subsequent investigation carried out by the CIA, Lahore; Exh. P.W. 3/3-J, which is a note recorded by appellant Bhutto on the said document (in which Saeed Ahmad Khan had suggested if publicity ought to be given to the relevant portions of the judgment) to the effect that he would decide the said question after going through the judgment; Exh. P.W. 3/3-L, which is a letter written to appellant Bhutto by the Chief Secretary, Punjab, enclosing therewith a copy of the judgment of Shafi-ur-Rehman, J., referring therein to the discussion which he already had with Mr. Saeed Ahmad Khan during his visit to Lahore, and on which appellant Bhutto recorded his own note "What was the point of discussing it with you? Please discuss."; and Exh. P.W. 3/3-I in which it is said that appellant Bhutto disagreed with the suggestion of Saeed Ahmad Khan to give publicity to the favorable portions of the said judgment.

101. Before dealing with the effect of these documents, it may be mentioned that according to the learned Special Public Prosecutor, the said role played by Mr. Saeed Ahmad Khan was that of an innocent agent, whereas the one played by late Mr. Bajwa was clearly criminal in nature inasmuch as his only object was to divert the course of the investigation into wrong channels. This contention seems to be a contradiction in terms, although the reason for which it has been made is understandable. The entire case of the prosecution, in so far as it concerns the existence of conspiracy, entered into between appellant Bhutto and Mr. Masood Mahmood, is anchored in the evidence of the latter as corroborated by the evidence of Mr. Saeed Ahmad Khan. It is, therefore, obvious that if Saeed Ahmad Khan was not given the role of an 'innocent' agent, evidently he would then be an accomplice and incompetent to corroborate the evidence of P.W. Masood Mahmood.

102. Now coming to the said various documents, relied upon in the High Court, I feel no hesitation to say that they are innocuous or at any rate capable of being explained on the basis of more than one reasonable hypothesis. Assuming for the sake of argument that appellant Bhutto himself had given instructions to Mr. Saeed Ahmad Khan to go to Lahore, meet the concerned officials and look after his interest, in which respect, however, I have disbelieved the evidence of the latter, even then his said conduct cannot be said to be criminal, as the same can as well be explained on the hypothesis to the effect that being the first elected Prime Minister of the country, naturally he would be anxious to know the true facts of the case, in which, his arch detractor, namely, Mr. Ahmad Raza Kasuri had mentioned his name. In point of fact this conduct of appellant Bhutto would seem to be entirely natural, for anyone being accused of murder, and that too by an arch enemy, would conduct himself in the like manner. Without going into the details of the said various documents, therefore, every word of which I have read with considerable care, it is clear to me that they do not even remotely incriminate

appellant Bhutto. But nonetheless it would be proper to refer to few of them to highlight the utter absurdity of the evidence of Mr. Saeed Ahmad Khan.

103. Now the evidence of Mr. Saeed Ahmad Khan, and here disregarding the various improvements made by him therein from stage to stage, is that when the name of appellant Bhutto was mentioned in the inquiry proceedings conducted by Shafi-ur-Rehman, J. of the Lahore High Court, the former telephoned him either from Larkana or Karachi and told him "what the hell are you doing in Rawalpindi when my name is being taken before a judicial inquiry being held at Lahore ..... in the murder case of late Muhammad Ahmad Khan. What kind of Chief Security Officer and Legal Advisor you are? and that you should proceed to Lahore immediately". He admitted, however, that the said inquiry proceedings had started in January, 1975. And so it should be obvious that the very first time appellant Bhutto talked to him about the murder of Nawab Muhammad Ahmad Khan was after about two months of his assassination, and that too when his name was mentioned in the proceedings before the said Tribunal. Long before that, however, his name had been mentioned in the FIR lodged by Mr. Kasuri, but evidently he showed no anxiety in the matter, although Mr. Saeed Ahmad Khan had kept him informed in that behalf in the various notes submitted to him from time to time.

104. The next claim of Mr. Saeed Ahmad Khan, which in any case, is by way of improvement, is that during his visit to Lahore he came to know that the type of crime empties recovered from the scene of occurrence (7.62 mm.), clearly indicated the use of Chinese weapons which were then in the official use of the FSF. On returning to Rawalpindi, therefore, he conveyed the said information to Mr. Masood Mahmood who, however, put him off saying that Chinese weapons were also an use with the various Army Units as also that they were smuggled into the country. Being dissatisfied with the said answer of Masood Mahmood, he met with appellant Bhutto and conveyed him the said information but he also gave him the same reply. Thereafter (and acre again he is deposing by way of improvement), appellant Bhutto told him to find out from J.A.D.O. as well as from the Defence Secretary as to which Units of the Army were in possession of the Chinese weapons, and further if they were available at Bara, a market place situate in the Tribal territory of N.W.F.P.). In pursuance of the said instructions given to him by appellant Bhutto, he wrote to J.A.D.O. and the Defence Secretary, who in reply (vide Exhs, P.W. 3/3-B and P.W. 3; 3-C, respectively) informed him that the Chinese weapons were in the official use of Frontier Corps Units and FSF etc. On receipt of the said replies (and here again he is deposing by way of improvement), he "got perplexed because in it was mentioned that the Chinese weapons are in the use of the FSF and I had been given positive instructions by the Prime Minister that FSF be kept out". The fact, however, is that long before the alleged instructions given to him by appellant Bhutto, the exact information in respect of the type of ammunition used in the attack made on the car of Mr. Ahmad Raza Kasuri at Lahore had come on the record of the Tribunal presided over by Shafi-ur-Rehman, J., as

also that the said ammunition was used in the Chinese weapons which were in the official use of the FSF. In this view of the matter, there was hardly any occasion for Mr. Saeed Ahmad Khan to get 'perplexed', as the information conveyed him by J.A.D.O. and the Defence Secretary was already known publically. I am, therefore, of the view that by writing to J.A.D.O. and the Defence Secretary, Mr. Saeed Ahmad Khan was trying to exhibit his usual enthusiasm in all matter even remotely relating to appellant Bhutto, and not that the latter had given him any instructions in that behalf.

105. Mr. Saeed Ahmad Khan has next said in his evidence, which again is by way of improvement, that "In May, 1974 in one of my usual interviews with the Prime Minister", after a number of subjects had been discussed and he got up to leave, appellant Bhutto asked him if he knew Ahmad Raza Kasuri? He replied that he did not know him personally. On this he told him that he had given some work to Mr. Masood Mahmood, Director-General, FSF in connection with Mr. Kasuri and to "remind him". Now on the face of it, this claim of Mr. Saeed Ahmad Khan seems to be patently absurd and unbelievable. If there was any truth in his said claim, evidently he ought to have mentioned the same in his previous statements, which, however, is not the case. Furthermore, it is inconceivable that after he told appellant Bhutto that he did not know Mr. Kasuri personally, the latter, instead of picking up the secrophone himself and reminding Mr. Masood Mahmood, would ask him to do the same - unless of course it is assumed that appellant Bhutto was so naive as not to realize the implications of his said indiscretion to the effect that by proliferating the said news unnecessarily, he was evidently tightening the noose round his own neck.

106. The evidence of Mr. Saeed Ahmad Khan also is that on the instructions given to him by appellant Bhutto, he had opened three files in respect of Mr. Ahmad Raza Kasuri in July, 1973, with the aid of his 'personality' sheets. secured by him from the Director-General, Intelligence Bureau, as well as from the Special Branch, Lahore. It is in evidence, however, that similar files also were opened and maintained in respect of many other persons belonging to different walks of life as a measure of the usual practice of each Government. In the case of Mr. Kasuri, therefore, how can it be said that he was treated differently? Furthermore, by the type of speeches made by him both inside and outside the National Assembly, in which he poured out his venom against appellant Bhutto, can any serious objection be really taken to the opening of his said files or for the matter of that to keep him under strict surveillance.

107. The entire claim of Mr. Saeed Ahmad Khan to the effect that on the instructions given to him by appellant Bhutto, he had gone to Lahore to oversee his interest is belied by the fact that when Mr. Muhammad Hanif Ramay, the then Chief Minister of the Punjab, wrote letter (Exh. P.W. 35/3) to appellant Bhutto saying therein amongst other things, "The report has already been discussed with your Chief Security Officer. I have asked the Chief Secretary to send him a copy". Mr. Bhutto made a note on it "What was the point of discussion with you? Please discuss". Now this note of appellant Bhutto

does not appear on Exh. P.W. 3513, but the same was proved by Muhammad Yousaf (PW. 27), Superintendent, CMLA Secretariat, Rawalpindi, from the Diary/Dispatch Register of the Secret Section of the Office in which all such correspondence used to be entered, as also the notes recorded thereon by appellant Bhutto. If the claim of Mr. Saeed Ahmad Khan was really true, then the said note recorded by appellant Bhutto would seem to be inconsistent with his claim. And thus how can any reliance be placed on his simple word?

108. The claim of Mr. Saeed Ahmad Khan also is that in accordance with the instructions given to him by appellant Bhutto, he had arranged through the media that wide publicity be given to the statements made by Messrs Asghar Khan, S.S.P., Lahore, and D.S.P., Malik Muhammad Waris before, the Special Tribunal presided over by Shafi-ur-Rehman, J. of the Lahore High Court, because the said statements favored Mr. Bhutto. However, the judgment delivered by Shafi-ur-Rehman, J. in the said proceedings was, not permitted to be given any publicity by Mr. Bhutto, as according to him it was against his interest. Now the High Court has believed the said evidence of Mr. Saeed Ahmad Khan as true, and relying on documents Exhs. P.W. 3/3-D, P.W. 3/3-F and PW. 3/3-J, which are the notes written by Mr. Saeed Ahmad Khan to Secretary to the Prime Minister, held against appellant Bhutto. With profound respect to the High Court, however, neither the said finding can be sustained nor the evidence of Mr. Saeed Ahmad Khan accepted. A bare perusal of Exh. P.W. 3/3-D, dated 1-2-1975, would show that in it Mr. Saeed Ahmad Khan had for the very first time broached the subject of giving publicity to the statements made by Asghar Khan, S.S.P., Lahore, and Malik Muhammad Waris with Mr. S. N. Qutb, Director-General, Information and Broadcasting Division. However, in the very next note (Exh. P.W. 3/3-F, dated 6-2-1975) written by Anwar Ahmad, Director (News), it is pointed out that the proceedings of the inquiry conducted by Shafi-ur-Rehman, J. have already received publicity in '*Pakistan Times*', Lahore, '*Nawa-e-Waqt*', Lahore, '*Nawa-e-Waqt*', Rawalpindi, and '*Jung*', Rawalpindi, on January 30, 1975, as also in the '*Morning News*', Karachi, '*Hurriyat*', Karachi, and '*Nawa-e-Waqt*', Rawalpindi, of February 3, 1975. Now from these uncontroverted facts, it would be clear that the said proposal made by Mr. Saeed Ahmad Khan to Mr. Qutb was not only entirely futile, but indeed commensurate with his role as Major Domo in connection with anything which even remotely concerned Mr. Bhutto. The fact that no action was taken on his said proposal, as it is conceded that no publicity of any kind was given to the statements of P.Ws. Asghar Khan and Malik Muhammad Waris, would seem to support the said conclusion. But the High Court, with respect, seems to have accepted the evidence of the witness as a matter of course, without analysing it in the context of the said documentary evidence, only because Exh. P.W. 3/3-D was brought to the notice of appellant Bhutto and he had just put his initials on it.

109. The High Court also with respect seems to have given undue importance to the claim of Mr. Saeed Ahmad Khan to the effect that the judgment delivered by Shafi-ur-

Rehman, J. was not approved for publicity because according to Mr. Bhutto, it would be against his interest. A look at document, Exh. P.W. 3/3-J, dated 28-2-1975, which is a note written by Mr. Saeed Ahmad Khan to Secretary to appellant Bhutto, would show that after enumerating therein the finding of the learned Judge as to the lapses into the investigation of the case at the initial stages, and the directions given by him in respect of the future course of the investigation, the suggestion offered by him therein was "I would humbly suggest that the relevant portions of the report may be published to clear the position, emanating as a result of this incident. The various possibilities and probable causes of this murder have been enumerated in this report". Now a casual look at the words (underlined by me), which, however, seem to have escaped the notice of the High Court, would clearly reveal that all that Mr. Saeed Ahmad Khan was interested in was to give publicity only to those portions of the judgment of Shafi-ur-Rehman, J., in which "the various possibilities and probable causes" relating to the murder of Muhammad Ahmad Khan had been enumerated in order to help "clear the position" of appellant Bhutto.

110. Reference may also be made to Exh. P.W. 3/2-M, dated 7-12-1974, a note written by Mr. Saeed Ahmad Khan to Secretary to Mr. Bhutto, under the cover of which the former had forwarded a copy of the secret report of his assistant late Mr. Bajwa in which it was said, amongst other things, that Mr. Ahmad Raza Kasuri had moved a privilege motion in the Assembly about the assassination of his father, but most of his speech was expunged, as also that Mr. Bhutto being the murderer of his father should be arraigned before a Court of Law. Now in the secret report in question, there is no mention of the fact that "Ahmad Raza Kasuri is in a desperate state and has been heard saying that he will take revenge, of the murder of his father personally", and yet they are there in the said note of Mr. Saeed Ahmad Khan which would evidently mean that he was the author of them. Regardless of the question of the admissibility of the said secret report in evidence as the informant of it nor the source from which it emanated was examined in the High Court, a bare look at the said document (Exh. P.W. 3/2-M) would reveal the spontaneous conduct of Mr. Saeed Ahmad Khan, as this is how he commented upon the said report: "This note contains a pack of lies and incidents relate to 1971, before PPP came in power. Copies of this note, however, were distributed by Ahmad Raza Kasuri, and his henchmen to Foreign Embassies and to Foreign Journalists including Chinese News Agency". This being the type of witness as Saeed Ahmad Khan was, it is sad that his bare word from the dock should have been accepted as a gospel truth, especially when by the examination of the said documents, he was not at all a truthful witness.

111. Lastly, reference may be made to Exh. P.W. 28/1, which is a source report submitted by Ashiq Muhammad Lodhi (P.W. 28), Acting Assistant Director, FSF Headquarters; Rawalpindi, to late Mr. Abdul Hamid Bajwa in connection with one Sher Baz Khan, the gunman of Mr. Ahmad Raza Kasuri. Now this report, which has been proved by P.W. Lodhi, is no doubt admissible in evidence, but I am afraid there is

nothing in it to involve appellant Bhutto. By going through the said report, it would be seen that all that has been mentioned therein is the description of Mr. Sher Baz Khan, as also that when Mr. Kasuri goes into the National Assembly, he is present in the Gallery. Now the finding recorded by the High Court on the said report is (see para. 522 of the judgment) that Abdul Hamid Bajwa continued, with the consent of the principal accused, his witch hunting against Ahmad Raza Kasuri even after the Lahore occurrence and left no stone unturned to drive a wedge in the security measures taken by the latter to effect a break through obviously in order to facilitate the completion of the performance of the conspiracy. There could be no other object of collecting information about the security measures taken by Ahmad Raza Kasuri and about the description of his gunman." With profound respect to the High Court, however, the said report is susceptible of more than one construction. It is in the evidence of P.W. Lodhi that during the relevant period, he was posted in the National Assembly of Pakistan; that one of his duties was to eavesdrop on the conversation of the M.N.As. and to submit a report to the higher officials; that for the purposes of security, he used to give the description of all persons visiting the National Assembly; and that he had submitted report Exh. P.W. 28/1 to late Mr. Bajwa, as Mr. Bajwa had asked him to do so. It would thus be seen that even according to the routine of his charter of duties, P.W. Lodhi had to submit a report on Mr. Sher Baz Khan, the gunman of Mr. Kasuri, as he used to visit the House and sit in the Visitors' Gallery. Furthermore, if the object of Mr. Bajwa was "to drive a wedge in the security measures taken" by Mr. Kasuri, then he would have kept the said report to himself and not distributed its copy (Exh. P.W. 23/2-R) to the Spesikor of the National Assembly, and another copy (Exh. P.W. 23/2-S) to the Deputy Inspector-General of Police, Rawalpindi Range, for information. The High Court, with respect, seems to have not adverted to these facts, and so I have not been able to agree with its said conclusion.

112. I can go on and on dealing with each and every piece of evidence relating to the 'subsequent' conduct of appellant Bhutto to show their patent absurdity, unnaturalness, as also that they are capable of being explained on the basis of another reasonable hypothesis. But it would be a sheer waste of public time. Enough has been said by me to show that many vital links in the long chain forged by the use of the circumstantial evidence in this case by the prosecution have snapped, with the result that the chain has broken into many pieces. I am, therefore, of the humble view that all the pieces of evidence relied upon by the prosecution as to the alleged 'subsequent' conduct of appellant Bhutto are wholly illusory, and of no consequence whatever. A priori, it should follow that the prosecution has not only failed to establish any motive against appellant Bhutto. But from the evidence relied upon by it the existence of another motive has not been excluded.

113. I would now take up the question of conspiracy entered into between appellant Bhutto and Mr. Masood Mahmood to assassinate Mr. Ahmad Raza Kasuri. In doing so, however; what I propose to do is first to analyze the evidence of Mr. Masood Mahmood



to see if it is natural, probable and convincing, without taking into consideration the fact that he was taken into custody by the Martial Law Authorities on the very day (i.e. July 5, 1977) when the Government of appellant Bhutto was removed or that as an approver, he should not be believed, unless his evidence is corroborated in material particulars. To put it differently, I am going to treat him just like an ordinary witness, without holding against him (for the time being) the stigma that being self-confessed criminal, and having betrayed his former associates under the temptation of saving his own skin, his evidence must be viewed with distrust and the same not accepted in the absence of corroboration in material particulars.

114. I have in the earlier part of this judgment, quoted from treatise and quite a few judgments the necessary principles to show as to how the evidence in a case ought to be analysed. Notwithstanding the said position, however, I am tempted to quote the following passages appearing on pages 47 and 50 of the Law of Evidence by N. D. Basu (1950 Edition) as they seem to me to contain the essence of pragmatic wisdom:-

"In a jury trial great caution is to be observed by the Judge as regards circumstantial evidence. In cases of such evidence process of inference and deduction are essentially involved, frequently of a delicate and perplexing character liable to numerous causes of fallacy, some of them inherent in the nature of the mind itself, which has been profoundly compared to the distorting power of an uneven mirror, imparting its own nature to the true nature of things" ..... There is no standard for the sufficiency of evidence to induce belief, and the various degrees of more or less must, ordinarily, be left to the unprejudiced consideration of the jury," said Judge Wardlaw of South Carolina in *Means v. Means S Strobb*. LS (Cab.) 167. Belief is rarely the consequence of strictly logical process. It is either partially or entirely the outgrowth of education, bias, affection, fear or some other influencing passion. We believe what we wish to believe, and what we are in the mood of accepting as true. The same evidence which to one may be convincing, to another may seem absurd. Per Vice-Chancellor Pitney, in *Duvale v. Duvale* 34 Atl. Rep. 888. So there is no standard by which the weight of conflicting evidence can be ascertained. Per Sutherland, J., in *People v. Superior*. Ct. 5 Wind. (N Y) 114. In estimating the weight of evidence we cannot make it as so many ounces, pounds, or tons, and yet we know that it may have all degrees of weight from the lightest feather to the most absolute moral certainty. All we can do is to note all the facts and circumstances carefully and estimate its absolute and relative weight by the lights of conscience and experience (*Boylan v. Micker* 28 N J H 274). We have no test of truth of human testimony, except its conformity to our knowledge, observation, and experience. Per Vice-Chancellor, Van-Fleet in *Daggers v. Van Dyck* 37 NJ Eq. 130 and in *Jersey City Bank v. O' Rourke* 40 NJ Eq. 92. The effect, then; which all evidence has upon the mind is determined by observation and experience, the only original instructors of wisdom."

115. Now bearing these principles in view, let us proceed to examine the evidence of Mr. Masood Mahmood. The essence of his evidence, which actually runs into 132 typed pages, and the bulk of which is unnecessary, is that being a member of Police Service of Pakistan he attained the rank of Deputy Inspector-General, and in 1969 was selected as Deputy Secretary-General, CENTO, with Headquarters at Ankra. On his return from Ankra in 1970, at his own request, he was posted as Deputy Secretary-Ministry of Defence; later promoted as Joint Secretary and Additional Secretary, and then appointed to what he has called a punishment post, *viz.* Managing Director, Board of Trustees Group Insurance and Benevolent Fund into Establishment Division. On being appointed to that post, he attempted to meet with Mr. Vaqar Ahmad, the then Secretary Establishment, but failed. Sometime in early April, 1974, however, Mr. Vaqar Ahmad called him and told him that he was to meet with appellant Bhutto on April 12, 1974, but he should first come and see him. Mr. Vaqar Ahmad was very good to him in the said meeting. He told him that appellant Bhutto was going to offer him an appointment which he must accept. He then dilated on the state of his domestic affairs saying that his wife was not keeping good health; his children were small; he himself was a heart patient; he had yet to clear the loans obtained by him from the Bank, as well as the Government, in connection with the construction of the only house which he possessed; that under the revised Service Rules an officer of Grade 21 (which he was) and above could be retired from service at any time, and in that behalf read out to him the relevant Rules; and that all this conversation, therefore, left him with the impression that his job was at the mercy of the Prime Minister and Mr. Vaqar Ahmad.

116. On November 12, 1974, he called on Mr. Bhutto who was kind to him; he praised his integrity and capacity for hard work, and offered him the post of Director-General, FSF. He told him not to accept any instructions from the then Minister of Interior, namely, Mr. Abdul Qayyum Khan. He advised him not to terminate the services of reemployed officers without his prior permission, as they were all useful people, and in that connection specially mentioned the name of appellant Mian Muhammad Abbas. He said that he expected him to forge the FSF into a deterrent Force. He finally told him that since Mr. Vaqar Ahmad did not like him he should keep on his right side.

117. Between 12-4-1974 and 23-4-1974, while he was still working as Managing Director, Board of Trustees Group Insurance and Benevolent Fund, Saeed Ahmad Khan (P.W. 3), the then Chief Security Officer to appellant Bhutto, and his assistant Abdul Hamid Bajwa (deceased) visited him several times and gave him the impression that if he declined to accept the job offered to him by appellant Bhutto he would not be able to see his wife and children again. Therefore, he formally assumed the charge as Director-General, FSF, on April 27, 1974. The charter of his duties was contained in the Federal Security Force Act, 1973, but appellant Bhutto had, during the said interview, instructed him that the Force must be made available to him for-

- (a) breaking up political meetings;
- (b) harassment of personages both in his own party and in the Opposition; and
- (c) induction of the plain-clothed personnel of the Force in public meetings addressed by him to swell the crowd.

118. In June, 1974, when appellant Bhutto was addressing the National Assembly of Pakistan, Mr. Ahmad Raza Kasuri interrupted him at which appellant Bhutto, ignoring the Speaker of the House, addressed him directly, and admonished him to keep quiet, adding that he had had enough of him and that he would not tolerate his nuisance any more. A day or two later, he (Masood Mahmood) was sent for by appellant Bhutto who told him that he was fed up with Ahmad Raza Kasuri, and that Mian Muhammad Abbas knew all about his activities, as he had already., been given instructions through his predecessor Haq Nawaz Tiwana (deceased) to get rid of him. He, therefore, told him to ask Mian Muhammad Abbas to get on with the job and "produce the dead body of Mr. Ahmad Raza Kasuri or his body bandaged all over", adding that he would hold him personally responsible for the execution of the said order. On hearing this, he was naturally shaken and pleaded with Mr. Bhutto that the execution of his order would be against his conscience, and certainly against the dictates of God. But Mr. Bhutto lost his temper and shouted at him saying that he would have no nonsense from him or from Mian Muhammad Abbas. He raised his voice and said "you don't want Vaqar chasing you again, do you?" At this, he returned to his Office in a perplexed state of mind, called Mian Muhammad Abbas and conveyed him the order of appellant Bhutto. However, he was surprised to notice that Mian Muhammad Abbas was not at all disturbed. He told him not to worry and that the said order would be duly executed, as he had already been conveyed the same through the former. Director-General, FSF. Subsequently, appellant Bhutto kept on reminding him and goading him from time to time for the execution of his said order on the green telephone, as well as through Saeed Ahmad Khan and Abdul Hamid Bajwa (deceased). Saeed Ahmad Khan had spoken to him over the green line and told him that appellant Bhutto wanted him to execute the order already given to him in respect of Ahmad Raza Kasuri.

119. In August, 1974, Ahmad Raza Kasuri was fired upon at Islamabad. However, before the said incident, and after appellant Bhutto had spoken to him to do away with Ahmad Raza Kasuri, he had asked him that since Mi. Kasuri was likely to be paying a visit to Quetta he had better take care of him there. Accordingly, he gave directions to Mr. M. R. Welch (P.W. 4), the Director, FSF, Quetta. He told him that some anti-State elements such as Ahmad Raza Kasuri had to be got rid of, as he had been delivering anti-State speeches with a view to damaging the interest of the country. The said directions were given by him to M. R. Welch on telephone, as well as personally, when he later met him at Quetta. In this respect he produced in evidence three documents, *viz.* Exh. P.W. 2/1 (also marked as Exh. P.W. 2/Z), Exh. P.W. 2/2 and Exh. P.W. 2/3, all

of which had emanated from Mr. Welch and which showed that when Mr. Ahmad Raza Kasuri subsequently visited Quetta how his movements were kept under observation and he kept under the constant surveillance of Mr. Welch.

120. On November 11, 1974, when he (Masood Mahmood and appellant Bhutto both were on a visit to Multan, the latter phoned him up very early in the morning and said "Your Mian Abbas has made complete balls of the situation. Instead of Mr. Ahmad Raza Kasuri, he has got his father killed". On hearing this, he was taken by surprise, but appellant, Bhutto disconnected saying that he would summon him later. His A.D.C. then called him at the residence of Mr. Sadiq Hussain Qureshi at Multan and when he was ushered into his presence (Mr. Sadiq Hussain Qureshi being seated with him) he told him in a non-chalant manner, as if he had not talked to him before: "I hear Mr. Ahmad Raza Kasuri's father has been killed last night at some place in Lahore". He replied he had also heard of the same. Soon thereafter, he (Masood Muhmood) returned to the Headquarters at Rawalpindi, when Mian Abbas informed him that his operation had been successful, but instead of Ahmad Raza Kasuri his, father had been murdered at Lahore.

121. On the same day he was summoned by appellant Bhutto at Rawalpindi, who was "peevied and agitated". He told him that the actual task had yet to be accomplished. He, however, replied that: "at your behest an idea conceived by you was carried out and the fact remains that both you and I and my subordinates will be taken to task by God Almighty, but I will not carry out any such orders anymore". Accordingly, Mr. Bhutto "piped down after hearing me", but "there were other occasions on which he continued to goad me into getting Ahmad Raza Kasuri assassinated. I categorically said 'no'." With the result that there came to be made attempts on his life; threats were extended to him; attempts were made to kidnap his children from Aitcheson College, Lahore; attempts were made at the poisoning of his food at Chamba House, Lahore, where he discovered that some of his own subordinates, who seemed to have been won over, were lurking around the places where they had no business to be present when he was around.

122. On July 5, 1977, he was taken into protective custody in the early hours of the morning. He was initially taken to some Army Mess at Rawalpindi, but later removed to Abbottabad the same evening, where he stayed until the early days of August. On August 14, 1977, however, he addressed a letter to the Chief Martial Law Administrator, making a clean breast of the misdeeds of the FSF,, carried out by him under the orders of appellant Bhutto. Before the 4th week of August, 1977, he was contacted by the Federal Investigating Agency before whom he volunteered to make a confessional statement in respect of the murder of Nawab Muhammad Ahmad Khan. He was, therefore, produced before a Magistrate at Islamabad and he made the confessional statement (Exh. P.W. 2/4). Subsequently, he made an application to the authorities from Camp Jail, Lahore, and said therein that if he were to be granted pardon and made an approver in the case, he would tell the whole truth in connection with the murder of

Nawab Muhammad Ahmad Khan. Upon receipt of his said application (Exh. P.W. 12/5), he was granted pardon under section 337, Cr. P.C., and made an approver. On 14-9-1977, therefore, he made before a Magistrate at Lahore, his (approver's statement (Exh. P.W. 2/6).

123. In support of his evidence, the witness also produced a copy of his T.A. Bill (Exh. P.W. 2/7), in connection with his visit to Multan on November 10, 1974, along with the details of his tour programme for the period a 1-11-1974 to 11-11-1974 (Exh. P.W. 2/8), and T.A. Bills (Exh. P.W. 2/9) and (Exh. P.W..2/10), in connection with his visit to Karachi, Sukkur, Larkana, Quetta and Lahore, for the period July 18, 1974 to August 4, 1974, and, during which visit he was received in audience by appellant Bhutto at Larkana, who discussed with him the details of his proposed visit to Balochistan. On July 29, 1974, again he was given an 'audience' by appellant Bhutto at Quetta as he distinctly remembered that three days thereafter (i.e. on August 2, 1974), he addressed a public meeting there.

124. Now this is the substance of what Mr. Masood Mahmood has said in his examination in chief. Enough has been said by me in the earlier part of the judgment to the effect that all his evidence in respect of what Mr. Vaqar Ahmad had, told him in the meeting held in April, 1974, is inadmissible in evidence. But that apart, it may still be instructive (if not necessary) to analyze his examination-in-chief (without going into his cross-examination for the present, however, or for that matter into the various omissions, contradictions and improvements made by him therein from time to time) in order to see if the same is natural or probable? In finding a proper, answer to this question, however, the various judgments and treatise noted hereinbefore, and in which safe guidelines have been laid down for the proper appreciation of evidence in a criminal case, must constantly be kept in view, as also that Mr. Masood Mahmood is not an ordinary witness in the sense of being uneducated, or lacking worldly wisdom or experience of human affairs.

125. Now besides being a University Graduate, at a very young age, he joined the then Royal Indian Air Force as a Trainee Pilot Officer, but due to an accident, on account of which he seems to have lost what he has described as 'rubber-neck' and consequently his utility for flying. Therefore, he left the Air-Force, and after a short stint in a Secretarial job in the Department of the Rehabilitation of the then Government of Punjab, he joined the Police Service of Pakistan. As Police Officer, he seems to have justified his selection, as soon he attained the high rank of Deputy Inspector-General. In 1969, he was selected as Deputy Secretary-General, CENTO, with Headquarters at Ankara. On his return from Ankara in 1970, at his own request, he was posted as Deputy Secretary in the Ministry of Defence, Government of Pakistan, later promoted as Joint Secretary and Additional Secretary, and then appointed to what he has called a punishment post, namely, as Managing Director, Board of Trustees Group Insurance Benevolent Fund in the Establishment Division. On this appointment, which he

evidently resented, he attempted to seek an interview with Mr. Vaqar Ahmad, the then Establishment Secretary, but did not succeed, and so he continued to remain in that post until appointed as Deputy Director-General, FSF.

126. Now this is the background of Mr. Masood Mahmood in the context of which his first meeting with Mr. Vaqar Ahmad held in April, 1974, and all that transpired therein between them has to be seen and evaluated. Now the substance of his evidence is that sometime in April, 1974, Mr. Vaqar Ahmad called him, and told him that he was to meet with appellant Bhutto on April 12, 1974, but he should first come and see him. Mr. Vaqar Ahmad was very nice to him in the said meeting, he even discussed with him his very intimate and personal affairs such as that his wife was not keeping, good health; his children were small; that he himself was a heart patient; that he had yet to clear the loans obtained by him from the Bank, as well as the Government, in connection with the construction of his only house; that under the revised Service Rules an officer of Grade 21 and above could be retired from service at any time; and that he actually read out to him the relevant Rule with the result that he went away with the impression that his job was at the mercy of the Prime Minister and Mr. Vaqar Ahmad. Frankly, all this evidence of Mr. Masood Mahmood is not only intriguing, but utterly unnatural and improbable. His evidence would show that before he was called by Mr. Vaqar Ahmad to his office, the latter seems to have made thorough enquiries into his very personal and intimate affairs; had heard from appellant Bhutto his views about his proposed appointment as the Director-General, FSF; had already arranged his interview with appellant Bhutto for April 12, 1974; and that the kind of talk which he had with Mr. Vaqar Ahmad in the said interview had left him with the impression that his job was at his as well as at the mercy of appellant Bhutto. There is no evidence on record to show, however, that the post of the Director-General, FSF was so hazardous, or unpopular or in congenial as to require such a well-calculated effort on the part of no less a person than Mr. Vaqar Ahmad to play upon his finer susceptibilities, psychologically to prepare him not to decline the said job, nor indeed is there any evidence to show that Mr. Masood Mahmood (or for that matter Mr. Bhutto) was known for the depravity of his character as to make him the proper instrument for the implementation of the alleged diabolical designs of the latter. It is in his evidence that when Mr. Vaqar Ahmad called him in his office in April, 1974, he not only reminded him that an officer of Grade 21 and above, under the revised Service Rule's, could be retired at any time, but he actually read out to him the relevant Rule in that behalf with the evident view in his mind to make him agree to accept the post of Director-General, FSF or face the unpleasant prospect of losing his job as a Government servant. I am afraid all this is too unnatural and improbable to be believed. After all, he was a Government servant, and so how could he have refused to be posted to any post in the hierarchy of the Government - specially when on his own showing he was plagued by a variety of domestic problems such as the poor health of his wife; his small children and the loan which he owed to the Bank as well as the Government, and consequently could not afford to lose or resign his job. His claim that in the said meeting Mr. Vaqar Ahmad

actually read out to him the relevant Rule, under which an officer of Grade 21 and above could be retired at any time seems further to render his testimony absurd and improbable. Mr. Vaqar Ahmad, being the Establishment Secretary of the Federal Government, must be deemed to have the requisite experience, maturity and the realization of the importance of his high office, and hence it is inconceivable that he would have indulged in the said unnatural exercise when the simplest thing for him ought to have been to issue the necessary order of the transfer of Mr. Masood Mahmood as Director-General, FSF. The kind of picture which Mr. Masood Mahmood seems to have painted in his evidence, however, is as if he was goaded into a 'Kami Kaze' type of an undertaking, not realizing that as Government servant he could be transferred from one post to another without his consent by the issuance of a simple notification/order.

127. Similarly, the type of picture painted by him of his alleged conversation with appellant Bhutto, in the meeting of April 12, 1974, Mr. Masood Mahmood does not seem to have helped his image. It is inconceivable that as Prime Minister of the country, only to persuade him to accept the post of Director-General, FSF, Mr. Bhutto would first praise his integrity and capacity for hard work, and then proceed to advise him not to accept any instructions from a member of his own Cabinet, namely, the then Minister of Interior under whom he was to work directly; not to terminate the services of the re-employed officers of the FSF without his permission (making a special mention of Mian Muhammad Abbas), and to keep himself on the right side of Mr. Vaqar Ahmad. If there was any evidence on record to show (not of course the surmises and conjectures with which the evidence of the P. Ws. is indeed replete) that the FSF was so dreaded a Force as to make any correct officer hate to do anything with it, or for that matter Mr. Masood Mahmood was known for the depravity of his character, then there would be no difficulty to appreciate his evidence. But this is not the position. I am, therefore, of the humble view that the said evidence of Mr. Masood Mahmood is patently absurd, just as it would be absurd to believe him that after all the said efforts made on him both by Mr. Vaqar Ahmad and Mr. Bhutto, the latter then set after him his 'hounds', namely, Mr. Saeed Ahmad Khan (his Chief Security Officer) and his assistant late Mr. Bajwa to keep on reminding him that in case he declined to accept the job offered to him by appellant Bhutto, he would not be able to see his wife and children again.

128. Mr. Masood Mahmood has next deposed that after the National Assembly incident between appellant Bhutto and Mr. Ahmad Raza Kasuri in June, 1974, the former called him and told him to remind Mian Muhammad Abbas to get on with the job of assassinating Mr. Ahmad Raza Kasuri; that after sometime appellant Bhutto asked him that Mr. Kasuri was likely to be paying a visit to Quetta, and so he had better take care of him there; that accordingly he gave instructions to Mr. M. R. Welch, the Director, FSF, Quetta, and that Mr. M. R. Welch had in that connection exchanged with him letters Exhs. PW. 2/1, P.W. 2/Z, P.W. 2/2 and P.W. 2/3 in which Mr. Kasuri was said to have been kept under close surveillance by the men of Mr. M. R. Welch. The High Court seems to have believed the said evidence of Mr. Masood Mahmood, as in

paras. 480-483 of its judgment all the said evidence has been taken notice of and in the end the following finding recorded against appellant Bhutto:-

"480. The documentary evidence therefore, shows that although there was evidence of the stay of several persons belonging to the party of Ahmad Raza Kasuri P.W. I in Imdad Hotel, but the report Exh. P.W. 2/1 and the query of Mian Muhammad Abbas accused (Exh. P.W. 2/2) were confined to the dwelling place of Ahmad Raza Kasuri P.W. I. It is clear in this context that report Exh. P.W. 4/1 about the arrangements of the security of the Party of Ahmad Raza Kasuri is a device to submit a report that he was well-protected. This was explained by M. R. Welch P.W. 4 who stated that since he had no intention of committing the heinous murder he had to find a plausible excuse for not executing the order of P.W. 2 and he took refuge in the fact that Ahmad Raza Kasuri was well-protected."

129. Mr. Yahya Bakhtiar, the learned counsel for appellant Bhutto has taken serious objection to the said finding recorded by the High Court, He contended that the said evidence of Mr. Masood Mahmood is untrue; and that the High Court has accepted the said evidence as a matter of course without giving any consideration to the fact if the same could as well be explained on the basis of another reasonable hypothesis. He argued that when Mr. Kasuri visited Quetta, the conditions there were abnormal due to insurgency that Mr. Kasuri was known for the aggressive style of his politics as well as his antipathy towards the person and the Government of appellant Bhutto, and so it was feared that he might use the said opportunity to incite the local people against the Government; that it was for this reason that instructions were given to Mr. M. R. Welch by p Mr. Masood Mahmood that he should be taken care of; and that the said innocuous instructions given to Mr. Welch and the correspondence exchanged between him and Mr. Masood Mahmood have been misconstrued by the High Court to the great prejudice of appellant Bhutto. There seems to be force in this contention. However, since I have already discussed this part of the case in great detail, while discussing the motive-part of the case of the prosecution, the same process need not be repeated, except for this observation that the High Court, with respect, has not only accepted the bare word of Mr. Masood Mahmood, without subjecting it to proper examination in the context of the correspondence (Exhs. P.W. 2/1, P.W. 2/Z, P.W 2/2 and P.W. 2/3), which clearly belied him. "But it seems to have proceeded on a course of simply canvassing the probabilities of the case against appellant Bhutto which in view of the judgment of the Federal Court. PLD 1953 F C 137 was impermissible.

130. His evidence further is that Mr. Bhutto called him sometime in June, 1974, and told him that he was fed up with the obnoxious behavior of Mr. Kasuri; that Mian Muhammad Abbas knew all about his activities, as he had already been given instructions through the former Director-General, FSF, to get rid of him; that he should therefore, remind Man Muhammad Abbas to get on with the job and "produce the dead



body of Ahmad Raza Kasuri or his body bandaged all over"; and that he would hold him personally responsible for the execution of his said order. Mr. Masood Mahmood protested against the said order saying That it was against his conscience, as well as against the dictates of God; that at this Mr. Bhutto lost his temper and shouted at him saying that he would have no nonsense from him or from Mian Muhammad Abbas, as also that "you don't want Vaqar chasing you again, do you?" At this he got up and went back to his office, called Mian Muhammad Abbas and repeated to him the order of Mr. Bhutto, who was not the least disturbed, however, and replied that he need not worry, that the order would be duly executed, as the same had already been passed on to hire by the former Director General, FSF. Subsequently, Mr. Bhutto went on reminding him from time to time for the execution of the said order personally, on the green telephone, as well as through Mr. Saeed Ahmad Khan.

131. Now a casual look at this part of his evidence ought to suffice to reveal at once the utter futility of his claim. A little contemplation over the basic concept of conspiracy would be enough to bring it home even to the most credulous that conspirators have to be circumspect, vigilant and cautious in keeping their designs so secret as not to leave any tell-tale signs or traces which may unmask their designs. I feel that there ought to be no quarrel with this basic assumption, even in the case of conspirators of low intelligence and unsophisticated background. Bearing this principle in mind, therefore, I have anxiously gone through every word of the story of Mr. Masood Mahmood a number of times to find in it some basis to make it plausible. But each time, I have been disappointed. It is inconceivable that a Prime Minister like Mr. Bhutto, the measure of whose political astuteness can be seen from the fact that within two years of his removal as the Foreign Minister of Pakistan in 1966 by the late Field-Marshal Muhammad Ayub Khan, he founded the PPP which in the General Elections of 1970 swept the polls to the National Assembly of Pakistan, and at least two of the Provincial Assemblies of what is now left of former Pakistan, would take into confidence Mr. Masood Mahmood, and that too only to use him for conveying to Mian Muhammad Abbas the message that he should get on with the job of doing away with Mr. Ahmad Raza Kasuri. It is in evidence that Mian Muhammad Abbas had throughout been working as Director, Operations FSF, at the Headquarters at Rawalpindi, as also that according to Mr. Masood Mahmood himself some of his own officers were not only in direct contact with the personal staff of Mr. Bhutto, but on the instructions given by the latter had carried out certain secret missions over his head. If this be the case, then the question is as to why Mr. Bhutto would take Mr. Masood Mahmood into confidence, and that too in respect, of a very trivial matter, and not remind Mian Muhammad Abbas himself through a variety of means at his disposal such as by sending for him to his own office which in a case of conspiracy of the present type ought to have been the most natural thing for him to do.

132. For similar reasons, I have not been able to persuade myself to accept the claim, of Mr. Masood Mahmood to the effect that subsequent to, the said order given to him

by Mr. Bhutto, the latter went on reminding him through Mr. Seed Ahmad Khan to get on with the job entrusted to him in connection with Mr. Kasuri. In point of fact, the whole evidence of Mr. Masood Mahmood in that regard is utterly improbable unless of course it is assumed that Mr. Bhutto was so naive as not to realize the implications of his said conduct. It is difficult to believe that having already conveyed to Mian Muhammad Abbas, through the former Director-General, FSF his order to assassinate Mr. Kasuri, Mr. Bhutto would go on flaunting the said secret so indiscretely as to take, into confidence Mr. Masood Mahmood and Mr. Saeed Ahmad Khan both, and that too in respect of a very inconsequential matter, namely, that the former should remind Mian Muhammad Abbas about the task already entrusted to him and the latter Mr. Masood Mahmood to get on with the said job. Now if this was all the role played by the said two witnesses, which indeed is the case of the prosecution, how could a Court of law be persuaded to believe them when their respective roles, in the execution of the conspiracy to assassinate Mr. Kasuri, were not only wholly trivial, but Mr. Bhutto could as well have done without their aid simply by calling Mian Muhammad Abbas to his presence and telling him to get on with the job. It is true that the High Court has accepted all the said evidence but in doing so, with respect, it seems to have disregarded even the basic principle of scrutinizing the same on the touchstone of naturalness and probability.

133. Mr. Masood Mahmood has further deposed that on November 11, 1974, he and Mr. Bhutto both were camping at Multan in connection with the tour programme of the latter. In the very early hours of the morning, when he was still in bed, Mr. Bhutto phoned him up and said: "your Mian Abbas has made complete balls of the situation. Instead of Mr. Ahmad Raza Kasuri he has got his father killed". On hearing this, he was taken by surprise, but Mr. Bhutto disconnected after telling him that he would summon him later. After sometime, the A.D.C. of Mr. Bhutto summoned him to the residence of Mr. Sadiq Hussain Qureshi, where he was staying, and when he was ushered in, Mr. Bhutto, in the presence of Mr. Qureshi, who was seated beside him, told him in a non-chalant manner, as if he had not talked to him before: "I hear Mr. Ahmad Raza Kasuri's father has been killed last night somewhere in Lahore", and he replied that he also had heard about it.

134. Soon thereafter he returned to Rawalpindi when Mian Abbas reported to him (Masood Mahmood) that his operation had been successful, but instead of the intended victim his father Nawab Muhammad Ahmad Khan had been murdered at Lahore. According to him, he had left Multan the same afternoon (i.e. on November 11, 1974) and on his return to Rawalpindi, he was summoned by Mr. Bhutto whom he found "peevish and agitated". However, he said that the actual task had yet to be accomplished. But he replied: "at your behest an idea conceived by you was carried out and communicated, by me to Mian Abbas who had already your directions through my predecessor and the fact remains that both you and I and my subordinates will be taken to, task by God Almighty, but will not carry out any such orders anymore". After

hearing him, thus, Mr. Bhutto "piped down" but "there were other occasions on which he continued to goad me into getting Mr. Ahmad Raza Kasuri assassinated. I categorically said 'no'." Thereafter attempts were made on his life; threats were held out to him; attempts were made to kidnap his children from Aitcheson College, Lahore; there were repeat performances at poisoning his food at Chamba House, Lahore, where he discovered that some of his own subordinates seemed to have been won over, as he saw them lurking around at places where they should not have been when he was around.

135. Now it is true that the father of Mr. Ahmad Raza Kasuri was murdered on the night between November 10 and 11, 1974, at Lahore. But the question is whether Mr. Bhutto can be said to have phoned up Mr. Masood Mahmood about it in the very early hours of the morning, when he was still in bed, and told him that "your Mian Abbas has made complete balls of the situation. Instead of Mr. Ahmad Raza Kasuri, he has got his father killed"? It is admitted on all hands that Mr. Bhutto was connected with Mr. Masood Mahmood through the public-call-system, without the cover of arty secrecy. It is, therefore, unbelievable that Mr. Bhutto, who was the main Architect of the conspiracy, would take the risk of talking to him on the phone due to the evident fear of being monitored or overheard by the Operator at the Local Exchange. The utter futility, of the said claim of Mr. Masood Mahmood seems to be highlighted by the fact that when Mr. Bhutto later summoned him to the house of Mr. Sadiq Hussain Qureshi, all what he did was to repeat in the presence of Mr. Qureshi, the same thing which he had already told him on the telephone, as if his earlier conversation with him was not enough to have achieved the desired effect.

136. Be that as it may, it is difficult to believe him that he was phoned up by Mr. Bhutto at the said hour or subsequently summoned to the house of Mr. Sadiq Hussain Qureshi. In this respect, the evidence of Manzoor Hussain (P.W. 21) is not only relevant, but essential. Manzoor Hussain was employed as the personal driver of Mr. Masood Mahmood, and was staying with him at the Canal Rest House, Multan, during the relevant period. In his evidence, Manzoor Hussain has denied to have driven Mr. Masood Mahmood to the house of Mr. Sadiq Hussain Qureshi at any time on November 11, 1974. But according to Masood Mahmood, when the A.D.C. of Mr. Bhutto later phoned him up, he went over to the house of Mr. Qureshi. There is no evidence on record to show, however, that Mr. Masood Mahmood had himself driven the car or had asked for a car from the house of Mr. Sadiq Hussain Qureshi. In these circumstances, it was the unavoidable burden of the prosecution to prove as to by what means he had gone over to the house of Mr. Qureshi. It seems to me to be absolutely extraordinary, however, that in a case of the present nature, the prosecution ought to have felt so satisfied about the bare word of Mr. Masood Mahmood (which in the case of an approver was in any event insufficient) as to ignore the basic need of proving his said claim (which was in the nature of a physical fact, and as such easily provable) that he had indeed gone over to the house of Mr. Qureshi to see Mr. Bhutto. In the face of

this reality, therefore, the entire evidence of Mr. Masood Mahmood in respect of the said crucial aspect of the case must be held to have become doubtful, and so his said claim cannot be accepted.

137. Mr. Masood Mahmood has further claimed that when he returned to Rawalpindi (on November 11, 1974), Mian Muhammad Abbas met him and told him that his operation had been successful but instead of the intended victim his father Nawab Muhammad Ahmad Khan had been murdered at Lahore; that later in the day he was summoned by Mr. Bhutto and when he went and met with him he found him "peeved and agitated" but even so he told him that the actual task had yet to be accomplished to which he replied "at your behest an idea conceived by you was carried out and communicated by me to Mian Abbas who had already your directions through my predecessor and the fact remains that both you and I and my subordinates will be taken to task by God Almighty, but I will not carry out any such orders anymore".

138. Now when I come to consider the cross-examination of Mr. Masood Mahmood, my effort would be to show, amongst other things, that his said claim *viz.*, to have met with Mian Muhammad Abbas, on his return to Rawalpindi from Multan, is absolutely untrue as on that day Mian Muhammad Abbas was at Peshawar from where he returned at about 7 p. m. on November, 12, 1974. Assuming for the present, therefore (as I have already said that for the analysis of his examination-in-chief, I would take it that whatever he has said therein is true subject of course to its being natural and probable) that his said claim is tenable, the essential question is whether it is acceptable? A bare look at his evidence would show that the same was carefully tailored and pre-orchestrated in order to suit the craving of his own psyche, for otherwise, it would be wholly unnatural for any witness (mores in the case of an intelligent and sophisticated person like Mr. Masood Mahmood) to have deposed for example "at your behest an idea conceived by you was carried out and communicated by me to Mian Abbas who had already your directions through my predecessor and the fact remains that both you and I and my subordinates will be taken to task by God Almighty". Now by the said language used by him, it ought to be clear to anyone having the slightest insight into human nature that the object which he intended to achieve thereby was: (1) to portray himself as an innocent agent; (2) that he was a God fearing person and would be taken to task by God Almighty for his earlier indiscretion; and (3) his defiant attitude in the presence of Mr. Bhutto refusing to carry out "any such orders anymore. The analysis of his evidence would show that at one moment, he is pusillanimous, at another intrepid and yet at another a man of conscience and fully alive to the fear of God Almighty. The fact, however, is that if he neither had the slightest courage nor the elementary human decency to resist the pernicious influence of Mr. Bhutto and readily succumbed to his design to assassinate Mr. Ahmad Raza Kasuri, how can any reliance be placed on his evidence from the deck that he defied Mr. Bhutto in his presence and refused to carry out his order. Mr. Bhutto was still the powerful Prime Minister in 1974. And so it would be ridiculous to believe Mr. Masood Mahmood that he could address him in the said

manner and yet be able to continue as Director-General, FSF, for almost three years thereafter, until both of them were taken into custody by the Martial Law Authorities on July 5, 1977.

139. For similar reasons, it is difficult to believe him that after his said encounter with Mr. Bhutto, attempts were made on his life, threats were extended to him, attempts also were made to kidnap his children from Aitcheson College, Lahore, and repeated attempts were made at the poisoning of his food. Apart from the fact that there is no evidence on record to show if any of the said attempts ever materialized, the said claim of Mr. Masood Mahmood again seems to be the product of his own psyche in order to portray himself as if he was constantly pursued and persecuted. But the same is patently absurd and unbelievable. If there was the slightest truth in his claim, the most natural and obvious course for him to adopt ought to have been to ask for retirement, which was his due, but evidently he preferred to stay on in service without giving the slightest thought to the said possibility. Now this conduct of Mr. Masood Mahmood seems to reveal the contradiction of his own stand to the effect that he could not afford to lose his job because his children were small, etc. and yet he felt no hesitation 'boldly' to face the ever present threats with respect to his physical extermination by Mr. Bhutto, not realizing that his own extermination was bound to defeat the same very object, which he so dearly espoused, namely, the welfare of his sick wife and small children, for whose sake he had put with all the said persecutions. Furthermore, Mr. Bhutto, or for that matter, the persons detailed by him to kidnap his children and poison his food, seem to have been so incompetent as not to have been able to achieve their intended object in spite of the vigorous zeal shown by Mr. Bhutto in that behalf. If Mr. Bhutto was really a tyrant and blood thirsty a person, surely he ought to have had no difficulty in doing away with Mr. Masood Mahmood who had not only defied him in his face but refused to carry out his orders anymore.

140. Having dealt with his examination-in-chief, in all its fundamental essentials, I would now take up his cross-examination to show that Mr. Masood Mahmood is not only an untruthful witness but the whole of his evidence is utterly unnatural and improbable. Before taking up this exercise, however, first I would like to deal with a question which seems to me to be of some importance in understanding his evidence. The record would show that at the initial stage of his cross-examination by Mr. D. M. Awan, about the background of his marriage, he replied that he was married in June 1961; that late Khan Bahadur Abdul Qayum was his father-in-law; that he knew one Mr. Munawar Ali Khan, who was his contemporary in the Government College but did not know where he was working; that he had no information if Munawar Ali Khan was employed with Messrs Mchinnon Machenzi Limited, Karachi; that Mr. Munawar Ali Khan also was his colleague in the Air Force, but they have never been on visiting terms; and that it was incorrect to suggest that whenever he visited Karachi, he paid a visit to the house of Mr. Munawar Ali Khan.

141. It seems that Mr. Bhutto was not satisfied with the recording of the said questions as well as the replies made thereto by Mr. Masood Mahmood, as in his lengthy application, dated 5-1-1978, he (in para. 19,(3) (i)) expressed his grievance thus: "almost every day many pertinent material and relevant questions put by the defence counsel are either disallowed or overruled. The record, however, does not generally indicate that such questions were put to the witnesses. This is perhaps being done with a view to leaving petitioner with precious little to argue in appeal. For instance, on 24-10-1977, Mr. Masood Mahmood (P.W. 2), while in the witness-box stated" (referring to his evidence reproduced hereinabove) and proceeded to contend that "the following questions were put to him by the petitioner's counsel:-

Q. - What is the name of your wife?

Q. - Is it not a fact that prior to marrying you she was the wife of the said Munawar Ali Khan?

Q. - I put it to you that you developed illicit relations with her during your visits to Munawar Ali's house and then she got divorce from her husband and married you?"

142. Mr. Bhutto maintained that Mr. Masood Mahmood had answered these questions by saying "Iffat was the name of his wife and that she was wife of Munawar Ali prior to her marriage with the witness. The witness denied only the last suggestion put to him. The Acting Chief Justice disallowed these questions and neither the questions nor the answers were brought on record. Since these questions reflected on the character and credibility of the witness they were not allowed to be brought on the record of evidence. The object of the questions was not to defame the wife of the witness, but to expose his veracity".

143. The Court, vide order, dated 9-1-1978, dismissed the said application of Bhutto, but while dealing with his said objection, in para. (xiv) observed "it is clear that the questions referred to in para. 19 (3) (i) at page 24 of the petition are slanderous and have nothing to do with the testing of veracity of the witness. These questions furnish instances of irrelevant questions put by the learned counsel for the petitioner. It is not necessary that each question, however, irrelevant should be brought on record. Sometimes questions were noted and overruled, while at other times, though infrequently the learned counsel was directed to give the question in writing. This was done with the question that had absolutely no nexus with the case". It would thus be seen that the High Court accepted the said allegation of Mr. Bhutto, although it disposed it of observing that the said questions were slanderous and had nothing to do with the testing of veracity of the witness. The legal position, however, is that under section 146 of the Evidence Act, in cross-examination, a witness may be asked any question which would tend - (1) to test his veracity; (2) to discover who he is and what

is his position in life; or (3) to shake his credit, by injuring his character, although the answers to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

144. The object of such questions has been explained by Monir, at page 1539 of his Law of Evidence. He says that the said questions "do not, strictly speaking, relate to relevant facts; they are relevant only to the issue whether the witness should or should not be believed. In cases depending for decision on oral evidence, this issue, it need hardly be said, is the most important issue. All questions tending to show that the witness has not told the truth, or that he is not likely to tell truth in the particular case, are permissible under section 146 (1). Such questions fall more properly under the first clause to section 146 than under the third clause to that section, which seems to contemplate questions tending to show defects of moral character rendering the witness less likely to speak the truth. The chief factors governing a witness's willingness or otherwise to speak the truth are (i) bias, (ii) interest, and (iii) corruption. "Bias", in common, acceptance, covers all varieties of hostility or prejudice against the opponent personally or of favor to the opponent personally. "Interest" signifies the specific inclination which is apt to be produced by the relation between the witness and the cause at issue in the litigation. "Corruption" is here to be understood as the conscious false intent which is inferable from giving or taking a bribe, or from expressions of a general unscrupulousness for the case in hand".

145. Now the evidence of Mr. Masood Mahmood who claimed that Mr. Bhutto and Mr. Vaqar Ahmad both were his enemies, being entirely oral, all questions which tended to test his veracity and shake his credit were admissible under section 146 of the Evidence Act to show that he was unworthy of credit. Assuming, however, that the High Court was justified not to permit the putting of the said questions, as in its view they were slanderous, even then only the last question, namely, "I put it to you that you developed illicit relations with her during your visits to Munawar Ali's house and then she got divorce from her husband and married you?", ought to have been disallowed by it, and not the first two questions, which were not only innocuous, but had a direct bearing as to the credibility of Mr. Masood Mahmood. The record would show that in the previous answers given by him, which had already been brought on record, Mr. Masood Mahmood Admitted that Munawar Ali Khan was his contemporary in the Government College, Lahore, as well as a colleague in the Air Force, but maintained that they had never been on visiting terms, nor indeed had he paid any visit to his house whenever he visited Karachi. In answer to the subsequent two questions, however, which were not brought on record, he admitted that the name of his wife was 'Iffat', and that previously she was the wife of Mr. Munawar Ali Khan. From this it should have been obvious that Mr. Masood Mahmood had deliberately prevaricated about the question of his said marriage for the evident reason of avoiding himself the public embarrassment, as otherwise why should he have denied to have ever met Mr. Munawar Ali Khan since they were together in College and the Air Force?

147. Now in 1961, when he married the ex-wife of Mr. Munawar Ali Khan, Mr. Masood Mahmood was not only more than 40 years of age, but already had attained the high rank of an Additional Inspector-General Police, therefore, if he had no moral scruples to refrain from undermining the marriage of his close friend, just to satisfy his own cravings, surely the learned counsel for Mr. Bhutto had every right under section 146 of the Evidence Act to question him about his credit in order to reveal the seamy side of his character in an effort to urge upon the Court that he was unworthy of credit. I am, therefore, of the humble view that the High Court, with respect, ought not to have, after the learned counsel for Mr. Bhutto was able to elicit from Mr. Masood Mahmood answers to the said questions, refused to bring on the record of the case the said answers which under section 146 of the Evidence Act were clearly admissible.

148. Now bearing in mind that Mr. Masood Mahmood is not only a self confessed criminal, but essentially lacks any serious regard for moral virtues, his evidence must be scrutinized with care and caution. To begin with he was questioned as to why he was appointed to the "punishment post", namely, that of Managing Director, Board of Trustees Central Benevolent Fund and Group Insurance? and he replied: "I had knowledge of the fact that Arms and Ammunition had been given to Jam Sadiq Ali and late Mr. Abdul Hamid Bajwa, for operations against the Burrs, in Sindh. After this information became available to me, I noticed a certain amount of coolness in the dealings with me by the then Secretary and I think in order to ensure that I did not blurt out the secret, the Prime Minister sent Abdul Hamid Bajwa to me to keep my mouth shut. It was after a shortwhile that I was transferred as Managing Director, Board of Trustees, Central Benevolent Fund and Group Insurance". His evidence, however, is that he had obtained this information as Additional Secretary Defence. But when questioned as to why did he not report the said matter to the Defence Secretary, or any other higher officer such as the Chief of the Army Staff, or the Prime Minister's Secretariat? he replied that since the Defence Secretary himself was involved in the said transaction, and he also was threatened by Mr. Bhutto, through late Mr. Bajwa to keep his mouth shut, he was helpless. In answer to another question, however, whether the said Arms and Ammunition were not supplied to Jam Sadiq Ali by the Chief of Army Staff in connection with the Defence Department? he replied that he was not aware, but "as I walked into the Office of the Defence Secretary in one of my routine official visits I saw Jam Sadiq Ali and late Mr. Abdul Hamid Bajwa with the Defence Secretary in the chair having some crates of arms and ammunition being transferred through *chaprasis* to a car outside. The Defence Secretary looked rather embarrassed I would not have thought the deal to be unusual or unofficial had Mr. Abdul Hamid Bajwa sometime later, the same day, not seen me in my Office to say that the Prime Minister wanted me to keep my mouth shut about this transaction". Now is not all this ridiculous? To say that the Defence Secretary to the Government of Pakistan, during the office hours and in broad daylight, would transact a shady deal with Jam Sadiq Ali and late Mr. Bajwa, by giving them the crates of arms and ammunition, and that too which the peons of the



Office were made to carry to a car waiting outside, would be tantamount to doing violence to the basic human intelligence. It is plain to me that the said transaction (even if the same had actually taken place) was evidently official, and consequently there would be no occasion for the Defence Secretary to get embarrassed, unless Mr. Masood Mahmood was looking at everything around him through rose colored glasses. The truth of the matter, however, is that he was not serious about his said assertion, as in the same very answer he admitted that "I would not have thought the deal to be unusual or unofficial, had Mr. Abdul Hamid Bajwa sometime later, the same day, not seen me in my Office to say that the Prime Minister wanted me to keep my mouth shut about this transaction". Quite apart from the fact that the alleged statement made to him by late Mr. Bajwa is not admissible in evidence under section 32 of the Evidence Act, which is the only section under which a statement made by a dead person would be admissible, the said claim of Mr. Masood Mahmood is patently ridiculous. Since the whole transaction conducted by the Defence Secretary with Iqbal Sadiq Ali and late Mr. Bajwa was official (and I am saying this on the assumption that the same had really taken place) there would be hardly any occasion for late Mr. Bajwa to carry to Mr. Masood Mahmood the message of Mr. Bhutto to the effect that he had better keep his mouth shut.

148. In order to prove that Mr. Masood Mahmood was an ambitious person, the learned counsel for Mr. Bhutto questioned him to the effect if in December, 1971, soon after Mr. Bhutto took over as the President and Chief Martial Law Administrator, he had informed Mr. Abdul Hafiz Pirzada on telephone that General Yahya and his compatriots were burning some important intelligence files? he first replied in the negative. But immediately volunteered and confirmed to have done so at which Mr. Pirzada told him that if the said information was found to be false he would have him beheaded. On the following morning General Ishaq, the Military Secretary to the President, rang him up saying that the said information conveyed by him was found to be correct and that the President appreciated his concern. The learned counsel, therefore, asked Mr. Masood Mahmood if he had asked Mr. Pirzada that he should be remembered for the services thus rendered by him, but he denied the suggestion.

148. Now by analyzing this part of his evidence it is clear to me that although it was no part of his duty to convey to Mr. Abdul Hafiz Pirzada the said information, yet he took it upon himself to do so, as Mr. Pirzada was one of the most important colleagues of Mr. Bhutto. By saying this, however, I am not trying to belittle the efforts of Mr. Masood Mahmood in that behalf, but what has intrigued me is as to why as an Additional Secretary to the Government of Pakistan, he ought not to have informed his immediate boss, namely the Defence Secretary, or for that matter the Police or anyone of the Law and Order Enforcing Agencies. I am, therefore, clear in my mind that by getting in touch with Mr. Pirzada, he was more motivated by the desire to curry favor with him, than by any sense of duty. Had this not been the case, first he would not have

said 'no' to the unambiguous question put to him in that behalf, and then immediately contradicted himself by taking up the opposite position.

150. He also has admitted in cross-examination that within about five months of his taking over as the Director-General, FSF, he was promoted to Grade 22; that twice he was sent abroad on a study tour of the forces, equivalent to the FSF, in West Germany, Belgium, U.S.A., Japan and U.K., that on his visits to Peshawar, Lahore and Karachi, sometimes he stayed in Intercontinental Hotels, occasionally in Delux Suites for which, however, he used to be charged only that amount which was admissible to him under the Government Rules, as the said concession also was available to other officers. In answer to a question, however, if he could name the said officers? he replied that he would not like to name them.

151. It would thus be seen that within a short time of his appointment as the Director-General, FSF, he was promoted as Full Secretary, and further that he had twice gone abroad on a study tour of U.S.A., Japan and the countries of Western Europe. From this it should be obvious that as Director-General, FSF, he not only fared well, but evidently advanced his fortune. As to his other claim, namely that the Intercontinental Hotels at Peshawar, Lahore and Karachi used to charge him the same amount which was admissible to him under the Government Rules, because the said concession also was available to other officers, all that can be said is that it is absurd. It seems to me that he was given to a luxurious mode of living, therefore, he either paid from his own pocket the normal rates at the said Hotels or else got for himself concession by abusing his official position. The main reason for which he claimed to have been meted out the said preferential treatment was because other officers also used to be treated similarly. But he refused to divulge their names. From this it should follow that if there was any truth in his said statement, he would have readily mentioned the names of other officers. I am, therefore, of the view that even in respect of this innocuous part of the case he had not told the truth.

152. Mr. Masood Mahmood was next cross-examined about the conspiracy entered into between him and Mr. Zulfikar Ali Bhutto for the assassination of Mr. Ahmad Raza Kasuri. In answer to a question whether the said conspiracy had already been hatched before he took over as Director-General, FSF?, he replied that Mr. Bhutto had told him, in no uncertain terms, that Mian Abbas, an officer in the FSF, had already been given directions in that behalf by his predecessor, namely. Mr. Haq Nawaz Tiwana. He, admitted, however, that for the execution of the said conspiracy he had provided no plan of his own to Mian Abbas, nor indeed had he told him as to how and from where he had to arrange the arms and ammunition. In answer to another question whether he knew, when he made his confessional statement on 24-8-1977, that the earlier attack made on Mr. Ahmad Raza Kasuri at Islamabad on 24-8-1974, was a part of the conspiracy?, he replied that he had a "hunch" about it, and further that Mian Muhammad Abbas had informed him about the same when he told him of the murder

of Nawab Muhammad Ahmad Khan. The learned counsel for Mr. Bhutto, who seems to have been dissatisfied with this part of his answer, confronted him with his confessional statement in which he had said "it is most likely that the incident of August, 1974 in which Mr. Ahmad Raza Kasuri was sniped at in Islamabad may have been an, earlier attempt before the accomplishment of the task resulting in the death of Nawab Muhammad Ahmad Khan" and asked him whether his said statement would in any way convey the feelings of his "hunch"? and he replied that "in my way of thinking it does". He maintained, however, that the said part of his confessional statement proved that Mian Abbas had informed him about the earlier attack made on the life of Ahmad Raza Kasuri at Islamabad, as it was thereafter that Mr. Bhutto reminded him that nothing tangible had taken place (*kuchh nahin huwa*) by which he understood his inference, and consequently reminded Mian Abbas who replied "*hukam ki tameel ho gi*", that is to say that the order shall be executed.

153. Now by analyzing this part of his cross-examination, it should be evident that except for having reminded Mian Abbas to get on with the job of assassinating Mr. Kasuri, Mr. Masood Mahmood remained completely out of the picture. On his own showing he had neither given to Mian Abbas any plan about the assassination of Mr. Kasuri, nor indeed he had discussed with him as to how and from where he would procure the necessary arms and ammunition. In point of fact he was not even aware of the earlier attempt made on the life of Mr. Ahmad Raza Kasuri at Islamabad, for otherwise, how could he have said that he had a "hunch" about it, especially when after the murder of Nawab Muhammad Ahmad Khan, Mian Abbas had told him of the said attempt positively. Furthermore, his confessional statement, recorded long after his said talk with Mian Abbas, also would support the said conclusion, as in it he positively alleged "it is most likely that the incident of August, 1974 in which Mr. Ahmad Raza Kasuri was sniped at in Islamabad may have been an earlier attempt". The words "likely" and "may have been" used by him in the said statement would clearly reveal that his claim was wholly untrue, and that his story of the so called conspiracy entered between him and Mr. Bhutto was simply the product of his own imagination, having no truth in it whatever.

154. His next claim is that after he met Mr. Bhutto at Quetta on 29-7-1974, he conveyed to Mr. Welch the orders given to him by the former, that during his visit to Quetta, Mr. Ahmad Raza Kasuri should be taken care of, meaning thereby that he should be assassinated. In his examination-in-chief, however, what he had said was, and with which he was duly confronted, that "before the Islamabad incident and after the Prime Minister had spoken to me, I was asked by the Prime Minister to take care of Mr. Ahmad Kaza Kasuri who was likely to visit Quetta. I gave directions to Mr. Welch, the Director of FSF at Quetta. I told Mr. Welch that some anti-State elements had to be got rid of and that Mr. Ahmad Raza Kasuri was one of them. I had also told him that he was delivering anti-State speeches and was doing damage to the interest of the country".

155. Now this part of his cross-examination was evidently in conflict with what he had said in his examination-in-chief, therefore, the learned counsel for Mr. Bhutto questioned him in that regard and he replied that "I communicated to Mr. Welch on the telephone and also had an occasion to remind him personally when I visited Quetta ..... the sequence is not clear from my statement quoted in the question. Now that a specific question has been asked of me, about which I state that I communicated orders to Mr. Welch after Mr. Zulfikar Ali Bhutto had asked me to take care of Mr. Ahmad Raza Kasuri, on the 29th of July, 1974. The telephonic conversation followed this event".

156. Now a bare look at this statement of Mr. Masood Mahmood would make it clear that the said instructions were given to him by Mr. Bhutto at Islamabad, or someplace other than Quetta. In fact, this is made clear in his examination-in-chief in which he said: "I communicated to Mr. Welch on the telephone, and I also had an occasion to remind him personally when I visited Quetta". However, when he reached the stage of cross-examination, he evidently realized the frailty of his said claim with the result that he made a complete volte-face, and said that he had first talked to Mr. Welch at Quetta, after his meeting with Mr. Bhutto on 29-7-1974, and subsequently reminded him on phone from Rawalpindi. Now this conduct of Mr. Masood Mahmood is quite understandable, as during those days Pindi and Quetta were not connected by the direct dialing system, and so it would be inconceivable that he would talk to Mr. Welch through the Exchange for the evident fear of being monitored by the operator on duty. Caught in this embarrassing position, and the learned counsel for Mr. Bhutto having relentlessly pursued him in cross-examination, the witness went on making confused statements such as "that I did say in my examination-in-chief that I communicated the orders to Mr. Welch in September, 1974, but on telephone. I think that I communicated the order to Mr. Welch on one occasion and reminded him on another the sequence is not clear from my statement ..... Now that a specific question has been asked of me, about which I state that I communicated orders to Mr. Welch after Mr. Z. A. Bhutto had asked me to take care of Mr. Ahmad Raza Kasuri, on the 29th of July, 1974. The telephonic conversation followed this event ..... It is correct that on one occasion I communicated the orders and on another I reminded him. I reminded him also in person and on the telephone certainly ..... and the expression communicated something personally does include other means of communication also". Now all this should make it clear that Mr. Masood Mahmood was at pains to get out of the embarrassing position in which he had placed himself, but even so the said exercise undertaken by him could not erase the effect of his clear and unambiguous assertion in examination-in-chief to the effect that I communicated to Mr. Welch on telephone, and I also had an occasion to remind him personally when I visited Quetta".

157. His two T.A. Bills, namely, Exh. P.W. 2/9 and Exh. P.W. 2/10 would seem to support the said conclusion. These T. A. Bills cover the period between 18-7-1974 and 4-8-1974 when the witness visited Karachi, Sukkur, Larkana, Quetta and Lahore, back to

Rawalpindi, again to Quetta and back to Rawalpindi. In Exh. P.W. 219 under the column "Purpose of journey or halt" the witness had stated "visited the Office of Director, FSF Key, was received in audience by the Prime Minister at Larkana. Looked into the affairs of the force and attended to the visit of Prime Minister to Baluchistan, met the Governor and Chief Minister Punjab at Lahore". Now according to the relevant entries in Exh. P.W. 2/9, he had arrived at Larkana at 14-15 hours, on 20-7-1974, and had left for Sukkur the following afternoon at 13-15 hours. According to his own evidence, however, he had met Mr. Bhutto at Quetta a week thereafter, i.e. on 29-7-1974 and yet he omitted to mention the said fact in his T. A. Bills although he remembered to mention therein his earlier meeting with Mr. Bhutto at Larkana. Normally, I should have ignored the said omission but in view of the facts and circumstances of this case it cannot be ignored. Had the witness omitted to mention his meeting with Mr. Bhutto at Larkana then the non-mention by him of his meeting with Mr. Bhutto at Quetta would be just an omission. But the fact remains that while mentioning his meeting with Mr. Bhutto at Larkana evidently his mind was focused on the said eventuality, and so if there was any truth in his statement that he had met Mr. Bhutto at Quetta on 29-7-1974, it would be inconceivable that he would forget to mention the same in his T. A. Bill Exh. P.W. 2/10, as the said meeting was the latest in the series as well as in point of time. Therefore, I have not the slightest doubt in my mind that the witness was not telling the truth due to a well-calculated motive.

158. Furthermore, it is in his evidence that he had given the said instructions to Mr. Welch in a meeting lasting for five minutes at the Lourdes Hotel, Quetta, when he was about to leave for the Airport. Apart from the fact that while giving Mr. Welch the said instructions he made no mention of the name of Mr. Bhutto, and so the evidence of Mr. Welch, in so far as the involvement of Mr. Bhutto is concerned, would be of no avail to the prosecution, the witness was cross-examined to show as to how well he knew Mr. Welch before giving him the said instructions. and he replied that he had met him once or twice in meetings, and further that in a disciplined force it was not necessary for an officer to know his subordinate well before giving him an order. Now had the matter rested there, I would have readily agreed with the said explanation of Mr. Masood Mahmood; but the fact is that he and Mr. Welch both seem to have placed a sinister construction on the otherwise innocuous words "to take care of Mr. Ahmad Raza Kasuri" to mean to assassinate him. In this view and specially the type of witness Mr. Masood Mahmood is, it would be difficult to accept his said statement, which under the circumstances seems to be improbable and unnatural. To say that it would be unnecessary for a senior officer to know his subordinate well, before he is asked to execute an order, is one thing; but an order to assassinate a citizen, and that too a member of the National Assembly of Pakistan is another. I am, therefore, of the firm view that in the first place Mr. Masood Mahmood, who knew Mr. Welch almost casually, could not have conveyed him the said instructions in a chance meeting lasting for about five minutes, and in the second place the said instructions, even if he had given them to Mr. Welch, were meant only "to take care of Mr. Ahmad Raza Kasuri"

meaning thereby that the type of person he was, surveillance should be kept on him during his stay at Quetta, as the whole of Baluchistan was then in a state of insurgency, so that he may not come in contact with the insurgents or to create Law and Order situation for the Government.

159. This conclusion finds ample support from the evidence on record. In his evidence (see page 71 of Volume I of the Evidence), Mr. Masood Mahmood has clearly stated that before the Islamabad incident, and after the Prime Minister had spoken to him, he was asked by the latter "to take care of Mr. Ahmad Raza Kasuri, who was likely to visit Quetta. I gave directions to Mr. Welch, the Director of FSF at Quetta. I told Mr. Welch that some anti-State elements had to be got rid of and that Mr. Ahmad Raza Kasuri was one of them". Now it is evident that what Mr. Bhutto had told Mr. Masood Mahmood was "to take care of Mr. Ahmad Raza Kasuri" but Mr. Masood Mahmood seems to have conveyed to Mr. Welch (without mentioning the name of Mr. Bhutto, however,) that Mr. Kasuri "had to be got rid of". Not only this, but when we come to the evidence of Mr. Welch, he has given yet another version of the instruction given to him by Mr. Masood Mahmood saying (see page 286 of Volume 1 of the Evidence) that what he had told him was that since Mr. Kasuri had been making obnoxious speeches against Mr. Bhutto, "he should be eliminated". From all this, it should, therefore, follow that in so far as Mr. Bhutto is concerned all that he had told Mr. Masood Mahmood was "to take care of Mr. Ahmad Raza Kasuri" possibly meaning thereby to keep a watch on him during his stay at Quetta (as the Province of Baluchistan was then in a state of insurgency) in order to prevent him from coming into contact with the insurgents. Ironically, however, Mr. Masood Mahmood and Mr. Welch both seem to have placed a sinister construction on the said instruction of which they are not even remotely susceptible. With very great respect to the High Court, however, reliance has been placed on the said evidence of the two witnesses without scrutinizing it in the proffer context with the result that the consequent finding recorded by it has worked to the prejudice of Mr. Bhutto.

160. The High Court also has relied against Mr. Bhutto on the Intelligence Reports (Exh. P.W. 2/1 and Exh. P.W. 2/2) submitted by Mr. Welch to Mr. Masood Mahmood and the correspondence exchanged between him and the former, namely, Exh. P.W. 2/2 and Exh. P.W. 2/3. All these documents have already been discussed by me (while discussing the prosecution case as to the motive) and consequently it would be unnecessary to go over the same process again. In none of these documents, either read severally or together, is there anything to show the incriminating conduct of Mr. Bhutto. But with respect, the High Court again has used them against Mr. Bhutto, without subjecting them to proper scrutiny so as to exclude the possibility that they could as well be explained on the basis of another reasonable hypothesis.

161. Mr. Masood Mahmood also has admitted in cross-examination that on his second trip to London, in connection with his medical check-up, and to undergo a likely

operation if the doctors so advised, he was allowed to take his wife as an official attendant; that both of them had, in pursuance of the necessary arrangements made in that behalf by the Pakistan Embassy, stayed at the Intercontinental Hotel; that during his stay in London, he did purchase two pairs of spectacles (fitted with the hearing aid) for £400; and that the total expenses incurred by him and his wife during their said stay was about Rs. 50,000. In answer to a question if the price of the said two pairs of spectacles was paid by the Government? he replied that the said question was still under examination when he was taken into custody on July 5, 1977. Having said this, however, the learned counsel for Mr. Bhutto confronted him with a letter written by the Pakistan Embassy, to the Interior Division of the Government of Pakistan, to the effect that the price of the said two pairs of spectacles had been paid by the Government, to which he agreed. It would thus be seen that before he was confronted with the said letter, the witness had conveniently confused the issue by saying that the question of the payment of the said pairs of spectacles was still under consideration, when he was taken into custody, which was evidently untrue. Furthermore, it is clear that he (along with his wife as his official attendant) was allowed to go to London for medical check-up; that both of them stayed at the Intercontinental Hotel in pursuance of the arrangements made in that behalf by the Pakistan Embassy; and that the fees of his doctors also seems to have been paid by the Government, as in answer to a question put to him in that behalf he replied: "I do not remember the amount paid to the doctors I consulted". Now considering that this is his own evidence, can it be said that Mr. Bhutto was his enemy? It seems to me that the word 'enemy' has the opposite connotation with the witness, for otherwise the Government of Mr. Bhutto would have not only refused him the said VIP treatment but surely not expended the tax-payers money on him so lavishly as to enable him to purchase for himself the two unique pairs of spectacles fitted with hearing and for the huge amount of £400. The High Court seems to have noticed all this evidence in para. 66 of the judgment. But with respect, did not give any finding thereon one way or another.

162. His evidence further is that on the specific directions given to him by Mr. Bhutto, in addition to the police escort, he used to detail plain clothed men from FSF to escort his children whenever they travelled in motor transport. Now if Mr. Bhutto was really his enemy, could he have trusted the men from FSF? and that too when his children also used to be escorted by the Police. I am afraid that by the type of evidence given by Mr. Masood Mahmood, he has evidently trampled on his own credibility as a witness, and so how can any Court believe him?

163. His evidence next relates to his meeting with Mian Muhammad Abbas on November 11, 1974. He deposed in examination-in-chief that "soon after that, when I returned to the Headquarters Mian Abbas informed me and reported to me that his operation had been successful". In his cross., examination also he substantially maintained the same position, except that for the expression "soon after" used by him in his examination-in-chief, he employed the expression "immediately". Now the admitted

position which transpires from his evidence is that he had arrived at Rawalpindi from Multan on November 11, 1974, and met with Mian Muhammad Abbas "soon after" or "immediately". It thus happened, however, that Mian Muhammad Abbas was not present at Rawalpindi on November 11, 1974, as he had gone to Peshawar on the previous day (see his T. A. Bill Ex. P.W. 4/10) from where he returned to Rawalpindi sometime in the late evening on November 12, 1974. The learned counsel for Mian Muhammad Abbas, therefore, questioned him as to at what time on November 11, 1974, he had met Mian Muhammad Abbas at Rawalpindi?, but he started confusing the issue by saying "I do not recall the exact time when I contacted Mian Muhammad Abbas in this connection after my return from Multan to Rawalpindi. I do not remember if I went straight to my office from the Islamabad Airport or I had gone to my house. I do not remember if I had met Mian Muhammad Abbas on 11th or 12th of November, 1974". With this reply of his, naturally, the learned counsel was not satisfied, and in order to compel him to take up a positive position he questioned him further to the effect: "you did not contact Mian Muhammad Abbas either on 11th or the 12th of November, 1974?" and he replied "I do not recall exactly. I do not remember if I went to my office on ) 2th of November, 1974". Now in the context of his positive assertion that "soon after" or "immediately" after his arrival he met with Mian Abbas (not realizing of course that Mian Abbas was away at Peshawar), the said replies given by him not only clearly unmask the rather unethical side of his character, but also bring into bold relief the evident scheme of his prevarication. His further claim to the effect that in the said meeting with Mian Muhammad Abbas, the latter told him that Nawab Muhammad Ahmad Khan had been killed at some place at Gulberg, Lahore, seems to support me in the said conclusion, as the said gentleman had been killed at the roundabout of Shah Jamal-Shahman Colony, Lahore, which has no nexus or contiguity with the area of Gulberg at all.

164. Now this is all the evidence of Mr. Masood Mahmood in its essential features. I have designedly first dealt with all the crucial aspects of his examination-in-chief and then with his cross-examination to show that each piece of his evidence is either unnatural and improbable or does not have the ring of any truth about it. In spite of this exercise, however, if there is still any doubt about his evidence the same ought presently to disappear in view of the ensuing discussion about the omissions, contradictions and improvements made by him therein from time to time. Both in his confessional as well as the approver's statement (recorded on August 8, 1977 and September 14, 1977, respectively), Mr. Masood Mahmood has not said a word that on November 11, 1974, when he and Mr. Bhutto both were camping at Multan, the latter phoned him up in the very early hours of the morning saying "your Mian Muhammad Abbas has made complete balls of the situation, instead of Mr. Ahmad Raza Kasuri he has got his father killed"; that thereafter Mr. Bhutto called him through his ADC to the house of Mr. Sadiq Hussain Qureshi and repeated to him the same thing; that on his return to Rawalpindi on November 11, 1974, he was summoned by Mr. Bhutto who told him that Mr. Kasuri had yet to be assassinated, but he replied "at your behest an idea



conceived by you was carried out and communicated by me to Mian Abbas who had already your directions through my predecessor and the fact remains that both you and I and my subordinates will be taken to task by God Almighty, but I will not carry out any such orders anymore"; that thereafter "attempts were made on my life, threats were held out to me, attempts were made to kidnap my children from the Aitcheson College, Lahore, there were repeat performances of poisoning my food at Chamba House, Lahore, where I discovered that some of my subordinates seemed to have been bought over or won over as I had seen them lurking around"; that after the Islamabad incident of August, 1974, in which an abortive attempt was made on the life of Mr. Kasuri, Mr. Bhutto reminded him that nothing tangible had taken place (*kuchh nahin huwa*); that in his very first meeting with Mr. Bhutto the latter had told him to make the FSF a deterrent Force meaning thereby that the people of Pakistan, his Ministers, M.N.As. and M.P.As. should fear it; that the after incident of June 3, 1974, between Mr. Bhutto and Mr. Kasuri in the National Assembly of Pakistan; the former sent for him and told him that he was fed up with the obnoxious behavior of Mr. Kasuri; that Mian Muhammad Abbas knew all about his activities as he had already been given instructions through the previous Director-General, FSF, to get rid of him that he should ask Mian Muhammad Abbas to get on with the job and to produce the dead body of Mr. Kasuri or his body bandaged all over; that he had told Mr. Welch that some anti-state elements had to be got rid of that Mr. Ahmad Raza Kasuri was one of them as he had been delivering anti-State speeches; that he had conveyed the said instructions to Mr. Welch on the telephone, as also in person when the later met him at Quetta; and that when he returned to Rawalpindi on November 11, 1974, Mian Muhammad Abbas met him and told him about the earlier incident of Islamabad in which an attempt was made on the life of Mr. Kasuri. Similarly in his confessional statement he has not said a word that in his very first meeting with Mr. Bhutto, the latter asked him to make available to him the FSF for:-

- (a) breaking up of the political meetings;
- (b) harassment of personages both in his own party and the opposition; and
- (c) the induction of plain clothed men in the public meetings addressed by him to swell the crowds..

165. Now relying upon these omissions, which were claimed to be tantamount to contradictions, within the meaning of section 145 of the Evidence Act, the learned counsel for appellant Bhutto contended in the High Court that the evidence of Mr. Masood Mahmood (in which he had deposed to the said omissions for the first time in Court), was clearly untrue and no reliance could be placed on it. This contention, which was rejected by the High Court, has been dealt with in paras. 378-381. But it would be proper to reproduce at this stage paras. 380 and 381 which read as under:

"380. It is true that sometime an omission may have the force of at inconsistent or contradictory statement and may be used for the purpose of impeaching the credit of the witness but such cases are rare. A witness may omit to furnish details in his previous statement or the previous statement may be absolutely devoid of details. The omissions of details do not amount to contradiction. They may have the force of contradiction only if the witness omits to refer to anything in the previous statement which he must have mentioned in it in the circumstances of a particular case.

381. The question whether an omission amounts to contradiction was considered in *Ponnuswanu v. Emperor*<sup>479</sup>. It was pointed out in that case that whilst the bare omission can never be a contradiction a so-called omission in a statement may sometimes amount to a contradiction, for example, when to the police three persons are stated to have been criminals and later at the trial four are mentioned. This statement of law by Burn, J., is clearly based upon the principle that in order to amount to inconsistency the omission must be of such material fact which the witness would not have omitted to state."

166. Now the principle of law laid down in these two paras., with respect, seems to be generally right except for the reliance therein on the view taken by Burn, J., to the effect that an omission in a previous statement can never be tantamount to a contradiction. Monir, has at page 1524 of the Law of his Evidence (1974 Edition) taken note of the said view of the learned Judge and commented upon it as follows:-

"In a Madras case it has been remarked by Burn, J., that it is impossible to state a case in which an omission may amount to a contradiction; but is submitted that the prosecution cannot be laid down as broadly as the learned Judge lays it down."

167. Respectfully, I agree with this view of the learned author just as I feel inclined to agree with his further views recorded by him at page 1523 of his treatise to the following effect:

"A failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact. But it is wrong to suppose that all omissions are contradictions. It must be left to the Court in each particular case to decide whether the omission in question amounts to a contradiction or not .... An omission in order to amount to a contradiction must be material. Thus where a prosecution witness deposes in Court that the accused gave a blow on the head or implicates the accused in his deposition before the

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<sup>479</sup> AIR 1933 Mad. 372 (2)

Court but did not mention such before the police, the omission would amount to contradiction."

168. Similar view has been taken in *Abdul Hashem v. The State*<sup>480</sup>; *Ekubbar Ali and 10 others v. The State*<sup>481</sup>; *Hazara Singh and others v. Emperor*<sup>482</sup>, *Ram Bali and others v. State*<sup>483</sup>, *Parikhith Thapa v. Nidhi Thapa and others*<sup>484</sup> and many other judgments which, however, may not be reproduced. Now the fact, however, is that after having laid down the correct principle to the (effect as to when an omission would amount to a contradiction, the High Court proceeded to observe (see para. 378 of the judgment):-

"These authorities are distinguishable since the dictum laid down therein would apply only to a case where a witness has specifically made a statement in his earlier statement which is said to be contradictory to the statement made during his examination at the trial. It cannot be applied to a case where the statement made at the trial was not made at the earlier stages and is a mere omission as distinguished from a contradiction."

169. Now evidently, this finding of the High Court is not only clearly inconsistent with the finding recorded by it in paras. 380 and 381 (supra) of the judgment, but the High Court did not even consider the effect of the said omissions from the confessional statement as well as the approver's statement of Mr. Masoud Mahmood one way or another, for the reason that perhaps the omission, in question being simply in the nature of details would not amount to contradictions. Mr. Ijaz Hussain Batalvi, the learned Special Public Prosecutor has supported the said finding of the High Court, *inter alia*, on the grounds: (1) that for an omission to amount to a contradiction, the evidence of the witness in Court must be shown to be inconsistent with his previous statement. For example, if the witness has deposed to something for the first time in Court, which however, was not mentioned by him in his previous statement, he would be wholly consistent and hence the said omission would not amount to a contradiction; (2) that in some cases an omission in a previous statement may amount to a contradiction, e.g. where what is actually stated by the witness in Court is not reconcilable with the said omission; and (3) that similarly if the witness in Court has asserted the existence of a fact 'A' but in his previous statement had asserted fact 'B' then evidently he would be inconsistent and he would be deemed to have contradicted himself. The learned counsel argued that the actual test which should be applied in all such, eventualities is to go through the previous statement as well as the evidence of the witness recorded in Court and see if the assertions made by him therein about any fact in issue or a relevant fact are inconsistent and not reconcilable. If by the said

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<sup>480</sup> 1969 P Cr. L J 491

<sup>481</sup> 1971. P Cr. L J (Dacca) 275

<sup>482</sup> AIR 1928 Lah. 257

<sup>483</sup> AIR 1928 Lah. 289

<sup>484</sup> AIR 1954 Osirra 31

examination, it is found that he has indeed been inconsistent only then he can be said to have contradicted himself and not otherwise. In support of his contention, the learned counsel relied on some of the cases cited by the other side as also on *Balmokand v. Emperor*<sup>485</sup>, *Badri Chaudhry and others v. King-Emperor*<sup>486</sup>, *Iltaf Khan v. Emperor*<sup>487</sup>, *In re: Guruva Vannan*<sup>488</sup>, *Abul Monsur Ahmad and another v. State*<sup>489</sup> and Wigmore on the Law of Evidence (1970 Edition), page 154. By going through these judgments, however, they seem to be either distinguishable or of no help to the learned counsel. In AIR 1915 Lah. 16 each and every omission in the previous statements of witness Dina Nath had been noted, but the learned Judges took the view that these were in the nature of mere details as in respect of most of them, the witness had made assertions in the said statements although in his evidence in Court he explained them by furnishing additional details; in AIR 1926 Pat. 20, the main question which was discussed was whether the statement of witnesses recorded under section 161, Cr. P.C. could be used for the purpose of cross-examining the witnesses not merely to show contradictions (for which purpose alone it could be used) but also for the purpose of showing (which was impermissible in view of the express language of the first proviso to section 162, Cr. P.C. ) that the said statements did not corroborate or assist the story as put forward in the first information report; in AIR 1926 Pat. 362 the view taken was that all omissions in the previous statements would be tantamount to contradictions, but with respect this was not the correct view and therefore, rightly dissented from in AIR 1928 Lah. 257; in AIR 1944 Mad. 385 the question was whether omissions in the statement of the witness, recorded in the police diary, to which however, he deposed during the trial, would be tantamount to a contradiction, and it was rightly held that it would not because all that an Investigating Officer was required to do was to make a short record therein of what the witness examined by him had said, without recording the unimportant details; and that in PLD 1961 Dacca 753, the question of omissions amounting to contradictions, was not considered, in fact the only question considered therein was the effect of the non-supply to the accused copies of the statements recorded under sections 161 and 164, Cr. P.C. It would thus be seen that all these judgments are distinguishable.

170. As regards the Law of Evidence by Wigmore, the Edition relied upon by the learned Special Public Prosecutor is not available, but I have been able to lay my hands on an older Edition printed in 1940, at page 1042 of which would be found the relevant discussion under the heading "*Silence, Omissions, or Negative Statements, etc.*" The statement of the principle recorded there under and in support of which a large number of cases have been quoted, is: "A failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact. This is conceded as a general principle of Evidence .... There may be explanations, indicating

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<sup>485</sup> AIR 1915 Lah. 16

<sup>486</sup> AIR 1926 Pat. 20

<sup>487</sup> AIR 1926 Pat. 362

<sup>488</sup> AIR 1944 Mad. 385

<sup>489</sup> PLD 1961 Dacca 75

that the person had in truth no belief of that tenor; but the conduct is '*prima facie*' an inconsistency much depends on the individual circumstances, and in all of them the underlying test is. Would it have been natural for the person to make the assertion in question? At page 1044, under the heading "*Explaining away the Inconsistency*", it is said "in accordance with the logical principle of Relevancy .... the impeached witness may always Endeavour to explain away the effect of the supposed inconsistency by relating whatever circumstances would naturally remove it. The contradictory statement indicates on its face that the witness has been of two minds on the subject, and therefore that there has been some defect of intelligence, honesty, or impartiality on his part; and it is conceivable that the inconsistency of the statements themselves may turn out to be superficial only, or that the error may have been based not on dishonesty or poor memory but upon a temporary misunderstanding. To this end, it is both logical and just that the explanatory circumstances, if any, should be received". It would thus be seen that this statement of law from the American Jurisprudence is not only in complete harmony with the case-law quoted by the learned counsel for appellant Bhutto, but also with the views expressed by Monir already quoted in the earlier part of this discussion.

171. The learned Special Public Prosecutor, however, relied on the majority judgment of the Indian Supreme Court: *Tahsildar Singh and another v. State of U.P.*<sup>490</sup>, in support of his said contention. Now in that case the main question for decision was to consider the true scope of the first proviso to section 162, Cr. P.C., as well as the extent to which the statement of a witness recorded under section 161, Cr. P.C. could be used at an inquiry or trial in respect of any offence under investigation at the time when the said statement was recorded. From this it would be seen that the judgment is not really relevant to the present discussion, as here I am dealing with the confessional statement as well as the approver statement of Mr. Masood Mahmood to which the restrictions contained in the first proviso to section 162, Cr. P.C. have no application. However, the only point on which the said judgment would seem to be somewhat relevant is the construction of section 145 of the Evidence Act, which being applicable to all previous statements of a witness, may be reproduced:-

"145. *Cross-examination as to previous statements in writing.* A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

172. The view taken by the majority in the said judgment, and here I would confine myself to the discussion of the second part of the said section, was "though a particular statement is not expressly recorded, a statement that can be deemed to be part of that

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<sup>490</sup> AIR 1959 SC 1012

expressly recorded can be used for contradiction, not because it is an omission strictly so-called but it is deemed to form part of the recorded statement". In order to make the point clear, the learned Judges gave a number of examples such as in the recorded statement before the police the witness states that he saw A stabbing B at a particular point of time, but in the witness-box he says that he saw A and C stabbing B at the same point of time; in the statement before the police the word "only" can be implied, i.e. the witness saw "A only stabbing B". The essence of the finding of the majority, therefore, is that before a witness can be confronted with a part of his statement recorded under section 161, Cr. P.C. to contradict him on what he had deposed from the witness-box, it must be shown that there actually existed in both of them his positive assertions which, however, are inconsistent with each other. Omissions from his said 161, Cr. P.C. statement, of what he has deposed from the witness-box, would not amount to a positive assertion and therefore, he cannot be confronted with his said statements for the purpose of contradicting him on his evidence in Court.

173. The two learned Judges, who constituted the minority, disagreed with the said finding of the majority. The essence of their finding is that "the statements of witnesses may and do comprise numerous facts and circumstances, and it happens that when they are asked to narrate their version over again, they omit some and add others. What use can be made of such omissions or additions is for the accused to decide, but it cannot be doubted that some of the omissions or additions may have a vital bearing upon the truth of the story given. We do not think that by enacting section 162, in the words used, the Legislature intended a prohibition of cross-examination to establish which of the two versions is an authentic one of the events as seen by the witness. The use of the words "reexamination" and "cross-examination" in the same proviso shows that cross-examination is contemplated or in other words, that the manner of contradiction under S. 145 of the Indian Evidence Act comprises both cross-examination and contradiction. Indeed, the second part is only the final stage of the contradiction, which includes the earlier stages. Reexamination is only permissible where there is cross-examination .... The purpose of cross-examination is to test the veracity of the statement made by a witness in his examination-in-chief as also to impeach his credit. Not only is it the right of the accused to shake the credit of a witness, but it is also the duty of the Court trying an accused to satisfy itself that the witnesses are reliable. It would be dangerous to lay down any hard and fast rule .... If the section is construed too narrowly, the right it confers will cease to be of any real protection to the accused, and the danger of its becoming an impediment to effective cross-examination on behalf of the accused is apparent".

174. With respect, I am rather, inclined to agree with the view taken by the minority in that case. Now if the view taken by the majority is said to have laid down the correct law, the obvious result would be that if a witness has said nothing in his previous statement about a vital fact relating to the occurrence, to which however, he subsequently deposed in his evidence during the trial, then he cannot be confronted

with the said omission to show that he had contradicted himself. This in my humble view would not only run counter to the basic norms of criminal jurisprudence, but evidently work to the great prejudice of an accused. For example, the fact in issue in a case is if A had travelled on a flight which was hijacked in the midair by certain bravados. The claim of A is that he was indeed a passenger on the flight but, in his 161, Cr. P.C. statement he had made no mention of the said hijacking event, although in his evidence in Court he mentioned it with confidence. Now can it be said that the event of said hijacking was not the most unforgettable thing which should have been present to the mind of the witness to mention in his 161, Cr. P.C. statement? Examples such as this can be multiplied. But according to the view taken by majority, the witness in the hijacking case could not be confronted with his 161, Cr. P.C. statement to show that he had contradicted himself in respect of the most vital part of the case only because no mention of the said event had been made by him therein.

175. Be that as it may, unlike the case before the Indian Supreme Court in which section 145 of the Evidence Act was narrowly construed, because of the language of the first proviso to section 162, Cr. P.C., namely, "in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the, Evidence Act", here I am dealing (as I have already said) with the confessional statement as well as the approver statement of Mr. Masood Mahmood in respect of which the prohibition of cross-examining a witness in relation to his 161, Cr. P.C. statement (as held by the majority in that case) would not be applicable. A further distinction between the language of the said proviso to section 162, Cr. P.C. and section 145 of the Evidence Act is that whereas under the former the witness can be confronted only with a part of his 161, Cr. P.C. statement (and that too if duly proved) in order to contradict him, there is no such restriction under the latter section which says that a witness may be cross-examined as to his previous statements provided they are in writing or reduced into writing, and without such writing being shown to him or being proved. However, if it is intended to contradict him by the writing his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

176. Now Mr. Masood Mahmood was extensively cross-examined as to his two previous statements to show if he had mentioned therein the said various omissions about which for the first time he deposed in Court and he agreed that he had not mentioned them. Evidently, therefore, his replies in the said cross-examination would be covered under the first part of section 145 as well as under section 155 (3) of the Evidence Act, to which no objection can be taken. The learned Special Public Prosecutor, however, would not agree with this conclusion. His contention was that Mr. Masood Mahmood could not be cross-examined generally in respect of his previous statements so as to make him agree that he had made therein no mention of the said various omissions, as the same could only be brought on the record of the case by confronting him with those parts, by which it was intended to contradict him. In this

respect, he relied on the second part of the said section saying that being specially applicable to the said eventuality, should be preferred to the first part of it which was general in nature. I am afraid, there is no force in this contention. If the contention of the learned counsel is accepted, evidently the first part of section 145 of the Evidence Act would become meaningless and thereby the intention of the Legislature would stand defeated. It is a well-settled principle of construction that each part of a section must be so construed as to make it workable and meaningful. Now bearing this principle in mind, both parts of section 145 of the Evidence Act must be given their proper effect, and thus it cannot be said that Mr. Masood Mahmood could not have been cross-examined as to his previous statements under the first part of the section. It is true that under the second part of the section, he was confronted with his entire said two statements, because in them no mention was made of the said various omissions, and to that extent the requirement of the said part, namely, "his attention .... must be called to those parts of it", was seemingly contravened but in substance this is not the position. If by the examination of the said various omissions made by him in his two previous statements, it can be said that they were so fundamental in character that he ought to have made a mention of them therein then the requirement of the second part of the section also would in view of all the preceding discussion as well as the minority judgment of the Indian Supreme Court stand satisfied.

177. Now in none of his said previous two statements he had made any mention of the fact that on November 11, 1974, when he and Mr. Bhutto both were camping at Multan, the latter phoned him up in the very early hours of the morning saying "your Mian Muhammad Abbas has made complete balls of the situation, instead of Mr. Ahmad Raza Kasuri he has got his father killed"; that thereafter Mr. Bhutto called him through his A.D.C. to the house of Mr. Sadiq Hussain Qureshi and repeated to him the same thing; that on his return to Rawalpindi on November 11, 1974, he was summoned by Mr. Bhutto who told him that Mr. Kasuri had yet to be assassinated but he replied "at your behest an idea conceived by you was carried out and communicated by me to Mian Abbas who had already your directions through my predecessor and the fact remains that both you and I and my subordinates will be taken to task by God Almighty, but I will not carry out any such orders anymore"; that thereafter attempts were made on his life, threats were held out to him, attempts were made to kidnap his children from the Aitcheson College, Lahore, and there were repeated performances at poisoning his food at Chamba House, Lahore, where he discovered that some of his subordinates seemed to have been bought over or won over as he had seen them lurking around; that after the Islamabad incident of August, 1974, in which an abortive attempt was made on the life of Mr. Kasuri, Mr. Bhutto reminded him that nothing tangible had taken place (*kuchh nohin huwa*); that in his very first meeting with Mr. Bhutto, the latter had told him to make the FSF a deterrent Force meaning thereby that the people of Pakistan, his Ministers, M.N.As. and M.P.As. should fear it; that after the incident of June 3, 1974 between Mr. Bhutto and Mr. Kasuri in the National Assembly of Pakistan, the former sent for him and told him that he was fed up with the obnoxious



behavior of Mr. Kasuri; that Mian Muhammad Abbas knew all about his activities as he had already been given instructions through the previous Director-General, FSF, to get rid of him; that he should ask Mian Muhammad Abbas to get on with the job and to produce the dead body of Mr. Kasuri or his body bandaged all over; that he had told Mr. Welch that some anti-State elements had to be got rid of; that Mr. Ahmad Raza Kasuri was one of them as he had been delivering anti-State speeches; that he had conveyed the said instructions to Mr. Welch on the telephone, as also in person when he later met him at Quetta; and that when he returned to Rawalpindi on November 11, 1974, Mian Muhammad Abbas met him and told him about the earlier incident of Islamabad in which an attempt was made on the life of Mr. Kasuri.

178. Now without laboring much, on this part of his evidence, it ought to be clear to anyone, that the witness had perjured himself. If there was the slightest truth in his evidence, it is inconceivable that Mr. Masood Mahmood would have failed to mention the said monumental facts in his two previous statements, especially when he claimed to have entered into conspiracy with Mr. Bhutto to assassinate Mr. Ahmad Raza Kasuri during the execution of which, however, the highly respectable and elderly father of Mr. Kasuri was assassinated.

179. Incidentally, the confessional statement made by Mian Abbas not only does not support Mr. Masood Mahmood, but clearly undermines the case of the prosecution. The main thrust of the prosecution has been that Mr. Masood Mahmood was made to agree by Mr. Bhutto for the assassination of Mr. Ahmad Raza Kasuri through the FSF under threats and by exercising over him undue influence. Mr. Masood Mahmood went to his office in a perplexed state of mind, called Mian Abbas and conveyed to him the message of Mr. Bhutto. Mian Abbas not only showed no sign of embarrassment, but told Mr. Masood Mahmood that the said order would be carried out because the same had already been conveyed to him by the former D.G., FSF. In his confessional statement, however, Mian Abbas has taken up the opposite position. The assertion made by him therein is that Mr. Masood Mahmood called him into his office, and told him that he had assigned a task to approver Ghulam Hussain and that he should supervise him. Mian Abbas, accordingly, called Ghulam Hussain and enquired from him about the nature of the said assignment and he told him that it was for the assassination of Mr. Kasuri. It should be obvious, therefore, that the confessional statement of Mian Abbas instead of being of any help to the prosecution, has struck at the very foundation of its case. I am, therefore, of the view that this piece of evidence has snapped the chain of the prosecution's case in the forging of which great effort was evidently expended.

180. Having reached this conclusion, the next question is whether there is any need to seek the corroboration of the evidence of Mr. Masood Mahmood. Mr. Yahya Bakhtiar, the learned counsel for appellant Bhutto, has relied on quite a few judgments and contended that once the evidence of an approver is found to be unnatural, improbable

and untrue, there would be no need to seek the corroboration of his evidence and his evidence must be rejected. He argued that in law this approach has come to be known as a 'double test' and relied in that behalf on the following judgments;

*Doctor Muhammad Bashir v. The State*<sup>491</sup>, *Sarwan Singh Rattan Singh v. State of Punjab*<sup>492</sup>, *Luchhi Ram v. The State of Punjab*<sup>493</sup>, *Piara Singh v. The State of Punjab*<sup>494</sup>, *Babuli v. The State of Orissa*<sup>495</sup>, *Noor Zaman Khan v. Mt. Maimunnissa Bibi and others*<sup>496</sup>, *State of Bihar v. Srilal Kojriwal and others*<sup>497</sup>, *Sharaf Shah Khan and others v. State of Andhra Pradesh*<sup>498</sup>, *Balmokand v. Emperor*<sup>499</sup> and *Chatru Malak v. Emperor*<sup>500</sup>.

181. The learned Special Public Prosecutor, however, joined issue with Mr. Yahya Bakhtiar on the said question and in that behalf relied on *Major E. G. Barsay v. State of Bombay*<sup>501</sup>. He argued that the theory of 'double test', in relation to the appreciation of an approver's evidence is misleading because an approver is a competent witness under the law and all that the law requires is that his evidence should not be believed unless it is corroborated in material particulars. With respect, this is precisely what the 'double test' means in respect of the scrutiny of the evidence of an approver. It is true that an approver is a competent witness, but under section 114 (b) of the Evidence Act the Court is entitled to presume that he is unworthy of credit unless corroborated in material particulars. Now according to section 3 of the Evidence Act a fact is said to be proved when, after considering the matters before it the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. It is evident, and in fact this is what section 3 of the Evidence Act says, that a fact has to be proved by oral as well as documentary evidence permissible under the Evidence Act. It should, therefore, follow that if the evidence of a witness in proof of a fact in issue has to be evaluated by the Court to see if the same is shown to exist or considers its existence so probable that a prudent man ought, under the circumstances to act upon the supposition that it exists then the same principle would be applicable to the scrutiny of the evidence of an approver who is just another witness. Furthermore, this test would seem to be common to all witnesses regardless of their social standing and reputation of unblemished character, therefore, how can a better privilege be claimed in respect of an approver to whom the law itself has cautioned the Court not to accept his evidence

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<sup>491</sup> PLD 1971 SC 447

<sup>492</sup> AIR 1957 SC 637

<sup>493</sup> AIR 1967 SC 792

<sup>494</sup> AIR 1969 SC 961

<sup>495</sup> AIR 1974 SC 775

<sup>496</sup> AIR 1958 Orissa 228

<sup>497</sup> AIR 1960 Pat. 459

<sup>498</sup> AIR 1963 Andh. Pra. 314

<sup>499</sup> AIR 1915 Lah, 16

<sup>500</sup> AIR 1928 Lah. 681

<sup>501</sup> AIR 1961 S C. 1762

unless it is corroborated in material particulars. Seen in this context, there ought to be no quarrel with the theory of 'double test'. Unlike an ordinary and truthful witness, an approver is stamped by the law with the stigma of doubtful credibility, with the result that as a rule of prudence, which has almost hardened into a rule of law, the Courts have invariably considered it dangerous to act on his uncorroborated evidence. In other words, if by the scrutiny of the evidence of an approver, it is found to be natural and probable even then the Court must look for its corroboration which in the case of an ordinary witness would be unnecessary.

182. It would be interesting to note that in essence the theory of 'double test' was first expounded, without using the said expression though, about sixty years ago in AIR 1915 Lah. 16 from which the following passage (appearing on page 22) may be reproduced:-

"Turning to the merits of the case one cannot help seeing that the most important matter for consideration is the evidence of Dina Nath, P.W. No. 3, the approver, and the questions that here arise are ..... Is his story substantially true? Is it materially corroborated? Apart from corroboration by independent evidence, does it contain in itself intrinsic indications its truth? .... I will first consider the question of the value of Dina Nath's evidence taken by itself apart from direct corroborative evidence."

183. It is true that the expression 'double test' was used for the first time in AIR 1957 SC 637. But evidently this cannot be said to have blazed a new trail in the field of jurisprudence, because the same ground had already been traversed in the said Lahore judgment. I am therefore, in respectful agreement with the views taken in all the judgments cited by Mr. Yahya Bakhtiar, in which the theory of 'double test' in relation to the appreciation of an approver's evidence has been expounded.

184. AIR 1961 SC 1762, relied on by the learned Special Public Prosecutor does not help him. Now apart from the fact that the said judgment, which was delivered by two learned Judges, could not overrule the earlier judgment reported in AIR 1957 SC 637 which was delivered by a larger Bench, the evidence of the witness Lawrence by name in that case was not treated by the learned Judges themselves as that of an approver, as it should be clear from the following dictum:-

"We must also make it clear that we are not equating the evidence of Lawrence with that of an approver; nor did the Special Judge or the High Court put him exactly on that footing.

185. Furthermore, the view taken by the learned Judges was that in most of the cases the evidence of an approver and the corroborative pieces of evidence would be so interconnected that it would not be possible to give a separate treatment, for as often as

not the reliability of an approver's evidence, though not exclusively, would mostly depend upon the corroborative support it derives from other unimpeachable pieces of evidence. With great respect to the learned Judges, however, this finding cannot be said to have laid down the correct law, for no notice was taken by them of section 3, as well as section 114 (b) of the Evidence Act in respect of which enough has already been said by me in the earlier part of this discussion.

186. In support of this conclusion, it would suffice to say that the view taken in the earlier judgment of the Indian Supreme Court: AIR 1957 SC 637 has been consistently followed not only by the said Court itself but also by the various High Courts of India. Evidently, therefore, the judgment relied upon by the learned Special Public Prosecutor must be held to be of no use to him.

187. In fairness to the prosecution, however, and considering that extensive and elaborate arguments were addressed from the bar on almost every point arising from the evidence, it may yet be useful to see if there is any evidence on record to corroborate the evidence of Mr. Masood Mahmood. The learned Special Public Prosecutor has relied in that behalf on the evidence of Mi. Saeed Ahmad Khan, and Mr. M. R. Welch as well as on the subsequent conduct of Mr. Bhutto. Enough has already been said by me, while discussing the motive-part of the case of the prosecution about the evidence of the said two witnesses, as well as the evidence relating to the subsequent conduct of Mr. Bhutto. But all the same some treatment of it would still seem to be necessary, although the field already covered should be avoided. By the analysis of his evidence, I have already held that Mr. Saeed Ahmad Khan is an untruthful witness. In finding him so, I have tested his oral testimony in juxtaposition with the large number of documents on which he relied and thus the rest of his oral evidence must be rejected. Furthermore, his evidence is streaked with potential improvements practically on each and every material part of the case of the prosecution in respect of which, however, he had made no mention in his 161, Cr. P.C. statement (Exh. P.W. 41/3-D) as well as confessional statement (Exh. P.W. 10/16-D), respectively recorded on September 3, 1977 and September 4, 1977. Now in his said two statements he had made no mention of the fact that when Mr. Bhutto phoned him up from Larkana or Karachi about the proceedings going on before the Tribunal headed by Shafi-ur-Rehman, J. of the Lahore High Court, "that I should meet the Advocate-General, the Chief Secretary, I.G. Police and the Investigating Officers and look into the case": similarly in connection with his alleged dialogue with Mr. Bhutto about the type of weapons used in the murder of Nawab Muhammad Ahmad Khan he deposed in his evidence that "he snubbed me and said in so many words, 'Keep out the FSF', but no such thing was said by him in his two previous statements: similarly during his said dialogue with Mr. Bhutto, he claimed in his evidence that "the Prime Minister further directed me to find out from the Joint Army Detection Organization (JADO), a part of the Inter-Services Intelligence Directorate, whose main task was to find out and control illicit traffic in arms in the country", but again he had made no mention of any such thing in his said previous

statements; similarly in his evidence Court he deposed that "on receiving letter Exh. P.W. 3/3-C I got perplexed because in it was mentioned that the Chinese weapons are in the use of the FSF and f had been given positive instructions by the Prime Minister that FSF be kept out", but again no mention was made by him of any such thing in his previous statement, similarly in his evidence in Court he claimed "I had no other alternative but to go back to the Prime Minister and I met him and showed him this D. O. letter of the Defence Secretary and enquired as to whether this letter was to be produced before the tribunal", but nothing of this was mentioned by him in his previous statement; similarly he deposed in Court "on that Mr. Bhutto got infuriated and said, 'Have I sent you to safeguard my interests or to incriminate me.' This letter will certainly be not produced before the tribunal. You are trying to become over-clever and if you don't behave you will suffer the consequences which your progeny will not forget", but again no such thing was mentioned by him in his said two previous statements; similarly he deposed in Court "as far as I recollect it was somewhere in the middle of 1975, when there was a rift brewing up between Ahmad Raza Kasuri and the Tehrik Chief, Air Marshal (Retd.) Asghar Khan, I was instructed by the Prime Minister that I should try to win over Ahmad Raza Kasuri and bring him back to the PPP fold", but again no such thing was mentioned by him in his said two previous statements; similarly he deposed in Court "I told him that I did not know Ahmad Raza Kasuri personally, but I will ask Mr. Bajwa to initiate the matt and I was told by Mr. Bhutto that Mr. Bajwa has already been instructed in this matter", but again nothing of this was said by him in iris previous two statements; similarly he deposed to a question put to him in Court "What steps did you take to get in touch with Mr. Ahmad Raza Kasuri?" and he replied: "As I have said earlier, Mr. Bajwa initiated talks with Mr. Ahmad Raza Kasuri on the subject and persuaded him to come and see me", but again no such thing was said by him in his two previous statements; similarly he deposed in Court about his, meeting with Mr. Kasuri: "The first meeting took place and he came to my house at Rawalpindi, and after that I had met him at his house in Model Town at Lahore. As far as I recollect the subsequent meetings took place at my house at R W P." but no such thing was mentioned by him in his previous statements; similarly he deposed in Court. In the first meeting, I asked him that since he had parted company with Air-Marshal Asghar Khan of the Tehrik-i-Istiqlal, he might consider joining the PPP, as he claimed to be a Founder Member", but again nothing of this was said by him in his previous statements: similarly he deposed in Court "On this. Ahmad Raza Kasuri turned round and said that "how could he join the party of which the Chairman was Mr. Z. A Bhutto who had been responsible for the murder of his father and was after his blood", but nothing of this was said by him in his said two previous statements, similarly he deposed in Court "I told him that it was all the more reason that he should make up with Mr. Bhutto and not put his life in jeopardy as he knew that he was a marked man", but again nothing was said by him in his previous statements: similarly he deposed in Court "I also told him that he is a young bright person with a future and if he rejoins the PPP he may even be rehabilitated", but nothing of this was said by him in his previous statements; he similarly deposed that "on this, Mr. Ahmad Raza Kasuri told me that he

may be given some time to think it over", but again nothing of this was said by him in his previous statements; and similarly he deposed in Court "He came back to me after a few days and told me that my suggestion was sound and that I may inform the Prime Minister that he is prepared to join the PPP, and would like to meet Mr. Bhutto", but again nothing of this was said by him in his said two previous statements. Now all these pieces of evidence were taken notice of by the High Court in paras. 79, 82, 491, 492, 493, 494, 495, 496, 505, 540 and 570 of the judgment and used against Mr. Bhutto.

188. The grievance of Mr. Yahya Bakhtiar, the learned counsel is that all the said improvements made by Mr. Saeed Ahmad Khan for the first time in his evidence in Court are so fundamental and prominent that they ought to have been present to his mind when his 161. Cr. P.C. statement as well as the confessional statement were recorded. He, therefore, contended that the witness had evidently perjured himself. There seems to be force in his contention. A casual look at each one of the said improvements made by Mr. Saeed Ahmad Khan for the first time in Court would show that if there was the slightest truth in them they ought to have been present to his mind when he made the said statement, as evidently they are so prominent that he could not have possibly failed to mention them in his said statements. I am, therefore, of the view that in line with the relevant discussion already made in connection with the similar aspect of the evidence of Mr. Masood Mahmood, all the said improvements made by Mr. Saeed Ahmad would be tantamount to contradictions within the meaning of section 145 of the Evidence Act. Now by taking into consideration the said contradictions, there ought to be no doubt in anyone's mind that he is not a truthful witness and consequently no reliance can be placed upon his evidence.

189. The further difficulty in the way of the prosecution is that Mr. Saeed Ahmad Khan is an 'accomplice' or at any rate in the nature of an 'accomplice' as his role has been that of an 'accessory after the fact'. The learned Special Public Prosecutor, however, does not agree with this conclusion. He argued that whatever role was played by Mr. Saeed Ahmad Khan in the investigation of the case was that of an innocent agent of Mr. Bhutto, as he was not aware that the latter himself was responsible for the assassination of Nawab Muhammad Ahmad Khan. I am afraid the evidence on record, and the manner in which the said evidence has been treated in the High Court, shows the contrary position. It is true that in para. 469 of the judgment, the High Court has held Mr. Saeed Ahmad Khan to be an independent witness, but it would be necessary to take note of paras. 207, 502, 505 and 506 of the judgment in which, amongst other things, the High Court held that "Although this exercise in fishing for local disputes and political rivalries was to change the venue of investigation in order to exonerate the real culprits, yet it is important to note that despite concentrating all his efforts in conducting the investigation on the lines directed by Saeed Ahmad Khan, P.W. 3, Malik Muhammad .... Waris completely, failed to make any headway .... it is, therefore, proved beyond any shadow of doubt that the guidelines given by the principal accused to Saeed Ahmad Khan and communicated by him to P.W. 15 were not correct and were

not given for the purpose of helping the discovery of the actual culprits. The purpose of these guidelines and direction was only to lead the Investigating Officer astray .... In view of the evidence about the use of Chinese weapons of 7.62 mm. caliber which were in the use of the Federal Security Force, the Investigating Officer ought to have taken his investigation into the ranks of the force but the efforts of the principal accused and his Officers, namely, Abdul Hamid Bajwa and Saved Ahmad Khan P.W. 3, were to keep the Federal Security Force as well as the principal accused out of the reach of the Investigating Officer".

190. With this finding, which is supported by evidence, I respectfully agree. The learned Special Public Prosecutor, however, argued that this finding would make Mr. Saved Ahmad Khan at best an 'accessory after the fact', but it would not make him an 'accomplice' under the Law of Pakistan which says that an 'accomplice' must be shown to be a *particeps criminis* in the crime with which the accused is charged. In support of his contention he relied on a large number of cases out of which only some may be quoted: *Nga Pauk v. The King*<sup>502</sup>, *Ramasnami Goundan v. Emperor*<sup>503</sup>, *Jagannath v. Emperor*<sup>504</sup>, *Ghudo and another v. Emperor*<sup>505</sup>, *The Crown v. Ghulam Rasul and others*<sup>506</sup> and *Narain Chandra Biswas and others v. Emperor*<sup>507</sup>.

191. As against this, Mr. Yahya Bakhtiar, the learned counsel for Mr. Bhutto contended that the concept of as 'accessory after the fact' is now so well established in the legal system of this country that it cannot be doubted. He argued that in view of the said finding recorded against him by the High Court Mr. Saeed Ahmad Khan was an 'accomplice' or at any rate in the nature of an 'accomplice' and therefore, his evidence cannot be accepted unless the same is corroborated in material particulars. In support of his contention he also relied on a large number of judgments out of which the following may be quoted:- *Begu and others v. Emperor*<sup>508</sup>, *Mahadeo v. The King*<sup>509</sup>, *Mahikilili Dhalamini and others v. The King*<sup>510</sup>, *Ashutosh Roy v. The Sate*<sup>511</sup>, *Pt. Darshan Lal and another v. Munnoo Singh and others*<sup>512</sup>, *Gopi Nath Singh v. Emperor through Suraj Pal Singh*<sup>513</sup>, *Musafar v. The Crown*<sup>514</sup> and *Vemireddy Satyanarayon Reddy and others v. State of Hyderabad*<sup>515</sup>.

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<sup>502</sup> AIR 1937 Rang. 513

<sup>503</sup> ILR 27 Mad. 271

<sup>504</sup> AIR 1942 Oudh 221

<sup>505</sup> AIR 1945 Nag. 143

<sup>506</sup> AIR 1950 Lah. 129

<sup>507</sup> AIR 1936 Cal. 101

<sup>508</sup> AIR 1925 PC 130

<sup>509</sup> AIR 1936 PC 242

<sup>510</sup> AIR 1943 PC 4

<sup>511</sup> AIR 1959 Orissa 159

<sup>512</sup> AIR 1937 Oudh 258

<sup>513</sup> AIR 1948 Oudh 130

<sup>514</sup> PLD 1956 FC 140

<sup>515</sup> PLD 1956 SC (Ind.) 280

192. Now before considering the two sets of judgments relied upon by the learned counsel for the parties, it may be stated that expressions 'accessory before the fact' and 'accessory after the fact' have not been defined in the Evidence Act, 1872, but in view of the language of section 337, Cr. P.C. 1 section 201, P.P.C., sections 133 and 114 (b) of the Evidence Act, 1872, the Courts as well as the commentators on the Evidence Act have felt no difficulty to spell out the existence of the said concepts in the legal system operating in the Indo-Pak Sub-Continent. In this behalf reference may usefully be made to the following comments appearing at page 1451 of the Law of Evidence by Monir (1974 Edition):-

"Accessories before and after the fact. The term accomplice includes all persons who have been concerned in the commission of a crime, all *particeps criminis* whether they are concerned in strict legal propriety as principals in the first or second degree, or merely as accessories before or after the fact. It is well settled that all accessories before the fact, if they participate in the preparation for the crime, are accomplices; but if their participation is limited to the knowledge that crime is to be committed, they are not accomplices. Whether a person is or is not an accomplice, therefore, depends upon the facts in each particular case considered in connection with the nature of the crime; and persons, to be accomplices, must participate in the commission of the same crime as the accused persons in a trial as charged. But it has been held in some Indian decisions that an accessory after the fact is not an accomplice. Thus, it has been held that a witness who merely assists in removing or disposing of the body of the deceased without in any way being privy to the murder, is not an accomplice of the murderer. But a person who knows all about the proposal to murder and is a consenting party to it is in the position of an accomplice. The circumstances that the deceased met his death at the hands of the accused in the presence of his wife who was probably in love with the latter and that she made no attempt to prevent the commission of the offence do not, in the absence of evidence to show that she shared with the accused the intention to kill the deceased, render her, an accomplice whose evidence requires corroboration. In some cases from India, the Privy Council has treated an accessory after the fact in the same way as an accomplice in the matter of corroboration. Thus it has been held that a person who gives medicine to the murderers for the purpose of purifying them from the killing is an accomplice. A person who opens the door to the murder and then helps him to burn the corpse is clearly an accomplice. A receiver of stolen property is not necessarily an accomplice of the thief. But a person who knowingly aids in the disposal of the stolen property is an accomplice."

193. Now these comments of the learned author, in which support is available for the contentions urged by both sides, clearly brings out the legal position obtaining in the Indo-Pak Sub-Continent as to who is an 'accomplice' or for that matter an 'accessory before the fact' or an 'accessory after the fact'. From the various judgments cited by the



learned counsel for the parties the same position emerges. But the question is as to why there has not been any unanimity of views in that behalf? By going through the said various judgments what I have noticed is that in one set of them the view taken has been that an 'accessory after the fact' must be shown to have been a conscious *particeps criminis* in the same crime with which the others are charged in order that he could be jointly tried with them; and in the other that any conscious step taken by him such as shielding the actual criminal, or disposing of the dead body, or destroying any evidence relating to the crime would be sufficient to hold him an 'accessory after the fact', although not a *particeps criminis*. Now the view taken in the first set of judgments is readily understandable because if an 'accessory after the fact' whose trial would fall under section 201, P.P.C., is jointly tried with the actual criminal, say, accused of a murder, it is bound to lead to complications because an 'accessory after the fact' would be incompetent to appear as a witness against the other and give evidence on oath. This in my view would seem to be the ratio of all the said judgments. In the other set notice does not seem to have been taken of this difficulty, because in view of the peculiar facts of each case the Courts were not confronted with any such situation. In all of them the only question before the Courts was whether an 'accessory after the fact' who was not being jointly tried with the actual criminal, could be said to be an 'accomplice' and consequently his evidence unacceptable without corroboration in material particulars. It would thus be seen that in the two sets of judgments, the point in issue was not really the same, although observations would be found in each set one way or another.

194. I am of the humble view that the concept of an 'accessory before the fact' and an 'accessory after the fact' has not only been known to the Courts of the Indo-Pak Sub-Continent for more than a century, but the same position must be maintained as otherwise it is bound to lead to startling and disturbing consequences. If the contention of the learned Special Public Prosecutor is accepted, it would mean that a person, though not a *particeps criminis*, say, in the commission of a murder, disposes of the dead body with a view to aiding the actual assassin yet he would not be an 'accessory after the fact', and hence not an 'accomplice'. It is true that under section 201, P.P.C., he may be tried for having disposed of the dead body, but what about the actual culprit? It is conceivable that he also may be arrested and sent up for trial, but look at the complications which might very well arise in many cases in which due to the disposal of dead body, it would be difficult if not possible, to secure the conviction of the accused.

195. Furthermore, what is the basic function of a Court of Law in a criminal case? To do justice, I suppose, isn't it? It is true that justice has to be done according to law. But then if the Courts of Indo-Pak Sub-Continent have over the long period of a century, taken the view that an 'accessory after the fact', though not *particeps criminis*, would be no better than an 'accomplice', I feel that the said view, which is based on pragmatism and juridical wisdom, ought to be respected for the safe administration of criminal justice-especially in view of the declining moral standards and the perjured evidence

which is frequently offered in the Courts of Law. Now take the case of a person, who not being a *particeps criminis* in the same crime consciously destroys the evidence relating to the crime can it be contended on his behalf that at least he was no biased in favor of the actual culprit? Faced with such a situation the essential question to which the Court must address itself is whether the evidence of a witness of that type can be accepted without corroboration, and not that he could be jointly tried with the actual culprit. It is in this context that the ratio of the second set of judgments relied upon by Mr. Yahya Bakhtiar must be seen. But before notice is taken of them, reference may again be made to the Law of Evidence by Monir, at page 1453 of which appears the following observations:-

"Witnesses no better than accomplices .... Though there is no warrant for the extreme proposition that if a man sees the perpetration of a crime and does not give information of it to anyone else, he might be regarded as an accomplice and could be put in dock with the actual criminals, yet a person who sees a murder committed but gives no information of the fact, or who is cognizant of the commission of an offence, and keeps quiet, is no better than an accomplice. A witness who sees the crime being committed, assists in, or connives at, concealing the evidence of that crime, and does not attempt to give any information to the police or any other person to enable the offenders to be brought to justice, is no better than an accomplice. A witness, who assisted the criminals to the extent of keeping a look-out to see whether the police were approaching, is in the position of an accomplice. An accessory after the fact is virtually an accomplice and his evidence requires very careful scrutiny and corroboration. Thus a person who harbors the offender after the commission of the crime is no better than an accomplice."

196. In support of these observations, the learned author has quoted a large number of judgments in the footnote of his said treatise with which I respectfully agree. However, coming to the judgments relied upon by Mr. Yahya Bakhtiar, the first case of which notice may be taken is *Mahadeo v. The King*<sup>516</sup>. In that case a boy of 13 years of age was murdered by the appellant in the presence of witness Sukraj who was, however, found to have helped the appellant in the disposal of the dead body. Upon these facts it was held by the Privy Council that Sukraj plainly was an 'accessory after the fact' and hence his evidence could not be accepted without corroboration. The same view was reiterated by the Privy Council in the subsequent judgment: *Mahilkilili Dhalamini and others v. The King*<sup>517</sup>.

197. Judgments also are not wanting from the various High Courts of the Indian Sub-Continent to the same effect: see for example: *Ashutosh Roy v. The State*<sup>518</sup>, *Pt. Darshan Lai*

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<sup>516</sup> AIR 1936 PC 242

<sup>517</sup> AIR 1943 PC 4

<sup>518</sup> AIR 1959 Orissa 159

and another v. Munnoo Singh and others<sup>519</sup>, Gopi Nath Singh v. Emperor through Surajpal Singh<sup>520</sup>, The State v. Jamalana and others<sup>521</sup>. In AIR 1959 Orissa 159 an objection was taken to the competency of certain witnesses and it was held "They are clearly 'accessories after the fact', and a Court must insist on adequate corroboration of their testimony before it can sustain the conviction". Not only this but the same view has been taken in *Musafar v. The Crown*<sup>522</sup>, *Vemireddy Satyanarayan Reddy and others v. State of Hyderabad*<sup>523</sup>. In the case before the Federal Court, two of the witnesses were found to have helped in the disposal of the dead body of the murdered man and it was held that they were no better than 'accomplices' but since there existed on the record of the case sufficient corroboration of their evidence they were believed. In the case before the Indian Supreme Court, however, the said principle seems to have been enlarged, as in there all that was found against the witness was that having seen the commission of the crime he gave no information about it to anyone else. Upon these facts it was held, "he might well be regarded in law as an accomplice. However the evidence of such a witness should be scanned with much caution and the Court must be fully satisfied that he is a witness of truth, especially when no other person was present at the time to see the murder. Though the witness was not an accomplice, the Court would still want corroboration on material particulars because the person being the only witness to the crime it would not be safe to hang the accused on his sole testimony without the certainty that he is speaking the truth."

198.

It would thus be seen that the concept of an 'accessory after the fact' has been accepted both by the Privy Council, the Indian Supreme Court as well as the Federal Court of Pakistan. In this view; all the judgments cited by Mr. Ijaz H. Batalvi from the various High Courts of the Indian Sub-Continent, as well as from the High Court of Burma, must be held to have been overruled.

199. Furthermore, each one of the said judgments is distinguishable for the following reasons:- ILR 27 Mad. 271 was not a unanimous judgment as Boddam, J., wrote a dissenting note observing that a person assisting in the disposal of a dead body or concealing the evidence was no better than an 'accomplice'. This judgment was sub-sequently cited before the Chief Court of Oudh in *Brijpal Singh v. Emperor*<sup>524</sup> and the learned Judges followed the view taken by Boddam, J.; AIR 1937 Rangoon 513, no doubt supports the learned counsel, but that judgment was based on the majority view taken in ILR 27 Mad. 271; in AIR 1942 Oudh 221, the witness, who was an ekka driver, was made to carry the accused in his ekka by the show of threats. Evidently, he was not

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<sup>519</sup> AIR 1937 Oudh 258

<sup>520</sup> AIR 1948 Oudh 130

<sup>521</sup> PLD 1959 Lah. 442

<sup>522</sup> PLD 1956 FC 140

<sup>523</sup> PLD 1956 S C (Ind.) 280

<sup>524</sup> AIR 1936 Oudh 413

an 'accomplice' at all, but even so it was observed therein that 'accessories before and after the fact' 'accomplices'; in AIR 1945 Nag. 143, the facts were somewhat unique. In that case under the Himalian authority of a Police Head Constable all the villagers were made to participate in beating the deceased and watching the disposal of the dead body, under the threats extended to them by the said Police Officer. It was found as a fact; however, that these simple villagers lived in a far-flanged area of India, and in the nature of things could not resist the authority of the said Officer. Therefore, when some of them appeared as witnesses, against the said Officer during his trial, objection was taken to their competency, but the same was overruled, as none of them were found to have any bias or personal grudge against him. Now from this it should be obvious that whatever role the witnesses had played in the beating of the deceased or in watching the disposal of his dead body was under the threats extended to them by the said Head Constable and so they could not be termed as 'accomplices'; in AIR 1950 Lah. 129, the witness, Mst. Zainab Bibi by name, was found to have been threatened and locked up in a room when the accused committed the murder. However, when the accused, after disposing of the dead body, returned to the house and released Mst. Zainab Bibi, she informed the Police of the incident. Upon these facts, therefore, she was rightly held not an 'accomplice'; in AIR 1936 Cal. 101, it was held that the persons, who had not taken any part in the actual commission of any overt acts, were merely the sympathizers of conspirators, and aware of the existence of the conspiracy between them. Upon these facts, therefore, it was rightly held that they were not only not 'accessories before the fact' but not 'accessories' at all.

200. I am also inclined to agree with Mr. Yahya Bakhtiar, which is his alternate argument that if Mr. Saeed Ahmad Khan does not strictly fall within the category of 'accomplices', he is no better than an 'accomplice' and so his evidence would need corroboration. In this respect he relied, tit amongst others, on AIR 1937 Oudh 258; AIR 1948 Oudh 130; A I 1959 Orissa 159; PLD 1956 S C (Ind.) 280; PLD 1956 F C 140 and PLD 1959 Lah. 442.

201. By going through these judgments, they do seem to support the contention of the learned counsel. Furthermore, Mr. Saeed Ahmad Khan was not an ordinary witness as not to realize the consequences of his acts and conduct. He had served as a senior Police Officer for umpteen (?) years, having attained the status of an I.G. of a Province, and yet he continued to interfere with the investigation of the case with a view only to shield the actual assassins of Nawab Muhammad Ahmad Khan. I am, therefore, of the view that the complement given to him by the learned Special Public Prosecutor as an innocent agent of Mr. Bhutto seems to be clearly unwarranted. On the contrary, he seems to be an 'accomplice', or at any rate in the nature of an 'accomplice', therefore, his evidence cannot be accepted without corroboration. The fact, however, is that there is no evidence on record to corroborate him and consequently his evidence cannot be accepted.

202. This leaves us with the evidence of Mr. 114. R. Welch (P.W.4). Enough has already been said by me about his evidence, under the topic of motive, and I have disbelieved him. The basic reason for which I have disbelieved him is that in the casual meeting held between him and Mr. Masood Mahmood, lasting just about five minutes, at the Lourdes Hotel, Quetta, when the latter was leaving for the Airport, Mr. Masood Mahmood could not have possibly given him the instructions to assassinate Mr. Ahmad Raza Kasuri during his forthcoming visit to Quetta, as he knew him only casually. In any event, by the examination of the secret reports submitted by him to Mr. Masood Mahmood, and the correspondence exchanged between them, his oral testimony given by him in the Court has been disbelieved by me, as the said documentary evidence is not only inconsistent with the evidence but the same seems to documentary clearly innocuous, was exchanged in routine and thus has nothing in it, which would support the case of the prosecution.

203. Mr. Yahya Bakhtiar has, however, taken serious objection to the evidence of Mr. Welch. He argued that being a Christian by faith, Mr. Welch ought to have been sworn in the witness-box on Bible and not on solemn affirmation. The fact, however, is that he was a worn on solemn affirmation and consequently his evidence has to be disregarded. I am afraid, I am not inclined to go into this question, as there is nothing in the evidence of Mr. Welch to show that he was put any question about his faith. Furthermore, his evidence does not seem to help the case of the prosecution, firstly because there is nothing in it to show that when Mr. Masood Mahmood gave him the said instructions he had told him that the same had come from Mr. Bhutto, and secondly because he admitted in his evidence that it was a part of his duty to keep an eye on the activities of all political leaders; that it was also his duty to keep a watch on all politicians, including the fact where they resided, that reports Exhs. P.W. 2/1, P.W. 2/3 and P.W. 2/4 were submitted by him to Mr. Masood Mahmood in the normal routine of his duties; that it was also a part of his duty to report to the FSF Headquarters at Rawalpindi in case he found that a political leader had left the place of his residence during the night; and that the Head Office had not questioned him, as to why he replied to the letter written to him by Mian Muhammad Abbas (Exh. P.W. 2/2) after the delay of about one and a half months. Now these admissions made by the witness would seem to be forthright and truthful, as they are in complete harmony with the said documentary evidence. But strangely in his examination-in-chief in Court he seems to have placed a sinister construction on the said documentary evidence to the effect "I had no intention of committing heinous murder and had to find a plausible excuse for not executing the orders of Mr. Masood Mahmood. I took refuge in the fact that Mr. Ahmad Raza Kasuri was well protected and made this my excuse. I had hoped that Mr. Masood Mahmood would read between the lines and find the reason why I had not complied with his orders".

204. Apart from the fact that the sinister construction placed by him on the said documents, being in the nature of his own opinion, which the. said documents do not

even remotely bear, it is obvious to me that by making the said statement he was simply obliging the prosecution. It may be noted that while narrating the details of his conversation at the Lourdes Hotel, Quetta, between him and Mr. Masood Mahmood, he was questioned in examination-in-chief "did he mention the name of Mr. Ahmad Raza Kasuri"? and the Court rightly disallowed the said question. Unfortunately, however, the learned Public Prosecutor was allowed to ask him the very next question to the effect "did he mention any particular name"? and he replied "he had mentioned the name of Mr. Ahmad Raza Kasuri, M.N.A. and had stated that he had been obnoxious in his speeches against Mr. Bhutto, the then Prime Minister, and he should be eliminated". With respect to the High Court, it ought to have realized that after having disallowed the learned Public Prosecutor from putting to the witness the said leading question about Mr. Ahmad Raza Kasuri, he again should have been prevented from asking the next question, as by then the witness knew full well as to what exactly was he expected to answer.

205. I am further of the view that Mr. Welch also is an 'accomplice' or at least in the nature of an 'accomplice' (see PLD 1956 SC (Ind.) 280), and consequently his evidence, which in any event is of no help to the prosecution, cannot be accepted without corroboration. It is the case of the prosecution that in view of the instructions given to him at Quetta by Mr. Masood Mahmood for the assassination of Mr. Kasuri, Mr. Welch had done all which under the circumstances was possible, but his efforts did not fructify because Mr. Kasuri seldom stayed in the room which was reserved for him at the Lourdes Hotel. It is very well to say, as Mr. Welch has no doubt said in his evidence in the High Court, that he had no intention to carry out the said instructions given to him by Mr. Masood Mahmood, but there is nothing in his evidence, or for that matter in any part of the evidence on record to support his said claim. It should be borne in mind that being a senior officer of somewhat sophisticated background, he ought to have not only resisted the said pernicious influence exercised over him by Mr. Masood Mahmood, but shown some regard for the law of the land as contained in section 44 of the Code of Criminal Procedure under the warrant of which every person is obliged forthwith to give information to the nearest Magistrate or a Police Officer if he is aware of the commission of or of the intention of any other person to commit, amongst others, any offence punishable under section 302, P.P.C., Furthermore, under section 7 (3) (a) of the F.S.F. Act, 1973, as Director FSF, he was deemed to be an Officer Incharge of a Police Station, therefore, it was his bounden duty under section 149 and section 150 of the Code of Criminal Procedure to, frustrate the plot of the assassination of Mr. Ahmad Raza Kasuri, and not to facilitate its execution. In this view, even if his evidence was acceptable, it would need corroboration in material particulars. But there is no such evidence to corroborate him.

206. The High Court also has held (see para. 431 of the judgment) that the actual crime empties Were substituted by Mian Muhammad Abbas with a view evidently to putting the investigation into the wrong channels, so that any suspicion about the

involvement of the FSF in the murder of Nawab Muhammad Ahmad Khan and Mr. Bhutto both could be effectively avoided. In recording the said finding the High Court has relied on the evidence of P.Ws. Abdul Wakil Khan, Muhammad Bashir, Muhammad Sarwar, Abdul Ikram, Fazal Ali, Lt.-Col. Zawar Hussain, Abdul Hayee Niazi, Nadir Hussain Abidi, as well as a large number of documents. By going through the said voluminous evidence, however, I have not been able to agree, and I say so with respect, with the view taken by the High Court because (1) the evidence of the said witnesses is unnatural, t improbable and does not inspire confidence; (2) that in essential features, their respective evidence is made up of improvements; and (3) that most" of the documentary evidence is not only equivocal in nature but also is not entirely convincing. The learned Special Public Prosecutor also seems to have realized the infirmity of the finding of the High Court, as (quoting him verbatim) this is what he contended during the arguments:-

"I am not in a position to say positively that there is positive evidence of substitution but there is mass of evidence to suggest substitution. Delay and other circumstances prove that empties recovered lost all authenticity .... My submission is, that there is no theory. There is a high probability that the empties had been changed. The evidence as to high probability has to, be looked at in the totality of the picture. There is a case for strong inference that the empties had been changed."

207. Frankly, I should have, therefore, desisted from going into the said voluminous evidence but all the same I am tempted to deal with the evidence of at least those witnesses who, because of their respective positions, had played the central role in the said transaction. Abdul Hayee Niazi (P.W. 34), who is one such witness, seems to have laid the foundation in his evidence for the substitution of the actual crime empties saying that at 9/10 p.m. on November 11, 1974, "Abdul Ahad, D.S.P., who had his Office adjacent to the Police Station, told me to accompany him to Rao. Abdur Rashid, I.G. Police's residence. The DSP informed me that the I.G. had ordered for the production of 24 empty cartridges, lead bullet and cap of the deceased. The DSP put the 24 empty cartridges and the lead bullet in a 'Service' envelope. He also had the cap of the deceased and we reached the I.G.'s residence in the jeep. I and the driver kept sitting in the jeep while the DSP entered the I.G.'s. residence with the articles mentioned above. The DSP returned after about half an hour and till then we kept sitting in the jeep. The DSP informed me that I.G. Police had kept the 24 empties and lead bullet with him and had returned the clip. The DSP further informed me that I.G. Police told him that he would pass further orders and investigation should be conducted according to his orders". He further deposed that on November 13, 1974, Abdul Ahad, DSP obtained from him the site plan Exh. P.W. 34/2 and left for Rawalpindi; that two-three days thereafter he returned from Rawalpindi and sent for him; that when he went to see him he handed him a prepared draft in respect of the empty cartridges and the lead bullet and told him that the said draft had been given to him from the Prime Minister's House

and, therefore, he should copy out the said draft; that in obedience to his orders he accordingly prepared the recovery memo. of the crime empties; that thereafter he went to Abdul Ahad, D.S.P. and told him that in the said memo. prepared by him, the markings on the crime empties were different than the ones on the actual crime empties as also that it contained no mention of the lead bullet; but in reply he told him that all this was done on the Orders which had to be obeyed failing which both would lose their job as well as. be involved in a case. Without dealing with the rest of his examination-in-chief, as the substantial part of it was put to him in his cross-examination, I would presently proceed to examine his cross-examination to show as to how untruthful witness he is and how his evidence is wholly uninspiring.

208. He admitted in cross-examination that in the proceedings of the tribunal headed by Shafi-ur-Rehman, J., of the Lahore High Court, he appeared as a witness and made three statements in the proceedings. The learned counsel for Mr. Bhutto, therefore, questioned him if in his said three statements he had mentioned that on the instructions given to him by Mr. Abdul Ahad, D.S.P.; he accompanied him to the house of the I. G., Punjab, with the cap of the deceased, a piece of lead and 24 empties; that while proceeding to Model Town, Lahore Mr. Abdul Ahad told him not to prepare the recovery memo until he gives him further instructions in that behalf; that since no instructions were given to him by Mr. Abdul Ahad he did not prepare the parcel of the empties and took the empties to the Police Station; that in accordance with the instructions given to him by Mr. Abdul Ahad, he had shown the empty cartridges to the Ballistic Expert; that in the proceedings of the said Tribunal he had not only denied the claim of the Ballistic Expert, namely, Mr. Abidi to the effect that he had shown him the empties, but also that they were not sealed on the spot; that on reaching the house of the I. G., Punjab, Mr. Abdul Ahad took the said articles into the house while he along with the driver of the jeep stayed outside and after half an hour Mr. Abdul Ahad returned and told him that the empties had been retained by the I.G. Police; that Abdul Ahad, D.S.P. had stitched and sealed the original F.I.R. of the occurrence; that on return from Rawalpindi he gave him a prepared draft saying that the same had been given to him from the Prime Minister's House and told him to prepare the recovery memo. of the empties accordingly; that he had informed Mr. Abdul Ahad that in the said draft given to him there was no mention of the lead bullet as also that the markings on the empties were shown differently; that he asked Mr. Abdul Ahad for return of the said empties but he told him that the same would be given to him later; that when A. S. I. P., Bashir Ahmad returned from leave on November 17, 1974, he gave him the said recovery memo. and asked him to get the entries made in the relevant register against the date of November 11, 1974, through Head Constable P.W. Abdul Ikram, as on the date he (Bashir Ahmad) was himself on leave; that Mr. Abdul Ahad, D.S.P. finally gave him the empties on November 23, 1974, and consequently he sealed them; and that when he returned from Rawalpindi Mr. Abdul Ahad told him that he had been threatened with the termination of his service, as also that both of them would be involved in cases if they did not obey the orders given to him from the House of the Prime Minister. And in



reply to all these questions, the answer given by the witness was in the negative saying, however, that he was then under pressure and consequently not a free agent.

209. Now the witness was the Investigating Officer in this case, and except for his bare word that the I.G. and D.I.G. both had pressurized him there is nothing on the record to support him. The I.G. was not examined by the prosecution, and the D.I.G. (Abdul Wakil Khan) has denied in his evidence the said claim of the witness. Besides, if there was any truth in his said claim, surely, he would not have crossed swords with Mr. Nadir Hussain Abidi (P.W. 36) in the inquiry proceedings conducted by Shafi-ur-Rehman, J. denying his (Mr. Abidi's) claim that he had shown him the crime empties in the Police Station on November 11, 1974, and that they were then lying unsealed. It is evident that the substitution of the crime empties in question was one of the crucial aspects of the case of the prosecution and if proved it would have gone a long way to strengthen its case. It should, therefore, follow that if any pressure was to be brought on the witness, surely that ought to have been the proper occasion. But clearly this was not the case, as by the forthright and bold stand taken by him against the contrary assertion made by Mr. Abidi he himself seems to have dispelled any doubt to the effect that he had been pressurized.

210. Now it cannot be denied that each one of the said questions put to him by the learned counsel for appellant Bhutto is so important that their contents ought to have been present to his mind when he made the three statements in the inquiry proceedings conducted by Mr. Shafi-ur-Rehman, J., of the Lahore High Court. Enough has already been said by me in this connection while discussing the topic as to when an omission in a previous statement would amount to contradiction, therefore, the inevitable conclusion ought to be that all the said omissions in the three previous statements of the witness would amount to contradiction, and consequently he cannot be believed.

211. The next witness in this connection is Mr. Fazal Ali (P.W. 24) who at the relevant time was Incharge of the Armoury, FSF, Headquarters, Rawalpindi. The object for which he was examined by the prosecution was to prove:- (1) that the ammunition used both in the incident of Islamabad, in which abortive firing was made at the car of Mr. Kasuri, and at Lahore in which the father of Mr. Kasuri was murdered, was from the same lot number, and was of the type used in SMG/LMG; (2) that out of the same lot he had supplied to Ghulam Hussain, approver, some ammunition for use in SMG/LMG; (3) that in the early part of August, 1974, he had supplied to Ghulam Hussain, on the strength of a chit brought by him from Mian Muhammad Abbas, a sten-gun, two magazines, sixty rounds of ammunition and one pistol; (4) that two-three days prior to November 25, 1974, Ghulam Hussain came to return him the ammunition, which was issued to him on May 9, 1974, but on checking the same it was found short by fifty/fifty-one empties of SMG, which he refused to accept; (5) that on November 25, 1974, he came back to him and returned him the correct number of rounds and empties; (6) that 8/ 10 days prior to Ghulam Hussain's depositing with him 1500 empties he was

summoned by Mian Muhammad Abbas to his Office who asked him if he had any empties in the Armoury, and he replied in the affirmative; (7) that at this Mian Muhammad Abbas asked him to fetch 25/30 empties of SMG/ LMG which he did; (8) that Mian Muhammad Abbas asked him to leave the said empties on his table, as he was busy, and that he would let him know when to collect them and (9) that after 2-2 ½ hours, Mian Muhammad Abbas sent for him and returned him the said empties which he re-deposited in the Armoury.

212. Now the case of the prosecution is that whereas in both the incidents of Islamabad and Lahore the ammunition used was from the same lot number, issued to approver Ghulam Hussain, that in both the cases Ghulam Hussain had organized and led the assault, but in order to divert any suspicion against the FSF and Mr. Bhutto both Mian Muhammad Abbas managed to substitute the actual crime empties in the manner deposed to by P.W. Fazal Ali. In support of its case, the prosecution has also relied on a number of documents such as ammunition vouchers (Exhs. P.W. 24/1, P.W. 24/3 and Exh. P.W. 24/5), entries in the Stock Register of the Armoury (Exhs. P.W. 24/2, P.W. 24/4 and Exh. P.W. 24/6), road certificates (Exhs. P.W. 24/7, P.W. 24/8 and Exh. P.W. 24/9) and the Stock Register of the Armoury in which all the said entries were made by or at the behest of P.W. Fazal Ali. Now all this documentary evidence seems to me to be of no use to the case of the prosecution because according to the opinion of the Fire-Arms Expert the crime empties sent to him for examination, along with 25 SMGs. belonging to the 3rd Battalion, FSF, were found to have not been fired from the sad weapons.

213. The learned Special Public Prosecutor, however, argued that this precisely was his grievance, because the empties sent to the Fire-Arm Expert were actually the substituted ones and that was why his report was in the negative. With respect, there seems to be quite a few information in this contention. It is the case of the prosecution that the crime empties were first taken to the house of the I.G. Punjab by Mr. Abdul Ahad, D.S P., who retained them saying that he would give his instructions about them subsequently. However, there is no evidence on record to show as to how and in what manner the said empties travelled to Mian Muhammad Abbas who then substituted them. This lacuna in the evidence of the prosecution seems to be crucial, as in a case of circumstantial evidence (which this case undoubtedly is), it would be the burden of prosecution to show that no link in the chain forged cut of the circumstantial evidence is missing. Not only this but there are more difficulties in the way of the prosecution. If the prosecution had any doubt to the effect that the actual crime empties had been substituted, then all the witnesses examined by the prosecution in Court such as Abdul Hayee Niazi, Fazal Ali, Muhammad Bashir, Muhammad Sarwar, Abdul Ikram, Abdul Wakil Khan and Nadir Hussain Abidi ought to have known that fact since 1974 but none of them had spoken a word about it any time. Neither in the interim challan nor in the final challan submitted by the prosecution in the High Court was any mention made of the said fact and, therefore, there weans to be force in the contention of Mr. Yahya

Bakhtiar that the prosecution, after the report of the Fire-Arms Expert was known, started making grievance of the fact that the crime empties had been actually substituted. In support of his contention Mr. Yahya Bakhtiar rightly pointed out that the two witnesses to the recovery memo. of the said crime empties, namely, Abdul Ghafar and Abdullah, who were independent witnesses, as both were civilians and resided near the place of occurrence, ought to have been examined by the prosecution but they were given up although their names had been mentioned in the calendar of witnesses and the copies of their 161, Cr. P.C. statements also supplied to the defence. Furthermore, Report No. 17 (Exh. P.W. 16/1-2) of the Daily Diary maintained at the Ichhra Police Station shows that the sealed parcel containing the said crime empties was deposited in the Malkhana on November 11, 1974; that the Daily Diary in question used to be maintained by Muhammad Bashir (P.W. 16) and that the said entry had been made by Abdul Ikram (P.W. 18). Now this documentary evidence, in respect of which the presumption of truth would be available, ought to dispel any doubt that the crime empties were not sealed on the spot and the parcel containing them subsequently deposited in the Malkhana of the Ichhra Mice station not in the same condition.

214. The learned Special Public Prosecutor, however, contended that all the said entries were forged as they were not made on November 11, 1974, but on November 17, 1974. In support of this contention he relied mainly on the evidence of P.W. Nadir Hussain Abidi. It is true that he has supported the case of this prosecution to the effect that when he went to the Ichhra Police Station on November 11, 1974 in the company of F. W. Abdul Hayee Niazi, the latter showed him the crime empties, which were lying unsealed and asked his opinion as to the type of weapons from which they were fired. However, in the inquiry proceedings conducted by Shafi-ur-Rehman, J., Mr. Abdul Hayee Niazi had seriously challenged the said claim of Mr. Abidi and disagreed with him. In the High Court, however, Mr. Niazi took up the contrary position saying that while giving his statement in the said inquiry proceedings he was under pressure of the I.G. and the D.I.G. But the D.I.G. has not supported him in that behalf whereas the I.G. was not examined by the prosecution. Furthermore, Mr. Saeed Ahmad Khan came on the scene only after about seven weeks of the commencement of the said inquiry proceedings with a view to putting the investigation into the wrong channels. It is in the evidence of Muhammad Asghar Khan, S.S.P. that Mr. Saeed Ahmad Khan and his assistant late Mr. Bajwa both started interfering in the investigation with the result that he was no more a free agent. However, he does not claim to have put any pressure on Abdul Hayee Niazi to the effect that he should not disclose the truth before the said Inquiry Tribunal and I believe him because his own evidence in those proceedings was not only forthright but also against his own I.G. accusing him of having put pressure on him. In these circumstances, it would be dangerous to accept the word of Mr. Abidi as against the word of Mr. Niazi, specially when the documentary evidence clearly supports the earlier statement of the latter given by him in the said inquiry proceedings.

215. Furthermore, the contention of the learned Public Prosecutor cannot readily be accepted. To say, as he had no hesitation to contend, that the entries in the said various documents maintained at the Ihhra Police Station had been forged by P. Ws. Muhammad Bashir and Abdul Iram at the behest of P.W. Niazi would be tantamount to condemning his own evidence. If the witnesses had no scruples to desist from committing forgeries in the official record, what reliance can be placed on their bare word from the dock? I am, therefore, of the view that the contention urged by the learned counsel is not at all convincing. It is in the evidence of P.W. Niazi that when Muhammad Bashir returned from leave on November 17, 1974, he told him that since the parcel containing the empties was still lying undiarised, he should ask P.W. Abdul Ikram to diarist it in the Daily Diary of the Police Station under the date of November 11, 1974 as on that date he (Muhammad Bashir) was on leave. Muhammad Bashir and Abdul Ikram both have confirmed this position in their evidence not realising of course the patent absurdity of their claim. The admitted position is that Abdul Hayee Niazi and Abdul Ikram both were on duty on November 11. 19.4, and consequently the question is as to why the said entry could not have been made by Abdul Ikram on the said date? when the parcel containing the empties also was in the custody of Mr. Niazi. This being the basic question to which no satisfactory explanation has been offered by the P. Ws, evidently it would be dangerous to hold that the said official documents had been forged especially when no evidence has been brought on the record to show. if any inquiry was made against the said P. Ws. for having committed such 8 grave crime in respect of public documents.

216. It is in evidence that P.W. Niazi was joined in the investigation. as evidently he was suspected of some foul-play. But there is no evidence to show as to why the said course was later abandoned. It is clear, however, that he was subsequently produced as a witness in this case and thus it can be presumed that he was under some sort of pressure, as otherwise, why would he have disowned his earlier statement made by him in the inquiry proceedings conducted by Shafi-ur-Rehman, J., so completely as to make himself ridiculous. The fact that his said earlier statement was the only correct statement made by him is proved from the following circumstances. It is in the evidence of approver Ghulam Hussain, and he is corroborated ire that behalf by P.W. Fazal Ali, that when Fazal Ali refused to accept from him the ammunition issued to him on May 9, 1974 as the same was found to be short by 50/51 empties of SMG he went back to Mian Muhammad Abbas who told him that he should come back and see him after 2-3 days; when he went to see Mian Muhammad Abbas after 2-3 days he gave him 51 empties of S. M. G. and thereafter he went to Fazal Ali who then accepted from him the ammunition as well as empties, as the shortage of 51 empties had been made up. Now if Mian Muhammad Abbas could procure from his own resources 51 empties of S. M. G., surely he ought to have been able to procure also 24 empties with a view to replacing them with the actual crime empties, especially when in the nature of things the said undertaking was evidently fraught with dangerous possibilities. The absurdity of the claim of P.W. Fazal Ali would seem to be highlighted by the fact that on the instructions

given to him by Mian Muhammad Abbas. when P.W. Fazal Ali brought from the Malkhana 21 empties curiously they coincided in every detail with. the actual crime empties which were taken into possession and sealed vide recovery memo. Exh. P.W. 34/4. Now according to this document out of the empties recovered from the spot, -22 bore the marking: BBI/71 whereas the other two as 31/71. The evidence of Fazal Ali, however, is that Mian Muhammad Abbas had asked him to fetch the empties of S.M.G. And if this be so then how is it that out of the stock of empties maintained by him in the Malkhana, he was miraculously able to pick up the type of empties which coincided with in every detail with the ones actually recovered from the scene of occurrence. Fantasy also ought to have a limit, but P. Ws. Abdul Hayee Nizi, Muhammad Bashir, Abdul Ikram and Fazal Ali seem to have allowed their imagination to run so wild as to mock even the fantasies of 'Alice in Wonderland'.

217. Now coming back to the evidence of Fazal Ali, it may be said that his name was not mentioned in the interim challan. However, in his evidence in Court he seems to have deposed to certain essential features Cr the C. statement respect recorded on September 18 1977 td He was, s, therefore. questioned in cross-examination if in his said statement he had mentioned that "Ghulam Hussain Inspector, left having got annoyed. He returned after short times and told me that I was being called by Director, Mian Muhammad Abbas. I accompanied him to Director, Mian Muhammad Abbas. As soon as I entered the Office room of Director Mian Muhammad Abbas, he asked me as to why I had not obeyed his orders. I informed him that since the orders were not according to the standing order, I had not issued the weapons and ammunition. The Director shouted at me saying if I did not want to serve any more and that I would be discharged from service and that I would not reach my home. He again ordered me to issue the weapons and ammunition forthwith otherwise my services would be terminated. I issued the weapons and the ammunition on the receipt given to me by Ghulam Hussain"; that "I did not make any entry in the register about it and had issued the same only on the receipt. Two days before the end of the same month, Ghulam Hussain, Inspector, returned the entire weapons and ammunition. He took back the receipt which he had given to me"; that "Two or three days prior to 25th of November, 1974 Ghulam Hussain, Inspector, Incharge. Commando Course, came to me to return the ammunition that had been issued to him on 9th May, 1974. When I checked the sent ammunition, I found that fifty to fifty-one S.M.O. empties were sort. I consequently informed him that I would accept the ammunition brought by him to me only if he accounted for these missing empty cases. He, therefore, took it back. He returned with the ammunition again and I found that the correct number was being returned"; that "After 40 or 50 boles of the empties are collected in the armoury those are sent to the Wah Factory"; that Eight-ten days before Ghulam Hussain deposited 1500 fired rounds I was summoned by Mian Muhammad Abbas in his office. Mian Muhammad Abbas enquired from me if I had fired cartridges in the armoury. I told him that fired cartridges of all the weapons were lying in the armoury. After hearing my reply, Mian Muhammad Abbas told me to bring 20-30 fired cartridges of S.M.G., L.M.G. I returned

to the armoury and took 30 empties of S.M.G., L.M.G. to the Director. The Director ordered me to place those empties on the table as he was busy in his work and he further told that he would let me know as to when I should collect those cartridges. I was summoned again after 2 or 21 hours by the Director, Mian Muhammad Abbas and told to take away the empties. I counted those empties. Those were thirty and I deposited them again in the armoury" and he replied that he had made all the said statements in his 161, Cr. P.C., statement but it was neither read to him by the Investigating Officer nor was his signature obtained by him thereon. The factual position, however, is that in his 161, Cr. P.C. statement, with which he was duly confronted, he had made no mention of the said facts. And thus his bare word would not carry any conviction. A casual look at the said statements would show that they were all prominent and fundamental in character and consequently the same ought to have been present to his mind when his 161, Cr. P.C. statement was recorded. These omissions, therefore, would be tantamount to contradictions. and so his evidence cannot be accepted.

218. Muhammad Bashir (P.W. 16) has no doubt supported the theory of substitution of the crime empties. But his evidence also, in addition to what has already been said about him, is improbable, unnatural and incapable of carrying any conviction. He admitted in cross-examination not to have made any statement before the Investigating Officer in the year 1974-75. In his 164, Cr. P.C. statement however, he had made mention of the fact that the crime empties were substituted. But this statement of his was recorded a week after the submission of the interim challan in Court, i.e. on September 18, 1977. Mr. Yahya Bakhtiar, the learned counsel for Mr. Bhutto, therefore, argued that the witness was tutored in order to corroborate the evidence of P.W. Fazal Ali. There seems to be force in this contention. If there was any truth in the evidence given by him in Court, surely the Investigating Officer would have recorded his 161. Cr. P.C. statement during the investigation of the case conducted in 1974-1975.

219. The next witness in the series is Muhammad Sarwar (P.W. 17). His evidence is that in November, 1974, he was posted as A. S. I. (Investigations) at the Police Station, Ichhra. On November 23, 1974, P.W. Niazi gave him the sealed parcel, containing the crime empties, and asked him to deliver the same to the Inspector Armaments, G.H.Q., Rawalpindi, after obtaining from P.W. Abdul Ikram the road certificate. After getting the required road certificate, he carried the said parcel to Rawalpindi and delivered it to the Inspector of Armaments. In cross-examination, however, he was questioned if in his 161. Cr. P.C. statement he had made any mention of the said fact and he replied "the statement was recorded by the S.H.O. and I am not in a positron if he had recorded that". In this view of his statement, he was confronted with his 161. Cr. P.C. statement and he admitted that the same did not contain his said statement. This being the substance of his evidence, it is neither here nor there. Assuming, however, that he was given the said parcel on November 23, 1974, by P.W. Niazi to be carried to the Inspector

of Armaments, Rawalpindi. It would hardly be sufficient to prove as the case of the prosecution that the crime empties were actually substituted.

220. The evidence of Abdul Ikram (P.W. 18), with which I have already dealt with in some measure, no doubt supports the claim of P. Ws. Fazal Ali and Muhammad Bashir but his evidence is unnatural, improbable, made up of improvements and thus incapable of carrying any conviction. I have already disbelieved the evidence of the prosecution to the effect that entry Exh. P, W. 16/1-1, was actually made on 17-11-1974, and consequently the same was forged. However, since P.W. Abdul Ikram has supported the case of the prosecution in that behalf he cannot be believed. Furthermore, he was not examined as witness during the investigation of the case in 1974-75 which again would render his evidence doubtful. It is true that his 161 and 164, Cr. P.C. statements were recorded on November 9 and 18, 1977, respectively. But even in those statements he had made no mention of the fact that when Muhammad Bashir returned from leave he told him that he should not make any entries in the relevant register, as entries in regard to the case property had yet to be made therein, and further that when the crime empties were taken to the house of the I.G. Police by Mr. Abdul Ahad, D.S.P. and P.W. Niazi he made no entry of that fact in the *Roznamcha* of the Police Station. It is true that in answer to a question put to him by Mr. Irshad Ahmad Qureshi, the learned counsel for appellants Rana Iftikhar Ahmad etc. who seems to have supported the case of the prosecution throughout, he replied that he had seen the crime empties lying on the table of Mr. Niazi unsealed between 4-5 p. m. and 9-10 p.m. on November 11, 1974, as also that on 12-11-1974, he noticed in the *Roznamcha* the fact of the arrival report of Mr. Niazi from the house of the I.G. Police. Now with profound respect to the High Court, after the close of cross-examination of the witness by the learned counsel for Mr. Bhutto, Mr. Irshad Ahmad Qureshi ought not to have been allowed to ask the said question. Furthermore, the *Roznamcha* of the Police Station was not before the witness and consequently he could not have deposed to its contents. Mr. Yahya Bakhtiar further pointed out that a similar question was asked by the Court from P.W. Muhammad Bashir (see page 422 of Volume 11 of the evidence) In respect of an entry in the Daily Diary of the Police Station when the Daily Diary was not before the witness in Court, and he replied "In the report the case property according to the recovery memos, was mentioned but not this parcel specifically". He contended that the procedure thus adopted by the Court was inconsistent with the view taken by it in respect of a similar question asked on behalf of the defence with the result that the defence has been prejudiced. In this respect he referred to the evidence of Mr. Masood Mahmood (see page 188 of Volume II of the Evidence) in which he was asked: "Is it a fact that while staking entries in the said register, Mian Muhammad Abbas would add the words "D.I." against the amounts received by you to your annoyance?", but the Court overruled the said question observing "the contents of the register are being put to the witness without the original being shown to him". From this it should be obvious that the grievance made by Mr. Yahya Bakhtiar is not unjustified that in similar circumstances, the evidence of the prosecution and defence was differently treated in the High Court.

221. In view of this analysis of the evidence of the witness, it ought to be obvious that in respect of the essential features of the case of the prosecution, namely, the substitution of the crime empties, he was not examined during the investigation of the case in 1974-1975, as also that in his 161 and 164, Cr. P.C. statements recorded on September 11 and 18 1977, again he made no mention of the fact that when Muhammad Bashir returned from leave, he told him not to make any entries in the relevant register, because the entries regarding the case property of this case had yet to be made therein. In these circumstances, therefore, he does not seem to be a truthful witness and hence cannot be believed.

222. The next witness in this connection is Abdul Wakil Khan (P.W. 14). He has no doubt deposed to the substitution of the crime empties, but his evidence in that behalf has been made up of improvements in the High Court. He was questioned in cross-examination if in his 1151 and 164, Cr. P.C. statements he had mentioned that "Mr. Bajwa suggested that a report could be recorded on the statement of any other person saying that the fire was opened by some unknown persons and the accused had fled away and the name of the Prime Minister thus could have been avoided"; that in order to put off late Mr. Bajwa, he had mentioned therein "I wanted to avoid any suggestion from him to tamper with the empties in order to exonerate the FSF"; that I remember Mr. Ahad met me after about a fortnight when I enquired from him if any result has been received from the Ballistic Expert to with the empties were sent"; that "I was surprised to hear from him that he had delayed the sending of the empties because these were taken away by Mr. Abdul Hamid Bajwa and then he returned to him after two or three days and after that the empties were sent for the examination. I got annoyed with Mr. Ahad and asked him as to why did he hand over the empties to Mr. Abdul Hamid Bajwa. He told me that Mr. Bajwa contacted him and told him that these empties were to be taken to the Prime Minister's House to be shown to the high officers and because of this threat these empties were given to him": and that "I kept quiet when I came to know that he (Mr. Ahad) did all this because of the instructions from the Prime Minister's House. I did not say anything snore", and his reply to all these questions was in the negative saying, however, that he had mentioned them in his evidence because he was asked about them for the first time.

223. Now the witness was a senior Police Officer of the rank of D.I.G., and yet had said nothing in his 161 and 164, Cr. P.C., statements about the said crucial improvements made by him in his evidence in court. If there was any truth in his said statements, they ought to have been present to his mind when his said two previous statements were recorded, because they related among other things, to the incriminating conduct of late Mr. Bajwa which was evidently designed to divert the course of investigation into wrong channels. In these circumstances, the said improvements made by him in Court. in respect of the substitution of the crime empties would be deemed to be contradictions, and so he cannot be believed.



224. Now after all this lengthy discussion, it would be a waste of public time to go into the various vouchers Exhs. P.W. 24/1, P.W. 24/3, and Exh. P.W. 24/5) and the road certificates (Exh: P.W. 24/7, P.W. 24/8 and Exh. P.W. 24/9), as ill that the prosecution wanted to prove therefrom was that the ammunition used both in the Islamabad incident, as well as the Lahore incident, was of the same caliber and issued from the same lot number to approver Ghulam Hussain, who had organized and led the assault at both these places on the car of Mr. Kasuri. Now by the examination of the said documents, in juxtaposition with the evidence of approver, Ghulam Hussain, it seems to me that the case of the prosecution in that behalf is unconvincing. At some stage I would be dealing with the evidence of Ghulam Hussain to show that the same is patently absurd unnatural, improbable and untrue, but for the present it would suffice to say that road certificate (Exh. P.W. 24/9) seems to be of doubtful character as the same is cyclostyled, whereas the road certificate (Exh. P.W. 24/7) is on the printed form. It is true that this distinction by itself may not be sufficient to hold that the same was forged. But there is other evidence on record which would seem to render the genuineness of it questionable. Now Exh. P.W. 24/9, which is addressed by Ghulam Hussain to Ghulam Hussain, bears the date of November 25, 1974. But according to entry (Exh. P.W. 31/4) from the Daily Diary of his Battalion he had left Rawalpindi for Peshawar on November 22, 1974. and returned from Peshawar to Rawalpindi (see Exh. P.W. 31/5) on 29th November 1974. His evidence, however, is that he had made the said entries (.both of which bear his signature). on the instructions given to him by Mian Muhammad Abbas, as he wished him not to be officially present in Rawalpindi. However, he is belied by road certificate (Exh. P.W. 24/9). If Mian Muhammad Abbas had really given him the said instructions (respecting which, however, no reason has been shown as to why his presence at Rawalpindi was not wanted) it is inconceivable that just three days thereafter he would contravene the said instructions with impunity, and show himself again officially present at Rawalpindi.

225. Be that as it may, his T.A. Bill (Exh. P.W. 31/6), which is a consolidated bill, and with which I would be dealing in some detail subsequently, clearly supports the said conclusion. Now this bill under which he was paid his T. A./D. A. shows that he left Rawalpindi for Peshawar on November 22, 1974 at 3-30 p. m. reaching Peshawar at 8-25 p.m. Leaving the other details of the bill in question, however, as they pertain to the local journeys undertaken by him at Peshawar, it further shows that during his stay at Peshawar he had stayed at a hotel for which he paid Rs. 210 as also that he left Peshawar for Rawalpindi at 2-00 a. m. on November 29, 1974, reaching Rawalpindi at 7-40 a. m. on the same date. Now this authentic document on the basis of which public money was paid to hire from the treasury should suffice to hold that the witness is allergic to tell the truth. The learned Special Public Prosecutor, however, argued that the said part of the bill was forged. But with respect this contention cannot be accepted. There is no denial of the fact that the document in question is a Government document and was produced in evidence from the proper custody. In this view, the contention

urged by the learned counsel is not only incapable of carrying; arty conviction, but in the nature of things seems to b» rather odd as well as intriguing. Furthermore, on a part of the said document, in so far as it shows that on November 10 and 11 1974, approver Ghulam Hussain was present at Lahore, the learned counsel has relied. And hence how is it possible to accept a part of the document to be genuine and the other part of it as forged. It may be noted that as against the said document, as well as the two entries recorded is the Daily Diary of the Battalion of the witness in which his departure from Rawalpindi to Peshawar and back has been shown, what credence can be given to his bare word, when admittedly he is a self-confessed criminal and there is no evidence whatever tea support him in that behalf.

226. Furthermore, road certificates (Exhs. P.W. 24/7 and P.W. 24/9) were produced in evidence by P.W. Fazal Ali. But in none of his previous statements he had made any mention of them, as also that in the two challans submitted by the prosecution again no mention was made of them. Abdul Khaliq (P.W. 41), who was the Investigating Officer in the case, was questioned in cross-examination. If during the investigation, he had taken the said two documents into possession?, he replied in the negative. In reply to another question put to him, namely, "Did you see documents P.W. 24/7 and P.W. 24/9 during the investigation of this case?", he said - This issue was looked into by one of the Inspectors of the Investigating Team and so far as I recollect I had seen the photostat copies of these documents". He agreed, however, that the photostats thereof were not attached with the challan submitted in the Court. In these circumstances, therefore, he was finally questioned: "is it a fact that after the commencement of the trial in this Court and having seen the trend of cross-examination of the witnesses the above-mentioned two documents were forged"? He replied in the negative, saying that he could not even think of doing such a thing.

227. Now this evidence of P.W. Abdul Khaliq would further seem to support the conclusion, that road certificate Exh. P.W. 24/9 was indeed doubtful. The Inspector of the Investigating Team, who according to him had seen the said documents, was not examined in proof of the fact that he had actually seen the said two documents. Not only this but the phatostat copies thereof, which P.W. Abdul Khaliq says he had seen during the investigation, also were not attached with the challan submitted in the High Court. From this it should follow that if the claim of P.W. Abdul Khaliq had any truth in it, surly he would have taken the said two documents into possession when he saw the photostat copies of them. The fact, however, is that even P.W. Fazal Ali had not said a word about the said documents in any of his previous statements and consequently the grievance of the learned counsel for Mr. Bhutto seems to be justified that Exh. P.W. 24/9 was not a genuine document.

228. The High Court has. however, relied on a letter (Exh. P.W. 39/2) written by Colonel Wazir Ahmad Khan, Commandant Central Ammunition Depot, Havelian, to the Deputy Director, Federal Investigating Agency, Lahore, showing therein that the

ammunition issued to FSF (some of which according to the prosecution was used in the two assaults carried out on the car of Mr. Kasuri at Islamabad and Lahore) bore the lot Nos. 0024-71-661, 0015-71-661 and 0001-661. Furthermore, no ammunition issued under the said lot numbers bore the marking: B81/71, presumably it was 661 /71. Mr. Yahya Bakhtiar has taken objection to the said finding of the High Court. He contended that Colonel Wazir Ahmad Khan was not examined in the proceedings, although an application was made in that behalf by the prosecution (see page 10E of the Volume of Applications) to which no objection was taken on behalf of the defence, but even so it was rejected. He, therefore, argued that the contents of the said letter remained unproved and consequently could not be taken into consideration. Now the finding recorded by the High Court is that since the said letter was written and signed by Colonel Wazir Ahmad Khan in the presence of P.W. Muhammad Boota, there was no need to examine Colonel Wazir Ahmad Khan, as the contents of the said letter were proved by Muhammad Boota himself. By looking at the said letter, however, it would be seen that it is typed and not written as observed by the High Court. Besides, Colonel Wazir Ahmad Khan could not have typed the said letter himself, and there is no evidence to show as to who had typed the same, as also the source from which the information conveyed therein as to the lot number of the ammunition issued to FSF was taken. In these circumstances, it was essential that Colonel Wazir Ahmad Khan should have been examined. Furthermore, that part of the evidence of P.W. Muhammad Boota in which he said "which he wrote and signers in my presence" (meaning Colonel Wazir Ahmad Khan) was brought on the record of the case by replaying the tape of the evidence of the witness (see page 65 of the Volume of Order Sheets). But unfortunately in a similar situation (see page 38 of the same Volume), the High Court rejected the application filed on behalf of Mr. Bhutto to the effect that he be allowed to place his own tape-recorder in the Court, to take down the proceedings observing "since the tape-recorder is not part of the proceedings, the application is rejected". Apart from the other considerations, therefore this finding of the High Court would suffice to hold that the said part of the evidence of P.W. Muhammad Boota, brought on the record of the case by replaying the tape of his evidence, was inadmissible, and consequently could not have been taken into consideration. Inevitably, therefore, it would follow that the prosecution has failed to establish even the lot number of the ammunition issued to FSF from the Central Ammunition Depot, Havelian, as also that the ammunition used in both the incidents at Islamabad and Lahore were from the same lot number.

229. The learned Special Public Prosecutor, however, relied on the Stock Register (not exhibited) of the Central Armoury of the F S F to show that a part of the T. A. Bill (Exh. P.W. 31/6) in which approver Ghulam Hussain was shown to have been away at Peshawar with effect from November 22, 1974 to November 29, 1974, as well as the two entries (Exh. P.W. 31/4 and Exh. P.W. 31/5) made by him in that behalf in the Daily Diary of his Battalion must be held to be forged. In this respect he relied on entry (Exh. P.W. 24/10) dated November 25, 1974 appearing therein (at page 12) in which Ghulam Hussain was shown to have returned to the Central Armoury, 1500 empties of

LMG/SMG. He argued that since the register in question was maintained by P. 'N. Fatal Ali in the normal course of his duty, the said entry made therein (Exh. P.W. 24/10) must be held to be genuine, and consequently road certificate (Exh. P.W. 24/9) through which the said empties were carried by approver Ghulam Hussain to the Central Armoury would be free from any doubt. I am afraid, there is no force in this contention. In the first place the register in question was maintained by or under the supervision of P.W. Fazal Ali alone whereas the T. A. Bill (Exh. P.W. 31/6) was evidently prepared, authenticated by different persons, as also that on the strength of it, payment was made to approver Ghulam Hussain by yet another agency. In this view the said T. A. Bill and the two entries made by Ghulam Hussain in his own hand should carry more conviction than the word of P.W. Fazal Ali or for that matter entry (Exh. P.W. 24/ 10) appearing in the said register. Be that as it may. I have already disbelieved the genuineness of road certificate (Exh. P.W. 24/9) and so what reliance can be placed upon entry (Exh- P.W. 24/10) made in the said register by P.W. Fazal Ali?

230. Furthermore, the Register in question, and the manner in which it has been maintained, does not inspire confidence. It is just an ordinary register which is freely available at a common Stationer; its pages do not carry any embossed numbers on them; it has not been wholly maintained by P.W. Fazal Ali alone; entry (Exh. P.W. 24/10) has been made therein by one Muhammad Azad (not examined) and only initialed by P.W. Fazal Ali; out of the 34 written leaves of it, the first two leaves are blank and are marked with a black pointed ball pen, whereas the rest of the leaves (except for leaf Nos. 32 and 33 which are marked with a red pointed ball pen) are marked with red pencil; each one of its leaves is marked with the number of the succeeding leaf, but the said numbers have been made with a ball point pen of different hues, as also that the said numbers have been written by three different persons; the entries made on leaves 2 to 20 are not only written with the ball pointed pen of black hue, but in distinct hand, whereas the succeeding pages (from 21 to 34 and again to 80), have been written by another hand using a ball point pen of blue color; that the various entries made therein, to which P.W. Fazal Ali has appended his signatures, are distinctly written in two different hands; and that even the figures such as '2', '3' and '4', appearing to all the entries, each are supposed to have been written by P.W. Fazal Ali, are completely different than similar figures appearing in the other entries written by him.

231. Furthermore, the Register in question is of the type which can be easily tampered with in the sense that its pages can be removed and replaced with another set of pages. As it is, the register is in a pitiable condition. It is in the evidence of P.W. Fazal Ali that when he left the Central Armoury, the register had become loose and consequently the same was stitched again by Inspector Muhammad Siddiq (not examined) to ensure that it was properly secured. The factual position, however, is that the register as such has not been stitched again but only a part of it which contains the entry (Exh. P.W. 24/10). Finally, there has been given on the inner side of the cover of the register, a certificate

by one A.S.I. M. Azad, which has been duly certified by two officers, namely, Fazalul Rehman, Inspector and another styling himself as D.D.A. that the register contains 103 leaves, but this is incorrect as by counting them I found that actually it contains 104 leaves. Now from all this, it should be obvious that the register in question is not of the type for the contents of which any presumption of truth can be claimed. In any event, even if the said presumption of truth is conceded in favor of its contents, the same has been displaced by more credible evidence and consequently no reliance can be placed upon the same.

232. With profound respect to the High Court, however, in recording the contrary conclusion. it seems to have accepted the evidence of the witnesses and the said various documents as a matter of course without subjecting them to proper scrutiny to exclude the possibility if all the said evidence could as well be explained on the basis of another reasonable hypothesis. The evidence of the P. Ws. when seen in the overall context of the case of the prosecution, is not only unnatural, improbable and untrue, but is essentially made up of significant, and prominent improvements made by them during their evidence in Court of which. However the High Court has not taken, with respect, any notice whatever. It seems to me that the High Court, and against say so with respect had launched itself on the course of simply canvassing the probabilities of the case of the prosecution which was impermissible. It is well settled, that the burden to prove the guilt of an accused lies on the prosecution, as also that the benefit of any doubt arising from the evidence must be given to the accused. This axiomatic wholesome and cardinal principle relating to the safe administration of criminal justice does not seem to have been present, with respect, to the mind of the High Court while appraising the mass of said oral and documentary evidence with the result that the said finding recorded by it cannot even be remotely supported. Now if the object of the prosecution was, which indeed seems to have been its object, to prove that the crime empties were actually substituted, then why would Mian Muhammad Abbas (who is said to have been responsible for the said substitution) not replace them, say, with .303 or empties of some other caliber as according to the prosecution itself he was resourceful enough, as he had already made up the deficiency of 51 empties by which Ghulam Hussain approver was short instead of launching himself upon a circuitous, complicated, hazardous and unnatural course of taking into confidence P.W. Fazal Ali. Similarly. It is unbelievable that any of the P. Ws. were put under any pressure during the course of investigation conducted in 1974-1975. because (1) P.W. Abdul Hayee Niazi had already registered the F.I.R. of occurrence in which the name of Mr. Bhutto was mentioned; and (2) that inspite of the forceful, statement given by P.W. Muhammad Asghar Khan, S.S.P., Lahore, before the Inquiry Tribunal headed by Shafi-ur-Rehman, J., in which he not only impugned the conduct of his own I.G., but also of P.W. Saeed Ahmad Khan and his assistant late Mr. Bajwa, and yet no action was taken against them by the Government of As, Mr. Bhutto.

233. The learned Special Public Prosecutor seems to have been aware of the infirmity of the finding recorded by the High Court, because he frankly conceded from the bar that "I am not in a position to say positively that there is positive evidence of substitution .... There is a high probability that the empties had been changed. The evidence as to big probability has to be looked at in the totality of the picture. There is a case for strong inference that the empties had been changed". Now canvassing the high probabilities in a case against an accused can never be a ground to hold him guilty: see *Woolmington v. D.P.P.*<sup>525</sup>, *Brij Dhushan Singh v. Emperor*<sup>526</sup>, *Safdar Ali v. State*<sup>527</sup>, *Muhammad Luqman v. State*<sup>528</sup>, *Fazlul Qadir Chaudhury v. Chown*<sup>529</sup>, *Sarwan Singh v. State of Punjab*<sup>530</sup> and *Ramzan Ali v. The State*<sup>531</sup> in which the same principle has been reiterated. But it would be instructive to reproduce from page 12 of the judgment reported in PLD 19i0 S C 10 the following dictum:-

"With due respect to the learned Judges, it may be said that a finding of guilt against an accused person cannot be based merely on the high probabilities that may be inferred from evidence in a given case. The finding as regards his guilt should be rested surely and firmly on the evidence produced in the case and the plain inferences of guilt that may irresistibly be drawn from that evidence. Mere conjectures and probabilities cannot take the place of proof. If a case were to be decided merely on high probabilities regarding the existence or non-existence of the fact to prove the guilt of a person, the golden rule of benefit of doubt to any accused person, which has been dominant feature of the administration of criminal justice in this country with the consistent approval of the Superior Courts would be reduced to at naught."

234. I think I have now dealt with all the evidence of essential witnesses as well as the documentary evidence except of course the evidence of approver Ghulam Hussain with which I would deal at the proper stage. Taking up the subject of conspiracy, therefore, let us again recall the relevant evidence of P.W. Masood Mahmood in so far as it relates to the conspiracy, entered between him and Mr. Bhutto, for the assassination of Mr. Ahmad Raza Kasuri. His evidence is that being a member of the Police Service of Pakistan, he attained the rank of Deputy Inspector-General in 1969, however, he was selected as Deputy Secretary-General, CENTO, with headquarters at Ankara; on his return from Ankara in 1970, at his own request, he was posted as Deputy Secretary, Ministry of Defence, later promoted as Joint Secretary and Additional Secretary and then appointed to what he has called a punishment post, namely, the Managing

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<sup>525</sup> 1935 AC 462

<sup>526</sup> AIR 1946 PC 38

<sup>527</sup> PLD 1953 FC 93

<sup>528</sup> PLD 1970 SC 10

<sup>529</sup> PLD 1952 FC 19

<sup>530</sup> PLD 1957 SC (Ind,) 555

<sup>531</sup> PLD 1967 SC 545

Director, Board of Trustees Group Insurance and Benevolent Fund in the Establishment Division. In this connection, he attempted to meet with Mr. Vaqar Ahmad, the then Secretary Establishment, but did not succeed; sometime in early April, 1974, however, Mr. Vaqar Ahmad called him and told him that he was to meet Mr. Bhutto on April 12; 1974, but he should first come and see him that in the meeting in question Mr. Vaqar Ahmad was very nice to him and told him that Mr. Bhutto was going to offer him an appointment which he must accept; thereafter he dilated on his personal affairs such as about the poor health of his wife, his small children and then told him that under the revised Service Rules an officer of Grade 21 (which he was) and above could be retired at any time; and that the said conversation, therefore, left him with the impression that his job was at the mercy of Mr. Bhutto and Mr. Vaqar Ahmad.

235. On April 12, 1974, he called on Mr. Bhutto who was kind to him and after praising his integrity and capacity for hard work, offered him the post of Director-General, FSF. He told him not to accept any instructions from the then Minister of Interior, namely. Mr. Abdul Qayyum Khan; not to terminate the services of the re-employed officers of the FSF without his prior permission as they were all useful people and in this connection specially mentioned the name of Mian Muhammad Abbas. Mr. Bhutto told him to be on the right side Mr. Vaqar Ahmad; that he expected him to forge the FSF into a deterrent force and that since Mr. Vaqar Ahmad did not like him he should be on his right side.

236. Between April 12th and 23rd, 1974, while he was still holding the charge of the said punishment post, he was visited by Mr. Saeed Ahmad Khan and his assistant late Mr. Bajwa who gave him the impression that if he declined to accept the job offered to him by Mr. Bhutto he would not be able to see his wife and children again.

237. On 23rd April 1974, he formally assumed the charge as Director-General, FSF. The charter of his duties was contained in the FSF Act, 1973, but Mr. Bhutto also told him in the said meeting, that the Force must be made available to him for political purposes, namely, for-

- (a) breaking up of political meetings;
- (b) harassment of personages both in his own Party and the Opposition; and
- (c) induction of the plain-clothed men in public meetings addressed by him so as to swell the crowd,

238. In June, 1974, when Mr. Bhutto was addressing; the National Assembly, Mr. Ahmad Raza Kasuri interrupted him at which, ignoring the Speaker of the House, Mr. Bhutto asked him to keep quiet adding that he had had enough of him and that he would not tolerate his nuisance any more. A day or two later, Mr. Bhutto sent (or him

and told him that he was fed up with Mr. Ahmad Raza Kasuri and that Mian Muhammad Abbas knew all about him as he had already been given instructions through his predecessor, Mr. Haq Nawaz Tiwana (deceased) to get rid of him. He, therefore, told him to ask Mian Muhammad Abbas to get on with the job: "produce the dead body of Mr. Ahmad Raza Kasuri or his body bandaged all over". He further told him that he would personally hold him responsible for the execution of his said order. On hearing this from Mr. Bhutto. he was naturally shaken and pleaded with him that to execute his said order would be against his conscience and would certainly be against the dictates of God. At this Mr. Bhutto lost his temper and shouted at him saying, that he would have no non-sense from him or Mian Muhammad Abbas. He raised his voice saying, you don't want Vaqar chasing you again, do you? Having thus been snubbed, he returned to his Office in a perplexed state of mind, called Mian Muhammad Abbas and conveyed him the said order of Mr. Bhutto. He was surprised to note, however, that Mian Abbas was not at all disturbed. He told him not to worry and that the order in question would be duly executed, as the same had already been conveyed to him by the former Director-General. Subsequently, Mr. Bhutto kept on reminding him and goading him from time to time in respect of the execution of his said order personally on the green telephone, as well as through Mr. Saeed Ahmad Khan and late Mr. Bajwa. Mr. Saeed Ahmad Khan had spoken to him over the green line and told him that appellant Bhutto wanted him to execute the order already given to him in respect of Mr. Kasuri.

239. Now this in essence is the evidence of Mr. Masood Mahmood, which according to the High Court constituted the conspiracy entered into between him and Mr. Bhutto for the assassination of Mr. Kasuri. The learned Special Public Prosecutor has, however, relied on the mass of oral and documentary evidence, such as relating to the prior and subsequent conduct of Mr. Bhutto and contended that all the said evidence must conjointly be read with the evidence of Mr. Masood Mahmood in proof of the existence of the said conspiracy. While this contention of the learned counsel would be dealt with in detail subsequently, at this stage it would be proper to reproduce section 120-A of the Penal Code of Pakistan, which runs as under:-

"120-A. Definition of criminal conspiracy .... When two or more persons agree to do, or cause to be done -

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.



*Explanation.* - It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."

240. Now there has been a great deal of controversy between the learned counsel for the parties as to the true scope and connotation of the expressions 'agree' and 'agreement' appearing in the said section and both sides have relied on a large number of judgments, legal treatise as well as dictionaries and law lexicons. Mr. Yahya Bakhtiar, the learned counsel for appellant Bhutto argued: (1) that the said two expressions should be given their normal meaning i.e., to say an 'agreement' has to be the product of the free consenting minds of two or more persons without the exercise of intimidation, coercion or undue influence by one upon the other; and (2) that in view of the said evidence of Mr. Masood Mahmood, there did come into existence a seeming 'agreement' between him and Mr Bhutto, but to till intents and purposes actually it was not an 'agreement' at all as undue influence was exercised on him by Mr. Bhutto and hence he was not a free agent. The learned Special Public Prosecutor, on the other hand argued that the so-called undue influence exercised by Mr. Bhutto on Mr. Masood Mahmood would have no relevancy firstly, because it was not the type of undue influence which would vitiate his free consent; and secondly, because the existence of conspiracy in this case has to be seen from the evidence of Mr. Masood Mahmood as well as all the surrounding circumstances. Furthermore, there need not be the need of direct meeting or combination nor the need that parties be brought into each other's presence; the agreement may be inferred from the circumstances raising a presumption of a common concerted plan to carry out the unlawful design.

241. If I have been able to correctly understand the learned counsel, perhaps he has desired me to hold (1) that even if Mr. Bhutto is found to have exercised undue influence on Mr. Masood Mahmood still they must be held to have entered into an effective conspiracy to assassinate Mr. Kasuri, and (2) that the evidence of Mr. Masood Mahmood is not the only basis to adjudge the existence of the said conspiracy, the prior and subsequent conduct of Mr. Bhutto and all the surrounding circumstances have to be considered together.

242. Dealing with his latter contention first, I am afraid the same is misconceived. I think it ought to be understandable that in the nature of things a conspiracy has to be a secret transaction and the conspirators extremely vigilant and circumspect so as to prevent the leakage of any tell-tale signs which may not only frustrate their design but also make themselves accessible to be reached by the long arm of law. In this respect, reference may be made to *Pulling Behari Das v. King Emperor*<sup>532</sup> from which the following dictum seems to be relevant:-

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<sup>532</sup> 16 CWN 1105-15 CLJ 517-161 C 257-13 Cr. LJ 609

"It must be remembered that direct proof can scarcely be afforded of a conspiracy .... But as Earl, J., well says in *R. v. Duffield* 5 Cox. C. C. 404, it does not happen once in a thousand times that anybody comes before the Jury to say "I was present at the time when these parties did conspire together and when they agreed to carry out their unlawful purpose .... It is from this point of view that the overt acts may properly be looked to as evidence of the existence of a concerted intention; indeed the conspiracy is usually closely bound up with the overt acts, because in many cases, it is only by means of overt acts that the existence of the conspiracy can be made out."

243. It should thus be clear that the need to look into the overt acts as evidence of the existence of a conspiracy only arises because it does not happen once in a thousand times that anybody comes before the Jury to say "I was present at the time when these parties did conspire together and when they agreed to carry out their unlawful purpose". A priori it would follow that in this case since the prosecution has been able to lay its hands on, and actually relied on the direct and express evidence of Mr. Masood Mahmood, constituting the conspiracy, then to fall back upon circumstantial evidence would be impermissible, unless, of course the same would be complementary and not derogatory to the said express 'agreement'. In my humble view there ought to be no quarrel with this proposition. For example, if an express agreement entered into between A and B related, say, to the sale of a motor car belonging to A, then can any evidence be taken into consideration which shows that they had actually intended to agree upon the sale of a plot of land belonging to A? Inevitably the answer has to be in the negative, as evidently the express agreement and the said evidence would be destructive of each other. It must be said, however, that if an agreement is only partly expressed, then the surrounding circumstances may be taken into consideration to give it the purpose and meaning. But in this respect more would be said later.

244. The learned Special Public Prosecutor, however, did not agree with this conclusion. He argued that an agreement of criminal conspiracy should never be equated with an 'agreement' under the Law of Contract for (1) the former agreement is illegal and punishable under the Pakistan Penal Code, whereas the latter enforceable through civil proceedings instituted in a competent Court; and (2) that if the said distinction is not kept in mind, it would lead to disastrous consequences inasmuch as in a given case a hired assassin or for that matter a child under the age of seven years, who under section 82 of the P.P.C. cannot be guilty of any offence committed by him can as well be a party to a criminal conspiracy with a grown-up person, and yet the latter would be able to get away with the crime as it needs at least two persons to form a conspiracy. This example given by the learned counsel is not only extreme, but is misconceived. In this respect reference has to be made to sections 82, 83 and 90 of the P.P.C., which respectively read as under:-

"82. *Act of a child under seven years age* - Nothing is an offence which is done by a child under seven years of age.

83. *Act of a child above seven under twelve of immature understanding* - Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

90. *Consent known to be given under fear or misconception* - A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury or under a misconception of fact and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or ....

*Consent of child* - Unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age....."

245. Now by reading these three sections together it should be clear that a child under the age of seven years has been exempted from any criminal liability, because being of tender age the law takes him to be incapable of having *mens tea* or to understand the nature and the consequences of his conduct. In this view it would be difficult perhaps to hold that a child of that age could ever be a party to a criminal conspiracy of which *mens tea* is one of the essential ingredients.

246. It is conceivable, however, that a hardened criminal may in a given case rise the services of a child under the age of seven years in the commission of a crime. In the nature of things, however, the suggestion in that behalf has to be made to the child by the former and when so made it would be tantamount to abetment on his part within the meaning of section 107, P.P.C., for which he would be punishable under section 115 or 116, P. N. C. as the case may be. In this respect reference may be made to Explanation 3 to section 108, P.P.C., as also Illustration (b) appearing under the said explanation which respectively read as under:-

"*Explanation 3.* - It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge.

#### *Illustrations*

(a) -----.

(b) A, with the intention of murdering Z, instigates B, a child under seven years age, to do an act which causes Z's death. B, in consequence of the abetment, does

the act in the absence of A and thereby, causes Z's death. Here, though B was not capable by law of committing an offence, A is liable to be punished in the same manner as if B had been capable by law of committing an offence, and had committed murder, and he is therefore subject to the punishment of death.

(c)-----.

(d)-----.

247. I hope this ought to suffice to clarify the doubt of the learned counsel. Now coming to his other contention, namely, that an 'agreement' of criminal 'conspiracy' should not be equated with an 'agreement' under the Law of Contract, I am afraid it has not impressed me. Before dealing with this aspect of the case, however, let us take into consideration the fact as to how in our daily lives is the word 'agree' or 'agreement' commonly understood. For example A, a Food-Inspector appointed by the Government, goes to a shop to purchase, say, some items of merchandise for which the shop keeper quotes him the price of Rs. 100, A, however, goes on arguing with him to reduce the price but the shopkeeper does not agree. Finally, A discloses to the shopkeeper the fact that he was the Food-Inspector of the area at which the shopkeeper immediately reduces the price of the said articles to, say, Rs. 80. Now upon these facts can it be said that the shopkeeper had agreed to sell the said articles to A for Rs. 80? The answer has to be in the negative. It is true that no sooner the shopkeeper delivered the goods to A, in consideration of having received from him Rs. 80, to all intents and purposes, he would seem to have agreed to sell A, the said articles on reduced price. But actually it cannot be said that he had agreed to do so because he was only made to 'agree' after A disclosed to him his identity as Food Inspector which in the nature of things at once robbed him of his free volition in the matter. It is precisely for this reason that the word 'consent' which is the sine qua non of an 'agreement' has been defined in the Black's Law Dictionary (1968 Edition) to mean, amongst other things, "A concurrence of wills, voluntarily yielding the will to the proposition of another there is a difference between consenting and submitting .... every consent involves a submission but a mere submission does not necessarily involve consent". Examples can be multiplied in this behalf, but it would be unnecessary.

248. In the Dictionary of English Law by Earl Jowitt the word 'consent', which is an essential ingredient of an 'agreement', has been defined to mean "an act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil of either side. Consent presupposes three things: a physical power, a mental power, and a free and serious use of them. Hence it is that if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind." In the same Dictionary an 'agreement' has been defined to mean "a consensus of two or more minds in anything done or to be done". Furthermore, "when analyzed, the essential marks of

an agreement ere; There must be at least two persons; they must intend the same thing; their intention must be communicated; and the object of their intention must be such as will, when carried out, alter their legal position, e.g., by producing the transfer of property or the creation or extinction of a right. The communication of intention may be formal or informal, simple or complicated, but it may always be reduced to the elements of a proposal made by one party and accepted by the other; so that until the proposal is absolutely accepted there is no agreement; or there must be concurrence of both parties to a form of words expressing their common intention".

249. In Black's Law Dictionary (1968 Edition), the word 'agree' has been defined thus: .... To concur; come into harmony; give natural assent; unite in mental action; exchange of promises; make an agreement; arrange, to settle". As to an 'agreement' it is said therein: A coming or knitting together of minds; A coming together in opinion or determination; the coming together in accord of two minds on a given proposition; in law a concord of understanding and intention between two or more parties". Similarly, 'Consent' has been defined therein to mean: "A concurrence of wills. Voluntarily yielding the will to the proposition of another; acquiescence or compliance therewith there is a difference between consenting and submitting every consent involves a submission but a mere submission does not necessarily involve consent .... There must be an exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent. And if a woman resists to the point where further resistance would be useless or until her resistance is overcome by force or violence, submission thereafter is not 'consent' .... Express consent: That directly given, either viva voce or in writing. It is positive, direct, unequivocal consent requiring no inference or implication to apply its meaning .... that manifested by signs, actions, or facts, or by inaction or silence, which raise a presumption, that the consent has been given."

250. In Corpus Juris Secundum (Volume 15) 'conspiracy' has been defined to mean: A combination of two or more persons intentionally participating in the furtherance of a preconceived common design and purpose is essential to constitute a conspiracy... one person cannot conspire with himself. Furthermore, there must be a preconceived plan and unity of design and purpose, for the common design is of the essence of the conspiracy. The mere fact that each of several defendants acted illegally or maliciously with the sumo end in view does not constitute a conspiracy, unless such acts were done pursuant to a mutual agreement .... the mere knowledge, acquiescence, or approval of the act, without cooperation or agreement to cooperate, is not enough to constitute one a party to a conspiracy. There must be intentional participation in the transaction with a view to the furtherance of the common design and purpose... no formal agreement is necessary; it is sufficient that the minds of the parties meet understandingly so as to bring about an intelligent anti deliberate agreement to do the acts and to commit the offence charged, although such agreement is not manifested by any formal voids or by a written instrument".

251. In Halsbury's Laws of England (4th Edition, Volume II) 'conspiracy' is said to mean as follows: "Conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. It is an indictable offence at common law, the punishment for which is imprisonment or fine or both in the discretion of the Court.

252. The essence of the offence of conspiracy is the fact of combination of agreement. The agreement may be express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as that combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however it may be. The *actus reus* in a conspiracy is the agreement to execute the illegal conduct, not the execution of it. It is not enough that two or more persons pursued the same unlawful object at the time or in the same place; it is necessary, to show a meeting of minds, a consensus to effect an unlawful purpose. It is not, however, necessary that each conspirator should have been in communication with every other".

253. Glanville Williams, at page 212 of his Criminal Law (Second Edition) has defined a 'conspiracy' to mean: "A conspiracy is not merely a concurrence of wills but a concurrence resulting from agreement ..... This view of the nature of offence is borne out by a dictum of Martin B. in Barry (1865): "The parties must put their heads together to do it." ..... "Conspiracy" means a breathing together; and two People cannot breathe together unless they put their heads together. Of course, they can metaphorically put their heads together by correspondence through the post, or even by correspondence with a third party but some sort of communication there must be."

254. In Corpus Juris Secundum (Volume 3) an 'agreement' is said to mean; Accordance; an assent, coming together or knitting, concord, concurrence or union of two or more minds to the same thing, opinion, determination, proposition, thing done, or thing to be done; an exchange of promises understanding, arrangement or stipulation. In short, everything done or committed by the compact of two minds is universally and familiarly called an agreement".

255. In the Judicial Dictionary by Stroud (1951 Edition), consent has been defined to mean: "all act of reason, accompanied with deliberation, the mind weighing, as in a balance the good and evil on each side ..... You 'consent' to the doing of that which you are yourself doing it; Every 'consent' to an act involves a submission; but it by no means follows that a mere submission involves consent."

256. The Shorter Oxford English Dictionary (Volume I) defines the word 'agreement' to mean: "The action of pleasing; consenting; setting at one, atoning; A coming into

accord; a mutual understanding." It also defines 'consent' thus: To agree together, or with; to act or be affected in sympathy Voluntarily to accede to or acquiesce in a proposal, request etc ..... Voluntary agreement to or acquiescence In what another proposes or desires". The word 'conspire' also has been defined therein to mean: To breathe together: To combine privily so do something criminal, illegal, or reprehensible, to commit treason or murder; To combine in action or aim; to concur, cooperate as by intention".

257. Now all this wealth of literature in which the words 'agreement', 'consent', and 'conspiracy' have been so thoroughly and vividly defined ought to suffice to allay any doubt that 'criminal conspiracy' as envisaged in section 120-A, P. P.C., has to be the product of two consenting minds; uninfluenced by any consideration of threat, intimidation, coercion or undue influence. The fact that this has to be so and respecting which there ought to be no doubt whatever, should be readily appreciated from the pithy and penetrating expressions used in all the said literature such as "To concur; come into harmony; give mutual assent; unite in mental action; exchange of promises; make an agreement; arrange; to settle; a coming or knitting together of minds; voluntarily yielding the wile to the proposition of another; acquiescence or compliance there .... with there is a difference between consenting and submitting every consent involves a submission, but a mere submission does not necessarily involve consent; the parties must put their heads together to do it; conspiracy means a breathing together; and two people cannot breathe together unless they put their heads together; you 'consent' to the doing of that which you are yourself doing it".

258. It may be pointed out that for all the said literature, as to the expressions used therein, namely, 'consent', and 'conspiracy' the foundation seems to be the classical judgment *Denis Dowling Mulcahy v. The Queen*<sup>533</sup>; in which Willes, J., defined the 'conspiracy' to mean consisting not merely in the intention but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in Intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful, punishable if for a criminal object or for the use of a criminal means". Similarly at page 325 of the judgment, Lord Chelmsford defined a 'conspiracy' thus: -

"It is a mistake to say that conspiracy rests in intention only. It cannot exist without the consent of two or store persons, and their agreement Is an act in advancement of the intention which each of them has conceived in his mind. The argument confounds the secret arrangement of, the conspirators amongst themselves with the secret intention which each must have previously had in his

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<sup>533</sup> 1868 LR 3 HL 306

own mind, and which did not issue in act until it displayed itself by mutual consultation and agreement".

259. This definition of 'conspiracy' has not only stood the test of more than a century, but the same has been followed by the Courts of all the common law countries, as well as the Courts of the Indian Sub-Continent without any exception. Now what I would like to emphasize from the judgment of Lord Chelmsford is the italicized words in general and the words with the secret intention which each must have previously had in his own mind, and which did not issue in act until it displayed itself by mutual consultation and 'agreement' in particular. Now a look at these words would show that in order to reach an 'agreement', it must be shown that the conspirators had tire secret 'intention' which each one must have previously, held in his own mind, and which issued in an act only after the bolding of mutual consultations between themselves. The emphasis on the words 'intention' and which each one must have previously held in his own mind, must be noted, as in them lie the essence of what an 'agreement' is. Recalling a well-known legal epithet that a man is judged by his actions, as even the devil knows not what his 'intention' is, it would follow that 'intention' must necessarily reside in the inner recesses of the mind of a person and remain there as a secret until it is displayed in the physical environments by an act of which notice can be taken. Seen in this context, it should hardly need any further discussion that an 'agreement' has to be the product of the independent minds of two or more persons without any threat, intimidation, coercion or undue influence exercised by the one over the other. While saying this, I am conscious of the fact that 'intention' can as well be planted in the mind of a person, say, by persuasive reasoning and logic. But that will be a different situation than a case in which a person is threatened or forced to submit to the will of the other. For example, let us look at the religious missionaries who go about propagating to all and sundry their views about the ideals of their religion and in the process they do seem to succeed in some measure by converting some people to their faith. This is the method which I would name as the persuasive method by which 'intention' is planted by the missionaries in the mind of others and which issues in an act only when the latter convert to the faith of the said missionaries. As against this, if a person is threatened, intimidated, coerced or subject to undue influence, with a view to making him change his faith, can it be said that he had any intention to do so or for that matter given his 'consent' in that behalf? It is because of such eventuality that in the literature quoted hereinbefore it has been said that every consent involves a submission; but a mere submission does not necessarily involve consent".

260. Now if I have been right in this conclusion, it would be difficult to agree with the learned counsel that an 'agreement' of criminal 'conspiracy' should be treated differently than an 'agreement' under the Contract Act. In fact, in *Quinn v. Leathem*<sup>534</sup>, the House of Lords not only followed its earlier judgment in Malcahy's case but also

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<sup>534</sup> 1901 Appeal Cases 495



held that "The essential elements, whether of a criminal or of an actionable conspiracy, are, in my opinion, the same, though to sustain an action special damage must be proved". Apart from the fact that in the preceding discussion I have confined myself to be consideration of 'agreement', as popularly understood, but frankly I do not see any reason as to why reference may not be made to section 2(e) of the Contract Act, 1872, in which 'agreement' has been defined to mean "Every promise and every set of promises, forming the consideration for each other, is an agreement". Furthermore, in clause (a) of the said section, it is said that "When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal; and (b) "When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise". Now from this it would be seen that the words "signifies to another his willingness .... with a view to obtaining the assent of that other", appearing in sub-clause (a) of the said section presuppose that the person concerned was evidently displaying his 'intention' to the other, which he previously held in his own mind, with a view to obtaining his assent thereto, and when the latter accepted the said proposal the same matured into a 'promise'. Looked at from whatever angle, therefore, an 'agreement' has to be the product of free consenting minds without there being the slightest indication of the exercise of any pernicious influence by one over the other.

261. The learned counsel, it may as well be pointed out, has not been right to contend that an 'agreement' of a civil nature would be enforceable under the Contract Act, because according to sub-clause (h) of section 2 of the said Act, an 'agreement' is enforceable in law only if it is a contract and not that every 'agreement' is enforceable.

262. The learned counsel next argued that Archbold in Criminal Pleading, Evidence and Practice has, at page 1680 of his Treatise, distinguished the case of *Quinn v. Leathem* but with respect he is mistaken. In fact, the learned author has preferred to the said case with approval, but as to the application of it is to the criminal remedies he has observed that the statement of law contained therein "must be read subject to the provisions of the Conspiracy and Protection of Property Act, 1875, and the Industrial Relations Act, 1971; but it is submitted that such a combination as above stated is still indictable. At common law it certainly was indictable". It would thus be seen that although in England, there existed on the Statute Book the said two Acts, which in the case of criminal conspiracies may have watered down the effect of the common law conspiracy, yet the learned author has owned the ratio of the said judgment.

263. The learned counsel next argued that Lord Lindley in *Quinn v. Leathem* (supra) had taken a different view than the one taken by Lord Brampton. With respect, this statement is incorrect. It is true that Lord Lindley does not seem to have dealt with the question, namely, the essential elements, whether of a criminal or of an actionable conspiracy" are the same but that would not mean that he had disagreed with the view

taken by Lord Brampton. Furthermore, Archbold in Criminal Pleading, Evidence and Practice, to which reference has already been made, as well as Gour, on the Penal Law of India, both have referred to the said view taken by Brampton, J. with approval. Not only this but Gour has, at page 941 of his said Treatise (referring to section 120-A, P. P.C. ) observed thus:-

"This definition in this section is taken from that formulated by Lord Brampton" in *Quinn-v. Leaihem* (supra).

From this it would follow that the contention raised by the learned counsel is misconceived.

264. Now by keeping in view all the preceding discussion as to what an 'agreement' is let us examine the language of section 120-A, P.P.C., in which the words used are: "When two or more persons agree to do, or cause to be done:- (1) an illegal act, or (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy." It is well settled, and in respect of which no law need be quoted, that while construing a statute, the language used therein generally should be given its normal meaning. Seen in this context the words used in section 120-A, P.P.C., to the effect "when two or more persons agree" would mean the voluntary agreement of the two and not the one brought into existence by the exercise of any pernicious influence by one over the other so as to rob him of his free volition in the matter. This in my view can be the only meaning which the said words must bear, as otherwise the Legislature could as well have expressed itself thus; "When two or more persons agree or made to agree to do or cause to be done", etc. Bearing this principle in mind, therefore, the definition of the words 'agree', 'consent' and 'conspiracy' already quoted from the wealth of legal literature ought equally to be applicable to the word 'agree' used in section 120-A, P. P.C.

265. Section 10 of the Evidence Act, 1872, which is attracted only to a trial held under section 120-B, P.P.C., would further clarify the said position, as it runs as under:-

"10. Things said or done by conspirator in reference to common design. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

#### ILLUSTRATIONS

Reasonable ground exists for believing that A has joined in a conspiracy to wage war against Pakistan.

266. Now this section which is an exceptional section as it is applicable only in a trial under section 120-B, P.P.C., clearly lays it down that before anything said, done or written by anyone of the conspirators in reference to their common intention can be used against the other, the existence of reasonable ground to believe must be shown to exist that two or more persons have conspired together to commit an offence or an actionable wrong. If the word "conspired" used therein was to be construed differently than the way in which it has been defined in the wealth of legal literature quoted hereinbefore it would lead to an anomalous situation inasmuch as the act of conspirators could as well be mistaken for the joint act committed by two or more persons and vice versa. To illustrate this point, let us recall the well-known saying in respect of an 'agreement' as defined in section 2 (e) of the Contract Act, 1872, that every 'agreement' is not a 'contract' whereas every 'contract' includes in itself an 'agreement'. From this it should be obvious that whereas an act committed by two or more conspirators would include in itself the concept of 'jointness', but the converse cannot be true, unless the joint act is proved to have been committed in pursuance of a conspiracy. In this respect reference may usefully be made to page 92 of the Law of Evidence by Monir, in which the learned author has observed as under:-

"Conspiracy means something more than the joint action of two or more persons to commit an offence; if it were otherwise, section 10 would be applicable to any offence committed by two or more persons jointly, and with deliberation, and would thus import into a trial a mass of hearsay evidence which the accused person would find it impossible to meet."

And again at page 90, "section 10, Evidence Act, 1872 makes it clear that apart from the act or statement of the co-conspirator, some *prima facie* evidence must exist of the antecedent conspiracy in order to attract section 10". It may be mentioned that the learned counsel on both sides have agreed with this enunciation of the law. But even so reference may be made in that behalf to *Maqbool Hussain v. State*<sup>535</sup>, *Mirza Akbar v. The King-Emperor*<sup>536</sup>, *H. H. S. Gill and another v. The King*<sup>537</sup>, *Sardul Singh Gaveeshar v. State*<sup>538</sup>, *Vishindas Lachhmandas v. Emperor*<sup>539</sup> and *Abdul Aziz v. Emperor*<sup>540</sup>.

267. A comparison of the respective schemes contained in section 107 and section 120-A, P.P.C., would clarify the position further. Section 120-A, P.P.C., has already been

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<sup>535</sup> PLD 1960 SC (Pak.) 382

<sup>536</sup> ILR 1940 Lah. 612

<sup>537</sup> AIR 1948 PC 128

<sup>538</sup> AIR 1957 SC 747

<sup>539</sup> ILR. 1943 Kar. 449

<sup>540</sup> 137 IC 317

reproduced, therefore, it would suffice to reproduce here section 107, P.P.C., which runs as under:-

"107. Abetment of a thing. A person abets the doing of a thing who:-

First. - Instigates any person to do that things; or

Secondly. - Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly. - Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1. - A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, a thing to be done, is said to instigate the doing of that thing."

268. Now this Section, in the secondly part of which, there existed the offence of conspiracy, was already there on the Statute Book when by Act VIII of 1913, section 113-A, was introduced in the Penal Code in which "criminal conspiracy" has been defined. It is true that by a cursory examination of the said two sections an impression can easily be formed as if Legislature, by enacting section 120-A, has repeated himself in respect of the same subject covered by section 107, P.P.C., But this impression would be incorrect. In this respect first the following statements of object and reasons, as to the passing of Act VIII of 1913, appearing at page 941 of the Penal Law of India by Gour, would be instructive to be taken notice of:

"The sections of the Indian Penal Code which deal directly with the subject of conspiracy are those contained in Chapter V and section 121-A of that Code. Under the latter provision, it is an offence to conspire to commit any of the offences punishable by section 121 of the Indian Penal Code or to conspire to deprive the King of the sovereignty of British India or of any part thereof or to overawe by means of criminal force or show of criminal force the Government of India or any Local Government, and to constitute a conspiracy under this section it is not necessary that any act or illegal omission should take place in pursuance thereof. Under section 107 abetment includes the engaging with one or more person or persons in any conspiracy for the doing of a thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing. In other words, except in respect of the offences particularized in section 121-A conspiracy *per se* is not an offence under the Indian Penal Code....."

"Experience has shown that dangerous conspiracies are entered into India which have for their object aims other than the commission of the offences specified in section 121-A of the Indian Penal Code and that the existing law is inadequate to deal with modern conditions. The present Bill is designated to assimilate the provisions of the Indian Penal Code to those of the English law with the additional safeguard that in the case of a conspiracy other than a conspiracy to commit an offence some overt act is necessary to bring the conspiracy within the purview of criminal law. The Bill makes criminal conspiracy a substantive offence, and when such a conspiracy is to commit an offence punishable with death, or rigorous imprisonment for a term of two years or upwards, and no express provision is made in the Code provides a punishment of the same nature as that which might be awarded for the abetment of such an offence. In all other cases of criminal conspiracy the punishment contemplated is imprisonment or either description for a term not exceeding six months, or with fine, or with both."

269. This 'statement of object and reason,' as to the passing of Act VIII of 1913, is self-revelatory. The main reason for which the bringing of section 120-A, P.P.C., was thought as necessary on the Statute Book was that the existing law in respect of conspirators, as contained in sections 107 and 121 of the Penal Code, was found to be deficient because "Experience has shown that dangerous conspiracies are entered into in India which have for their object aims other than the commission of the offences specified in section 121-A of the Indian Penal Code and that the existing law is inadequate to deal with modern conditions". It is true that the offence of abetment by conspiracy was already provided for in section 107, P.P.C., but it was not enough because conspiracy as such, unless it was proved that an act or illegal omission had taken place in pursuance of the conspiracy and in order to the doing of that thing, was not an offence. This deficiency in the law was, therefore, made up by the enactment of section 120-A, P.P.C., as now no sooner two or more persons agree to do or cause to be done an illegal act, or an act which is not illegal by illegal means, than the offence of criminal conspiracy would be complete, and all of them punishable under section 120-B of the Penal Code.

270. Gour at page 859 of the Penal Law of India (1978 Edition) has this to say on abetment within the meaning of section 107, P.P.C.:-

"Three things are essential to complete abetment as crime: There must be an abettor; he must abet; and the abetment must be an offence. This section analyses the meaning of the word "abet" as used in this connection. It lies down that a person who instigates another to do a thing abets him to do that thing. In this sense, it makes instigation tantamount to abetment. But a person may not only instigate another, he may cooperate with him and his cooperation may consist of counsel or conjoint action. In Pother case there is abetments. It is not difficult to

see why person who aids another in the commission of a crime is regarded as an abettor. Nor is it difficult to imagine why one who plots a crime and thereby facilitates its commission should be placed in the same category. But a person who merely "instigates" another may have no idea of the crime that may be committed in consequence. And, moreover, is an "instigator" worse than a co-conspirator, whose abetment is not complete unless "an act or omission takes place in pursuance of that conspiracy?" The question then depends upon the precise meaning attaching to the expression "instigates", "engages" and "intentionally aids which have therefore to be examined. As is apparent from the above discussion the definition of abetment in this section includes not merely instigation which is the normal form of abetment but also conspiracy and aiding. In order that there may be abetment there must be either instigation or intentional aiding or engaging in a conspiracy as laid down in this section. General advice is far too value an expression to prove abetment."

271. Having thus observed as to what an abetment is within the meaning of section 107, P.P.C., the learned author at page 860 proceeds to distinguish section 107 from section 120 A, P.P.C., as follows:-

"The distinction between the offence of abetment under the second clause of section 107 and that of criminal conspiracy under section 120-A is this. In the former offence a mere combination of persons or agreement between them is not enough. An act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing conspired for; in the latter offence the mere agreement is enough, if the agreement is to commit an offence."

At page 865, the learned author gives a very instructive example as to what an instigation is and the same may be usefully noted:

"So if A orders his servant to hire another to murder B and the servant hires C with the money of A, A is an abettor in the same way and to the same extent as if he had himself hired C to commit the deed."

272. Incidentally this also should answer the misgivings of the learned Special Public Prosecutor who while arguing that an 'agreement' of criminal 'conspiracy' should not be equated with an 'agreement' under the Contract Act and in that behalf had quoted the example of a child under seven years of age, as well as of a hired assassin.

273. The learned author has again at page 868 of his Treatise referred to quite a few judgments and observed that "Before the enactment of Chapter V-A in 1913, conspiracy as such was treated as only a species of abetment and was held to be punishable as such (section 120). But conspiracy relates to the stage of preparation other than abetment though when it develops beyond the preparatory stage it amounts to and is punishable

as an abetment. A mere conspiracy does not amount to abetment, and is not punishable as such .... A person A may propose to B: "Let us murder C". B may dissent or say nothing or he may agree. As proposal is met by the first clause. But it is clear that if p agrees, he is equally guilty. His case is met by this clause. As soon as A and B agree both become liable, B under this clause and A both under this aid the last clause. If B dissents. A is nevertheless liable as an abettor under the last clause, though neither A nor B is liable under this. The two clauses thus then overlap, but this clause is intended to cover which, but for it, would not fall under the first or next clause".

274. The learned author again at page 869 has this to say as to the liability of a conspirator *vis-a-vie* of an abettor: "Indeed, almost all cases of abetment, resulting in crime thereupon would fall under the head of conspiracy, the only difference being that the abettor, as such, may be less guilty than the conspirator, as where he merely instigates another to do a thing which the other may not agree to do, in which case, the offence abetted is not actually committed in consequence of the abetment. An example would suffice to illustrate the difference. A instigates B to murder C, B refuses. Hire A has abetted B but there is no conspiracy. Even in such a case, if B agrees to commit murder, but does no other overt act in pursuance of the agreement, both neither. A nor B can be charged of conspiracy. But if B does an overt act, both A and B would be equally guilty, though in a case of abetment A would be less guilty than B. The distinction between the two cases is at times fine and in many cases, it is without a difference; but the distinction exists and has been made in the law, which must be recognized".

275. Finally, the learned author at page 877 has this to say on the same subjects "If a person instigates another or engages with another in a conspiracy for the doing of an act which is an offence, he abets such an offence and would be guilty of abetment under section 115 or section 116, I.P.C., even if the offence abetted is not committed in consequence of the abetment. The offence of abetment is complete when the alleged abettor has instigated another or engaged with another in a conspiracy to commit the offence. It is not necessary for the offence of abetment that the act abetted must be committed. This is clear from Explanation 2 and Illus. (a) thereto, to section 108, I. P.C. "

276. In *Pramath Nath Taluqdar v. Saroj Ramjan Sarkar*<sup>541</sup>, the same question had fallen for consideration and it was held as under:-

"The gist of the offence of criminal conspiracy is in the agreement to do an illegal act or an act which is not illegal by illegal means .... Therefore, the distinction between the offences of abetment by conspiracy and the offence of criminal conspiracy, so far as the agreement to commit an offence is concerned, lies in this. For abetment by conspiracy mere agreement is not enough. An act or illegal

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<sup>541</sup> (1962) 2 SCR 297

omission must take place in pursuance of the conspiracy and in order to the doing of the thing conspired for. But in the offence of criminal conspiracy the very agreement or plot is an act in itself and is the gist of the offence. Willes, J observed in *Malcahy v. The Queen*<sup>542</sup> .... Put very briefly, the distinction between the offence of abetment under the second clause of section 107 and that of criminal conspiracy under section 120-A is this. In the former offence a mere combination of persons or agreement between them is not enough. As act or illegal omission, must take mace in pursuance of the conspiracy and in order to the doing of the thing conspired for; in the latter offence the mere agreement is enough, if the agreement is to commit an offence."

277. From this rather lengthy, albeit useful discussion, it should now be clear that section 107, P.P.C., deals with three situations:-

(1) Abetment simpliciter: For example if A tells B to kill C, A has abetted B and would be liable to punishment regardless of the refusal of B to oblige him; (2) Abetment by conspiracy: If in the said example B agrees with A, but does not commit any overt act in pursuance of the said agreement, neither A nor B can be charged of abetment by conspiracy as the further requirement of the secondly part of section 107, P.P.C., is the taking place of an act or illegal omission in pursuance of the said conspiracy and in order to the doing of that thing; and (3) that any person who intentionally aids, by any act or illegal omission, the commission of the intended object of the conspiracy by abetment also would be guilty of abetment.

278. In the case falling under section 120-A, P.P.C., however, when two or more persons agree to do or cause to be done an illegal act or an act which is not illegal by illegal means, the offence of criminal conspiracy would to complete and both of them liable to punishment under section 120-B, P.P.C., I feel that this ought to be sufficient to underline the subtle distinction existing between the offence of abetment by conspiracy within the meaning of section 107, P.P.C., and a criminal conspiracy as envisaged by section 120-A, P.P.C., Furthermore, the said distinction has to be there, as otherwise why would the Legislature have felt the necessity to bring section 120-A, P.P.C. on the Statute Book by an amendment made in 1913?

279. Similarly, reference may be made in this connection to *Mirza Akbar v. King-Emperor*<sup>543</sup> at page 180 of which appears the following dictum:-

"The statement so far from admitting conspiracy with the appellant, categorically denied it. While the woman stated that the appellant had threatened to kill her

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<sup>542</sup> (1868) L.R.H.L. 306

<sup>543</sup> AIR 1940 PC 176



and her husband if she refused to marry him, also had, she said, refused his advances and stopped him coming to the house."

280. In that case of Mehr Taja, who entered into a criminal conspiracy with the appellant, made statement before the Magistrate in terms which has been reproduced in the parenthesis. From the dictum of their Lordship, however, it is clear that the said statement "so far from admitting a conspiracy with the appellant, categorically denied it". It would, therefore, follow that any threat, etc. would clearly negate the free consent of a party and subsequently his submission to the will of the other would not mean that he had actually agreed with him.

281. Finally, notice may be taken of Webster's New International Dictionary (Second Edition) at page 111 of which, after defining the word 'conspire', reference has been made to Gen. XXXVII. 18 of the Bible in which mention is made of the famous conspiracy of the brothers of Joseph to slay him. It would be interesting to reproduce the said part from the Bible which is as follows:-

"18. And when they saw him afar off, even before he came near unto them, they conspired against him to slay him.

19. And they said one to another, Behold, this dreamer cometh.

20. Come now therefore, and let us slay him, and cast him into some pit, and we will say, Some evil beast hath devoured him and we shall see what will become of his dreams.

21. And Reuben heard it.....

22. And Reuben said unto them, Shed no blood, but cast him into this pit .....

24. And they took him, and cast him into a pit."

282. The same incident is mentioned in Sura XII, Ayats 8, 9, 10, 15, 16 and 17 of the Translation and Commentary on the Holy Qur'an by Yusuf Ali (1973 Print) which respectively read as under:-

"8. They said: "Truly Joseph and his brothers are loved more by our father than we: But we are a goodly body: Really our father is obviously wandering (in his mind)

9. "Slay ye Joseph or cast him out To some (unknown) land, That so the favor Of your father may be Given to you alone (There will be time enough) For you to be righteous after that:

10. Said one of them: "Slay not Joseph, but if yet must Do something throw him down To the bottom of the well: as He will be picked up by some caravan of travelers."

15. So they did take him away, And they all agreed To Throw him down To the bottom of the well .....

16. Then they came To their father in the early part of the night, Weeping.....

17. They said: Oh our father! We went racing with another, And left Joseph with our things: And the wolf devoured him." But thou will never-believe us Even though we tell the truth."

283. Now it is obvious from the revealed scriptures itself that human nature is made up of elements which sometimes drive men to conspire with, like-minded people in order to accomplish some 'coveted' object for the realization of which he finds himself inadequate. Now what was the 'coveted' object for the realization of which the brothers of Prophet Yousuf (may peace be upon him) conspired together to assassinate him? This question has been answered in the said verses which is that they thought Prophet Yousuf (may peace be upon him) was loved more dearly by his father. It should be noted, however, that in that behalf first they deliberated together; agreed upon the said treacherous plan, persuaded their father to let Yousuf (may peace be upon him) accompany them on the pretext that he would play around and enjoy himself; and finally they threw him down into the well in pursuance of their said conspiracy. In this respect the version to given is the Bible is substantially the same, but on seeing Prophet Yousuf coming may peace be upon him), the conspirators exclaimed:-

"Come now, therefore, and let us slay him, and cast him into some pit.

284. Now watch the spontaneity of the said exclamatory language The words "Come now", by which the others were harkened to lead their hand in the execution of the intended object of their conspiracy have in their womb the germ; which alone must necessarily spawa an agreement as once the suggestion conveyed therein was accepted by the others there came into existence an 'agreement' between them. This to my mind should suffice to show that the concept of 'agreement' was also known to the ancients, which in spite of the passage of thousands of years has not only retained its purity, but has been owned and followed in all the civilized countries of the world. With this discussion now it is time to close this chapter. If I have not been able to show that an 'agreement', or for that matter an agreement of criminal conspiracy has to be the product of the exercise of spontaneous and free volition by two or more persons without there being the slightest indication of any threat, coercion or undue influence

exercised by one over the other, it would be futile to pursue the said discussion any further.

285. The learned Special Public Prosecutor, however, argued and here I would like to quote him in his own words, that "In conspiracy like any other offence, if there is the defence of pressure or duress it has to be raised by the accused and none other. If any accused raises a plea of pressure or duress, his plea has to be tested in accordance with section 94, P.P.C. In order to see the force of his contention, section 94, P.P.C. may be reproduced:-

"94. *Act to which a person is compelled by threats.* - Except murder; and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence: Provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which has been subject to such constraint.

*Explanation 1.* - A person who, of his own accord, or by reason of a threat of being beaten, join a gang of dacoits, knowing their character, is not entitled to benefit of this exception, on the ground of his having been compelled by his associates to do anything. that is an offence by law.

*Explanation 2.* - A person seized by a gang of dacoits, and forced by threat of instant death, to do a thing which is an offence by law; for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it, is entitled to the benefit of this exception."

286. Now this section appears in Chapter IV of the P.P.C. and is; captioned: "General Exceptions". The Chapter starts with section 76 and ends with section 105. Now in all these sections, the separate treatment of each one of which is not necessary, provide for the defence open to an accused person if for example he commits an offence under a mistake of fact; or a Judge acting Judicially in the exercise of any power which is or in which in good faith he believes to be given by law; or an offence committed by accident; or by a child under the age of seven years; or by a person of unsound mind, etc. From this it should follow that reliance on section 94, P.P.C. by the learned Special Public Prosecutor is misconceived the object of section 94, P.P.C. clearly is to provide to an accused, except in the case of murder and offences against the State punishable with death, a complete defence as to the offence committed by him which he was compelled to commit by threats and which at the time of committing the same reasonably caused him the apprehension that he would otherwise be instantly put to death. This being the plain connotation of section 94 P.P.C., frankly I have not been able to appreciate the

contention of the learned counsel. Furthermore, the section in question, because the conspiracy entered into by Mr. Masood Mahmood with appellant Bhutto related to the assassination of Mr. Kasuri, could not be invoked by Mr. Masood Mahmood in his defence, as the section itself lays it down that the defence provided therein will not apply in the case of murder and the offences against the State punishable with death. In the case of Mr. Masood Mahmood all this seems to be academic, because by the pardon granted to him under section 337, Cr. P.C., he ought to have no worry on this score.

287. I feel that section 90, P.P.C. would seem to provide not only a complete answer to the contention of the learned counsel, but would go a long way to support the conclusion that an 'agreement' of criminal 'conspiracy' has to be the product of free volition exercised by two or more persons. This section runs as under:-

"90. *Consent known to be given under fear or misconception* - A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear or injury or under a misconception of fact and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

*Consent of insane person* - If the consent is given ....

*Consent of child* - Unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age."

288. The words "if the consent is given by a person under fear or injury", appearing in the section are significant. The word "injury" has been defined in section 41, P.P.C., to mean "any harm whatever illegally caused to a person, in body, mind, reputation or property". Now if by the examination of the evidence of Mr. Masood Mahmood it is found that he had been threatened or coerced or undue influence was exercised on him by Mr. Bhutto which might have caused him any harm whatever in body, mind, reputation or property, in order to make him agree to the assassination of Mr. Kasuri, evidently the 'consent' given by him thereto would be no 'consent' in the eye of law, and consequently no agreement of criminal conspiracy can be said to have come into existence between them. At a glance it may seem as if this section is meant to provide immunity to an accused, but this is not the position, because under section 94, P.P.C., he would be answerable for his part in the commission of the crime unless of course he would be able to prove that he was compelled to commit the same by threats (except in the case of murder and offences against the State punishable with death) which at the time of committing the same had reasonably caused him the apprehension that otherwise he would be put to death instantly.

289. Some observation was made or contention raised during the course of the arguments that the pressure brought on and the undue influence exercised on Mr.

Masood Mahmood by appellant Bhutto would not prevent the formation of the agreement of conspiracy entered into between them as under the Law of Contract at best the said agreement would be voidable and not void. Now this argument seems to have proceeded in ignorance of the fact that no sooner two or more persons agree to do or cause to be done an illegal act or an act which is not illegal by illegal means than under section 120-A, P.P.C., an agreement of criminal conspiracy between them would be complete and each one of them punishable under section 120-B, P.P.C., Unlike avoidable contract, therefore, which can be avoided by an aggrieved party through proper steps taken by him in that behalf, none of the parties to the said agreement of criminal conspiracy could possibly save himself from the consequences of punishment, because having entered into a criminal conspiracy, each one would be liable to punishment under section 120.8, P. P.C., as the said conspiracy itself, regardless of any other considerations, is a substantive offence.

290. Having dealt with all the available law and legal literature on the subject as to what 'consent', 'agreement' and 'conspiracy' means, I would now again advert to the relevant part of the evidence of Mr. Masood Mahmood to see if he can be said to have entered into a criminal conspiracy with Mr. Bhutto. His evidence is that Being a member of the Police Service of Pakistan, he attained the rank of Deputy Inspector-General, and in 1969 was selected as Deputy Secretary-General, CENTO with Headquarters at Ankra. On his return from Ankra in 1970, at his own request, he was posted as Deputy Secretary, Ministry of Defence; later promoted as Joint Secretary and Additional Secretary, and then appointed to what he has called a 'punishment post', namely, as the Managing Director, Board of Trustees Group Insurance and Benevolent Fund in the Establishment Division. After his said appointment, he made attempts to meet with Mr. Vaqar Ahmad, the then Secretary Establishment, but did not succeed. Sometime in early April, 1974, however, Mr. Vaqar Ahmad called him to his office and told him that he was to meet with Mr. Bhutto on April 12, 1974, but before that he should come over and see him. Mr. Vaqar Ahmad was very good to him in the said meeting, he told him that Mr. Bhutto was going to offer him an appointment which he must accept. He then dilated on the state of his personal affairs saying how his wife was not keeping good health; his children were small and that under the revised Service Rules an officer of Grade 21 and above could be retired at anytime. This conversation left him with the impression that his job was at the mercy of the Prime Minister and Mr. Vaqar Ahmad. On April 12, 1974, he called on Mr. Bhutto who was kind to him, praised his integrity and capacity for hard work and offered him the post of Director-General, FSF. He told him not to accept any instructions from the then Minister of Interior, namely, Mr. Abdul Qayyum Khan. He advised him not to terminate the services of the re-employed officers without his prior permission, as they were all useful people, and in this connection specially mentioned the name of appellant Mian Muhammad Abbas. Mr. Bhutto then told him to be on the right side of Mr. Vaqar Ahmad. He said he expected him to forge the F.S.F. into a deterrent force, and that since Mr. Vaqar Ahmad did not like him he should be on his right side. Between 12th April, 1974 and 23rd April,

1974, while he was still functioning in his old job, he was visited by Mr. Saeed Ahmad Khan (p, W. 31, the then Chief Security Officer to Mr. Bhutto, and his Assistant Mr. Abdul Hamid Bajwa (deceased) several times, who gave him the impression that if he declined the job offered to him by Mr. Bhutto he would not be able to see his wife and children again.

291. In June, 1974, when Mr. Bhutto was addressing the National Assembly, Mr. Kasuri interrupted him at which Mr. Bhutto, ignoring the speaker of the House, addressed him directly saying to keep quiet, adding that he had had enough of him and that he would not tolerate his nuisance any more. A day or two later, he (Masood Mahmood) was sent for by the Prime Minister. He told him that he was fed up with Mr. Ahmad Raza Kasuri, and that appellant Mian Muhammad Abbas knew all about his activities, as he had already been given instructions, his predecessor Mr. Haq Nawaz Tiwana (deceased), to get rid of him. He therefore, told him to ask Mian Muhammad Abbas to get on with the job and produce the dead body of Mr. Ahmad Raza Kasuri or his body bandaged all over" He further told him that he would personally hold him responsible for the execution of this order.

292. On hearing this he was naturally shaken, and pleaded with Mr. Bhutto that to execute his order would be against his conscience and certainly against the dictates of God. However, Mr. Bhutto lost his temper, and shouted at him saying, that he would have no nonsense from him or from Mian Muhammad Abbas. He raised his voice and said" You don't want Vaqar chasing you again, do you?" With this said unpleasant experience, he returned to his office in a perplexed state of mind, called Mian Muhammad Abbas and conveyed him the order of Mr. Bhutto.

293. Now by going through his said evidence can there be any doubt to say that he was not a free agent in the matter? and that he succumbed to the design of Mr. Bhutto only because he was threatened in that behalf, as also because of the veiled threats extended to him by Mr. Vaqar Ahmad to the effect that an officer of Grade 21 (which he was), could be retired from service at any time and that he should not refuse to accept the job which Mr. Bhutto was going to offer him? After having been thus cajoled and threatened, the impression created on the mind of Mr. Masood Mahmood was, and here I would quote him in his own words, "on hearing this he was naturally shaken" and "he returned to his office in a perplexed state of mind". Now by the lengthy discussion made hereinbefore as to what an 'agreement' is clearly an agreement of criminal conspiracy can be said to have come into existence, between Mr. Masood Mahmood and Mr. Bhutto. Furthermore he claims to have executed the said order of Mr. Bhutto, as he had no choice in the matter, but that would be tantamount to submission on his part which according to Black's Law Dictionary, and other legal Treatise (supra); would not mean that he had consented to the proposal made to him by Mr. Bhutto because every consent involves submission; but the mere submission does not necessarily involve consent. On the contrary it should be obvious that by his said evidence the offence

committed by Mr. Bhutto would be that of abetment under section 107, P.P.C., more so when in accordance with the provisions of section 90, P.P.C., the order of Mr. Bhutto carried out by him, Mr. Mamood Mahmood cannot be said to have given his consent thereto as by the type of threat extended to him by Mr. Bhutto and Mr. Vaqar Ahmad both he was injured in mind within the meaning of that expression appearing in section 44, P. P.C.

294. Furthermore, from the evidence of Mr. Masood Mahmood, it is clear that undue influence was brought to bear on him both by Mr. Bhutto and Mr. Vaqar Ahmad as undue influence has been defined thus in the Black's Law Dictionary (Revised Fourth Edition) as under:-

"Undue influence consists (1) in the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him - the purpose of obtaining an unfair advantage over him; (2) in taking an unfair advantage of another's weakness of mind; or (3) in taking a grossly oppressive and unfair advantage of another's necessities or distress: *Buchanan v. Pral* 39<sup>544</sup>, *Dolliver v. Dolliver*<sup>545</sup>."

295. As against this it is said therein that "influence obtained by persuasion and argument, or gained by kindness and affection is not prohibited where no imposition or fraud is practiced, and where the person's will is not overcome". Now by keeping these two definitions in juxtaposition with each other, it should be clear that Mr. Masood Mahmood was made to agree to the design of Mr. Bhutto by the exercise of 'undue influence' over him because he was then the all powerful Prime Minister of the country, whereas Mr. Masood Mahmood was a Government servant who could be retired from service at any time. "Persuasion and agreement or kindness and affection" was not the method by which Mr. Bhutto made him agree to his design but harsher methods were used against him.

296. Coming now to the contention of the learned Special Public Prosecutor to the effect, that the existence of criminal conspiracy in this case between Mr. Masood Mahmood and Mr. Bhutto has to be gathered not only from the evidence of Mr. Masood Mahmood but also from all the surrounding circumstances. He argued that there was no difference between the mode of proof of the offence of conspiracy and any other offence under the Penal Code with the only difference that in the case of a criminal conspiracy section 10 of the Evidence Act, 1872, has introduced the doctrine of agency whereby the act of one conspirator would be admissible in evidence against the other conspirators. He contended that the "proof of the existence of conspiracy is generally a matter of inferences deduced from certain criminal acts or parts done in pursuance of

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<sup>544</sup> ND 423, 167 NW 488 (489)

<sup>545</sup> 94 Cal. 642, 30 P.4

an apparent criminal purpose in common between them,". In support of his contention, he relied on a large number of judgments such as *Dents Dowling Mulcahv v. The Queen*<sup>546</sup>, *Ashulosh Chattopahyay and others v. Nalinakshya Bandopadhyay and others*<sup>547</sup>, *Nadir Ali Barqa Zaidi and others v. The State of U.P.*<sup>548</sup>, *Bhagwan Swaup v. State of Maharashtra*<sup>549</sup> and many others which may not be reproduced, as also on 15-A, Corpus Juris Secundum, p. 903; *Halsbury's Laws of England*. IV Edition (Volume 11), pare. 53; Corpus Juris Volume 12, p. 543; 16 American Jurisprudence (II edn.) p. 7; Gangoli on 'Joint Acts, Abetment and Conspiracies' (1926. Edition). Now by going through all the said judgments and legal literature, including a large number of other judgments, I have not come across a single case in which the typing of evidence given by Mr. Masood Mahmood was tend red by the prosecution in proof of the existence of criminal conspiracy between the accused. It is true that in almost all cases cited at the bar the Chapter as to the existence of conspiracy between the accused therein was unfolded by the evidence of approvers, but none of them claimed to have entered into the conspiracy due to threats, coercion, intimidation or undue influence exercised over them by the others. Furthermore, in each one of the cases, there was the authentic evidence of recoveries such as bombs, explosive materials. literature and printing machines or correspondence exchanged between the accused during the time when the conspiracy was afoot and remained in existence. In these circumstances, therefore, it is difficult to agree that by the type of evidence given by Mr. Masood Mahmood in the High Court, any criminal conspiracy came into existence between him and Mr. Bhutto. It would, therefore, follow that even if the contention of the learned counsel is accepted it would not help him because (1) all the evident brought on the record of the case under section 10 of the Evidence Act will have to be ignored; and (2) that sin any event the said evidence, when read with the evidence of Mr. Masood Mahmood would equally be irrelevant in proof of the, existence of conspiracy between him and Mr. Bhutto. To put it differently since the express evidence given by Mr. Masood Mahmood in the High Court not only does not establish the existence of any conspiracy between him and Mr Bhutto (but at best an abetment on the part of the latter) how can all the evidence brought on the record of the case under section 10 of the Evidence Act, under the assumption of the existence of a criminal conspiracy, be looked into, as the ram clearly must also relate to the proof of conspiracy by abetment and not criminal conspiracy.

297. By going through my notes, however, I noticed that the learned Special Public Prosecutor relied on *Kalil Munda and others v. King Emperor*<sup>550</sup> to show that a criminal conspiracy could as well be found between, A and B, if A orders B to commit a crime. I can quite see his point because; if support can be found for his said submission in the said judgment, perhaps he would be justified to contend that Mr. Masood Mahmood,

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<sup>546</sup> 1868 LR 3 HL 306

<sup>547</sup> AIR 1937 Cal. 467

<sup>548</sup> AIR 1960 All, 103

<sup>549</sup> AIR 1965 SC 682

<sup>550</sup> ILR 1901 Cal. 797



being a civil servant, could not have resisted the pressure put upon him by Mr. Bhutto and hence had no option but to obey his order for the assassination of Mr. Ahmad Raza Kasuri. By going through the judgment, however, it is clearly distinguishable. It may be mentioned that the judgment was delivered in the year 1901 whereas section 120-A, P.P.C. was brought on the Statute Book by an amendment in 1913. However, this fact by itself is not decisive. What is decisive, however, is that in that case the learned Judges, in view of the evidence on record held that there existed conspiracy between the appellants and in pursuance thereof they committed acts of violence, arson and similar other depredations. Their finding in that regard appears at page 802 of the judgment which reads as under:-

"Having regard to the similarity of these outrages, and the large tract of country, over which they occurred, there can be no doubt that the occurrence, with which we are immediately concerned, were the result of some conspiracy, and there can equally be no doubt that it was the preaching and exhortations of Birsa that brought about the said conspiracy."

298. It is true that three of the appellants therein, namely, Kali, Chamra and Malgu were specially ordered by their spiritual leader namely, Birsa to proceed to certain specified places for the perpetration of the outrages already agreed upon, but it was found on the evidence that the three of them were the disciples of Birsa, frequently attended the meetings addressed by Birsa, in which he preached violence against the British Government, and so they were held to be parties to the said conspiracy. Seen in this context the said orders given to them by Birsa were evidently given in pursuance of the conspiracy of which they were members. Furthermore, the judgment turns more on the language of the secondly clause of section 107, P.P.C, namely, A conspiracy by abetment, and hence there is nothing in the said judgment which can be said to have laid down any different principle than the one laid down in the large number of judgments cited from the bar.

299. Having said this, however. I find myself in agreement with the learned Special Public Prosecutor that an agreement of criminal conspiracy need not be in any particular form; it can be oral; in writing partly oral; partly in writing, or inferable from the conduct of the parties; as well as from the surrounding circumstances. This principle would seem to be equally applicable in the case of an agreement', as understood in the common parlance, as well as under the Contract Act unless the act itself requires it to be in a particular form. in which case the requirement of the Act has to be followed. In this behalf reference may be made to the well-known practice of some of the large business concerns which send articles of merchandise to consumers on the basis of 'approval' without there ever having been any contact between them directly or otherwise. However, if the recipient of the articles accepts and appropriates the same it would at once give rise to the coming into existence not only of an 'agreement' but a valid contract between him and the said commercial concern with the result that he would be

obliged to pay the price of the articles. Now normally a contract between two or more persons is preceded by an 'agreement' which in turn is preceded by a proposal made by one and the same accepted by the other. This is what is called a formal contract, but two cases may be quoted from page 869 of the Penal Law of India by Gaur, (1978 Edition), to show how an agreement can as well come into existence wholly, casually informally. The first case which is quoted as *Kelly's case*<sup>551</sup> arose in the following circumstances:-

300. Two persons, namely. Kelly and MacCarthy, had been engaged by the prosecutor for unloading oats from a vessel, and carrying them to his warehouse, Kelly being employed to draw them from the vessel and MacCarthy to carry them to Kelly's trams on which they were carried. Whilst one bag was being this conveyed, Kelly said to MacCarthy: "it is all right" and shortly afterwards MacCarthy stole some oats of two sacks and put them under the tram. Kelly was absent when this was done, but returned and took away the stolen oats with the rest. It was contended for Kelly that he could not be convicted of theft, but Maule, J., said that it was all one transaction in which both concurred, and that both having concurred, and both being present at some parts of the transaction, both might be convicted. The learned author says, and here I would quote his words: "They would be convicted here of conspiracy under section 120-A which is much wider than the abetment punishable under this section". The facts in the second case, which is reported as *Ram Dhai's case*<sup>552</sup> were that a woman prepared herself for sari in the presence of the prisoners who followed her to the pyre and stood by, one of them, her step-son, crying "Ram Ram", and another asking the deceased to repeat "Ram, Ram" in order to become sati, Upon these facts the Court found the prisoners guilty of conspiracy and accordingly punished them.

301. Furthermore, if an agreement is partly expressed and partly implied in the sense that it is incomplete and to prove its existence reliance is placed on circumstantial evidence then the latter must coalesce with what has been expressed and not inconsistent therewith. Examples in this respect have already been given in some part of the discussion earlier but to clarify the matter further let us again illustrate this point. In this respect I would take the evidence of Mr. Masood Mahmood as a concrete example. Now by reading his evidence it should be clear that. if the same could be said to have brought into existence a criminal conspiracy between him and Mr. Bhutto then the said agreement would be complete in all respects and would need no further evidence to it complete. It is his own case that in the meeting held by him with Mr. Bhutto the latter had expressed his abhorrence of Mr. Kasuri and told him to remind Mian Muhammad Abbas who already had his order through the former Director-General, FSF, to assassinate Mr. Kasuri. He protested but Mr. Bhutto shouted at him saying "you don't want Vaqar chasing you again, do you?" He further told him that he would personally hold him responsible for the execution of his order. On hearing this he was "shaken".

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<sup>551</sup> 2 C&K 379

<sup>552</sup> (1) AIR 35 All. 26

returned to his office in a "perplexed state of mind", called Mian Abbas to his office and conveyed him the said order of Mr. Bhutto. Now this being his evidence, can it be said that the so-called agreement entered into between him and Mr. Bhutto was not complete in every detail. The answer is obvious. In these circumstances, therefore, how can it be contended that all the circumstantial evidence in this case such as a prior and subsequent conduct of Mr. Bhutto has to be taken into consideration in proof of the existence of the criminal conspiracy between him and Mr. Masood Mahmood. A priori it would follow that since there came into existence no criminal conspiracy between Mr. Bhutto and Mr. Masood Mahmood, all evidence brought on the record of the case under section 10 of the Evidence Act such as the 'prior' and 'subsequent' conduct of Mr. Bhutto, the evidence of Mr. Saeed Ahmad Khan (P.W. 3), Mr. Welch (P.W. 4) and late Mr. Abdul Hamid Bajwa has to be rejected. See for example: *Maqbool Hussain v. The State*<sup>553</sup>, *Balmukand v. Emperor*<sup>554</sup>, *Kunfalal Ghose v. Emperor*<sup>555</sup>, *Vishnadas Lachmandas and others v. Emperor*<sup>556</sup>, *H. H. B. Gill and another v. The King*<sup>557</sup>, *Badri Rai and another v. State of Bihar*<sup>558</sup> and *Bhagwan Swarup v. State of Maharashtra*<sup>559</sup>.

302. The learned Special Public Prosecutor also relied on sections 8, 9 and 13 the Evidence Act, 1872, in support of the finding recorded by the High Court as to subsequent conduct of Mr. Bhutto as well as the conduct of P. Ws. Saeed Ahmad Khan, M. R. Welch and late Mr. Abdul Hamid Bajwa. In support of his contention he relied on a large number of judgments such as: *Emperor v. Percy Henry Burn*<sup>560</sup>, *Laijam Singh v. Emperor*<sup>561</sup> and *Rajmal Marwadi v. Emperor*<sup>562</sup>. As against this, Mr. Yahya Bakhtiar, the learned counsel for Mr. Bhutto relied on *Chatru Malak v. Emperor*<sup>563</sup>, *Shankarshet v. Emperor*<sup>564</sup>, *Chandrika Prasad v. Emperor*<sup>565</sup>, *Muhammad v. State*<sup>566</sup> and *Mohanlal Bhanlal Goela v. Emperor*<sup>567</sup>.

303. Upon the peculiar facts of this case, however, there seems to be no need to consider the rival contentions of the learned counsel for the parties or the judgments cited by them as already I have recorded the conclusion that (I) all the evidence relating to the subsequent conduct of Mr. Bhutto or for that matter of P. Ws. Saeed Ahmad

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<sup>553</sup> PLD 1960 S C 382

<sup>554</sup> AIR 1915 Lah.16

<sup>555</sup> AIR 1915 Cal. 26

<sup>556</sup> AIR 1944 Sindh 1

<sup>557</sup> AIR 1948 PC 128

<sup>558</sup> AIR 1958 SC 953

<sup>559</sup> AIR 1965 SC 682

<sup>560</sup> 41 C 268

<sup>561</sup> AIR 1925 All. 405

<sup>562</sup> AIR 1925 Nag. 372

<sup>563</sup> AIR 1928 Lah. 681

<sup>564</sup> AIR 1933 Bom. 482

<sup>565</sup> AIR 1930 Oudh 321

<sup>566</sup> AIR 1934 Lab. 695

<sup>567</sup> AIR 1937 Sindh 293

Khan, Mr. M. R. Welch and late Mr. Bajwa can as well be explained on the basis of another reasonable hypothesis; and (2) in any event the same would be inadmissible against Mr. Bhutto, because the prosecution has failed to prove the existence of any criminal conspiracy entered into by him with Mr. Masood Mahmood, or anyone else for the assassination of Mr. Kasuri, with the result that the said evidence brought on the record of the case under section 10 of the Evidence Act has to be excluded. In this respect reference may profitably be made to *Sardul Singh Caveeskar v. The State of Bombay*<sup>568</sup>; in which the scope of section 10 of the Evidence Act was considered. At page 764 of the judgment, after recalling the principle of law laid down in AIR 1940 P C 176 this is what was observed:- It appears, therefore that 67 IA 336; AIR 1940 PC 176 (A) is a clear authority for the position that in criminal trials, on a charge of conspiracy evidence not admissible under section 10 of the Evidence Act as proof of the two issues to which it relates. *viz.*, of the existence of conspiracy and of the fact of any particular person being a party to that conspiracy, is not admissible at all".

304. Mr. Yahya Bakhtiar the learned counsel for Mr. Bhutto also raised during the arguments a large number of legal questions (22 in number) again the impugned judgment of the High Court. However, since some of these questions have been dealt with hereinbefore or else in the judgment proposed to be delivered by my Lord the Chief Justice, they need neither be reproduced here nor dealt with again except those questions for the resolution of which regrettably I have not been able to agree with the view taken by his Lordship. Furthermore, in respect of some of the questions dealt with by my Lord the Chief Justice, I sincerely regret not to have been able to agree with the conclusions recorded by him but since for the purpose of my judgment they are not relevant I would just make a mention of them without dealing with them in any manner. Now these questions are covered by the topics: "Implications of Camera Proceedings"; "Scope of section 540-A, Cr. P.C. "; and "Bias". In this view I would now proceed to examine the most essential question in this case, namely, the construction of section 111, P.P.C., which runs as under:-

"111. *Liability of abettor when one abetted and different act done.* - When an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it;

*Proviso.* - Provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment."

305. The view taken by my Lord the Chief Justice is that in the light of all the facts and circumstances and the evidence in this case, the conviction of the appellants by the High Court under sections 120-B/302, P.P.C., read with section 301/109/111, P.P.C.,

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<sup>568</sup> AIR 1957 SC 747

and section 307 read with section 109. P.P.C., is unexceptionable. But with profound respect, I have not been able to agree with the said conclusion nor with the reasoning in support thereof. My own reasons for the resolution of this question are as follows:-

306. Mr. Yahya Bakhtiar, the learned counsel for Mr. Bhutto contended that the different act resulting as a probable consequence of the act abetted should be foreseeable at the time the conspiracy was hatched, that is that the different act was likely to be committed to order to the carrying out of the act abetted irrespective of the subsequent development. In support of this contention the learned counsel relied on *Po Ya v. Emperor*<sup>569</sup>, *Harnam Singh v. The Emperor*<sup>570</sup>, *Queen Empress v. Mathura Das and others*<sup>571</sup>, *Mumtaz Ali v. The Emperor*<sup>572</sup>, *Girja Prasad Singh and others v. Emperor*<sup>573</sup> and *Jaimangul and others v. The Emperor*<sup>574</sup>.

307. On the other hand, Mr. Ijaz Hussain Batalvi, the learned Special Public Prosecutor, submitted that in construing the words "probable consequence" in the proviso to section 111, the criterion should be as to in what relation the act done stands to the act abetted; and if it stands in close proximity that is when the act done is the result of the act abetted, it would fall within the ambit of those words even if it be incidental. Consequently, as the death of Nawab Muhammad Ahmad Khan was the result of the act abetted, that is the firing, of automatic weapons at Ahmad Raza Kasuri, it must be regarded as the probable consequence of such abetment.

308. It was next urged that the execution of the plan was itself a part of the conspiracy and, therefore, the abettor cannot take the benefit of the proviso if he has limited imagination or through his recklessness is not able to foresee the probable consequence of the abetment irrespective of the fact whether the details in regard to the time, place and manner to accomplish the unlawful object were or were not given as he had himself let loose the evil force in motion. In other words, the probable consequence of abetment was spelt out as foreseeable from the order given by the abettors to kill Ahmad Raza Kasuri. In support of his contention the learned Special Public Prosecutor relied on a passage on page 161 of *Russel on Crimes* (12th Edition); *American Jurisprudence* (Volume 14), pages 813, 829 and 831; *Commentary on Law of Crimes* by Dr. Nand Lal (1929 Edition) at page 534; *Sahib Ditta v. The Emperor*<sup>575</sup>, *Victor Edward Betts and Herbert Charles Ridely*<sup>576</sup> and *John Boyed v. United States*<sup>577</sup>.

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<sup>569</sup> AIR 1919 Low. Bur. 20

<sup>570</sup> AIR 1919 Lah. 256

<sup>571</sup> ILR 6 All. 491

<sup>572</sup> AIR 1935 Oudh 473

<sup>573</sup> AIR 1935 All. 346

<sup>574</sup> AIR 1940 Bom. 126

<sup>575</sup> (1885) 20 PR 43 (Cr.)

<sup>576</sup> 22 Cr. App. R 194

<sup>577</sup> 142 US 1077

309. The controversy, therefore, turns on the true construction of the proviso. Both the counsel agree that it has to be construed strictly. But the main dispute is as to the test to be applied in determining whether the abettor had in contemplation the probable consequence, of the abetment whilst giving the orders to kill Ahmad Raza Kasuri having regard to the language of the proviso.

310. In construing a penal provision there is no manner of doubt that an act entailing penal consequences should not be applied to anyone who is not brought within it in express language. Accordingly the rule of strict construction requires that the language shall be so, construed as no case shall be held to fall within it which does not fall within the reasonable interpretation of that enactment.

311. Again, it is an accepted norm of interpretation that where two equally reasonable interpretations are possible, the penal provision should be so construed as not to place a burden on the subject; and that further in case of doubt the benefit should go to the subject. If section 111 stood minus the proviso then the controversy would not have presented any difficulty as according to its unqualified language the abettor would have been liable for the different act in the same manner and to the same extent as the principal. The proviso, however, puts an embargo and if the proviso were to be construed loosely then it is difficult to say to what extent it might not be stretched. To guard against this danger the words used therein should be given reasonable interpretation to bring a case within it. It applies to a case where different act is committed as a probable consequence of the act abetted; and that the act abetted should have been committed in pursuance of the conspiracy constituting such abetment. The expressions 'probable consequence of abetment' and 'in pursuance of the conspiracy which, constituted the abetment' regulate the application of section 111. The former expression conveys the meaning of a likely event or which can reasonably be expected to follow from the act abetted but would not include an unusual or unexpected result, whilst the latter confines the act abetted to have been committed to achieve the immediate object of the conspiracy, which is not without a purpose for the abettor could not be held liable for a distinct act not in any way connected with the immediate object of the conspiracy. In both the expressions the word 'abetment' is of significance which expressly refers to persons engaged in the conspiracy for the doing of the thing, according to section 107, secondly, which defines it. Therefore, there seems to be a nexus between the words 'probable consequence' and the agreement to do 'that thing' which reasonably leads one to conclude that the likely or the expected result must be foreseeable at that crucial time otherwise the principal can make the abettor liable for any indiscretion on his part which cannot be the object of the proviso as it was enacted to draw a line between the result likely to flow from the act abetted as distinct from an unexpected act. (See Illustration B of section 111).

312. It will not be difficult in a case where the conspirators agree to carry out the plan in a particular manner to determine the liability of the abettor as the likely result would

be foreseeable. For example, If A and B conspire to kill C by a fire-arm whilst he is being driven to a theatre; and if B fires at C killing his driver then obviously A cannot escape the liability for the result which should have been foreseeable as it was likely that the driver might also be hit by the bullet. Again, where the immediate object is to abduct a girl, with force if necessary, then grievous injury or possible death to her rescuers must be a likely or expected result to follow in which case the abettor would be liable if such result ensues. Similarly, illustration 'C' to section 111 also furnishes an example of the abettor being burdened with the liability of the likely result.

313. The difficulty arises in a case where the execution of the plan is left to the principal and it is then for him to choose how the immediate object is to be achieved but in that case to the test, as formulated by Straight J., in *Queen-Empress v. Mathura Das and others* which is in no way different would be applicable, namely, "whether having regard to the immediate object of the instigation or conspiracy the act done by the principal is one which, according to ordinary experience and common sense, the abettor must have foreseen as probable. The determination of this question as to the state of man's mind at a particular Moment must necessarily always be a matter of serious difficulty, and conclusions should not be formed without the most anxious and careful scrutiny of all the facts". Therefore, the relevant time could not be another but when the conspirators engaged themselves to do a particular thing which can throw light as to the state of man's mind and to make the probable consequence foreseeable otherwise, being absent from the place of the incident, it would not be possible to judge it.

314. If the contention of the learned Special Public Prosecutor is given effect to in its entirety, then howsoever erring the principal is, the abettor would be liable, for, it was he who had let loose the evil force in motion and, therefore, should have foreseen the act abetted. Such a wide interpretation cannot be given to the words 'probable consequence' as otherwise it would be impossible to fix any limits to an abettor's liability. Again it will not be possible to generalize instances in which such a probable consequence can be foreseeable or not and as Straight, J., said, "conclusions should not be formed without most anxious and careful scrutiny of all the facts". This approach is fundamental and sounds correct. In the above-cited case the immediate object was to commit robbery simpliciter but excessive force was used as a result of which two persons died. It was held on a consideration of facts and circumstances of the case that the abettor could not be held liable under section 111 as it could not be said that he had foreseen the probable consequence of the act abetted on the test enunciated above.

315. Again, the facts in *Po Ya v. Emperor* also illustrate an example where the instigation was to strike, of the headman but the blow fell on his son who was sitting next to him in the same bullock-cart after striking the aide of the headman and it was held that thus result was not the probable consequence of instigation.

316. In *Hornam Singh v. Emperor* while committing robbery one of the robbers fired and killed a man and it was held that such killing was not the probable consequence of robbery as instances were not wanting where robberies were committed without murders and, therefore, even if section 111 was invoked still it could not be regarded as the probable consequence of robbery.

317. In *Mumtaz Ali v. Emperor* Mst. Ashrafan "called out to her son" Mumtaz while grappling with Mst. Sukka who brought out a *Lathi* from his house and gave a blow on her head which proved fatal. It was held that the call could only mean an instigation to chastise her but not to kill her. As such her death was not regarded as the probable consequence of such instigation.

318. The facts in *Jaimangal and others v. Emperor*<sup>578</sup>, are distinguishable, as there the matter was decided on the consideration that the persons attacking Ram Parasad and Ram Lakhan had combined against their common enemy and as such each abetted the conduct of the other within (he meaning of section 107, and as each one of them had participated in the attack. they were liable under section 114. The principle laid down in this case will not be applicable as it was distinguishable on facts and the case fell under a different section.

319. In *Sonappa Shina Shetty v. Emperor*<sup>579</sup>, the instigation was to kill A but the principal killed B as he came to rescue him and it was held that the killing of B was a distinct act for which the abettor was not liable, as it was neither the probable consequence nor done in pursuance of the conspiracy. This case provides an instance where the ingredients of the proviso were not fulfilled and, therefore, section 111 was not held to be applicable.

320. In the case of *Girja Prasad Singh and others v. Emperor* there was an affray over the stealing of mangoes by Mst. Bhagwati, Bishnath shouted "*maro sale ko*" upon which Girja Prasad who wore a *kurta* and had a *lathi* and Mst. Bhagwati both caught hold of the deceased Barka, whereafter Girja Prasad stabbed him in the abdomen with a spear head which he took out from *kurta*. The question arose as to the offence committed by Bishnath and it was held that the words constituting the instigation meant nothing more than thrashing and if Girja Prasad stabbed him with a spearhead it was not a probable consequence of abetment. In holding so, the learned Judges held:-

"..... In our judgment Bishnath can only be convicted for abetment of murder if the use of the spearhead was a probable consequence of the shout "*maro sale ko*" and that the blow was struck under the influence of the instigation. Having regard to the fact that the stab with the spear head followed immediately after

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<sup>578</sup> AIR 1936 All, 437

<sup>579</sup> AIR 1940 Bom. 126



Bishnath's shout "*maro sale ko*" it might well be argued that the act of stabbing was committed under the influence of the instigation, but even so that is not enough to make Bishnath liable. The act of stabbing being a different act from the act of thrashing which was the act instigated, the prosecution must show not only that the act of stabbing was committed under the influence of the instigation, but also that it was a probable consequence of the instigation to thrash.

A probable consequence of an act is one which is likely or which can reasonably be expected to follow from such an act. An unusual or unexpected consequence cannot be described as a probable one. When the consequence of an act is such that a reasonable man could not be expected to foresee that it would follow from such an act, such consequence cannot be described as a probable one. On the contrary it can only properly be described as an unexpected, unlikely or improbable consequence. It is a well-established rule of construction that words in a statute creating a criminal offence must be construed strictly. In our judgment a wider meaning to the phrase 'probable consequence' in section 111, Penal Code, should not and cannot be given, otherwise it would be impossible to fix any limits to an abettor's liability. When the act done is different from the act instigated, an abettor, in our view, is only liable for such a different act if it was a likely consequence of the instigation or if it was an act which the instigator could reasonably have been expected to foresee might be committed as a result of his instigation."

321. The above cases affirm the test as laid down by Straight, J., in *Queen Empress v. Mathura Das and others* to determine the culpability of the abettor in the facts and circumstances of each particular case and strictly follow the rule of construction of a penal statute, that is, unless the result is likely or expected to follow from the act abetted and as such was foreseeable, the abettor cannot be held guilty of it.

322. Adverting now to the cases relied on by the learned Special Public Prosecutor, the principle laid down in *Victor Edward Betts and Herbert Charles Ridely*; and *Alan Bainbridge* is reflected in the following passage (also cited) at page 161 of *Russel on Crimes* (12th Edition), which was vehemently pressed into service:-

"....But if the principal complies in substance with the instigation of the accessory, varying only in circumstances of time or place, or in the manner of execution the accessory will be involved in his guilt: as if A commands B to murder C by poison, and B does it by a sword or other weapon or by any other means, A is accessory to this murder; for the murder of C was the object principally lit contemplation, and that is effected. And where the principal goes beyond the terms of the solicitation, yet if in the event, the felony committed was a probable consequence of what was ordered or advised, the person giving such orders or

advice will be an accessory to that felony. Thus if A advises B to rob C, and in robbing him B kills him either upon resistance made, or to conceal the fact or upon any other motive operating at the time of the robbery in such a case A is accessory to the murder as well as to the robbery. And if A solicits B to burn the house of C, and B does it accordingly; and the flames taking hold of the house of D, that likewise is burnt; A is accessory to B in the burning of the house both of C and of D. The advice, solicitation, or orders of A were pursued in substance; and the events, though possibly falling out beyond his original intention, were in the ordinary course of things, the probable consequences of what B did under the influence and at the instigation of A."

But in the present case the liability is to be assessed upon the language of section 111, P.P.C., and not by the principle of common law on which the liability of the accessory to the felony is grounded. It will be the words of the section which provide a guide to determine the liability of the abettor and the above statement of law must be read subject to its limitations.

323. *John Boyed v. United States*<sup>580</sup>; enunciates the same principle of liability as laid down in *Jaimangal and others v. The Emperor* namely, that each participant abets the conduct of the other and, therefore, is liable for the result likely to flow from the act abetted. Here there is no comparison with the liability burdened under section 111.

324. In *Sahib Ditta v. The Empress*<sup>581</sup>, the instigation was to kill Nihal through charms but he was killed by a different method; and it was held that he was nonetheless guilty of abetment of murder. The learned Special Public Prosecutor in placing reliance on this case has referred to the statement of law at page 46 of the Report which is as under:

"The rule for determining criminal responsibility in cases of this class is thus laid down in Bishop on Criminal Law:

Section 641. One is responsible for what wrong flows directly from his corrupt intentions; but not, though intending wrong, for the product of another's independent act. If he set in motion the physical power of another, he is liable for its result. If he contemplated the result, he is answerable though it is produced in a manner he did not contemplate. If he did not contemplate it in kind, yet if it was the ordinary effect of the cause, he is responsible. If he awakes into action an indiscriminate power, he is responsible. If he gave directions vaguely and incautiously, and the persons receiving them acted according to what he might have foreseen, would be the understanding, he is responsible. But if the thing done was a fresh and independent product of the mind of the doer, the other is

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<sup>580</sup> 142 US 1077

<sup>581</sup> (1885) 20 P R 43 (Cr.)

not criminal therein merely because when it was done, he meant to be a partaker with the doer in a different wrong."

325. The principle of liability is widely stated as compared to what Straight, J., said in *Queen-Empress v. Mathura Dos and others*, which the learned Special Public Prosecutor conceded to be the correct statement of law. If this be so then the rule of interpretation requires that the burden, other than what flows from the reasonable interpretation of the words 'probable consequence', should not be placed on the abettor.

326. The quotation at page 534 of the *Commentary by Dr. Nand Lal* (1929 Edn.) dealing with the liability of the abettor cannot be read beyond the limit judicially interpreted.

327. It will not be useful to refer to Corpus Juris-Secundum as the case has to be determined on the language of the section and not the general principle.

328. Coming now to the facts of the case, Mr. Masood Mahmood allegedly stated that appellant Mr. Zulfikar Ali Bhutto told him that his predecessor had already been given direction to get rid of Mr. Ahmad Raza Kasuri and that he further told him to tell Mian Abbas to get on with the job and produce the dead body of Mr. Ahmad Raza Kasuri or his body bandaged all over. This was all that he stated. Can it then be said that he would have foreseen the death of Nawab Muhammad Ahmad Khan as a probable consequence of the immediate object of the conspiracy while leaving the execution of the plan with Mian Abbas? Mian Abbas then secured the services of Mr. Ghulam Hussain, approver, to trace and finish off Mr. Ahmad Raza Kasuri at Islamabad, who on 24th of August, 1974, after contacting Mr. Ahmad Raza Kasuri on telephone spotted him sitting in his car parked between M.N.A.'s Hostel and the National Assembly Building, and talking to a stranger, standing outside the car. He directed his companions, namely, Mulazim Hussain and Allah Bakhsh not to open fire as there was likelihood of the stranger being hit. Later, the same day, he failed to carry out the order in spite of having followed the car of Mr. Ahmad Raza Kasuri who was the only occupant and instead told Mulazim Hussain to fire in the air. Again, in regard to the incident at Lahore on the fateful day he said to his companions to find out Mr. Ahmad Raza Kasuri so as to give some result and thereafter they left in a jeep towards Model Town and spotted his car proceeding towards Ferozepur Road where "the main road for Model Town branches off from Ferozepur Road". However, they did not follow it as they were turning on the road leading to Model Town in which case they had to reverse the jeep before following the car; and finally succeeded in tracing it parked in front of a house in Shadman Colony where wedding was being celebrated inside a Shamiana, after telephoning his residence to find out his whereabouts. This place was at a distance of about 80 to 90 yards from the roundabout where Shah Jamal Road ends and Shadman Road begins. A number of other cars were also parked there and the place was illuminate. After the detection of the car, they returned to the office of FSF where they resided and chalked out a plan from where to launch the attack on Mr. Ahmad

Raza Kasuri. A site at the intersection facing the house where the car was parked was selected. At 10-30 p.m. they went with their automatic weapons. Arshad Iqbal was posted at the intersection to ensure that Mr. Ahmad Raza Kasuri and his car was there. Rana Iftikhar was posted at the intersection behind a shoulder-high hedge. Arshad Iqbal was ordered to fire in the air whilst Rana Iftikhar was next to fire at the first car which came before him after the first burst. It is here significant to note that Ghulam Hussain stated that one of the reasons for ordering Arshad Iqbal to fire in the air was that he stood facing the Shamianas and ii he fired at the car of Mr. Ahmad Raza Kasuri then "people in the Shamianas might be hit" and so also was the danger of people sitting in the car or those walking on the road being injured. Finally, at mid-night he heard three bursts and saw a car moving without headlights and proceeding towards Canal Road.

329. From the narration of these facts it is clear that the approver was not only conscious of the fact that except for Mr. Ahmad Raza Kasuri no one else should be hurt but taken precautions in that behalf. In the case of the car of Mr. Kasuri, however, he evidently disregarded the said caution which in that respect makes his conduct inconsistent. The question, which therefore, arises is whether by firing at the car of Mr. Ahmad Raza Kasuri with automatic weapons, as a result of which his father was killed, can it be said that the killing of his father was the likely result of the act abetted by Mr. Bhutto? The learned Special Public Prosecutor has indeed argued that having set the forces of evil in motion, Mr. Bhutto would be liable as the act of firing on the car of Mr. Ahmad Raza Kasuri was the act abetted by him although in consequence of it his father was killed. I am afraid if this argument is taken to its logical conclusion it would be tantamount to obliterating the obvious distinction between section 109 and section 111, F. P.C. Unlike the proviso to section 111, P.P.C., in which the expressions "probable consequence of the abetment" and "the act done or committed under the influence of the instigation or with the aid or in pursuance of the conspiracy which constituted the abetment" appear, and will have to be give their proper meaning, there is no such requirement in section 109, P.P.C., Furthermore, section 109, P.P.C., is obviously a residuary section whereas section 111, P.P.C., is a special section applicable only to the facts of the case of present kind.

330. The conspiracy in this case remained floating for a period of six months during which period the conduct of the approver, in respect of the precautions which he had taken throughout that no stranger should be hurt, should be the touch-stone on which must depend the resolution of the said question. Having thus exhibited, rather an unusual degree of care and caution why on earth in respect of the incident at Lahore he suddenly became indifferent by throwing into the wind even the elementary principle of care and caution? It is his own evidence that the car of Mr. Ahmad Raza Kasuri was parked at a distance of just about 90 paces from the spot where Arshad Iqbal was posted by him. In this view the least that he ought to have done was to ensure that when Mr. Kasuri entered his car he was not accompanied by any other person. In these

circumstances, and also of having been conscious that no or, else sitting in the Shamianas should be hurt, the firing made on the car of Mr. Kasuri by Arshad Iqbal and Rana Iftikhar with automatic weapons was not only a wreckless act but under the circumstances an independent act of their own. This conclusion on the language of proviso to section 111, P.P.C., would seem to be the only possible conclusion, as Mr. Bhutto cannot be said to have foreseen the possibility of the murder of Nawab Muhammad Ahmad Khan when he gave the order for the assassination of Mr. Kasuri.

331. The learned Special Public Prosecutor, however, emphasized the fact that since the attack on the car of Mr. Kasuri was made by automatic weapons, Mr. Bhutto could not escape the responsibility, if in the process Nawab Muhammad Ahmad Khan was killed. Now testing the force of his contention let us assume for a moment that-

(1) the attack in question was made on the car of Mr. Kasuri in a crowded street with automatic weapons, as a result of which a passerby was killed, or

(2) in a public bus in which Mr. Ahmad Raza Kasuri was travelling and again a passenger was killed.

Will it have been possible on these facts then to hold that the killing of the said two persons was the probable consequence of the abetment of Mr. Bhutto? when he gave the order for the assassination of Mr. Kasuri. Upon the language of the proviso to section 111, P. P.C., which has to be narrowly and reasonably construed, there should be no difficulty to answer both these questions in the negative. The prosecution case no doubt is to the contrary, but then if the argument of the learned Special Public Prosecutor is taken to its logical conclusion, it could as well mean that finding no other suitable opportunity, a bomb could as well be placed by or at the behest or approver Ghulam Hussain in an aircraft, in which Mr. Kasuri was travelling, in consequence of which many innocent lives could have been lost. Will it have been possible then to hold that the said act was the probable consequence of the abetment of Mr. Bhutto? when he gave order for the assassination of Mr. Kasuri. The answer should be obvious.

332. The High Court, in convicting appellant Bhutto under section 301 read with sections 111 and 109, P.P.C., has not taken into consideration, with respect, the reasonable interpretation of section 11.1, but has disposed of the question on its language in disregard of the peculiar facts and circumstances of the case. At least some attention should have been diverted to the limitation placed by the proviso which regulates the application of section 111, P.P.C., which was not done. In the result, the High Court erred in convicting the appellant under section 301 read with section 111, P.P.C., As for the application of section 109, P. P.C., different considerations arise with which I shall presently deal.

333. Mr. Ijaz Hussain Batalvi, submitted in the alternate that the abettor would be liable under section 301 read with section 109, P.P.C., on the premise that the principal, as an agent of the abettor, acts in furtherance of the common intention as in the case of participants sharing the common intention in killing another person instead of the intended victim. The liability arises as the law takes into account the transfer of malice as embodied in section 301. Thus, where the firing was intended to kill Mr. Ahmad Raza Kasuri but instead the bullet hit his father, resulting in his death, the abettor would nonetheless be liable for his murder without there being the requisite intention or knowledge by reference to section 109, P. P.C.

334. Section 301 is a species of culpable homicide and is illustrated by illustration (a) to section 299, P.P.C., though it does not find place in the definition of the term "culpable homicide" in section 299, P. P.C., V. B. Raju in his Commentary on the Penal Code (1957 Edn.) says;

"This section does not enact any rule not deducible from the two preceding sections, but it declares in plain language an important rule deducible from those sections just as an explanation to either section 299 or section 300 as it relates to both."

Therefore, it cannot be said to be a specific penal provision as its principle is grounded in the preceding sections. The question arises whether the abettor can be held guilty for having committed this offence by reference to section 109. Section 109, P.P.C., reads as under:

"109. *Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment* - Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

*Explanation.* - An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment:"

This section from its language contemplates the abetted act to have been completed that is, if murder is instigated and the victim is killed, only then it provides for the punishment of such an abetment but only when there is no other specific provision in this behalf; whereas section 111 deals with the different act having been committed as a probable consequence of abetment. The different act in section 111 would include an offence under section 301, P. P. C, or for that matter any other section of the Penal Code. For example, if the instigation is to commit robbery but in the course of commission of that act violence is used and the victim dies, as a probable consequence of the act

abetted, then the death would be a different act within the meaning of section 111, P.P.C., The distinction thus is apparent between the two sections. In one the abetted act is completed and to the p other a different act is committed as a probable consequence of abetment; and where the Code provides a specific penal provision for dealing with a situation where a different act is committed, section 109 will have no application; for, that is a residuary provision. It is section 111 which will be applicable. Accordingly, it is idle to contend that the abettor can convicted under section 301 read with section 109, P. P.C.

335. Mr. Yahya Bakhtiar, the learned counsel next argued that in the High Court no charge was framed against Mr. Bhutto under section 111, P.P.C., yet he has been convicted thereunder which is illegal. He argued that in the three charges framed against him he was given notice fact only of the that-

(1) in the middle of 1974, he conspired with approver Masood Mahmood to assassinate Mr. Ahmad Raza Kasuri through the FSF and thereby committed an offence under section 120-B, P.P.C.;

(2) in pursuance of the said conspiracy and in pursuance of the directions given by Mr. Masood Mahmood to Mian Muhammad Abbas an attack with automatic weapons was made on the car of Mr. Ahmad Raza Kasuri at Lahore by appellants Arshad Iqbal and Rana Iftikhar under the overall supervision and organization of P.W. Ghulam Hussain, as a result of which his father Nawab Muhammad Ahmad Khan was killed, and thereby committed an offence under section 302 read with sections 109 and 301, P.P.C.; and

(3) in pursuance of the said criminal conspiracy he aided and abetted in circumstances narrated in charge No. 2, the commission of the offence of attempted murder on the life of Mr. Ahmad Raza Kasuri, and thereby committed an offence punishable under section 307 read with section 109, P.P.C., Upon these facts his grievance is that the High Court had no jurisdiction to convict Mr. Bhutto under section 111, P.P.C., for the following reasons:-

(1) That the framing of a charge under section 111, P.P.C. against Mr. Bhutto was essential, as it relates to a distinct and independent liability than the one envisaged by section 109, P. P. C.;

(2) that neither the High Court nor the prosecution were even aware of the said requirement of law, as notice of section 111, P.P.C, seems to have been taken only while writing the impugned judgment;

(3) that Mr. Bhutto had no notice of the charge under section 111 P.P.C., and consequently he had no opportunity to meet the said charge during his trial;

(4) that in any event there is no evidence on record to sustain the said charge, therefore, the conviction recorded thereunder is not only illegal but without jurisdiction;

(5) that in the case of constructive liability, with which Mr. Bhutto was charged, no conviction could have been recorded by the High Court under section 111, P.P.C., unless Mr. Bhutto was put on notice of the charge thereunder;

(6) that in view of the facts and circumstances of this case it would be incompetent for this Court to uphold the said finding recorded by the High Court by invoking in aid sections 237 and 238, Cr. P.C.; and

(7) that the said error of law committed by the High Court was not curable under sections 535 and 537, Cr. P.C., as Mr. Bhutto has been clearly prejudiced.

In support of his contention, the learned counsel relied on a large number of judgments out of which only the following may be quoted: *Jaifar and others v. Idris Ali*<sup>582</sup>, *Muhammad Anwar rind another v. The State*<sup>583</sup>, *Surajpal v. The State of Uttar Pradesh*<sup>584</sup>, *Amir Bakhsh v. The State*<sup>585</sup>, *The State v. Mian Muhammad Latif and others*<sup>586</sup>, *The State v. Abed Ali*<sup>587</sup>, *King-Emperor v. Charles John Walker*<sup>588</sup>, *Nanak Chand v. State of Punjab*<sup>589</sup>, *Narvirchand and others v. The State*<sup>590</sup>, *Dhum Singh v. Emperor*<sup>591</sup> and *Raghunath Kandu v. Emperor*<sup>592</sup>.

336. The learned Special Public Prosecutor on the other hand argued that the contention raised by Mr. Yahya Bakhtiar was only technical, as in view of the facts and circumstances of this case, this Court would be competent to invoke in aid sections 236, 237 and 238, Cr. P.C. with a view to upholding the finding recorded by the High Court against Mr. Bhutto under section 111. P.P.C., He argued that by the type of charges framed against him he had full notice of the fact that he was charged for the abetment by conspiracy of assassinating Mr. Kasuri through the F.S.F. In that behalf he was charged under section 109, P. P. C, which relates to an offence by abetment, and consequently it would be idle to contend that he had no notice of the charge under

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<sup>582</sup> PLD 1951 Decca 128

<sup>583</sup> PLD 1956 SC (Pak.) 440

<sup>584</sup> PLD 1956 SC (Ind.) 21

<sup>585</sup> PLD 1960 Lah. 15

<sup>586</sup> PLD 1962 Kar. 756

<sup>587</sup> PLD 1963 Dacca 806

<sup>588</sup> AIR 1924 Bom. 450

<sup>589</sup> AIR 1955 SC 274

<sup>590</sup> AIR 1952 Madh. Bha. 17=1952 Cr. LJ 246 (Madh. Bha.)

<sup>591</sup> 26 Cr. LJ 1057 (All.)=AIR 1925 All. 448

<sup>592</sup> 27 Cr. LJ 152 (All.)



section 111, P.P.C., which also relates to the commission of an offence by abetment. In support of his contention he also relied on a large number of judgments: *Muhammad Atmar and another v. The State*<sup>593</sup>, *Amir Bakhsh v. The State*<sup>594</sup>, *The State v. Mian Muhammad Latif and others*<sup>595</sup>, *The State v. Abed Ali*<sup>596</sup>, *Jehanzeb Khan v. The State*<sup>597</sup>, *King-Emperor v. Charles John Walker*<sup>598</sup> and *Hanmant Rao v. Emperor*<sup>599</sup>.

337. Before considering the respective contentions urged by the learned counsel, it would be appropriate to reproduce sections 109 and 111, P.P.C., as well as sections 233, 236, 237 and 238, Cr. P.C., which respectively read as under:-

"233. Separate charges for distinct offences. - For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239.

*Illustration*

A is accused of a theft on the occasion, and causing grievous hurt on another occasion. A must be separately, charged and separately tried for the theft and causing grievous hurt.

236. *Where it is doubtful what offence has been committed.* - If a single act or series of acts of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

237. *When a person is charged with one offence, lie ran be convicted of another.* - (1) If, in the case mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged Under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.

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<sup>593</sup> PLD 1956 SC (Pak.) 440

<sup>594</sup> PLD 1960 Lah. 15

<sup>595</sup> PLD 1962 Kar. 756

<sup>596</sup> PLD 1963 Dacca 806

<sup>597</sup> PLD 1963 Pesh. 145

<sup>598</sup> AIR 1924 Bom. 450

<sup>599</sup> AIR 1925 PC 180

238. *When offence proved included in offence charged.* - (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

(2-A) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.

(3) Nothing in this section shall be deemed to authorize a conviction of any offence referred to in section 198 or section 199 when no complaint has been made as required by that section.

338. While I would be dealing with these sections in some detail presently, it would be useful to take note of some other sections appearing in Chapter XIX of the Code of Criminal Procedure. The first section of which notice may be taken is section 221, which says that every charge under this Code shall state the offence with which the accused is charged; if the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only; if the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged; and that the law and section of the law against which the offence is said to have been committed shall be mentioned in the charge. The next section is section 222, which says that the charge shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom; or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged. Section 223, which is the next section says that when the nature of the case is such that the particulars mentioned in sections 221 and 222 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose. The next section is section 225, which says that no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the raise as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice. Section 227 is the next section, which says that any Court may alter or add to any charge at any time before judgment is pronounced. But every such alteration or addition shall be read and explained to the accused. The next section is section 32, which says that if any Appellate Court, or the Court of Session ..... is of opinion that any person convicted of an offence was misled in his defence by

the absence of a charge or by any error in the charge, it shall direct a new trial to be held upon a charge framed in whatever manner it thinks fit. If the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

339. Now a perusal of these sections together would seem to give rise to the following principles-

(1) that the framing of a specific and distinct charge in respect of every distinct head of criminal liability constituting an offence is the basic requirement of law;

(2) that an accused has to be put on notice in respect of the charge either by naming the offence, if the law has given to the offence any name failing which so much of the definition of the offence must be stated as to give to the accused notice of the matter with which he is charged;

(3) that the charge must contain such particulars as to the person (if any) against whom; or the thing (if any) in respect of which, an offence has been committed;

(4) that if in a case the particulars mentioned in sections 221 and 222, Cr. P.C. do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed by him;

(5) that no error or omission in the charge shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission and the same has occasioned a failure of justice;

(6) that a Court may alter or add to any charge at any time before judgment is pronounced. But every such alteration or addition must be read and explained to the accused; and

(7) that if an Appellate Court, or the Court of Session, in the exercise of its revisional powers, is of the opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by any error in the charge, it must direct a new trial to be held upon the charge framed but if the opinion recorded is that no valid charge could be preferred against the accused in respect of proved facts, his conviction must be quashed.

340. It would thus be seen that these principles do seem to contain the essential particulars of *audi alteram partem*. The essential question which must be answered in each case would, therefore, be whether, in the absence of a specific and distinct charge framed against him by the trial Court, an accused can be said to have been prejudiced in

the sense of having been condemned unheard or else taken unawares or handicapped in his defence. If the Court is of the opinion that he was indeed prejudiced then the Appellate Court must either direct his new trial to be held upon a charge framed in whatever manner it may think fit or else quash his conviction, if the conclusion reached is that in respect of facts proved no valid charge could be preferred against him. This in my view would seem to be the legislative intent gleaned from the said various sections, which indeed are in consonance with the basic norms of the administration of justice, namely, that no one shall be condemned unheard.

341. Keeping these principles in view, let us proceed to examine the scheme of sections 233, 236, 237 and 238, Cr. P.C. Section 233 need not detain us because it is complementary to section 221 which has already been discussed. However, sections 236, 237 and 238 are the more relevant sections requiring proper construction, as both sides have relied on them in support of their respective contentions. Now section 236 should present no difficulty it is captioned: "Where it is doubtful what offence has been committed," and these words would seem to provide the key to the operative part of the section. Apart from the illustrations given under the section, which ought to make the scope and connotation of it clear, the section has provided for an uncommon class of cases the solution that if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences. The word "doubtful" appearing in the section should be noted, as on this word would turn the fate of the present discussion. Now this and the other sections appear in Chapter XIX under the heading "Of the charge Form of Charges". Evidently, therefore, the Chapter mainly deals with the function of the trial Court. It would, therefore, follow that the word "doubtful" appearing in the section refers to the doubt in the mind of the trial Court, for it is the trial Court, which frames a charge/charges against an accused person and not an Appellate Court. This being the plain connotation of the section let us proceed to examine section 237, Cr. P.C. which begins with the words "If, in the case mentioned in section 236". Now these words would make it clear that the operation of this section is dependent on section 236 Cr. P.C. in which the word "doubtful" has been used. It is true that all the other conditions being satisfied, the jurisdiction under section 237 can be exercised by the trial Court as well as the Appellate Court, but subject to what has been said in section 236, which is that if a single act or series of acts is of such a nature that it is "doubtful" which of several offences the accused may be charged with then he may be tried on any number of such charges or in the alternative with some one of the said offences. To put it differently, if the facts of a case are plain enough not to have given rise to the entertaining of any doubt about it by the trial Court then the exercise of power under section 237 would not be open to it nor to the Appellate Court.

342. Now from the large number of authorities cited by the learned counsel for both sides it would suffice to deal with one judgment of this Court and two from the Indian Supreme Court, as in the nature of things, the judgments of the High Courts would have no utility as against these judgments. The first judgment from the Indian Supreme Court is *Nanak Chand v. State of Punjab*<sup>600</sup>. In that case, the appellant along with others was charged in the Court of Session under section 148 and section 302 read with section 149, I.P.C. His trial proceeded accordingly but the learned Sessions Judge held that the charge of rioting was not proved, therefore, he convicted the appellant and others under section 302/34, I. P.C. In appeal by them to the High Court, the High Court convicted the appellant alone under section 302, I.P.C., confirmed the death sentence awarded to him and dismissed his appeal. In appeal before the Supreme Court objection was taken on behalf of the appellant that having been charged under section 302/ 149, I.P.C., both the learned trial Judge as well as the High Court wrongly convicted him under sections 302/34, I. P.C. and 302, I.P.C. respectively, as he was not charged with the latter two offences which were distinct and different than the offence with which he was charged. On behalf of the State it was contended that under section 236 and section 237 of the Code of Criminal Procedure, the appellant could be convicted of an offence which he is shown to have committed although he was not charged with it. But this contention was rejected as follows:-

"Section 237, Cr. P.C., is entirely dependent on the provisions of section 236 of that Code: The provisions of section 236 can apply only in cases where there is no doubt about the facts which can be proved but a doubt arises as to which of several offences have been committed on the proved facts in which case any number of charges can be framed. In these circumstances if there had been an omission to frame a charge, then under section 237, a conviction could be arrived at on the evidence although no charge had been framed., In the present case there is no doubt about the facts and if the allegation against the appellant that he had caused the injuries to the deceased with takwa was established by evidence, then there could be no doubt that the offence of murder had been committed. There was no room for the application of section 236, Cr. P.C. "

*Surajpal v. The State of Uttar Pradesh*<sup>601</sup> is the other judgment from the Indian Supreme Court. The appellant in that case and others were charged in the Court of Session under sections 302 and 307 read with section 149, 1. P.C. He was convicted. But in appeal in the High Court, his conviction was altered to one under sections 307 and 302, I. P.C. as he was found to have, during the course of rioting, committed murder of Surajdin through the firing of pistol. Objection was taken on his behalf before the Supreme Court that having been charged in the Court of Session under sections 302 and 307 read with section 149, I.P.C., the High Court had no jurisdiction to convict him under sections 307

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<sup>600</sup> AIR 1955 SC 274

<sup>601</sup> PDL 1956 SC (ind.) 21

and 302, I. P.C. as the offences thereunder were distinctly different than the offences with which he had been charged. To counteract this contention reliance was placed on sections 236 and 237 of the Code of Criminal Procedure on behalf of the State, but the same was repelled as under:-

"It appears to us quite clear that a charge against a person as a member of an unlawful assembly in respect of an offence committed by one or other of the members of that assembly in prosecution of its common object is a substantially different one from a charge against any individual for an offence directly committed by him while being a member of such assembly. The liability of a person in respect of the latter is only for acts directly committed by him, while in respect of the former, the liability is for acts which may have been done by any one of the other members of the unlawful assembly, provided that it was in prosecution of the common object of the assembly or was such as the members knew to be likely to be so committed. A charge under section 149, I. P.C. puts the person on notice only of two alleged facts, *viz.* (1) that the offence was committed by one or other of the members of the unlawful assembly of which he is one, and (2) that the offence was committed in prosecution of the common object or is such that was known to be likely to be so committed. Whether or not section 149, I. P.C. creates a distinct offence (as regards which there has been conflict of views in the High Courts, there can be no doubt that it creates a distinct head of criminal liability which has come to be known as "constructive liability" - a convenient phrase not used in the I.P.C. There can, therefore, be no doubt that the direct individual liability of a person can only be fixed upon him with reference to a specific charge in respect of the particular offence. Such a case is not covered by sections 236 and 237 of the Code of Criminal Procedure. The framing of a specific and distinct charge in respect of every distinct head of criminal liability constituting an offence, is the foundation for a conviction and sentence therefore. The absence, therefore, of specific charges against the appellant under sections 307 and 302, I.P.C., in respect of which he has been sentenced to transportation for life and to death respectively. is a very serious lacuna in the proceedings in so far as it concerns him. The question then which arises for consideration is whether or not this lacuna has prejudiced him in his trial."

As to the question of prejudice, the finding recorded by the Court was that the appellant indeed had been prejudiced, notwithstanding the fact that in the Court of the Committing Magistrate he was questioned that Surajdin had been murdered by him by firing from pistol. Accordingly, the Court set aside his convictions and sentences under sections 307 and 302, I.P.C.

343. *Muhammad Anwar and another v. The State*<sup>602</sup> is the judgment of this Court. In that case six accused were initially charged under section 302/149, P.P.C., but only two of them were proved to have fired the two fatal shots which caused the death of two persons: The said two accused, who were appellants before this Court, were however, convicted under section 302, P.P.C., therefore, an objection was taken on their behalf that having been charged under section 302/149, P.P.C., they could not be convicted under section 302, P. Y. C. as the offence falling thereunder was distinct from the one with which they were charged. In support of that contention reliance was placed on Surajpal's case but the same was distinguished on the ground that whereas the case before the Supreme Court of India was not 'doubtful' within the meaning of section 236, Cr. P.C., in the case before this Court there was "an element of doubt" which might be "thought to appear, which was sufficient to justify, within the terms of section 236, Criminal P.C., the framing of a charge under section 302, P.P.C., read with section 149, P.P.C. It is true that at the same time, specific charges under section 302, P.P.C., might also have been framed against Muhammad Anwar and Khurshid Ahmad individually, but by section 236 aforesaid, the Court is expressly permitted to frame a charge in respect of any of the several offences which might have been charged. By the application of section 237, Criminal P.C., a conviction can legally be obtained, in a case of this kind, of any offence which appears from the evidence to have been committed, although it was not expressly charged".

334. It would thus be seen that this Court as well as the Supreme Court of India have construed the provisions of sections 236 and 237, Cr. P.C. in a manner which leaves no room for doubt. The application of section 237, Cr. P.C., which is dependent on section 236, arises only in a case in which due to single act or series of acts, it is 'doubtful' which of several offence the accused may be charged with. It would, therefore, follow that if upon the facts of a given case the trial Court was in no manner of doubt in that behalf then reliance cannot be made on the provisions of section 237 Cr, P.C.

345. Bearing this principle in mind, let us advert to the facts of the present case. The three charges, with which Mr. Bhutto was charged in the High Court have already been noted. He was charged for an offence under section 120-B, P. P. C; section 302 read with sections 109 and 301, P. P. C; and section 307 read with section 109 P.P.C., However, he was convicted, and here I would refer to only that part of his conviction to which objection has been taken, under section 302 read with section 301 and section 109 and section 111, P.P.C., and sentenced to death for the murder of Nawab Muhammad Ahmad Khan. Now right from the earliest stage of the case, when the F.I. R. of occurrence was lodged at the Ichhra Police Station by Mr. Kasuri in 1974, it was known to the prosecution that Mr. Bhutto had master-minded the plan to assassinate him, but in the execution of it his father got killed. The evidence given by P. Ws. Masood Mahmood, Saeed Ahmad Khan and M. R. Welch in the High Court was to the same

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<sup>602</sup> PLD 1956 SC (Pak.) 440

effect, as also that in view of the conspiracy entered into between Mr. Masood Mahmood and Mr. Bhutto, the former availed of the services of " Mian Abbas, who in turn detailed approver Ghulam Hussain and the other appellants for assassinating. Mr. Kasuri and in that behalf provided them with arms and ammunition. Notwithstanding this position, however, no charge was framed against Mr. Bhutto under section 111, P.P.C., and the case proceeded under section 109, P.P.C., In the judgment delivered by the High Court, however, it was noted that Mr. Bhutto was convicted, amongst others, under section 302/301/109/111, P. P.C.

346. The question of law, therefore, arises is whether the said finding recorded by the High Court can be sustained by invoking in aid section 237 of the Code, of Criminal Procedure? In this respect the consideration of section 109 and section 111; P.P.C., would seem to be relevant, which respectively read asunder:-

*"109. Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment - Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.*

*Explanation. - An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.*

*111. Liability of abettor when one act abetted and different act done. - When an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it.*

*Proviso. - Provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment,"*

347. Now a bare look at these two sections would make it clear, and here I am not referring to the illustrations appearing thereunder which make their true scope free from any doubt, that they would be applicable to completely different situations. Section 109, P.P.C., would be applicable to a case in which the act abetted must be shown to be the act committed in consequence of the abetment, as also that there is no express provision available in the Code for the punishment of such abetment. In a case falling under section 111, P. P.C., however, an act done must be different than the act abetted. But even so the abettor would be liable if the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment. This being the essential distinction between these two sections, it is obvious that in view of



the proved facts and circumstances of the present case a charge under section 111, P.P.C., should have been framed against Mr. Bhutto because (1) he had abetted Mr. Masood Mahmood to assassinate Mr. Ahmad Raza Kasuri; and (2) but in the execution of the said conspiracy his father Nawab Muhammad Ahmad Khan was murdered. In other words the act committed in pursuance of the said conspiracy was entirely different than the act abetted by Mr. Bhutto, therefore, on these facts he should have been charged only under section 111, P.P.C., which is a special section, and not section 109, P.P.C., which is not only residuary, but of general application to all cases in which the act committed is the same as the act abetted.

348. Furthermore, the words of the proviso of section 111, P.P.C, namely "Provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment" would seem to underline the burden of the prosecution to establish by evidence that when an act is abetted and a different act is done, the same was the "probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment". The expressions "probable consequence" and "or In pursuance of the conspiracy" should leave no room for doubt that this is what the Legislature has intended. If I am right in this conclusion, it would follow that, the prosecution or for that matter the High Court both were in no manner of doubt that though Mr. Bhutto had abetted Mr. Masood Mahmood in respect of the assassination of Mr. Ahmad Raza Kasuri yet in the execution of the plan in that behalf unfortunately his father got killed. In these circumstances, the High Court could not have possibly entertained any doubt that the offence committed by Mr. Bhutto squarely fell within the four corners of section 111, P.P.C., and not section 109, P.P.C., In point of fact, the High Court does not seem to have entertained any doubt in that behalf, as there is no indication of it in its judgment. Furthermore, the learned Special Public Prosecutor, even during the arguments in this Court, maintained that the act committed in the present case was not a different act than the one which was abetted by Mr. Bhutto or was the object of conspiracy entered into between him and Mr. Masood Mahmood. I am, therefore, of the humble view, in which respect I am supported by a judgment of this Court, and two judgments of the Supreme Court of India that since the case was not covered by section 236, Cr. P.C., the High Court under section 237, Cr. P.C. could not have recorded the conviction of Mr. Bhutto under section 111 P.P.C., Nor would this Court have jurisdiction to uphold the said finding as its jurisdiction in that behalf is coextensive with the jurisdiction of the High Court.

349. *Begu and others v. Emperor*<sup>603</sup> also does not support the learned Special Public Prosecutor. Apart from the fact that the Privy Council in that case observed "When there has been evidence before the Court below and the Court below has come to a

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<sup>603</sup> AIR 1925 PC 130

conclusion upon that evidence, their Lordships of the Privy Council will not disturb that conclusion; they will only interfere, where there has been a gross miscarriage of justice or a gross abuse of the forms of legal process", it was noted therein that during the trial the assessors had given their opinion, on the basis of which the learned trial Judge had recorded a note, "that there might be some doubt as to whether Hamid one of the accused, was also present and took part in the assault or not". Now this element of doubt naturally brought the case of some of the accused therein within the four corners of section 236, Cr. P.C. to which Section 237 was, therefore, attracted.

350. Before concluding this discussion it may be mentioned that PLD 1962 Kar. 756 cited by the learned Special Public Prosecutor has been overruled by this Court in *Muhammad Latif v. State*<sup>604</sup>, Besides, most of the other judgments referred by him related to cases in which the accused were charged for serious offences but in view of the proved facts against them, they were convicted of minor offences as this course was open to the Courts under section 238, Cr. P.C.

351. The learned Special Public Prosecutor, however, argued that even if Mr. Bhutto was not charged under section 111, P.P.C., he cannot be said to have been prejudiced, as also that the defect if any would stand cured under sections 535 and 537 of the Code of Criminal Procedure. I am afraid, there is no force in this contention. A similar contention was raised before the Supreme Court of India in AIR 1955 S C 274 and the same was repelled as under:-

"In the present case, however, there is no question of any error, omission or irregularity in the charge because no charge under section 302, I.P.C. was in fact framed. Section 232, Cr. P.C., permits an appellate Court or a Court of revision, if satisfied that any person convicted of an offence was misled in his defence in the absence of a charge or by an error in the charge, to direct a new trial to be had upon a charge framed in whatever manner it thinks fit. In the present case we are of the opinion that there was an illegality and not an irregularity curable by the provisions of sections 535 and 537, Cr. P.C. Assuming, however, for a moment that there was merely an irregularity which was curable, we are satisfied that, in the circumstances of the present case, the irregularity is not curable because the appellant was misled in his defence by the absence of a charge under section 302, I.P.C. By framing a charge under section 302, read with section 149, I.P.C., against the appellant. The Court indicated that it was not charging the appellant with the offence of murder and to convict him for murder and sentence him under section 302, I.P.C., was to convict him of an offence with which he had not been charged. In defending himself the appellant was not called upon to meet such a charge and in his defence he may well have considered it unnecessary to concentrate on that part of the prosecution case."

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<sup>604</sup> PLD 1966 SC 201

352. Respectfully, I agree with this conclusion which is fully applicable to the facts of the present case: By framing a charge against Mr. Bhutto under section 302 read with section 301 and section 109, P. P.C., the High Court put him on notice that he was not being charged for an offence under section 111, P.P.C., In these circumstances, how can it even be contended that Mr. Bhutto ought to have taken notice of the fact that perhaps the High Court may in its judgment convict him under section 111, P. P.C. ? especially when neither the High Court nor the prosecution were conscious of that position even inferentially.

353. The further difficulty in the way of the prosecution is that there is no evidence on record to support a charge under section 111, P.P.C.; Mr. Bhutto was not even questioned in his examination under section 342, Cr. P.C. about the offence falling under the proviso to the said section; and no arguments were addressed at the bar of the High Court in that behalf by either side. It should be remembered that an offence under section 109, P.P.C., is entirely different than the one covered by section 111, P.P.C., However, since Mr. Bhutto was not charged in the High Court under section 111, P.P.C., the High Court cannot be said to have committed any irregularity which can be cured under section 535 or 537, Cr. P.C. In reaching this conclusion, I am conscious of the fact that under section 537, Cr. P.C., as amended by Law Reforms Ordinance, 1972, even an illegality committed during the trial (including the mode of trial is curable but all the same the effect of the section cannot be stretched to the limits of absurdity and unreasonableness. If this caution is not observed, I am afraid the pragmatic seriousness and caution with which the criminal Courts in the country have been used to deal with trials would be displaced by non-seriousness and inattention with the result that a well tested and tried procedure would be impaired to the great prejudice of the citizen. Furthermore, if section 537, Cr. P.C. is so construed as to be invocable in aid of curing each and every illegality then what utility can be left of the other provisions of the Code in which are enshrined all those principles which are the hallmark of a civilized nation including the basic principle of *audi alteram partem*.

354. I am, therefore, of the humble view that in view of the law as it stands Mr. Bhutto, in so far as his conviction under section 111, P.P.C., is concerned, was condemned unheard by the High Court and consequently the illegality committed by the High Court is not curable under sections 535 and 537 of the Code of Criminal Procedure.

355. Another question of some importance raised by Mr. Yahya Bakhtiar is that in the High Court Mr. Irahad Ahmad Qureshi the learned counsel for appellants Rana Iftikhar, etc. was again allowed to cross-examine the P. Ws. after their cross-examination was concluded by the learned counsel for Mr. Bhytto and Mian Abbas with the result that a lot of damaging material was brought on the record of the case. His grievance is that the said procedure, to which objection was taken at the proper time,

was not only illegal but a request made on behalf of Mr. Bhutto and Mian Muhammad Abbas for permission to cross-examine the said P. Ws. again was refused by the High Court to their great prejudice. By going through the record, the contention raised by the learned counsel is factually right. At page 20 (of the Volume of Orders), the High Court has made a note in that behalf which reads: "At the instance of Ghulam Mustafa accused, his counsel Mr. Irshad Ahmad Qureshi, further cross-examined the witness by putting some specific questions. Mr. D. M. Awan objected to the asking of all the questions, which objection was duly noted". Similarly, at pages 650-651 (of the III Volume of Evidence), the High Court observed: "that Mr. Qurban Sadiq Ikram, wants permission to put question to the witness by way of cross-examination because, he says that Mr. Irshad Qureshi has by his cross-examination damaged the case of Mr. Qurban Sadiq's client. Let the question be taken down to enable us to take a decision on the point". After taking down the question, which may not be reproduced, the High Court observed "This question could have been very well asked at the time when Mr. Qurban Sadiq Ikram was cross-examining the witness this morning, because as the question shows the allegation is that the Officer of the F.I.A. briefed the witness yesterday. This question is, therefore, disallowed." Likewise at page 30 (of the Volume of Orders) the High Court noted the objection as well as the prayer of Mr. D. M. Awan, the learned counsel for Mr. Bhutto to the effect that Mr. Irshad Ahmad Qureshi should not have been allowed again to cross-examine P.W. Toor, as in consequence of it the interest of his client had been damaged, and further that he should be permitted again to cross-examine the witness. By an order, dated 21-11-1977, however, the High Court rejected the said objection taken by Mr. Awan as well as his prayer for the cross-examination of the witness. These objections also were raised by the learned counsel in the Chart "regarding some paragraphs of impugned judgment showing paralysis of judicial faculties on account of Bias", and in the written reply thereto the learned Special Public Prosecutor has made the following submission:-

"32. Mr. Irshad Ahmad Qureshi was the counsel for three accused in the case. There being no provision in law regulating the order in which the counsel of an accused in a joint trial is to cross-examine a prosecution witness, the learned trial Court had left it to the defence counsel to decide this issue amongst themselves and it was in accordance with this arrangement that Mr. Irshad Ahmad Qureshi sometimes cross-examined the prosecution witnesses first and sometimes later. When insisted by the other defence counsel that he should cross-examine first, he did so on behalf of some of his clients while reserving the right to cross-examine on behalf of the other later. The exercise of discretion by the Court in the instant case was always based upon sound and cogent reasons and the objections raised in this paragraph are devoid of any substance. It is respectfully submitted that the aforesaid reply is not in accord with the legal position as enunciated above cited cases.

356. It would thus be seen that as far as the facts are concerned, the learned counsel for the parties are not in dispute with each other. The only question, therefore, is if by adopting the said procedure the High Court can be said to have committed any illegality or else Mr. Bhutto prejudiced. I am of the humble view that the said procedure adopted in the High Court may have been technically unexceptionable, but in essence it seems to have made inroads into those axiomatic, well tried and precious norms which are the *sine qua non* of the safe administration of criminal justice. The scheme of the Evidence Act, 1872, is to elicit from the witnesses on either side the maximum possible truth in respect of a *litz* pending for adjudication before a Court. In that behalf the scheme of the Evidence Act is that each side should first examine his own witnesses, which is called examination-in-chief, and thereafter place them in the hand of the other side for cross-examination. The re-examination of a witness by the side producing him is not an invariable phenomenon, but is permissible in the discretion of the Court if in his cross-examination he has deposed to a fact which would need clarification. Now this scheme of the Code would be equally applicable in a case, and here I would refer to a case of a civil nature, in which some of the defendants are supporting the claim of the plaintiff. In such a case also the proper procedure would be first to examine the witnesses of the plaintiff followed by the witnesses of those defendants who support his case and thereafter the process must be repeated in the case of the other defendants. However, if the said procedure is subverted in the sense that the defendants who support the case of the plaintiff are allowed to be examined and cross-examined after the witnesses of the contesting defendants have already been examined evidently the case of the later defendants is bound to be prejudiced because of the partisan attitude of the defendants who are supporting the claim of the plaintiff. In fact, if reference in this behalf is made to the evidence of the P. Ws. in the present case, who were allowed to be cross-examined by Mr. Irshad Ahmad Qureshi, after the conclusion of their cross-examination by the learned counsel for Mr. Bhutto and Mian Abbas, it would be seen that a lot of damaging material was brought on the record of the case to the great prejudice of the latter. In these circumstances the least that ought to have been done in the High Court was to afford to the learned counsel for Mr. Bhutto and Mian Muhammad Abbas another opportunity to cross-examine the witnesses in the interest of justice.

357. In support of his contention, Mr. Yahya Bakhtiar relied on *Motiram Nerwari v. Lalit Mohan Ghose*<sup>605</sup>, *Haji Bihi v. H. H. Sir Sultan Mahmood*<sup>606</sup>, *Kirmany & Sons v. Agha Ali Akbar*<sup>607</sup> and *Muniappan v. State of Madras*<sup>608</sup>. By going through these judgments, they clearly support the contention of the learned counsel. In this view, it must be said that the permission granted to Mr. Irshad Ahmad Qureshi again to cross-examine the P. Ws. when their cross-examination was already concluded by the other side was illegal,

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<sup>605</sup> AIR 1920 Pat. 94

<sup>606</sup> 32 ILR 599

<sup>607</sup> AIR 1928 Mad. 919

<sup>608</sup> AIR 1961 SC 175

moreso when the damaging material brought on the record of the case by that method has been used against Mr. Bhutto and Mian Muhammad Abbas to their prejudice.

358. I would now take up the evidence of second approver namely, Ghulam Hussain P.W. 31. The substance of his evidence which runs in about 90 typed pages, and most of which is irrelevant and must, therefore, be ignored, is that he had studied up to middle class, thereafter joined the Army as Sepoy in 1950 and retired from the Army as Naib-Subedar on 19-11-1973. During his army career, he served as Commando for 14 years, out of which he remained as Commando Instructor for about 10 years.

359. On 3-12-1973, he joined the F.S.F. as A.S.I. after he was interviewed by the then Director-General, F.S.F., namely, Malik Haq Nawaz Tiwana. After joining the F.S.F. he was posted, on paper, to Battalion No. 5, but on the oral order of Mian Muhammad Abbas he worked with him at the Headquarters. A day or two after he joined the F.S.F. he was assigned a duty by Mian Muhammad Abbawt Larkana. After having performed the said duty, he was posted back to Battalion No. 5 which was stationed at Rawalpindi.

360. In April, 1974 he was summoned by Mian Muhammad Abbas who handed over to him the syllabus of the Commando Course and told him that he was required to run a Commando Course and in that behalf should make the necessary preparations. Accordingly he selected some persons from the 4th and 5th Battalions of the F.S.F. and set up a Camp in the barracks of the 4th Battalion at Islamabad. The Camp was run under the supervision of Mian Muhammad Abbas and he was the Chief Instructor. For the purpose of imparting training to the trainees, the latter were required to bring their own weapons to the Camp but the ammunition for their use was drawn from the Headquarters Armoury. P.W. Fazal Ali was the Incharge of the said Armoury from whom he drew ammunition for the purpose of Commando Camp vide Road Certificate Exh. 24/7.

361. In the end of May, 1974 he was summoned by Mian Muhammad Abbas to his Office who asked him about the methods which a Commando used for kidnapping someone or committing a murder. Accordingly, he explained to him the said methods, but he insisted that the same should be reduced to writing which he did and passed on the written paper to him. 2/3 weeks later, he again sent for him and asked him if he knew Mr. Ahmad Raza Kasuri, and he answered in the negative. At this, he placed a jeep and a driver at his disposal and told him to find out the whereabouts of Mr. Kasuri and in that connection Head Constable Zaheer was detailed to help him, as he knew Mr. Ahmad Raza Kasuri. Accordingly they took the jeep and went out searching for Mr. Kasuri while he was still running the Commando Camp.

362. In the beginning of August, 1974 Mian Muhammad Abbas, again sent for him and asked him about the results of his efforts in connection with Mr. Kasuri. He informed him that he had located his address and also identified him. He then told him

that he must remove Mr. Ahmad Raza Kasuri from the path of Mr. Bhutto, as Mr. Masood Mahmood had given him the order in that behalf. At this he pleaded with Mian Muhammad Abbas that he was a soldier, had small children, and, therefore, how can he commit such a heinous crime. Mian Abbas, however, told him that he need not worry because he would be fully protected. He further warned him that if he declined to carry out the said assignment he would not only lose his job but also his life. Faced with this situation he was left with no option but to carry out the said order under compulsion. In order to carry out the said undertaking, Mian Abbas procured for him the necessary weapons from the Central Armoury of which P.W. Fazal Ali was Incharge simply on the basis of a chit signed by him in that behalf. After collecting the weapons in question, he along with Head Constable Allah Bux and Constable Mulazim Hussain started following Mr. Kasuri. However, on 20-8-1974 Mian Muhammad Abbas called him to his Office and complained to him as to why he had not been able to carry out the task given to him, and further that although he was being promoted as Inspector, he must deliver the goods, as Mr. Masood Mahmood was very unhappy because Mr. Bhutto has been abusing him for the delay. He also warned him that if he failed to execute the said order, he would lose his life as another team has been detailed to cover him, and if necessary, to kill him.

363. On 24-8-74 he established contact with Mr. Ahmad Raza Kasuri on telephone. He told him to meet him at 1 o'clock at the gate of the M.N.A.'s' Hostel, Islamabad. Accordingly, he left Rawalpindi for Islamabad at 12-30 p.m. in a jeep along with Head Constable Allah Bux and Foot Constable Mulazim Hussain. Driver Mian Khan was at the wheel of the jeep, which was of blue color and the genuine number plates of which had been removed in accordance with the instructions given to him by Mian Abbas. When he reached the M.N.A.'s Hostel, he found the car of Mr. Kasuri parked at a place at some distance from the National Assembly Building. At that time Mr. Kasuri, while sitting in his car, was talking to someone standing outside on the road. However, he took a decision on the spot not to murder Mr. Kasuri, as also to save his own life. Accordingly, he directed Mulazim Hussain to fire in the air from the rear window of the jeep so that Mr. Kasuri should run away from the scene. Mulazim Hussain, therefore, fired a burst in the air and Mr. Kasuri sped away his car. However, when he returned to the office of Mian Muhammad Abbas, Ch. Nazir Ahmad (Deputy Director) met him outside the office and told him "How I justified myself in calling a Commando when it was day time and I had a jeep, automatic weapons, the distance. was about 30 yards, and still I let the target escape." He further said that "he had seen that neither Ahmad Raza Kasuri was hit nor did any bullet hit his car." This convinced him that another party had been detailed to watch big methods and that this party had informed him in advance of what had happened. Meanwhile Mian Abbas called him inside his Office and enquired from him the details of the incident. After having heard his version he reprimanded him saying that he was a strange Commando to have missed in broad daylight the target while armed with an automatic weapon. He, therefore, warned him to complete the mission and not to fire in the air again at Mr. Kasuri.

364. On returning from the office of Mian Abbas, he replaced the empties with live cartridges from the Commando Camp and returned the weapons, as well as the ammunition, to P.W. Fazal Ali. Thereafter, Mian Abbas ordered him to depute Head Constable Zaheer and Liaqat from the Commando Camp to go to Lahore and search for Mr. Ahmad Raza Kasuri. In compliance with the said order, he detailed these two incumbents who accordingly proceeded to Lahore. In October, 1974 Mian Abbas again sent for him to big office. He told him that the men sent by him to Lahore were enjoying themselves and had done nothing while the Prime Minister was angry and abusing him. He replied that he would leave for Lahore immediately after Eid, but Mian Abbas told him to proceed immediately as Eid was the proper occasion to assassinate Mr. Kasuri because he would be meeting with lot of people. Accordingly, he proceeded to Lahore, stayed there for about 10 days, found out the whereabouts of Mr. Kasuri, returned to Rawalpindi and reported to Mian Abbas for further instructions. On this, Mian Muhammad Abbas directed him to procure ammunition from the Commando Camp and proceed to Lahore with appellant Rana Iftikhar. He further told him that appellant Ghulam Mustafa would provide him a jeep at Lahore and appellant Arshad Iqbal and Soofi Ghulam Mustafa both would render all assistance. He also told him to change the ammunition from somewhere so that no suspicion could be directed against the F.S.F.

365. After collecting the ammunition, he and Rana Iftikhar left for Lahore. On arrival at Lahore, he contacted appellant Ghulam Mustafa at the F.S.F. Headquarters, Shah Jamal and told him about the mission and further that he had already changed the ammunition of the F.S.F. with other ammunition as directed by Mian Abbas. Ghulam Mustafa told him that he had known about his arrival through Mian Abbas on telephone who also told him to render him every possible assistance in order to facilitate the completion of the mission assigned to him. Ghulam Mustafa subsequently informed that he had already obtained a sten-gun and that another would be procured from the Battalion of P.W. Amir Badshah stationed at Walton. The second sten-gun was accordingly procured later and supplied to him along with two magazines.

366. At about 7/8 p.m. on 10-11-74, he along with appellants Ghulam Mustafa, Rana Iftikhar and Arshad Iqbal set out towards Model Town in order to locate Mr. Kasuri. At the junction of the road to Model Town and Ferozepur Road they spotted the car of Mr. Kasuri but since he was going in the opposite direction, they could not reverse the jeep in time and they lost his track. Thereafter they returned to the Headquarters and from there, appellant Mustafa rang up the residential number of Mr. Kasuri, in order to find out if he was at home. Someone from the house, however, replied that he had gone to attend a wedding dinner at Shadman. After receiving this information they again set out in jeep towards Shadman. This time Driver Amir was on the wheel of the jeep. However, on reaching a point about 80/90 yards from the roundabout where Shah Jamal ends and Shadman begins they saw a house with illuminations, with Shamianas



erected all over and many cars parked outside on the road. The car of Mr. Ahmad Raza Kasuri was also found parked there. After confirming that the car actually belonged to Mr. Kasuri they proceeded towards Ferozepur Road and stopped for a cup of tea in Ichhra before returning to the Headquarters at Shah Jamal. Upon arrival at the Headquarters all of them proceeded to prepare a plan as to the site where Mr. Kasuri should be killed. The consensus reached was that the intersection of Shah Jamal-Shadman Colony would be the proper place. At 10/10-30 p.m. the appellants Sufi Ghulam Mustafa, Rana Iftikhar and Arshad Iqbal, armed themselves with sten-guns whereas he was armed with a pistol. Arshad Iqbal and Rana Iftikhar put on their overcoats in order to keep the sten-guns hidden. On arrival at the spot, he posted Rana Iftikhar behind a shoulder high hedge facing towards the road from where the car of Mr. Kasuri was expected to come, and Arshad Iqbal about 9/10 steps behind him at a point from where the car was to pass after negotiating the semi-circular turn from the intersection. However, the instructions given by him to Arshad Iqbal were that he should fire in the air as otherwise someone sitting under the Shamianas or traveling in the car from the opposite direction was likely to be hit, as also that the said firing would caution Rana Iftikhar about the approaching car and he would be ready to fire upon it. Having given these instructions to Iftikhar and Arshad Iqbal, he himself retired to a side lane from where occasionally he came back to the spot to ensure that everything was alright. At mid-night he heard the sound of fire. Thereafter second and third bursts followed in very short intervals. Accordingly he headed for the spot and saw that the car of Mr. Ahmad Raza Kasuri, with no headlights, was speeding away which gave him the impression that he was safe. Thereafter, they returned to the Headquarters when Rana Iftikhar and Arshad Iqbal told him about the details of the occurrence in the presence of appellant Ghulam Mustafa. They returned to Ghulam Mustafa the arms and on checking their ammunition, it was discovered that 30 rounds had been fired in the operation. Next morning Ghulam Mustafa rang up the Ichhra Police Station and he was informed that the father of Mr. Ahmad Raza Kasuri had been murdered.

367. Sufi Ghulam Mustafa then tried to contact Mian Muhammad Abbas on telephone but he was not available. He rang up his house and he was told that Mian Abbas had left for Peshawar. Ghulam Mustafa accordingly contacted Mian Abbas on telephone at Peshawar and told him that the car of Mr. Ahmad Raza Kasuri was fired upon last night in which his father was killed. At this Mian Abbas asked Ghulam Mustafa to direct him (Ghulam Hussain) to get back to Rawalpindi. On receiving the said instructions he conveyed the same to him (Ghulam Hussain) who in turn asked his compatriots to go to their homes for 8 or 10 days and he himself stayed for the night at Shah Jamal. On the next day, i.e. 12-11-74 he travelled to Rawalpindi in the car of Mr. Masood Mahmood with the driver of the car P.W. Manzoor Hussain and the gun-man of Mr. Masood Mahmood. However, before leaving for Rawalpindi he had continued making enquiries in order to find out the result of the investigation of the case. On reaching Rawalpindi he contacted Mian Abbas on telephone at his house as he was told that he was present. Mian Abbas told him to come over to his house. He, therefore, took

a jeep from the Control Room and drove to the house of Mian Abbas who was waiting for him. Accordingly, he narrated him the details of the incident. He consoled him that it was the will of God that Mr. Kasuri was saved. In reply he told him that he had joined the Force to provide sustenance to his family, and not to commit murders. He also told him that whatever he had done by his connivance was due to the result of coercion and influence exercised over him and that he would not do any such thing in future. Mian Abbas, however, asked him if he had left anything incriminating at the spot which might disclose the identity of the F.S.F. He replied that some spent ammunition had been left at the spot and that the same could not be found out due to darkness. He replied that he should not bother about the empties as he would take care of them.. Thereafter he told him to go back to the Commando Camp, complete the job and disband the Camp. He accordingly obeyed the said order. After winding the Camp he returned to P.W. Fazal Ali the live as well as spent ammunition on the basis of a road certificate. However, he was short of 51 empties including the 30 fired at Lahore and 7 at Islamabad and the rest had been lost during practice firing. He hoped that Fazal Ali will not check the said shortage and accept the articles in confidence but he was disappointed because Fazal Ali insisted that the shortage has to be made up. At this he reported the matter to Mian Abbas, who told him to report to him after 3 or 4 days and he hoped that he will be able to make some arrangements. 3 or 4 days thereafter when he went to see Mian Abbas, he handed him a Khaki envelope containing 51 empties of sten-gun which he accordingly took to Fazal Ali and made up the deficiency.

368. In the last week of October, 1974, when they were leaving for Lahore they did make the requisite entry (Exh. P.W. 31/3) of their departure in the daily diary of Battalion No. 5 but actually made no mention therein of their destination because these were his orders. The said entries were made in his presence by person in charge of the said daily diary, and the same was initialled by Rana Iftikhar. After his return from Lahore on 12-11-74 he did not make any entry of his arrival in the daily diary until 8/10 days thereafter because Mian Abbas had told him so in that behalf. On the third day of his arrival at Rawalpindi, he made an entry in the daily diary (Exh. P.W. 31/4) showing his departure for Peshawar but actually he remained at Rawalpindi because these were the orders of Mian Abbas. However on 29-11-1974 he again recorded the entry (Exh. P.W. 31/5) in the said daily diary showing his arrival back from Peshawar. For all these so-called journeys, however, including his journey to Lahore, he submitted his TA/DA Bill (P.W. 31/6) and he was paid the amount claimed therein, after the same was certified by the Line Officer as well as Mian Muhammad Abbas.

369. On 13-8-77 he sent application (Exh. P.W. 9/ 1) to the District Magistrate, Lahore, through the Jail Superintendent, Lahore, praying therein that he would like to disclose the true facts as to the murder of Nawab Muhammad Ahmad Khan if he was granted pardon and made an approver. On receipt of the said application he was taken before the District Magistrate, who, after talking to him about the said crime, obtained his signatures on a piece of paper. Thereafter he sent him to a Magistrate who recorded his

Approver's statement (P.W. 10/11-1). Finally, he deposed that the firing made at the car of Mr. Ahmad Raza Kasuri at Islamabad and Lahore both, had been made under his supervision as he was pressurized and coerced. He had no enmity with Ahmad Raza Kasuri. He did not even know him.

370. Mr. Irshad Ahmad Qureshi, the learned counsel for appellants Rana Iftikhar, etc. cross-examined the witness who deposed that he had been given a reward of Rs. 500 because he had detected illicit liquor in the cafeteria of the National Assembly; that he was unable to say as to why Mian Abbas got him attached with himself when officially he was posted to Battalion No. 5, that he had no knowledge that he had thick relations with the then Prime Minister; that normally when a sten-gun is fired from a jeep the empties must fall in the jeep also, but if in the process of ejection the empties hit some other object its path can be altered; that the grenade of which the pin was deposited by him in the Central Armoury vide Road Certificate (P.W. 24/9) was used in the bath room of the mosque at Rawalpindi where Maulvi Ghulam Ullah was the Khatib. 213 days before the occurrence at Lahore, they were stopped on the Ferozepur Road by D.I.G. Sardar Abdul Vakil Khan when they were going in a jeep and he admonished them as the jeep was without the number plates; that in order to confirm their identity Sardar Abdul Vakil Khan spoke on the wireless to Mr. Mallhi at the F.S.F. Headquarters and then allowed them to proceed; that the mission on which the jeep in question was then proceeding was to assassinate film actor Muhammad Ali; that first shot fired on the car of Mr. Ahmad Raza Kasuri at Shah Jamal/Shadman Roundabout was fired by appellant Arshad Iqbal and thereafter by Rana Iftikhar and Arshad Iqbal both as the latter then turned round and opened fire on the speeding car; that he knew that Arshad Iqbal was, after the said incident, attacked outside his house at Ichhra, Lahore but in the process his brother Amjad was killed; and that the only undue influence and coercion on him was exercised by Mian Muhammad Abbas to assassinate Mr. Ahmad Raza Kasuri.

371. Before proceeding with his cross-examination, which is replete with grave omissions and contradictions, as well as the evasive tactics adopted by the witness to answer the questions put to him directly, let us analyze his examination-in-chief to see if it can stand the test of naturalness and probability. It is his own case that he was recruited in the F.S.F. by late Malik Haq Nawaz Tiwana, the then Director-General, and there is nothing in the evidence that he had known Mian Abbas or had ever come into contact with him. Now this point must be kept in mind in evaluating his evidence to the effect that a day or two after his recruitment in the Force, Mian Abbas not only sent him on a mission to Larkana but kept him with himself, although officially he had been posted to Battalion No. 5. From this claim of the witness only two conclusions are possible; (i) either he was notoriously known as a bravado or a man of questionable reputation; and (ii) that he and Mian Abbas were known to each other. This latter possibility, however, would stand excluded because there is no evidence to support it. Therefore one cannot help to hold that the reputation of the witness had travelled to

Mian Abbas and naturally he would be inclined to use his "services". This conclusion would seem to be supported by his own evidence because how else he could have assigned him a special mission at Larkana just after a day or two of his joining the F.S.F.?; or that in the end of May 1974, just about 5 months after he joined the Force, Mian Abbas could have called him to his office and questioned him as to the method of how a Commando would kidnap a person or commit a murder; or that 2-3 weeks later again, he should have been summoned by Mian Abbas, and questioned if he knew Mr. Kasuri and he replied in the negative; or that, nevertheless, Mian Abbas should have provided him with a jeep, a driver and the services of Head Constable Zaheer with instructions to go in search of and identify Mr. Kasuri; or that 2-1/2 months thereafter he again should have summoned him and enquired from him if he had succeeded to locate and identify Mr. Kasuri to which he replied in the affirmative; or that Mian Abbas should have then given him the order that Mr. Kasuri should be assassinated because that was the order given to him by Mr. Masood Mahmood. Now this being the nature of his evidence, can it be said to be natural or probable? There is no evidence that Mian Abbas had ever known him or knew anything about him. How in the name of God then could he have taken him into confidence in respect of the assassination of a prominent citizen and a Member of the National Assembly without any formality whatever as if the task assigned to him was in the nature of an ordinary errand. Furthermore if Mian Abbas was really under pressure from Mr. Masood Mahmood in getting Mr. Kasuri assassinated, then the narration of events given by the witness seems to be unconvincing. His claim in this behalf is that in the end of May 1974, Mian Abbas called him to his office and after he explained to him, in writing, as to the method used in kidnapping and committing murder, he provided him with a jeep, a driver and the services of Head Constable Zaheer with instructions to go out in search of Mr. Kasuri, and identify him and yet for 2-1/2 months thereafter neither he enquired from the witness as to the result of his efforts nor the witness himself gave him any information in that behalf. His claim to the effect that after Mian Abbas assigned him the task of assassinating Mr. Kasuri, he pleaded with him that he was a soldier, and a poor man with children and that he cannot be expected to commit a heinous crime, seems to be a convenient statement made by him in the Court having no truth in it whatever. The reason for which I have been driven to this conclusion is that although he was threatened by Mian Abbas that in case he failed to accomplish the said mission, he would not only lose his job but also his life, and yet when he finally finds Mr. Ahmad Raza Kasuri, within his reach to assassinate him, by some divine interjection he changes his mind and tells Mulazim Hussain to fire in the air so that Mr. Kasuri runs away from the scene of occurrence. The absurdity of his claim in that behalf is further highlighted by the fact that no sooner he reaches the office of Mian Abbas than Ch. Nazir Ahmad Dy. Director, F.S.F., meets him outside the office and taunts him "how I justify myself in calling a Commando when it was day time, and I had a jeep, automatic weapons, the distance was about 30 yards and still I let the target escape" and further that "he had seen that neither Mr. Ahmad Raza Kasuri was hit nor did any bullet hit his car". There is no evidence on record to show as to how and by what means the news of the said

ineffective firing reached the Headquarters of F.S.F. almost immediately as the claim of the witness, in essence, is that from the place of occurrence he drove back in a jeep with his companions straight to the Headquarters. It is true that in his cross-examination, with which I would be dealing separately, he claimed that the said information seemed to have been conveyed to the Headquarters by another party which was detailed by Mian Abbas to cover him as he had told him that in case he failed to carry out the said mission, the, said party would assassinate him but the same is absurd as he came to no harm despite his evasive tactics. As regards the claim of the witness that do the basis of chits issued to him by Mian Abbas he had drawn from P. W. Fazal Ali ammunition the least that can be said is that it is untrue. I have already discussed the evidence of P.W. Fazal Ali in some other context and disbelieved it just as I have disbelieved the Road Certificate (Exh. P.W. 24/9) through Which the witness claimed to have deposited with Fazal Ali the ammunition and empties.

372. The further claim of the witness is that after the said feigned attempt made by him on Mr. Kasuri as a result of which he was taunted and humiliated by Ch. Nazir Ahmad, Dy. Director, F.S.F. as well as Mian Abbas, the latter again ordered him to send Head Constables Zabeer and Liaqat from the Commando Camp to Lahore in search of Mr. Kasuri; or that accordingly he complied with the said order but in October 1974, Mian Abbas sent for him to his office and told him that Zaheer and Liaqat were enjoying themselves at Lahore and had done nothing in the matter, At this he replied that he would leave for Lahore immediately after Eid but Mian Abbas asked him to proceed to Lahore immediately as Eid was the proper occasion to assassinate Mr. Kasuri as he would be meeting a lot of people. Accordingly, he proceeded to Lahore, stayed there for about 10 days, found out the whereabouts of Mr. Kasuri and then returned to Rawalpindi, and reported to Mian Abbas for further instructions. Now from a casual look at this place of the evidence of the witness, it is clear that either he is totally naive or else he takes the Courts to be so credulous as to believe him. Assuming for the sake of argument that after having been exposed by the first feigned' attack by him on Mr. Kasuri, Mian Abbas still trusted him or else put the fear into his mind that in case he again failed to carry out the said assignment, the party detailed to cover him would assassinate him, still his whole conduct seems to be contradictions in terms and hence unconvincing. If Mian Abbas was so serious about the accomplishment of the said mission as not to leave the witness even to spend Eid at Rawalpindi, then how is it that. after spending 10 days at Lahore he should have returned to Rawalpindi on the untenable plea to obtain further instructions from Mian Abbas when the order given to him by Mian Abbas was absolutely clear that Eid was the proper occasion to assassinate Mr. Kasuri.

373. The further claim of the witness to the effect that Mian Abbas told him to change the ammunition from some other source so that no suspicion a directed towards F.S.F. is absurd because (i) how an officer of the standing of Mian Abbas could have expected the witness to be resourceful enough to change the said ammunition; (ii) the claim itself

is untenable as the type of ammunition used both at Islamabad and at Lahore was not in the exclusive use of the F.S.F. and (iii) that according to the witness's own claim, he had told lies to Sufi Ghulam Mustafa that he had indeed changed the ammunition although it was not a fact. Furthermore, Mian Abbas does not seem to have any trust in the witness because according to his own evidence, Mian Muhammad Abbas had asked him to confirm his arrival at Lahore with him on telephone and the said instructions were carried out by him. Similarly his evidence in respect of the actual occurrence, with which I would be dealing in detail subsequently, is also unconvincing. His claim is that he had posted Arshad Iqbal behind a shoulder-high hedge facing towards the road from where the car of Mr. Kasuri was expected to come and Rana Iftikhar about 9/10 steps behind him at a point from where the car was to pass after negotiating the semicircular turn from the intersection. The factual position, however, is that according to P.W. Abdul Hayee Niazi, he had recovered empties from four different spots separated from each other by quite some distance, and in that behalf he is supported by site plan (Exh. P.W. 34/2) which he prepared himself, as also the site plan (Exh. P.W. 34/5-d) prepared by Inam Ali Shah.

374. The further claim of the witness to the effect that after the said occurrence, Sufi Ghulam Mustafa first tried to contact Mian Abbas on telephone at Rawalpindi, but he was told that he had gone over to Peshawar, thereafter he contacted him at Peshawar and conveyed him the information that on the night between November 10 and 11, 1974, an attack was made on the car of Mr. Kasuri in which his father was killed. Now apart from the ipse dixit of the witness, there is nothing on the record to support him. In any event his said piece of evidence cannot be accepted because it is unnatural. After all, the news of the death of Nawab Muhammad Ahmad Khan who was not only a prominent and respectable citizen in his own right but also the father of an MNA was splashed by the national Press in every newspaper of the country on the following day and so what was the urgency due to which Sufi Ghulam Mustafa took the trouble of contacting Mian Abbas first at Rawalpindi and later at Peshawar only to convey him the said news. It may be mentioned, however, that Mian Abbas has, in his statement under section 342, Cr. P.C. denied the said claim of Sufi Ghulam Mustafa which, in the scheme of things, seems to be convincing. Similarly, I have not been impressed with the evidence of the witness to the effect that notwithstanding the instructions of Mian Abbas conveyed to him through Sufi Ghulam Mustafa to return to Rawalpindi immediately, he, nevertheless, stayed behind at Lahore on November 11, 1974 only to acquaint himself with the progress of the investigation of the case. A lot more would be said by me on this part of his evidence subsequently but for the present this much would suffice to say that he did not travel in the car of Mr. Masood Mahmood on November 12, 1974 from Lahore to Rawalpindi as in that behalf his own evidence has belied him. His claim is that when he reached Rawalpindi sometime in the early afternoon of November 12, he contacted Mian Abbas on telephone in his house and thereafter went to see him. On that date, however, as I have already discussed somewhere earlier in a different context, Mian Abbas was actually at Peshawar from

where he returned by P. I. A. Right in the evening and reached his house at about 7 p.m. It may be mentioned at this stage, however, that the High Court, with respect, seems to have explained away the said unconvincing evidence of the witness by observing that after reaching Rawalpindi, he might have rested for a few hours and then contacted Mian Abbas. The fact, however, is that this was not the claim of the witness because what he claimed was that soon after his arrival at Rawalpindi he contacted Mian Abbas and then went over to his house, and explained to him the details of the occurrence.

375. His next claim is that he was short of 51 empties and since P.W. Fazal Ali had, refused to accept them unless the shortage was made up, Mian Abbas helped him from his own resources in that behalf. By making this claim, the witness does not seem to have realized the deeper implications. His earlier claim was that when he was proceeding to Lahore, Mian Abbas had told him to change the ammunition from some other source so that no suspicion is directed at the FSF. From this it should be obvious that Mian Abbas was conscious of the importance of that fact and yet left the same to the witness in whom he had evidently no trust whatever. Furthermore, if he could provide from his own resources a number of empties to Ghulam Hussain to make up the shortage, obviously he could have as well changed this ammunition himself rather leaving it to the uncertain chance to a witness in whom he had no faith.

376. There is no truth in his evidence that while leaving for Lahore in the last week of October 1974, along with Rana Iftikhar, entry (Exh. P.W. 31/3) was made of their departure in the daily diary of Battalion No. 5 by a person in charge of the said diary (in which the mention of destination was not made) and the same was initialled by Rana Iftikhar. In the first place the person concerned who had made the said entry was not produced in evidence and in the second place, why would Ghulam Hussain not initial the said entry and leave this to his subordinate to do so. However, this circumstance by itself may not be conclusive but when taken into consideration with other evidence, it can carry conviction. His evidence is that whereas he returned from Lahore on November 12, 1974, no arrival entry was made by him in the daily diary of the Battalion until 8/10 days thereafter because Mian Abbas had told him to do so in that behalf. Except for the bare words of the witness, however, the prosecution has not shown any reason as to why the said strategy was adopted in respect of the said entry. Not only this, but according to entry (Exh. P.W. 31/4) recorded by him in the said diary, he is shown to have left for Peshawar on 22-11-1974 and returned to Rawalpindi on 29-11-1974 vide entry (Exh. P.W. 31/5) recorded in the same diary. When confronted with the said two documentary pieces of evidence all that the witness replied was that whereas he had actually remained throughout the said period at Rawalpindi, Mian Abbas had told him to make the said entry in order that he should not be officially present at Rawalpindi. The least, that can be said about this claim of the witness is that it is patently absurd as the reason for which he made that statement is to support the Road Certificate (P.W. 2419) through which he claimed to have deposited with P.W. Fazai Ali certain ammunition and empties. Furthermore, the prosecution has failed to show any

reason as to why it was necessary to keep the presence of the witness at Rawalpindi as secret in order to justify the committing of the said forgeries in the Government record.

377. The further claim of the witness that 2/3 days before the actual occurrence at Lahore while travelling in a jeep on Ferozepur Road, during the night P.W. Sardar Abdul Vakil Khan, D.I.G., Lahore Range, Lahore, intercepted him and admonished him as to why the said jeep was carrying no number plates. Before allowing him to proceed further, Mr. Abdul Vakil Khan contacted Mr. Mallhi at the FSF Headquarters on wireless to confirm his identity. Mr. Abdul Vakil Khan has, no doubt, supported the said claim of the witness, but both of them cannot be believed because according to Mr. Abdul Vakil Khan, he had written a letter to Mr. Mallhi in that behalf (of which mention would be made subsequently) but the prosecution has not cared to produce the said letter, which, in view of the peculiar circumstances of the case, was wholly indispensable. The prosecution ought to have realized that Ghulam Hussain was an approver and consequently the production of the said letter in Court would have gone a long way to dispel the natural doubt which attaches to the evidence of this type. Not only this but even Mr. Mallhi was not produced in evidence to prove that P.W. Abdul Vakil Khan had talked to him on wireless when he found the witness sitting in a jeep during the night with no number plates on it.

378. The witness was cross-examined extensively by the learned counsel for Mr. Bhutto and Mian Muhammad Abbas. Since the bulk of his cross-examination is irrelevant, evasive in nature and instead of being of any help in the resolution of the main question in the case, has added confusion to it, I would straightaway proceed to pin-point his manifold omissions, contradictions as also the major improvements made by him in his evidence in the High Court. It is in evidence that his confessional statement was recorded on 11-8-1977 and his approver's statement on 21-8-1977. His statement under section 161, Cr. P.C. was also recorded by Mr. Muhammad Boota, P.W. 39 on 27-7-1977 and duly verified by Abdul Khaliq, P.W. 41 on 20-7-1977, but a copy of the same was not supplied to the defence but that is a different matter and I would ignore the said statement for the present discussion. He admitted in cross-examination that in none of his previous two statements, he had made any mention of the fact that while officially he was posted to Battalion No. 5 but on the oral order given to him by Mian Abbas he worked with him, and a day or two after he joined the FSF, he was assigned the first special duty at Larkana; that for the purpose of training the trainees were to bring their own weapons but they used to be supplied ammunition drawn from the Headquarters' Armoury of the FSF; that Mian Abbas gave him a chit with a view to obtain from P.W. Fazal Ali a sten gun, a pistol, two magazines and ammunition but when he took the chit to Fazal Ali and asked him not to make any entry of the said issue in the Register, he refused. At this, he returned to Mian Abbas and told him about the attitude of Fazal Ali. Thereupon Mian Abbas asked him to fetch Fazal Ali to his presence. Accordingly, he went and brought Fazal Ali to the office of Mian Abbas who ordered him to do what he was told failing which he would settle the



score with him. On this, Fazal Ali expressed his willingness to comply, and so both of them returned to the Armoury. On reaching the Armoury, Fazal Ali handed him the said articles on the said chit and made no entry of them in the requisite Register.

379. As to the instructions given to him by Mian Abbas to go in search of and the identification of Mr. Kasuri, the witness agreed not to have mentioned in his said two previous statements that after one or two days, he rang up the number of Mr. Kasuri and asked for him. A person who responded from the other end told him that Mr. Kasuri was not available as he had gone out of Rawalpindi and he did not know as to when he was likely to return. Accordingly, he informed Mian Abbas about his said efforts.

380. Similarly, in answer to another question, he agreed not to have mentioned in his said two statements that Mian Abbas ordered him to depute Head Constable Zaheer and Liaqat from the Commando Camp to go to Lahore in search of Mr. Kasuri. He complied with the orders. He rejoined his work in the Commando Camp. He similarly agreed not to have mentioned therein that a day before Eid in October 1974, Mian Abbas sent for him and told him that his men were enjoying themselves at Lahore and have done nothing in respect of the assignment. He further told him that since no progress had been shown in that behalf, the then Prime Minister was abusing him. He replied that he would leave for Lahore immediately after Eid but Mian Abbas directed him to leave immediately and on reaching Lahore to confirm his arrival with him on telephone. He further told him that Eid was the best occasion to assassinate Mr. Kasuri as he would be meeting his friends and relations. Accordingly, he entered his departure in the daily diary of Battalion No. 4 and left for Lahore. On reaching Lahore he phoned up Mian Abbas, who, after sometime, re-contacted him on telephone to confirm that he had actually spoken to him from Lahore. He stayed at Lahore for about 10 days, found out the whereabouts of Mr. Kasuri and then returned to Rawalpindi where he noted his arrival in the Roznamcha of Battalion No. 4. Furthermore, he informed Mian Abbas that he had located Mr. Kasuri at Lahore who is being watched by his men, and asked him for further orders.

381. Similarly, in answer to another question, he agreed not to have said in his previous statements that on 10-11-1974 between 7/8 p.m. he suggested to appellant Ghulam Mustafa to go in search of Mr. Kasuri so that they would be able to show some result. Accordingly, Ghulam Mustafa, Rana Iftikhar, Arshad Iqbal, and he himself left in a jeep towards Model Town. On reaching the intersection of Ferozepur Road and the road leading to Model Town they saw the car of Mr. Kasuri proceeding towards Ferozepur Road while they were turning into the road leading to Model Town. Therefore, they could not reverse the jeep in time to follow him and consequently lost him. Thereafter they proceeded towards Ferozepur Road and "if my memory does not fail me" stopped for a cup of tea in Ichhra and returned to office at Shah Jamal. After leaving the jeep there, all four of them including the driver, went upstairs to their room

where they lived, and held a conference. Since they knew that the car of Mr. Ahmad Raia Kasuri was there in front of the house in which wedding festivities were going on, they proceeded to make a plan for selecting the site from where they could fire at him and kill him. Accordingly they selected Shah Jamal/Shadman Colony Roundabout to be the most suitable site as from there the said house was visible.

382. Similarly, in answer to another question he agreed not to have said in his previous two statements that before going to the said site selected by them, Arshad Iqbal and Rana Iftikhar had worn overcoats to keep the sten-guns hidden. Similarly, in answer to another question he agreed not to have said in his previous two statements that Rana Iftikhar was ordered by him to open fire at the first approaching car after Arshad Iqbal had fired in the air. He had directed Arshad Iqbal to fire in the air for more than one reason. He was facing the 'shamiana' and if he had fired in the air, people under the 'shamiana' might be hurt, secondly there was a danger of people sitting in the cars or those working on roads being injured, thirdly Iftikhar could not see the car arriving from the side where the wedding was taking place and the fire in the air was to be a caution for him. However what he had actually stated in his approver's statement was "I told Arshad to fire one or two bursts in the air after identifying the car so that he may run away." Similarly in his confessional statement what he has said was "I ordered them that Arshad Iqbal would fire in the air after identifying the car, and from other side Rana Iftikhar would fire so that there is commotion and our honor is also saved by this plausible excuse.

383. Similarly, in answer to another question he agreed not to have said in his aforesaid two statements that he came to the intersection on a number of times to keep Arshad Iqbal and Iftikhar on guard and also to find out whether the people had started leaving the place where the wedding was taking place. He similarly agreed not to have mentioned therein that when they returned to the F.S.F. Headquarters at Shah Jamal, they found the main gate closed, therefore, he asked the others to stay where they were so that they may not be seen by the Sentry on duty, who must have heard the report of fire. When he reached near the Gate he found the Sentry was wrapped up in a blanket and resting against the wall. He got the impression that he was asleep. The gate was on the right side of the building whereas on the left of it were some trees. Therefore, all of them went over the wall, one by one, from the left side, taking the shelter of the trees.

384. He similarly agreed not to have mentioned in his aforesaid two statements, the fact that on returning to the Headquarters at Shah Jamal they checked the ammunition and found that 30 rounds had been fired in the operation.

385. He also agreed not to have mentioned therein the fact that after Sufi Ghulam Mustafa had spoken to Mian Abbas on telephone and before he left for Rawalpindi, he went on making enquiries about the progress of the investigation in the murder case of Nawab Muhammad Ahmad Khan. He similarly agreed not to have mentioned therein

that when he reached Rawalpindi and met Mian Abbas the latter asked him if he had left any incriminating thing at the spot which might disclose the involvement of the F.S.F., he replied that the only thing left there was the empties which could not be collected as it was dark and the area around was grassy.

386. He also agreed not to have mentioned in his aforesaid two statements that he wound up the Camp and returned to Fazal Ali, on the basis of a Road Certificate the remaining ammunition as well as the empties. Actually he was short of 51 empties including 30 fired at Lahore, 7 at Islamabad and the rest during the practice firing by the trainees. However, he hoped that Fazal Ali would accept the articles from him in mutual confidence and without checking and thus the said shortage would go unnoticed. This hope of his, however, did not materialize because Fazal Ali carried out a physical check and found out the shortage of 51 empties. This shortage was in respect of sten-guns. He, therefore, reported the matter to Mian Abbas who told him to come back to see him after 3/4 days in which period he would be able to make some arrangement. After 3/4 days he went back to Mian Abbas who handed over to him a Khaki envelope containing 51 empties of sten-gun which he carried to Fazal Ali vide Road Certificate (Exh. P.W. 24/9) and thus made up the said deficiency.

387. He also agreed that in none of his said statements he had mentioned that on the third day after his arrival from Lahore to Rawalpindi he had made an entry in the daily diary of his Battalion showing therein his departure for Peshawar as he had been directed in that behalf by Mian Abbas so that his presence at Rawalpindi was not disclosed. The said entry was made by him on 22-11-1974 and is Exh. P.W. 31/4. However he had not gone to Peshawar and continued to perform his duties at the Commando Camp.

388. Finally, he also agreed not to have mentioned in his aforesaid two statements that for the days he was on duty at Lahore he claimed TA/DA for Karachi under the orders given to him by Mian Abbas.

389. Now look at each of the said omissions from his previous statements, and that too confessional in nature, it would be seen that they are so monumental and significant which the witness could not have forgotten to mention therein if there was any truth in them. Enough has already been said as to when an omission would amount to a contradiction within the meaning of section 145 of the Evidence Act. I am, therefore, of the humble view that each one of the said omissions from the previous statements would be tantamount to contradiction with the result that except for the bulk of the evidence of the witness, there is no substance left in it which can carry any conviction whatever. In some context herein before, T. A. Bill (Exh. P.W. 31/6); the entry made by the witness in the daily diary of his Battalion (Exh. P.W. 31/4) showing therein his departure from Rawalpindi to Peshawar, and entry (Exh. P.W. 31/5) showing therein his return from Peshawar to Rawalpindi have been discussed by me in some detail, and

I have held all of them as genuine. The learned Special Public Prosecutor, however, relied on Road Certificate (Exh. P.W. 24/9) to show that on 25-11-1974 the witness was present at Rawalpindi, as through the said certificate he had deposited with P.W. Fazal Ali ammunition and empties (Exh. P.W. 31/4 and Exh. P.W. 31/5) recorded in the daily diary of the Battalion were forged. With this contention also I have dealt in some detail previously and disagreed with it. I have held that in the face of the said authentic documentary evidence coming from the record of the Government it would be dangerous to rely upon the *ipse dixit* of the witness that they were forged as Mian Abbas had asked him to do so in order to keep his presence at Rawalpindi as secret. In fact, no reason, much less a plausible one, has been shown by the learned counsel as to why and for what purpose was this strategy adopted? What was the reason for which the presence of the witness at Rawalpindi was required to be kept secret? Furthermore, I have also dealt with his T. A. Bill (P.W. 31/6) in some other context and held the same to be genuine. The surprising part, however is that the learned Special Public Prosecutor also treats the same as partly genuine and partly forged. He argued that in respect of the travel of the witness to Lahore and his stay there between 16-10-1974 to 25-10-1974 the T. A. Bill is authentic whereas in respect of his travel to Karachi and Peshawar for the period from 31-10-1974 to 21-11-1974 and 22-11-1974 to 29-11-1974 respectively is forged. With respect to the learned counsel, however the contention raised by him, not only seems to be rather odd, but unconvincing. It is not the case of the prosecution that on the T. A. Bill in question, no money was drawn by the witness for all the journey shown therein including the one undertaken by him to Karachi, nor indeed is there any evidence on record to show if any enquiry was conducted in the matter, much less action taken against those who were responsible for preparing, authenticating and allowing the encashment of the said bills in favour of the witness. From this it should follow that the T. A. Bill had not only passed through the departmental channel as authentic but the same was treated as such by the paying authority. For 3 long years no objection seems to have been taken as to the genuineness of the said bill by anyone, and consequently, it would be perilous to hold the same as forged, simply because the witness says so, and that too who is self-confessional criminal.

390. The further reason for which the said T. A. Bill seems to me to be genuine is because of the witness's own evidence in respect of which, however, I have disbelieved him. His evidence is that when he returned to Rawalpindi on 12-11-1974 he did not record in the daily diary of his Battalion any entry to that effect for 8/ 10 days as this is what Mian Abbas had told him, but this claim of the witness is patently absurd. Having accomplished his mission at Lahore, or more appropriately miscarried it, what was the earthly reason to keep his presence at Rawalpindi as secret? On the contrary, care should have been taken by him to keep his presence at Lahore secret but there his conduct was different because instead of making himself scarce from Lahore, he continued to stay there on the plea of finding out the progress of the investigation of the case and then took a lift in the car of Mr. Masood Mahmood and returned to

Rawalpindi. It is, therefore, obvious, to me that since he was at Karachi between 31-10-1974 to 21-11-1974, he had no option but to invent all the said fables to the effect that although he had returned to Rawalpindi on 12-11-1974, Mian Abbas told him not to make an entry in the daily diary of the Battalion in that behalf until 8/10 days thereafter. It should be clear, therefore, that on his own showing, the witness allowed himself to be caught, so to say, in a vice, not realizing that he has exposed himself. Taking him on his word, therefore, it is obvious that the said entry was made by him in the daily diary on or about 21-11-1974. Now if this be so then his evidence seems to have under-written the authenticity of his T. A. Bill because his return to Rawalpindi from Karachi is shown therein on 21-11-1974 which date coincides with the date on which he recorded the said entry.

391. Unfortunately for him, the Road Certificate (Exh. P.W. 24/9) has already been held by me as forged, and the Register of the Armoury doubtful. In support of that conclusion I have given my reasons and, therefore, the same process should not be repeated. This much may be said, however, that the two entries (Exh. P.W. 31/4 and Exh. P.W. 31/5) recorded by him in the daily diary of his Battalion are genuine, but to support the case of the prosecution he seems to have forged the Road Certificate (Exh. P.W. 24/9) to show his presence at Rawalpindi on 25-11-1974, as this is the date on which he deposited with P.W. Fazal Ali the ammunition and empties.

392. Furthermore, it is in the evidence of Abdul Khaliq (P.W. 41) that during the investigation of the case he had taken into possession certain T. A. Bills but strangely the said controversial T. A. Bill (Exh. P.W. 36/1) was not taken into possession by him. Now this conduct of Abdul Khaliq would show that no objection as to the authenticity of the bill in question was taken before him by anyone, including Ghulam Hussain, whose 161, Cr. P.C. statement was recorded by Muhammad Boota (P.W. 39) and verified by Abdul Khaliq himself on 28-7-1977. Not only this but the said T.A. Bill was not even mentioned in the challan nor attached therewith. In fact, it was summoned in evidence by the defence and exhibited on the record of the case. As already said, no mention of the aforesaid T. A. Bill was made by Ghulam Hussain in his said two previous statements. From this, it should, therefore, follow that if the T. A. Bill in question was really forged, Ghulam Hussain could not have possibly forgotten to mention the same in his previous statements or in his 161, Cr. P.C. statement, a copy of which was, however, not supplied to the defence. It would be interesting to note that even the Road Certificate (P.W. 24/9) of which also no mention was made by him in his previous statements, was brought on the record of the case through P.W. Fazal Ali. Furthermore, it is in the evidence of Abdul Khaliq (P.W. 41) that during the investigation of the case, he did not take into possession the said and another Road Certificate (Exh. P.W. 24/7) which again would go to show that the said Certificate was evidently brought into existence at a subsequent stage, as otherwise how could Ghulam Hussain and Fazal Ali both have forgotten to make a mention of it or to produce it before the investigating officer. It is also in evidence that the said Road Certificate was

neither mentioned nor attached with the interim or final challan of the case, which again should support the said conclusion. The learned Special Public Prosecutor also relied on entry (Exh. P.W. 24/10) in the Stock Register of the Central Armoury in support of his plea that the T. A. Bill (Exh. P.W. 36/1) and the two entries in the daily diary of the Battalion of Ghulam Hussain (Exh. P.W. 31/4 and Exh. P.W. 31/5) are forged. Apart from the fact that no reliance can be made on the said entry, as by my finding I have already held the Register of the Armoury as doubtful. Notice, however, may be taken of the evidence of P.W. Fazal Ali in that behalf which is revealing. When the said entry was put to him in the cross-examination and he was asked as to who had made it, he gave three versions (i) that he had made it himself; (ii) that it was made by Bashir; and (iii) that it was made by Ilyas. However, by the examination of the entry, in question, it would be seen that it was made by one Azad, who was not produced in evidence. It is true that the entry, in question, was initialled by way of counter-signatures by P.W. Fazal Ali, but in view of the three conflicting statements by him, Azad should have been produced but the prosecution seems to have contented itself with the evidence of Fazal Ali in that behalf. Furthermore, a similar entry (Exh. P.W. 24/8) in which the deposit of substantial amount of ammunition is shown to have been made at the Central Armoury through various Road Certificates, has been made in the hand of P.W. Fazal Ali and counter-signed by an Officer, Assistant Director (Administration). No explanation has been given as to why the same practice was not followed in the case of Road Certificate (Exh. P.W. 24/9) nor indeed of the said Stock Register. This, in my view, would seem to furnish another reason which would go to support the conclusion that the Road Certificate (Exh. P.W. 24/91) was subsequently manufactured to suit the case of the prosecution.

393. The learned Special Public Prosecutor however, relied on the evidence of Manzoor Hussain (P.W. 21) and Muhammad Amir (P.W. 19) in support of his plea that P.W. Ghulam Hussain was indeed present at Lahore when Nawab Muhammad Ahmad Khan was murdered. He argued that on the evening of 10-11-1974 Muhammad Amir has driven Ghulam Hussain in his jeep whereas on the following morning Manzoor Hussain (the driver of the car of Mr. Masood Mahmood) gave him a lift in the car from Lahore to Rawalpindi. Enough has already been said that by his own evidence Ghulam Hussain has rendered the claim of both these witnesses doubtful. It is in his evidence that on reaching Rawalpindi at about 2 p.m. on 12-11-1974, he contacted Mian Abbas at his house on telephone; that Mian Abbas told him to come and see him and that he accordingly went to his house and narrated to him the detail of the occurrence. Unfortunately for him, however, Mian Abbas, on that date was at Peshawar from where he returned by a P. I. A. flight in the evening reaching his house at about 7 p.m.

394. Furthermore, it is the evidence of Ghulam Hussain that he had left for Lahore on 31-10-1974; that actually he was living at the F.S.F. Headquarters at Shah Jamal, but, on paper, he was shown to be residing in a hotel. In his approver's statement, however, what he has said was that it was in November, 1974 that Mian Abbas called him and

directed him to proceed to Lahore for the execution of the mission already assigned to him in respect of Mr. Kasuri. Now this contradiction by itself may not be conclusive, but when read in the context of other circumstantial evidence, seems to underline the prevaricative tactics adopted by the witness Keeping all this in the background, let us proceed to examine the evidence of P.W. Amir and Manzoor Hussain.

395. It is true that Amir (P.W. 19) claims to have been the driver of the jeep in which he had driven Ghulam Hussain and his companions on the evening of 10-11-1974 towards Model Town, Lahore, in search of Mr. Kasuri. The learned counsel for Mr. Bhutto objected to his evidence on the ground that the log book of the jeep (P.W. 19/1-T) does not support the witness. He pointed out that by examination of the relevant entries therein, it could be seen that on 10-11-1974 the jeep was detailed for the duty of one Iqbal (not the accused) although driven by the witness.

396. He further maintained that according to the evidence of the witness, all the movements of the jeep, in question, were shown in the *Roznamcha* and a Register maintained at the F.S.F. Headquarters, Shah Jamal, but the same were not produced in evidence. Relying on section 35 of the Evidence Act, 1872, he, therefore, argued that all the entries made in the log book of the jeep must be held to have been proved without the need of any formal proof of the relevant entries. It may be mentioned that in respect of the same submission of the learned counsel, the finding recorded by the High Court is that since Driver Amir was an illiterate person, and the entries in the log book of the jeep were made not by him but many other persons, the entries relied upon by the defence have to be formally proved. However, since no formal proof was tendered in that behalf by the defence, the High Court did not rely on the said entry. Be that as it may, and without giving any finding in respect of the contention of the learned counsel for Mr. Bhutto, it does seem to me that *prima facie*, his contention cannot be said to be without force, but I would stop at this observation, as the evidence of Manzoor Hussain (P.W. 21) would seem to provide a satisfactory answer to the said question.

397. Now it is not disputed that Manzoor Hussain was employed as a Driver with Mr. Masood Mahmood; that on 11-11-1974 he was on duty with Mr. Masood Mahmood at Multan, and that he had driven back from Multan to Rawalpindi via Lahore. It is his evidence that on 12-11-1974, he went to the F.S.F. Headquarters at Shah Jamal to fill in petrol in the tank of his car. On the arrival at the Headquarters, he met P.W. Ghulam Hussain who requested him for a lift to Rawalpindi to which he agreed and, accordingly drove him back in the car to Rawalpindi. Mr. Yahya Bakhtiar, the learned counsel for Mr. Bhutto has taken serious objection to the evidence of the witness on the grounds that (t) he was brought in this case only to support the prosecution because he was dismissed from the F.S.F. sometime in 1975 and re-employed only on 17-11-1977 when the F.S.F. was already disbanded; and that (d) from his own evidence it is clear that the witness had been invariably purchasing petrol on cash, and, therefore, there

was no reason for him to have gone to the F.S.F. Headquarters at Shah Jamal for obtaining petrol.

398. There seems to be force in the contention of the learned counsel. The witness has admitted in his evidence that after his dismissal from the F.S.F. he was employed by the Fauji Foundation, from where he resigned his job on 12-11-1977. On 9-9-1977, however, his 161, Cr. P.C. statement was recorded in this case by the Investigation Officer and on 17-11-1977 he was re-instated in the F.S.F. Now these admissions made by the witness seem to be intriguing. In the first place, I have not been able to see any reason in his resigning the job from the Fauji Foundation and taking up a job with the F.S.F. when the Force itself was already disbanded. Furthermore, he was not re-instated until his 161, Cr. P.C. statement was recorded on 9-9-1977 which again makes his re-instatement a little doubtful. To have a job with a permanent establishment which the Fauji Foundation evidently was for a job in a Force which was already disbanded, is really surprising, because normally no sane person can be expected to take any such decision. Without holding anything against him, however, at least this much ought to be said that his said conduct does seem to cast a serious doubt on his evidence. Furthermore the car of Mr. Masood Mahmood was meant to consume aviation gasoline. It is the evidence of the witness himself that he used to purchase gasoline on cash and presenting the receipts to the concerned officer. Seen in this background, his claim to the effect that he had gone to the F.S.F. Headquarters as Shah Jamal to fill aviation gasoline in the car seems to be unconvincing. Furthermore, he did not fill in any of the gasoline from there because some unidentified person told him that the petrol pump with which the F.S.F. had a contract for supplies, had no gasoline with it. However, his claim is that during his said errand to the F.S.F. Headquarters which lasted for about 5/10 minutes he met P.W. Ghulam Hussain who requested him for a lift in his car to Rawalpindi, for the proof of which someone from the F.S.F. Headquarters at Shah Jamal should have been produced to show that (i) the F.S.F. indeed had a contract with the said Petrol Pump for supplies; and (ii) on 12-11-1974 the said Pump had no stocks of aviation gasoline. The Ipse dixit of the witness alone, keeping in view the background in which he was re-employed as a Driver in the F.S.F, cannot be accepted to support the claim of Ghulam Hussain that he was present at Lahore on November 10, 11 and 12, 1974.

399. Mr. Yahya Bakhtiar, the learned counsel for Mr. Bhutto, however, argued that in the *Roznamcha* of Battalion No. 3, Walton, Lahore, the presence of Ghulam Hussain at Lahore on 25-10-1974 (against entry No. 2) was recorded on 7-11-1974 by one Muhammad Yusuf who was cited in the calendar of witnesses but later not produced. This *Roznamcha* was summoned by Mian Abbas but it was not produced.

400. However the High Court in para. 413 of the judgment, made use of an entry from the same *Roznamcha* to the effect that Ghulam Hussain had received a pistol from the said Battalion. He, therefore, argued that this approach of the High Court was illegal just as it was illegal in the case of a similar entry recorded on 25-10-1974 in the said



*Roznamcha*, showing therein that Ghulam Hussain had collected from the Armoury a sten-gun, two magazines and 60 rounds of ammunition. Para. No. 413 of the High Court judgment in this behalf reads as under:

"It appears that Mian Muhammad Abbas too is not serious about this objection since in his second written statement filed after the close of the defence evidence, he referred to the *Roznamcha* of Muhammad Yousaf, Head Constable in the Federal Security Force, brought by Abdul Khaliq D. W. 3 and the copies of two entries dated 25-10-1974 and 7-11-1974 made in it in order to show that P.W. 31 had obtained weapons directly from Muhammad Yousaf, Head Constable off Federal Security Force, Battalion No. 3 posted at Lahore *inter alia* on the 7th of November, 1974. The entries have not been proved on record, but it is clear from this written statement that on one hand the plea of Mian Muhammad Abbas is that Ghulam Hussain was not in Lahore from the 31st October, 1974 to the 12th November, 1974 and on the other hand, he pleads that he had obtained weapons at Lahore from Muhammad Yousaf, Head Constable on the 7th of November, 1974. There is no doubt left in my mind that Ghulam Hussain was not at Karachi during this period but was at Lahore."

401. It would thus be seen that Mian Muhammad Abbas in the second written-statement filed by him after the close of the defence evidence, brought on the record of the case, the said entries. In the first place he ought not to have been allowed to do so because the said entries (which were not proved at all) were bound to react against the interest of the other accused; and in the second place, the High Court, with respect, could not have taken them into consideration in recording the conclusion. "There is no doubt left in my mind that Ghulam Hussain was not at Karachi during this period but was at Lahore."

402. The High Court, and I say with profound respect, should have taken note of the evidence of P.W. Abdul Khaliq (see page 698 of Volume III of Evidence) in which he has made the admission that "*Roznamcha* of Battalion No. 3 was seen by me during the investigation of this case. It is correct that Inspector Muhammad Boota had put up the said *Roznamcha* along with its Memos before me. The *Roznamcha* and the Register are not readily available with him at this time. It might be with either the Investigating Officer, or returned to the Department since being not relevant to this case" and insisted either on the production of the said *Roznamcha* or else refused permission to Mian Abbas to bring on the record, the said two entries from it, which clearly influenced its decision.

403. The record would show that on 15-11-1977 an application was moved in the High Court (see page 73 of the Volume of Applications) on behalf of Mr. Bhutto praying therein, amongst other things, that the record of the T. A. Bills of appellant Rana Iftikhar pertaining to the period from October to December, 1974 may be directed to be

produced for use by the defence. This application was granted by the Court but Mr. M. A. Rahman the learned counsel for the State made a statement at the bar of the High Court that the same could not be found in the F.S.F. Offices. Now I have no doubt that Mr. Rahman had correctly made the statement on the instructions of his clients but it is intriguing as to why the said record was not available with the F. S.F., more so when it concerned financial transactions which in the nature of things is generally given more attention than the record of routine nature.

404. Furthermore, at page 698 of his evidence Abdul Khaliq admitted that "I think that the Members of the Investigating Team had taken into their possession certain T.A. Bills which were considered relevant to the case". Now, if the record of some T.A. Bills, which were considered relevant by the Investigating Team, were taken into its possession, then two things would follow from it; that (i) the members of the Investigating Team were conscious of the relevancy of the T.A. Bills, and, consequently, how could they have ignored T.A. Bills of Rana Iftikhar as the same would be the authentic evidence to show his presence at Lahore during the period when attack was made on the car of Mr. Kasuri; and (ii) if the said bill was lost or reported missing, then what steps were taken or enquiries made in that behalf by them, I am, therefore, of the humble view that the record of the T.A. Bill of Rana Iftikhar seems to have been deliberately withheld. The reason furnished for the non-production of the record of T.A. Bills of Rana Iftikhar was not convincing and consequently it ought to react against the case of the prosecution.

405. Now coming to the main occurrence, again the evidence of Ghulam Hussain seems to be unconvincing. In his evidence in the High Court, the stand taken by him was that on reaching the Roundabout of Shah Jamal Shadman Colony, he posted Arshad Iqbal and Rana Iftikhar at the specified spots, with instructions that the mission to assassinate Mr Kasuri has to be executed. In his confessional as well as approver's statements, however, what he had said was that he had told Arshad Iqbal to fire in the air so, that Mr. Kasuri is able to make a getaway and their honour also saved. Now, apart from this basic and fundamental contradiction between his two versions, appellants Ghulam Mustafa and Rana Iftikhar both, in their confessional statements, said that at the said roundabout Ghulam Hussain had fired from a pistol, but the latter in his own evidence prevaricated on the same point and when the learned counsel relentlessly pursued him in that behalf, first, he replied he did not remember and finally denied to have fired at all.

406. Mr. Yahya Bakhtiar, the learned counsel for appellant Mr. Bhutto, however, argued that the pistol firing by P.W. Ghulam Hussain was such an important element in the chain of events leading to the execution of the plan of assassinating Mr. Kasuri as to have been present to his mind when he made his two previous statements. He argued that since Arshad Iqbal and Rana Iftikhar both had in their previous statements asserted that Ghulam Hussain had indeed fired from his pistol, his denial of it in the High Court

would be tantamount to contradiction and the consequent benefit of it should have been given to the accused. His grievance is that the said omission on the part of the witness was explained away by the High Court in favor of the prosecution.

407. In order to see the force of the contention of the learned counsel, reference may be made to para. 572 of the judgment of the High Court, where the said question has been treated thus:

"The learned counsel argued that there was conflict between the statement of Ghulam Hussain and the confessions of all the three confessing accused. He pointed out that Ghulam Hussain did not say in his examination-in-chief that he fired his pistol, while Iftikhar and Arshad Iqbal said in their confessional statements that the pistol was fired by him. The argument clearly ignores the statement of Ghulam Hussain in cross-examination that he did not remember whether he fired the pistol. This statement does not exclude the possibility of his having fired it."

408. With profound respect to the High Court, however, no benefit ought to have been given to the witnesses in that behalf on the ground that "the argument clearly ignored the statement of Ghulam Hussain in cross-examination that he did not remember whether he fired the pistol. This statement does not exclude the possibility of his having fired it."

409. Now if there was no other evidence on record, exception could not be taken to this finding, but with respect. the High Court did not take into consideration the confessional statements of Rana Iftikhar and Arshad Iqbal in which both have positively asserted that Ghulam Hussain had indeed fired from his pistol. Furthermore, if one of the said two accused had made a similar statement, perhaps the finding of the High Court could yet be supported, but the two of them cannot be wrong as against the bare word of Ghulam Hussain, more so, when he happens to be a self-confessed criminal.

410. Furthermore, in none of his previous statements was any mention made by him that one Liaqat also was present with him right in the lane adjoining the Shah Jamal-Shadman Roundabout and he continued discussing with him the plans of the operation, as also with Ghulam Mustafa. Not only this but none of the other appellants have supported him in that behalf as they have not even mentioned the name of Liaqat or his presence anywhere around the place of occurrence. Similarly, he had made no mention of the fact in his previous statements that before proceeding to the said roundabout Arshad Iqbal and Rana Iftikhar had worn overcoats to cover their respective weapons, yet in his evidence in Court he mentioned that fact respecting which, however, Arshad Iqbal and Rana Iftikhar have not said a word in their own statements.

411. Likewise, neither Rana Iftikhar, nor Arshad Iqbal has said a word in their statements about the fact that on the evening of 10-11-1974 they along with Ghulam Hussain went out from the F.S.F. Headquarters at Shah Jamal in a jeep towards Model. Town in search of Mr. Kasuri, and yet in his evidence in Court, Ghulam Hussain deposed to that monumental fact, which if true, ought surely to have been present to his mind while making his previous statements.

412. Similarly, in his two previous statements, Ghulam Hussain did not mention that Zaheer and Liaqat were also detailed with him as members of the team to assassinate Mr. Kasuri yet none of them was examined in Court, nor challaned in the case as accused person. The other important fact about which Ghulam Hussain and Sufi Ghulam Mustafa are in disagreement With each other, is the fact as to who had telephoned the house of Mr. Kasuri in the evening of 10-11-1974 to find out his whereabouts. Ghulam Hussain says that Sufi Ghulam Mustafa had telephoned, whereas the latter says that it was Ghulam Hussain who had telephoned the residence of Mr. Kasuri.

413. As to the overall nature of the evidence given by him in the High Court, the same has been surveyed by me in sufficient detail to show that it was unnatural, improbable and wholly untrue. These few contradictions, however, seem to have received no treatment in the said discussion, and, therefore, it was necessary to mention them at this stage.

414. Now even the two site plans (Exh. P.W. 34/2 and Exh. P.W. 34/5 d) respectively prepared by Abdul Hayee Niazi and one Inam Ali Shah (not produced) not only do not support him but literally decimate his evidence. Abdul Hayee Niazi has admitted in his evidence that the site plan Exh. P.W. 34/5d) was prepared by Inam Ali Shah on his instructions, the writing appearing thereon in red was in his own hand, as also that it was signed by him on 11-11-1974. He has further admitted that the said site plan was prepared to scale Inam Ali Shah, whereas the one prepared by him (Exh. P.W. 34/2) was not prepared to the scales.

415. Now Inam Ali Shah was not produced in evidence, as Mr. M. A. Rahman, the learned A. O. R. for the State seems to have taken objection in the High Court that the site plan prepared by him had been incorrectly prepared. The factual position, however, is that the said plan was not disclosed in the Challan and was produced in evidence at the behest of appellants Bhutto and Mian Abbas.

416. It is in the evidence of Abdul Hayee Niazi, however, that Inam Ali Shah had prepared the site plan not only on his instructions but all the writing appearing thereon in red was made by him in his hand and the plan was signed by him. In this view, Inam Ali, Shah ought to have been examined during the trial as in some essential respects his plan was in conflict with the one prepared by Abdul Hayee Niazi. This step, in my

view, would have been not only in consonance with the principles of safe administration of criminal justice, but helped the Court in the resolution of the said conflict.

417. Furthermore, the manner in which Abdul Hayee Niazi deposed in that behalf ought to have made the taking of the said step indispensable. Having marked the relevant entries in the site plan (Exh. P.W. 34/5d) in red ink, and signed the same, it would follow that he was fully satisfied with its accuracy. More so, when he himself was familiar with the site, visited the same on more than one occasion, prepared his own rough plan (Exh. P.W. 34/2), as also that the site was kept guarded by him right from the earliest moments by posting there personnel from his Police Station. It would be of interest to note that at page 639 of the Volume of his evidence he admitted to have Prepared the spot inspection note on 11-11-1974 but the same also was riot allowed to be brought on the record because an objection was taken in that behalf by the learned counsel for the prosecution.

418. Furthermore, in his cross-examination by the learned counsel for Mian Abbas (page. 646, Volume III of Evidence) he retracted from the said position anything "it is correct that I had prepared the spot inspection note only after the D.S.P. had returned from Rawalpindi as the *Zimnis* were *Farzi*". In these circumstances, therefore, it was all the snore essential that Inam Ali Shah should have been examined in Court to clarify the position.

419. In some essential respects; however, the said two site plans are not in conflict with each other, for example, in both of them the place of occurrence shown is the same, the spots where. Arshad Iqbal and Rana Iftikhar were posted are the same and so are the four spots, two inside the roundabout and two outside of it, from where crime empties were recovered, are also the same. The main conflict in the two plans, however, is that whereas the plan prepared by P.W. Abdul Hayee Niazi is not to the scale, the one prepared by Inam Ali Shah is to the scale, and this seems to be the central point of conflict between the two parties. Now if the plan prepared by Inam Ali Shah is believed, to be the proper plan then the story of the prosecution as to the manner in which the car of Mr. Kasuri was fired upon, not only becomes doubtful but implausible. Before proceeding with the exercise of furnishing reasons in this behalf, notice may be taken of the examination-in-chief (see page 547 of the II Volume of Evidence) in which Ghulam Hussain deposed thus:

"Arshad Iqbal had said that he had fired in the air after identifying the correct car and Iftikhar informed me that he had fired at the first car which came before him after Arshad Iqbal had fired in the air. Rana Iftikhar informed him that he had correctly aimed at the car before firing."

420. In answer to a question put to him by Mr. Irshad Qureshi, the learned counsel for appellants Rana Iftikhar, etc. who seems to have supported the case of the prosecution throughout, Ghulam Hussain, however, replied (See page 561 of the same Volume of Evidence) as under:

"After the occurrence I had come to know who had fired the shots at the time of occurrence in Shadman. The first shot was fired by Arshad Iqbal, thereafter Iftikhar fired the shot and meanwhile the car having reached the other side of the roundabout, Arshad Iqbal turned round and opened the fire upon it from behind."

It would thus be seen that but for the question put to him by Mr. Irshad Qureshi. Ghulam Hussain had not said a word in his examination-in-chief that after having fired the first shot (which was a warning shot) Arshad Iqbal turned round and again fired at the moving car of Mr. Kasuri. If there was any truth in the answer given by him to Mr. Irshad Qureshi it is difficult to believe that he would have failed to mention the same in his previous statements, more so, when the conduct of Arshad Iqbal was clearly in conflict with the instructions he had given him in that behalf, namely, that on seeing the car of Mr. Kasuri approaching the roundabout. He should fire in the air in order to caution Rana Iftikhar so that he should be prepared to open fire on the car passing by him.

421. Furthermore, in their respective confessional statements what Rana Iftikhar and Arshad Iqbal had respectively said in that behalf was that:

"We came and sat in the Chowk of Shadman Colony at about 1 a.m. When Ahmad Raza Kasuri's car came there, Ghulam Hussain Inspector fired with his pistol, and we then fired with our stenguns and the car went away from there. We then returned on foot to F.S.F. office. On return, Ghulam Hussain, spoke on telephone to Mian Abbas at Rawalpindi and told him that the orders of D.G. and P.M. have been obeyed."

and that:

"I and Rana Iftikhar were sitting in Shah Jamal roundabout, Inspector Ghulam Hussain fired at the car of Ahmad Raza Kasuri, and according to the plan (programme) we fired indiscriminately, but the car escaped unhurt, and we returned to office."

422. Now, apart from the said two confessional statements of Arshad Iqbal and Rana Iftikhar which are not only in conflict even with the version given by Ghulam Hussain in his answer to the question of Mr. Irshad Qureshi, the said version seems to be improbable, if not impossible. A look at the site plan (P.W. 34/5d) would show that the

distance between the points where Arshad Iqbal was posted and the one in the extreme south-east (within the roundabout) from where six empties were recovered is 35 *karams*, i.e. 192.5 feet. Assuming for the sake of argument, however, that after firing the warning burst, Arshad Iqbal turned round and again fired on the moving car of Mr. Kasuri, evidently the empties should have fallen somewhere around the place where he was posted (i.e. within the hedge of the roundabout in the north) and not in the south-east of it.

423. It is not the case of the prosecution that Arshad Iqbal had traversed the said distance of 192.5 feet before firing at the car of Mr. Kasuri and rightly so, because in the nature of things it would have been impossible for him to run over that distance, and yet be able to effectively fire at the moving car. The position which emerges from the examination of the site plan (Exh. P.W. 34/5d) and in which respect it tallies with the plan prepared by Abdul Hayee Niazi is that 7 empties were recovered from a point just outside the hedge in the north where Arshad Iqbal was posted, 5 from a point (located just within the hedge) at some distance from the point where Arshad Iqbal was posted, 6 from a point just within the hedge in the extreme south-east of it, and 6 from a point outside the hedge (located more towards the extreme edge of the road) parallel to the last mentioned point.

424. Now disregarding the site plan (Exh. P.W. 34/5d) for a moment, and believing the one prepared by P.W. Abdul Hayee Niazi as genuine, still how can the prosecution be said to have proved its case beyond any reasonable doubt that all the said firing had been done only by Arshad Iqbal and Rana Iftikhar. I have not the slightest doubt in my mind that the firing in question was made by at least three persons, if not four. Furthermore, the prosecution was evidently cognizant of the frailty of its case in that behalf, and that was why it seems to have preferred not to disclose the existence of the site plan (Exh. P.W. 34/5d) in the challan and also opposed the examination of Inam Ali Shah as a witness in the proceeding.

425. It may be mentioned in this respect that while the learned counsel for the parties, were in serious disagreement with each other during the course of the arguments, the learned Special Public Prosecutor attempted to show that since Mr. Ahmad Raza Kasuri's car had been fired upon with automatic weapons, it was not unlikely to be the work of two assailants, as also that the empties could have fallen at the said four different places.

426. Mr. Yahya Bakhtiar, the learned counsel for Mr. Bhutto, on the other hand, argued that by no conceivable theory could it be proved that the said firing was done only by two persons or that the empties could be found from four different places.

427. In order to understand the nature of the evidence on this point, a demonstration of live firing was arranged through the courtesy of Mr. M. A. Rahman, the learned

A.O.R. for the State at the Armed Forces Firing Range situated in the outskirts of Westridge, Rawalpindi. The demonstration, in question, was attended by all the members constituting the Bench hearing these appeals as well as the learned counsel for the parties. A Brigadier of the Armed Forces of Pakistan gave the demonstration by firing from an S. M. G. of Chinese manufacture (which was the weapon used in the commission of the crime in this case) and the invariable pattern of ejection of empties whether firing was done in single shots or automatic bursts, noted was, that most of the empties fell towards the right and backwardly direction and some towards the right and ahead or the line of the fire at an average distance of about 20-23 feet and were scattered I from each other by 10-12 feet.

428. After the completion of the demonstration in question, an Inspection Note was prepared which has been placed on the record of these appeals. Now the said Note, being not evidence in the case, cannot be relied upon in support of any conclusion, one way or another, but it does seem to help in understanding the evidence in the case. A look at both the site plans (Exh. P.W. 34/5d and Exh. P.W. 34/2) would show that the empties were recovered from four different spots lying almost in clusters whereas from the said demonstration an altogether different pattern was noted.

429. In these circumstances Arshad Iqbal and Rana Iftikhar alone do not seem to have been the assailants as by no conceivable hypothesis can the recovery of empties from four different spots situated at some distance from each other, and that too in clusters, would be possible.

430. I am, therefore, of the humble view that looked at from whatever angle, the evidence of approver Ghulam Hussain is not only unnatural, and importable but patently absurd and untrue. In fact, I have no doubt in my mind that he was not present at the place of occurrence, as by the examination of his evidence and all the attendant circumstances of the case, this is the only possible conclusion.

431. Coming now to his confessional and Approver's statements, or for that matter, the confessional statements made by Arshad Iqbal, and Rana Iftikhar, it would be a waste of public time to consider them in any detail. On crucial and material points, the three of them have not only contradicted themselves but also each other.

432. Without going into the further question whether the said statements were made by them under any inducement, threat or promise within the meaning of section 24 of the Evidence Act, 1872, their said statements are of no use against appellant Bhutto not only because they are untrue but under section 30 of the Evidence Act, they can be only taken into consideration against him. In other words, they would have been relevant only if there existed independent evidence against appellant Bhutto to connect him with the commission of crime in this case, which, however, is not there. In these circumstances, the said confessional statements have to be disregarded. See for example:



*Joygun Bibi v. The State* PLD 1960 SC (Pak.) 313.

*Ibrahim and another v. The State* PLD 1963 Kar. 739.

*Shera and 3 others v. The State* PLD 1972 Lah. 563.

*Kashmira Singh v. State of Madhya Pradesh* AIR 1952 SC 159.

*L. S. Raju and others v. State of Mysore* AIR 1953 Bom. 297.

433. The prosecution has also relied on the evidence of Amir Badshah Khan, who, in 1974, was the Deputy Director, Battalion No. 3, F.S.F., Walton, Lahore and from the armoury of whose Battalion, weapons were supplied to approver Ghulam Hussain and his companions for assassinating Mr. Ahmad Raza Kasuri. The least that can be said about his evidence is that it is patently absurd, unnatural and unbelievable. The substance of his evidence is that from the armoury of his Battalion, weapons were thrice supplied to appellants Ghulam Mustafa as well as Ghulam Hussain but each time Mian Abbas had phoned him in that behalf saying that no entry thereof should be made in the Register but they be issued on chits only.

434. This statement of the witness is unbelievable because the type of conversation which Mian Abbas had made with him was clearly incriminating in nature and consequently, he could not have possibly talked to him in that manner on the telephone even if had spoken to him on the direct dialing system.

435. Furthermore, it is his claim that on one occasion at least he asked Mian Abbas as to what would happen to him if the weapons were lost and be replied not to worry as he would look after everything. His evidence, however, shows that he was a matured man having to his credit 28 years of police service from which he retired in 1968 as Inspector, and, therefore, it is inconceivable that he could have possibly succumbed to the illegal orders given to him in that behalf by Mian Abbas, and that too on telephone.

436. Be that as it may, if in spite of having put in more than 28 years of service in a disciplined force, he could obey an order of the said nature with impunity, and that too as a re-employed officer, than evidently he was a man of no scruples.

437. Furthermore, the evidence given by him in Court was different in some respects than what he has said in his 164, Cr. P.C. statement recorded on 16-8-77. In his evidence in Court he deposed that after Mian Abbas phoned him up for the first time, he called Muhammad Yusuf, Incharge, Armoury, and told him that appellant Ghulam Mustafa would be coming to collect some weapons and the same be issued to him only on a chit without making an entry thereof in the proper Register. Nothing of this sort was said by

him in his 164, Cr. P.C. statement and when questioned in that behalf, all that he replied was that his statement was a brief one because the Magistrate was pressing him to finish his narration quickly. The fact, however, is that the witness is not truthful, because Mian Abbas enquired into certain serious allegations against him, such as:-

- (1) of preferential treatment given by him to his favourites, which in the result annoyed the others;
- (2) violation of the standing orders relating to canteen/ration stores;
- (3) illegal collection of cost of Articles of the kit of deserters from their fellow trainees;
- (4) illegal collection of funeral fund, mosque fund and canteen fund from the trainees; and
- (5) spreading of regional feelings and rumours as a result of which hatred was likely to be created against his fellow officers.

438. Now the proceedings of the said enquiry conducted against him (Exh. P.W. 20/1-D) were produced in evidence through the witness and the finding recorded therein is his immediate removal from Mandi Bahauddin where he was then posted. He was pointedly questioned by the learned counsel for Mian Abbas that in view of the said finding recorded against him, he was summoned to the F.S.F. Headquarters and given a choice to resign or face an enquiry. It is true that he did not accept the suggestion but all the same, agreed that he had indeed resigned from the F.S.F. In this respect Mr. Masood Mahmood also seems to have been questioned and he replied that he was removed from service because his utility had expired. However, this version of Mr. Masood Mahmood is in conflict with the version of the witness himself who says that he had resigned his job. From all this it should be obvious that the witness was inimical to Mian Abbas and came forward simply to wreck vengeance on him.

439. This leaves us with the various statements made by Mian Abbas from time to time. His very first statement (Exh. D. W. 1/1) was recorded by a special team headed by Arbab Hidayat Ullah Khan, the then O.S.D., Establishment, Islamabad (now I.G. Police, Sindh) on 21-7-77, but in it he has not only leveled no accusations against Mr. Bhutto but has not even referred to him. The statement, in question, which runs in almost 15 closely typed pages, is a sort of 'White Paper' on the misdeeds committed by Mr. Masood Mahmood specially and various officers of and the F.S.F. generally. For example, it says that Mr. Masood Mahmood was more a politician than the Head of a uniformed force; that all his attention and energy was consumed by working for the P.P.P., and against the P. N. A., that in some of the bye-elections held to the Provincial Assembly of Punjab he actively supported the candidates of the P.P.P. by providing

them with transport and similar facilities; that political opponents of the Government of the P.P.P. were harassed and tortured by him; and that even in respect of the infamous Dullai Camp he used his 'genius' in ample measure. This being the nature of the said statement, evidently, it has no relevancy as to the guilt of Mr. Bhutto.

440. The next statement made by him is his confessional statement (Exh. D. W. 10/9) which was recorded on 18-8-77 by a Magistrate. By going through the said statement, however (it appears at page 250 of the Volume of Exhibits) it does not seem to be a confessional statement at all. What he has said therein is, and here I would ignore the irrelevant parts of it, that on or about 1-6-74 he was called by Mr. Masood Mahmood who told him that he had assigned to approver Ghulam Hussain an important mission; that he should accordingly supervise Ghulam Hussain; that he called Ghulam Hussain to his office and enquired from him as to the nature of the said mission; he told him that Mr. Masood Mahmood has asked him to assassinate Mr. Ahmad Raza Kasuri; that thereafter Mr. Masood Mahmood again called him to his office and told him that Mr. Kasuri has to be assassinated to which he replied that it would be difficult; that Mr. Masood Mahmood, however, interjected saying that these were the orders of the Prime Minister at which he kept quiet and left his room; that subsequently, after assessing his position, he submitted his resignation to Mr. Masood Mahmood but he got annoyed and warned him not to do so in future; that on 24-8-74 he came to know that Ghulam Hussain had ineffectively fired at the car of Mr. Ahmad Raza Kasuri at Islamabad; that Mr. Masood Mahmood accordingly called him, and told him that Ghulam Hussain had deliberately done so and he was right because Ghulam Hussain himself had told him so; that on 13-11-74, when he returned from Peshawar to Rawalpindi, he came to know that the father of Mr. Ahmad Raza Kasuri had been murdered at Lahore by Ghulam Hussain and his companions; and that he neither knew about the said incidents, nor had arranged or provided to Ghulam Hussain or anyone else any arms and ammunition for the commission of the said two crimes.

441. It would thus be seen that his so-called confessional statement is wholly exculpatory in nature. Therefore, it is not a confession at all within the meaning of that expression as understood in the Law of Evidence. Furthermore, he retracted from the said confession in the High Court, therefore, it is of no use whatever. It is true that during the course of hearing of these appeals he filed, from jail, a written statement in which he has fully implicated himself in the commission of the crime, but this statement is inadmissible against Mr. Bhutto, and cannot be taken into consideration:-

- (1) it is not evidence within the meaning of section 3 of the Evidence Act;
- (2) It was not put to appellant Bhutto in order to afford him an opportunity to explain his position; and

(3) that even if Mian Abbas had made the same in his examination under section 342, Cr. P.C. it could not be taken into consideration against appellant Bhutto.

See for example;

*William Cooper v. Emperor* AIR 1930 Bom. 354.

*Maadec Prasad v. King-Emperor* AIR 1923 All. 322.

*Mt. Sumitra v. Emperor* AIR 1940 Nag. 287.

*Tahsinuddin Ahmad v. Emperor* AIR 1940 Cal. 250.

442. Having disposed of, I suppose, all the questions on facts and law, still the question which remains is whether appellants Mian Muhammad Abbas, Sufi Ghulam Mustafa, Arshad Iqbal, and Rana Iftikhar can be said to have been properly convicted and sentenced by the High Court. As regards the three last mentioned appellants, there is no doubt about their guilt, and therefore, their convictions and the sentences are proper. Right from the initial stages of the case, all of them have not only confessed to their guilt, but the learned counsel appearing for them has supported the case of the prosecution throughout. In this behalf it would suffice to see the trend of his cross-examination of the P. Ws. Furthermore, in their statements, under section 342, Cr. P.C., recorded in the High Court, all of them stuck to their confessional statements saying, however, that they were helpless agents, because of the constant threats given to them by Mian Abbas to the effect that in case they failed to assassinate Mr. Ahnrad Raza Kasuri, they would not only lose their jobs and lives, but the members of their families also would be wiped out. During the course of arguments in this Court, when Mr. Bhutto and all three of them were granted special permission to address the Court, again they remained consistent. However, they pleaded for mercy on a few grounds with which, I would presently deal.

443. Mr. Irshad Ahmad Qureshi, the learned counsel appearing for them contended that although they had made confessional statements, yet had not admitted their guilt. He argued that they were forced to commit the crime under duress; that when they joined the F.S.F. they were made to take an oath showing loyalty to the then Prime Minister; that even according to the subsequent oath taken by them, when the F.S.F. Act XL of 1973, came into force the oath taken by them was to be loyal to the Government of Pakistan, that under sections 76 and 94, P.P.C., they cannot be said to have committed any offence, as they were threatened that in case they failed to carry out the said mission, they, as well as their families, would be wiped out. In support of these

contentions, he relied on *Ajun Shah v. State*<sup>609</sup>, *M. Aaim Khan v. State*<sup>610</sup> and *Sube Khan v. State*<sup>611</sup>.

444. There is no force in the contention of the learned counsel. The oath which his clients say they had taken while joining the F.S.F., swearing personal loyalty to the then Prime Minister, has not been brought on the record of the case. In fact, Abdul Majeed (P.W. 4) said that the prescribed form on which the said oath was to be taken was not available on the record. Furthermore, the oath taken by them, after the coming into force of the F.S.F. Act, clearly says that they would be loyal to the Government of Pakistan to which no exception can be taken. This leaves us with the so-called threats given to them by Mian Abbas well as the legal pleas taken by them relying on sections 76 and 94 of A the Penal Code. By analyzing the evidence of the P. Ws. in this case, at great length, I have disbelieved them, therefore, the question of any threat having been extended to them by Mian Abbas or anyone else seems to be a convenient device adopted by them for reasons of which they alone must be having the knowledge. Neither section 76 nor section 94, P.P.C., would help them, as in the illustration given under the former section, it is said "A, a soldier fires at a mob by the order of his superior officer in conformity, of the command of the law, A has committed, no offence". In so far as section 94 is concerned, reliance on the same is misconceived, as murders and offences against the State punishable with death have been excepted from its operation.

445. The judgments relied upon by the learned counsel also do not help him. It is clear to me that his clients are no better than hired assassins to which facts the said judgment have no relevancy. He pointed out that Rana Iftikhar and Arshad Iqbal, when they committed the offence, were respectively 19 and 21 years old, therefore, advantage was taken by Mian Abbas of their young age, who, by duress and threats extended to them, made them agree to attack the car of Mr. Kasuri. Upon these facts, he said, they deserve leniency in the matter of sentences. I am afraid, this contention also has no force in it. Having been employed in a Force, which was maintained by the tax-payers money, they were matured enough to have realized not to become the instruments of oppression and assassination in the hands of their superiors. Furthermore, this Court has in more than one case awarded death penalty to young person's just over 17 years of age, as it was found that they had deliberately taken the life of another wantonly. It is equally true that in many cases, including some of the judgments cited by the learned counsel, this Court reduced the capital punishment awarded to the accused to one of imprisonment for life, because it was found from the record that the murder committed by him was either in revenge or else in grave and sudden provocation. None of these considerations, however, apply in the case of the said three appellants.

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<sup>609</sup> PLD 1967 SC 185

<sup>610</sup> PLD 1967 Pesh. 119

<sup>611</sup> PLD 1959 Lah. 541

446. The case of Mian Muhammad Abbas, however, is entirely different. In the very first statement, recorded on 21-7-1977, by a Special Team headed by Arbab Hidayat Ullah Khan, the then O.S.D., Establishment, Islamabad (now I.G. Police, Sindh) all his accusations were directed against Mr. Masood Mahmood, in particular, and against the misdeeds of the F.S.F., in general. In his confessional statement (Exh. D. W. 10/9), recorded on 18-8-1977, he remained consistent, although by the examination of the said statement I found it exculpatory. Even from this statement he resiled in the High Court. In his 342, Cr. P.C. statement again, recorded in the High Court, he stuck to the same position. It is true that during the arguments of these appeals, he filed a written statement admitting therein his guilt, but the question is whether the said statement should be believed in preference to his previous conduct which has remained consistent.

447. In the High Court, Ashiq Muhammad Lodhi, (P.W. 28) was examined by the prosecution, who, in cross-examination by Mr. Qurban Sadiq Ikram, the learned counsel for Mian Abbas, admitted that on 1-4-1974, when his name was recommended by Mr. Haq Nawaz Tiwana for promotion as Assistant Director of F.S.F., Mian Abbas had opposed the said proposal; that during the period from 1973 to 1976 he worked in the National Assembly of Pakistan; that during the Ahmedia agitation approver Ghulam Hussain was posted on duty outside the National Assembly for reasons of security; that Ghulam Hussain was once given a reward of Rs. 500 in cash by Mr. Masood Mahmood for the good work done by him in the National Assembly in June 1974; that whenever Mr. Masood Mahmood visited the National Assembly, he would give him instructions directly; that once or twice he sent for approver Ghulam Hussain through him; that in the end of June he similarly sent for Ghulam Hussain through him and when he came, both Mr. Masood Mahmood and Ghulam Hussain remained closeted together in a room at the door of which a red light was burning; that Rana Iftikhar was the gunman of Mr. Masood Mahmood during those days; that in June 1974, Mian Abbas told him that he had tendered his resignation which had not been accepted; and that he repeated the same information to him again in February 1976.

448. Now the evidence of this witness indeed supported the claim of Mian Abbas that he had twice resigned his job, first when Mr. Masood Mahmood told him that he had assigned a mission to Ghulam Hussain and that he should supervise him, and again in 1976. Both these resignations are part of the record (Exhs. P.W. 2/12-D and P.W. 2/13-D). The first resignation is dated June 1974 and the same would seem to support the claim of Mian Abbas, because according to Mr. Masood Mahmood it was sometime in the middle of 1974, when Mr. Bhutto called him and ordered him that Mr. Kasuri has to be assassinated; that Mian Abbas knew all about it, and, that he should remind Mian Abbas to get on with the job. Furthermore, the ground on which he sought to resign was that he had developed heart trouble and in this respect Mr. Masood Mahmood himself seems to have supported his claim. It is in his evidence that on a visit to Lahore, he found out that Mian Abbas was lying in hospital and so he paid him a visit. In these

circumstances the claim of Mian Abbas which was also supported by the evidence of P.W. Lodhi should have carried conviction, but the High Court rejected the same. The view taken by the High Court was that in the light of the evidence of Ghulam Hussain, Amir Badshah Khan and Fazal Ali, the claim of Mian Abbas cannot be accepted, as also that in view of *Bagu v. The State*<sup>612</sup> the evidence of P.W. Lodhi was unacceptable "because it is well settled that when such like formal witnesses make certain concessions in favor of the accused in their cross-examination their statements cannot be considered to be of any credence, no matter, if they had been produced by the prosecution".

449. With great respect to the High Court, however, the conclusion cannot be accepted. The judgment of this Court cited from the Bar was clearly distinguishable. In that case, a Foot Constable Khuda Bakhsh by name, who was a formal witness, gave evidence in respect of certain essential features emerging during the course of investigation. Relying on his evidence, it was contended on behalf of the defence that the occurrence did not take place in the manner or at the time alleged by the prosecution; that the eye-witnesses relied upon by the prosecution were not present at the time of occurrence; and that the evidence of the said eye-witnesses, was, therefore, contradicted by the medical evidence. It was in this background that this Court, approving the view taken in *Sikandar Shah v. The State*<sup>613</sup>, observed:

"We cannot help observing that the frequency with which cases are coming up before us, wherein formal witnesses, particularly foot constables, are found to be obliging the defence in cross-examination with regard to matters wholly unconnected with the part the witnesses took in the investigation, is causing us some concern ..... that the obliging concessions made by such witnesses in cross-examination cannot be considered to be of any value. We also hope that the Provincial Governments will take note of these observations and take steps to check such propensities on the part of their own subordinate Police Constables."

450. P.W. Ashiq Lodhi was not a police constable, as he held a responsible post as Assistant Director FSF. It is true that he was meant to be an informal witness in the sense of having produced his report (Exh. P.W. 28/1), along with a copy of covering letter (Exh. P.W. 3/2-T), sent by him to late Mr. Abdul Hameed Bajwa, conveying therein the description of the gunman of Mr. Kasuri. However, he was allowed to be cross-examined by Mr. Irshad Ahmad Qureshi, the learned counsel for appellants Rana Iftikhar, etc. in a manner which dragged him away from the field of formality into the field of informality. The learned counsel asked him if he knew, while submitting his said report, that murderous assaults had taken place on Mr. Ahmad Raza Kasuri, at Islamabad as well as Lahore; if he inquired from late Mr. Bajwa as to the object for which he was asked to submit him a report on the description of the gunman of Mr.

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<sup>612</sup> PLD 1972 SC 77

<sup>613</sup> PLD 1965 Posh. 134

Kasuri; and if Ghulam Mustafa and Arshad Iqbal were ever asked to perform intelligence duty in the National Assembly. From this it should be obvious that once Mr. Qureshi, who has been supporting the case of the prosecution throughout was permitted to cross-examine the witness in the said manner, evidently, the learned counsel for Mian Abbas could not have been denied the same right.

451. Furthermore, unlike the Foot Constable in the above case who had nothing to do with the investigation of the case, P.W. Ashiq Lodhi was officially posted in the National Assembly of Pakistan during the period in respect of which he was cross-examined by Mr. Irshad Qureshi, the learned counsel for Rana Iftikhar, etc. Evidently, therefore, his evidence concerned his own observations to the admissibility of which no objection could be taken. The trend of his evidence seems to be inspiring confidence because he admitted in cross-examination that when late Mr. Haq Nawaz Tiwana recommended him for promotion as Assistant Director, Mian Abbas opposed the said proposal. In other words, he was not only having no soft corner for Mian Abbas but ought to have every reason to depose against him. Seen in this context, and keeping in view the fact that the prosecution has not denied his claim that during the relevant period, he was officially posted in the National Assembly; I believe him that during the Ahmadia agitation (which occurred during the same period) approver Ghulam Hussain was posted on duty outside the National Assembly for reasons of security; that whenever Mr. Masood Mahmood visited the National Assembly, he would give him instructions directly; that once or twice he sent for approver Ghulam Hussain through him; that in the end of June, 1974 he similarly sent for Ghulam Hussain through him and when he came, both Mr. Masood Mahmood and Ghulam Hussain remained closeted together in a room at the door of which a red light was burning; that Rana Iftikhar was the gunman of Mr. Masood Mahmood in those days; that Mian Abbas had told him that he had tendered his resignation which had not been accepted; and that Ghulam Hussain was once given a reward of Rs. 500 in cash by Mr. Masood Mahmood for the good work done by him in the National Assembly in June, 1974. It may be mentioned that the said cash reward has been admitted by Mr. Masood Mahmood in his own evidence. Now, this admission on the part of Mr. Masood Mahmood would seem to reinforce me in my estimate of the credibility of the witness but, with great respect, the High Court seems to have rejected his evidence on the ground, amongst others, that in view of the evidence of Ghulam Hussain, Amir Badshah Khan, and Fazal Ali the same could not be accepted.

452. Enough has already been said by me about the worthlessness of the evidence of these three witnesses but the High Court does not seem to have realized that Ghulam Hussain was a self-confessed criminal whereas Amir Badshah Khan was inimically disposed towards Mian Abbas because of the fact that as Inquiry Officer he had reported against Amir Badshah Khan (see Exh. D. W. 20/1-d) recommending therein his immediate removal from the command at Mandi Bahauddin. From all this it should, therefore, follow that neither the judgment of this Court, relied upon by the High Court,



was applicable to the facts of this case, nor was the evidence of Ashiq Lodhi of the type which could be rejected.

453. Having disbelieved all the evidence in respect of the charge of conspiracy as well as the prior and subsequent conduct of Mr. Bhutto what is left which can be taken against Mian Abbas? As already pointed out, right from the initial stages of the investigation in this case, he denied his own involvement therein. It is true that at some stage of the investigation he made a confessional statement (which in any event was exculpatory) but he retracted the same in the High Court, and even in his examination under section 342, Cr. P.C. there he continued to remain consistent. Now this is one side of his conduct, but on the other; he filed in this Court a written statement in which he has fully implicated himself.

454. Assuming for the sake of argument that his said written statement is a confession within the meaning of that expression as used in section 24 of the Evidence Act, still the question remains as to which one out of his said two conducts should be accepted 7 In this respect reference may be made to a passage appearing at page 712 of A.I.R. Commentaries on the Code of Criminal Procedure (Vol. 2) by D. V. Chitaley and S. Appu Rao, which reads thus:-

"If the accused pleads guilty, the Court should make a record of such plea. It is not, however, necessary that the Court must accept the plea in order to record it .... A plea of guilty may be accepted by the Court and the accused may be convicted thereon. But the Court is not bound to accept a plea of guilty in all cases. On the other hand, the Court must carefully consider whether the accused has fully understood the nature of the charge to which he pleads guilty. A plea of guilty no less than a confession must be received with caution. Generally, the Court should satisfy itself by putting questions to the accused, in order to see whether he is aware of the facts on which the charge is founded against him and also whether he has admitted his guilt voluntarily without any extraneous pressure or expectation of lenient sentence. In cases where the natural consequence of accepting the plea of guilty would be a sentence of death, it is not in accordance with the usual practice to accept a plea of guilty."

455. Now it is true that in the written statement filed by him in this Court as well as in his personal address made from the Bar (when he appeared in Court by special permission) Mian Abbas admitted his guilt saying, however, that he was a helpless agent as Mr. Masood Mahmood had constantly threatened him that in case he failed to assassinate Mr. Ahmad Raza Kasuri, he and the members of his family all would be wiped out. However, this Court had no opportunity to question him if he had admitted his guilt voluntarily without any extraneous pressure, or expectation of lenient sentence. Be that as it may, he seems to me to be not guilty in the present case because (i) from the above discussion of the evidence of P. Ws. Ashiq Lodhi and Amir Badshah

Khan, the stand taken by him at the earliest stage of the investigation in this case, has been corroborated, and (ii) the evidence of all P. Ws. in respect of the conspiracy entered into between Mr. Bhutto and Mr. Masood Mahmood as well as the prior and subsequent conduct of Mr. Bhutto has been disbelieved by me. This by itself ought to have sufficed to hold him not guilty at all, but even so, let us look at some of the decided cases in that behalf, by the High Courts of the Indian Sub-Continent.

456. *H. Paryathamma Hiremath v. State of Mysore*<sup>614</sup> which seems to be directly relevant to the present case as in that case also the question now under discussion had come up for consideration in appeal; the accused before the High Court had pleaded guilty in the appellate Court of the Sessions Judge, who after satisfying himself, accepted his said plea and convicted him. An objection was taken in that behalf in the High Court and it was observed that:

"The dictum that an accused can consent to nothing is restrictive in its operation; it means that an accused cannot legalize or validate by consent any departure from or violation of procedure prescribed by law. It is open to him to admit anything or waive his right but the provisions of the Code impose an obligation on the Courts to consider in each case whether it would be reasonable and proper to accept and act upon any such admission having regard to all the facts and circumstances of the case. The Court may in its best discretion, accept or reject it but all acceptance must be based on sound judicial discretion. So far as the accused's rights in a Court of appeal are concerned, he is entitled to a reasonable opportunity of being fully heard and it is for him to make or not to make any admission. In fact he need not concede to anything but if he does the Court of appeal must peruse the records of the case and decide whether it could reasonably accept such admission without any prejudice or injustice to the accused. The acceptance by Court ought not to be mechanical but must be judicial in the sense that such acceptance is made with full consciousness of and after due compliance with its legal obligations under section 423 of the Code."

457. I am in complete agreement with this dictum. If by the examination of all the evidence on record, the Court comes to the conclusion that the prosecution has not been able to prove its case beyond reasonable doubt, it would be dangerous to convict an accused on the basis of his own plea of guilty especially in murder case as an accused does not plead guilty to the section of the Penal Code but to the facts of the case constituting the ingredients of the offence.

458. In *State of Mysore v. Bantra Kunjanna*<sup>615</sup> the accused, in the Court of the Magistrate, admitted his guilt under section 304-A, I. P.C. and was accordingly

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<sup>614</sup> AIR 1966 Mys. 125

<sup>615</sup> AIR 1960 Mys. 177

convicted, and awarded a ridiculous sentence of fine of Rs. 10. The State of Mysore, feeling aggrieved of the said order, went to the High Court in Revision, the High Court consumed the conduct of the learned Magistrate in no uncertain terms but all the same acquitted the accused as from the examination of all the evidence on record it was found that the prosecution had failed to prove its case against him. As to the plea of guilty made by the accused in the Court of Magistrate, the High Court observed:

"The statement of the accused when properly considered, merely shows that he admitted the truth of the evidence adduced by the prosecution. But if the facts proved by the prosecution do not amount to an offence, then the plea of 'guilty' cannot preclude the accused from agitating in this Court, the correctness of his conviction."

*In re: U. R. Ramaswami*<sup>616</sup> the same view has been taken. But there is no need to multiply the process by referring to any more judgments of which there is no scarcity.

459. From all this protracted discussion, the main part of which seems to have been devoted to the appraisal of the evidence of P. Ws. my endeavor has been to show that with respect, the High Court accepted the evidence of the witnesses of the prosecution as a matter of course without subjecting it to proper scrutiny in line with the well-established principles bearing upon the safe administration of criminal justice. Furthermore, there has been some confusion of thought as to the burden of proof in a case of the present type, as the learned Special Public Prosecutor maintained during the arguments that the case should be decided on high probabilities and in that behalf he relied on section 3 of the Evidence Act. He further maintained that it was not the burden of the prosecution to establish by positive evidence its case nor indeed to eliminate the possibility that there could have existed more than one motive for the assassination of Mr. Ahmad Raza Kasuri. The evidence should be viewed in totality i. e. to say on "preponderance of evidence", and in that behalf he categorically stated from the bar "I refuse to accept the onus to show that ammunition of 7.62 mm. was not in use of any other unit". With respect to the learned counsel, however, he does not seem to have correctly stated the principles applicable to criminal cases. *In Woolmington v. The Director of Public Prosecutions*<sup>617</sup> which seems to be the basic case in point, the accused was convicted both by the trial Court as well as the Appellate Court for the murder of his wife. The accused admitted the killing of his wife with gun but denied any intention to kill her saying that it was an accidental death occurring in the course of committing suicide by him. Upon these facts the trial Court as well as the Appellate Court both recorded the conclusion that having raised the defence of accident he should have proved it. However, the House of Lords disagreed with that finding and held that the burden of proof in a criminal case never shifts from the prosecution and the prosecution

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<sup>616</sup> AIR 1954 Mad. 1020

<sup>617</sup> 1935 AC 462

must prove its case beyond all reasonable doubt. The prosecution had failed to prove the *mens rea*, and therefore, the accused was acquitted. In recording the said conclusion notice was taken by the House of Lords of all the previous law on the burden of proof including the commentary by Foster in which it was laid down that once the prosecution is found to have established against the accused a *prima facie* case then the burden shifts to the accused to prove his innocence.

460. In *Brij Bhushan Singh v. Emperor*<sup>618</sup> the facts were as follows:-

The accused, who was an I.C.S. Officer, beat his maid-servant Bilasia by name as he found her in compromising position with his bearer Samuel. The case of the prosecution was that on account of the said beating Bilasia died; thereafter in the middle of the night the accused put the dead body of Bilasia in his car and drove to another village where his brother-in-law was living; that during the journey the tyre of the car got punctured within a mile of the destination; the accused, therefore, left the car and went to the village from where a party was sent for the disposal of the dead body of Bilasia; and on arrival at the spot the members of the party dismembered the body and threw the limbs away in the jungle. Upon these facts the accused was arrested. He admitted having beaten Bilasia but alleged that the beating was not severe and all that he had asked his wife was to get rid of Bilasia. However, on returning to his house at midnight from a party he found Bilasia in the house, accordingly took her along with his wife in his car to the house of his brother-in-law where Bilasia's cousin Basanti by name was employed as maid-servant, that on the way the car got punctured within a mile from the said village, and therefore, all of them walked the said distance and on arrival at the house of his brother-in-law he handed over Bilasia to her cousin Basanti who thereafter disappeared from the house of his brother-in-law.

461. During the course of the investigation in the case the bones of Bilasia were recovered from the jungle at the pointing out of the witnesses. But in spite of all the said admissions made by the accused the finding recorded by the Privy Council was that the prosecution had failed to prove its case against him beyond reasonable doubt. In this behalf, the following dictum appearing at page 42 of the judgment may be reproduced with advantage:-

"It is true that both the Courts in India disbelieved the reasons given by the appellant to explain the midnight motor-car journey, holding that it was untrue and, indeed absurd, to suggest that such a journey was undertaken because the appellant could not face passing another night under the same roof as Bilasia; and their Lordships entirely concur in this view. The fact, that a long motor-car journey was undertaken in the middle of the night, and that a false reason was given in explanation, raises a suspicion that the object of the journey may have

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<sup>618</sup> AIR 1946 PC 38

been to dispose of the dead body of Bilasia, and that suspicion is much strengthened by finding that from the time when the motor-car left the appellant's house, Bilasia was never seen alive by any independent witness, and that admittedly she had disappeared the next day. The appellant has only himself to blame for much of the course which the case has taken. But suspicion is not proof. It is impossible to say that the only legitimate inference to be drawn from this motor-car journey and the disappearance of Bilasia, is that the appellant killed Bilasia."

462. In *Safdar Ali v. The Crown*<sup>619</sup> the principle of law laid down in Woolmington's case was acted upon and it was held that under section 105 of the Evidence Act the prosecution is not relieved of its duty to prove its case against an accused beyond reasonable doubt.

463. In *Muhammad Luqman v. State*<sup>620</sup> the principle of law laid down is to the following effect:-

"With due respect to the learned Judges, it may be said that a finding of guilt against an accused person cannot be based merely on the high probabilities that may be inferred from evidence in a given case. The finding as regards his guilt should be rested surely and the plain inferences of guilt that may irresistibly be drawn from that evidence. Mere conjectures and probabilities cannot take the place of proof. If a case were to be decided merely on high probabilities regarding the existence or non-existence of the fact to prove the guilt of a person, the golden rule of "benefit of doubt" to any accused person, which has been dominant feature of the administration of criminal justice in this country with the consistent approval of the superior Courts would be reduced to naught."

464. The same view has consistently been taken in *Fazlul Qader Choudhury v. Crown*<sup>621</sup>, *Sarwan Singh: Rattan Singh v. State of Punjab*<sup>622</sup>, *Ramzan Ali v. The State*<sup>623</sup>, *Shew Mori Shaw v. The State*<sup>624</sup>, and a score of other judgments which need not be mentioned. In PLD 1957 S C (Ind.) 555 as to the burden of proof in a criminal case the principle of law laid down is as follows:-

"It is no doubt a matter of regret that a foul cold-blooded and cruel murder like the present should go unpunished. It may be as Mr. Gopal Singh strenuously urged before us that there is an element of truth in the prosecution story against

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<sup>619</sup> PLD 1953 FC 93

<sup>620</sup> PLD 1970 SC 10

<sup>621</sup> PLD 1952 FC 19

<sup>622</sup> PLD 1957 SC (Ind.) 555

<sup>623</sup> PLD 1967 SC 545

<sup>624</sup> AIR 1953 Cal. 634

both the appellants. Mr. Gopal Singh contended that, considered as a whole, the prosecution story may be true; but between 'may be true' and 'must be true' there is inevitably a long distance to travel and the whole of this distance must be covered by legal, reliable and unimpeachable evidence."

465. It should, therefore, be obvious that in the High Court these principles, and I say so with respect, were wholly ignored as if they did not form part of the Corpus Juris of this country with the result that all the evidence tendered by the prosecution was accepted without testing it on the anvil of the principles furnished by the said pragmatic, well tested and enduring principles. I am therefore, of the humble view that the prosecution has failed to establish its case against Mr. Bhutto and Mian Muhammad Abbas at all, much less beyond any reasonable doubt.

466. However, the question is as to who had the motive for firing at the car of Mr. Ahmad Raza Kasuri first at Islamabad in August, 1974, and subsequently at Lahore in November 1974. In the nature of things it would not only be difficult to answer the said question positively, but uncalled for. However, reference may be made to some pieces of evidence available on the record to show at least one possibility without recording any positive finding in that behalf. Before proceeding with the said evidence, however, it would be profitable to reproduce from page 413 of the judgment of this Court:

*Abdul Qadir v. The State*<sup>625</sup> the following dictum:-

"It may be taken as proved that both the approvers were responsible for the murder and that neither of them had any special reason falsely to accuse the appellant, but we cannot accept the finding of the High Court that neither of them had any motive of his own to kill the deceased. It is true that the appellant has not in his defence suggested any motive on the part of either of these accomplices to kill the deceased, but this by itself is an inconclusive circumstance and does not establish that in fact neither of them had any such motive. Motive is a factor which is peculiarly within the knowledge of the actor and a man's motive in doing a thing may not be known to his most intimate friends just as the prosecution may not know the accused's motive for a crime. All that can be said on the strength of the record of this case is that the appellant failed to prove or suggest that either of the accomplices had any reason to get rid of the deceased but the appellant's ignorance of any such motive does not exclude the possibility of a motive having existed though unknown to the appellant. This circumstance, therefore, does not have any material corroborative value."

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<sup>625</sup> PLD 1956 SC (Pak.) 407

467. Now bearing in mind the words "but we cannot accept the finding of the High Court that neither of them had any motive of his own to kill the deceased Motive is a factor which is peculiarly within the knowledge of the actor and a man's motive in doing a thing may not be known to his most intimate friends just as the prosecution may not know the accused's motive for a crime", appearing in the said dictum, let us advert to the relevant evidence. In this behalf notice may first be taken of the Intelligence Report (Exh. P.W. 2/Z) submitted by Mr. M. R. Welch, Director, F.S.F., Quetta, to Mr. Masood Mahmood. The prosecution case is that this report, in which mention was made of the stay and movements of Mr. Ahmad Raza Kasuri at Quetta, was submitted to Mr. Masood Mahmood in pursuance of the instructions given by him to Mr. Welch to the effect that during his stay at Quetta, Mr. Kasuri should be assassinated. On the margin of the said report is an endorsement made by Mr. Masood Mahmood himself to the effect:

"To discuss at Quetta. Pl. see and return. Director (O&A)."

468. Now the claim of Mr. Masood Mahmood is that the said instruction had been given by him to Mr. Welch at Quetta after he (Mr. Masood Mahmood) met Mr. Bhutto who told him that Mr. Kasuri should be assassinated during his stay at Quetta. The fact, however, is that no attempt was made on the life of Mr. Kasuri at Quetta. In these circumstances, the question which arises is as to what was the object of the said endorsement made by Mr. Masood Mahmood? It is not the case of the prosecution that Mr. Masood Mahmood or for that matter anyone else on his behalf had given any information to Mr. Bhutto that his order to assassinate Mr. Kasuri could not be carried out at Quetta nor indeed Mr. Bhutto himself made any inquiries in that behalf. In this view the claim made by Mr. Masood Mahmood seems to be not only intriguing but unconvincing. If Mr. Bhutto was so serious to get Mr. Kasuri assassinated at Quetta as to make a special mention of it to Mr. Masood Mahmood, it would be inconceivable that he would make no inquiries in that behalf, as also that Mr. Masood Mahmood himself would not explain to him the causes leading to the failure of the said mission. In these circumstances, would it not be reasonable to hold that the endorsement made by him on the margin of Exh. P.W. 2/Z is intriguing or a pointer at some of his own design?

469. The next piece of evidence in this behalf would be found in the retracted confessional statement (Exh. P.W. 10/9-1) of Mian Muhammad Abbas recorded on 18-8-1977. In there what Mian Abbas has said is that on or about 1-6-1974, Mr. Masood Mahmood called him to his office and told him that he has assigned to approver Ghulam Hussain a mission and he should supervise him. Accordingly, he called Ghulam Hussain and made inquiries from him as to the said mission who told him that it related to the assassination of Mr. Kasuri. The case of the prosecution, however is that when Mr., Masood Mahmood finally conveyed to Mian Muhammad Abbas the order to get on with the job of assassinating Mr. Kasuri under the turvats extended to him by Mr. Bhutto, Mian Abbas told him not to worry as he had already received the said

instructions through the former Director-General, F.S.F. Apart from the fact that I have disbelieved Mr. Masood Mahmood, the said assertion appearing in the retracted confessional statement of Mian Abbas ought to carry more conviction because he has remained consistent throughout, In this view again the possibility cannot be excluded that either Mr. Masood Mahmood or approver Ghulam Hussain could as well have a motive of their own to assassinate Mr. Kasuri.

470. The third piece of evidence in the series is furnished by Ashiq Lodhi (P.W. 28) whom I have already believed as a truthful witness. His evidence in this behalf is that during the period from 1973 to 1976 he was posted in the National Assembly of Pakistan; that during the Ahmedia agitation approver Ghulam Hussain was posted on duty outside the National Assembly for reasons of security; that Ghulam Hussain was once given a reward of Rs. 500 in cash by Mr. Masood Mahmood for the good work done by him in the National Assembly in June 1974; that whenever Mr. Masood Mahmood visited the National Assembly, he would give him instructions directly; that once or twice he sent for approver Ghulam Hussain through him; that in the end of June he similarly sent for Ghulam Hussain through him and when he came, both Mr. Masood Mahmood and Ghulam Hussain remained closeted together in a room at the door of which a red light was burning; that Rana Iftikha, was the gunman of Mr. Masood Mahmood during those days; that in June 1974, Mian Abbas told him that he had tendered his resignation which had not been accepted; and that he repeated the same information to him again in February 1976. Now a bare look at the evidence of P.W. Lodhi should suffice to prove the wisdom of the observations made by this Court in PLD 1956 S C (Pak.) 407 to the effect that an approver can as well have a motive "of his own to kill the deceased". It is obvious that approver Ghulam Hussain as well as appellant Rana Iftikhar both were quite close to Mr. Masood Mahmood, but in his cross-examination he denied to have known Ghulam Hussain although he agreed to have awarded him a First Class Certificate and a cash prize of Rs. 500 for the good job done by him while posted in the National Assembly. The fact that he admitted Ghulam Hussain to have remained posted on duty in the National Assembly would go a long way to underline the truthfulness of the evidence of P.W. Lodhi, as he also was posted on duty in the National Assembly during the said period. From this it would follow that the denial of Mr. Masood Mahmood of having known Ghulam Hussain is patently false, because he has used to be frequently visiting the National Assembly himself and it is inconceivable that he would not know Ghulam Hussain who was, one of the few officers from the F.S.F. posted on duty in the National Assembly.

471. Furthermore, Mr. Masood Mahmood and Mr. Ahmad Raza Kasuri both hail from Kasur. In fact, the evidence of Mr. Masood Mahmood is that his father and the late father of Mr. Ahmad Raza Kasuri were great friends; that he used to call the father of Mr. Ahmad Raza Kasuri as uncle; and that they had excellent relations. Notwithstanding this, however, he agreed to the plan of assassinating Mr. Ahmad Raza Kasuri through the F.S.F. of which he was the Director-General, only because he was



threatened in that behalf by Mr. Bhutto. It is not his case, however, that Mr. Bhutto had threatened him with death. All that he told him was that "you don't want Vaqar chasing you again, do you?", that he would have no nonsense from him or from Mian Abbas, and further that he would hold him personally responsible for the execution of his order. It is his own claim, however, that in substance what the threats extended to him actually meant were that he could be retired from service at any time, as Mr. Vaqar Ahmad had actually read out to him the relevant rule in that behalf. Now if Mr. Masood Mahmood, only to save his job, so readily succumbed to this type of pressure and agreed to be a party to the assassination of his 'cousin' then to what length it would not have been possible for him to.

472. The possibility also cannot be excluded that Mr. Masood Mahmood did not have all those cordial relations with the family of Mr. Kasuri as he claimed. Mr. Kasuri besides being an M.N.A., evidently belonged to a powerful landed family of Kasur, whereas Mr. Masood Mahmood did not enjoy that position, although he attained a high rank in the Government. In these circumstances, it is also possible that there occurred between them rivalry and jealousy at the local level which could as well have spawned a motive in the mind of Mr. Masood Mahmood to do away with Mr. Kasuri who was evidently his strong rival in the field of power politics at Kasur.

473. The evidence of Ashiq Lodhi (P.W. 28), which has been corroborated by Mr. Masood Mahmood to this extent at least that Ghulam Hussain was posted on duty in the National Assembly in June 1974, as he had given him a cash award of Rs. 500 for the good job done there, is that while having been posted in the National Assembly Mr. Masood Mahmood used to give him direct instructions and on one occasion he sent for Ghulam Hussain through him and when he came both of them remained closeted together in a room at the door of which a red light was burning. I am, therefore, convinced that Ghulam Hussain was not only very close to Mr. Masood Mahmood but both the attacks carried out on the car of Mr. Ahmad Raza Kasuri at Islamabad and Lahore were master-minded by Ghulam Hussain, although during the latter attack he was away at Karachi. A lot has been said by me in this behalf to show that he did not return to Rawalpindi from Karachi until about November 21, 1974, and the said date coincides with the date mentioned in his T.A. Bill (Exh. (P.W. 31/6) which I have believed to be a genuine document. Now this conclusion being fully supported by the detailed discussion of his evidence hereinbefore, I am absolutely clear in my mind that since he was very close to Mr. Masood Mahmood he went over to Karachi on official duty in order to ward off any suspicion against him being seen at Lahore during the relevant period. From all this, will it not be reasonable to conclude that Mr. Masood Mahmood or Ghulam Hussain might have had a motive of their own for firing at the car of Mr. Ahmad Ram Kasuri in which his father unfortunately got killed?

474. It is said that fiction can be stranger than truth, but all the same it seems to me to be an extraordinary coincidence that out of the group of four, namely, Ghulam Hussain,

Sufi Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad, the first three should have remained on duty in the National Assembly of Pakistan, and thus known to each other, whereas Rana Iftikhar Ahmad was the gunman of Mr. Masood Mahmood for some time, as also that he was the immediate subordinate of Sufi Ghulam Mustafa posted under him at Lahore.

475. It is in the evidence of Abdul Khaliq (P.W. 41) that on the visit of retired Air-Marshall Asghar Khan to Lahore a bomb explosion had taken place at the Lahore Railway Station in March 1975, and consequently one Riaz was a paid agent of F.S.F. was caught red-handed, but subsequently let off on the intervention of the Authorities. Mr. Irshad Ahmad Qureshi, the learned counsel for appellants Rana Iftikhar, etc. cross-examined him in that behalf as to who had intervened on behalf of Riaz but the witness replied: "This aspect of the case is still under investigation". Now there is no evidence on record, nor indeed has the prosecution alleged, that the said bomb explosion had taken place in pursuance of a conspiracy to assassinate retired Air-Marshall Asghar Khan. From this, and the many other illegal acts committed by the man of F.S.F. it would follow that Mr. Masood Mahmood not only cannot escape the responsibility but possibly intervened on behalf of the said Riaz himself and consequently got him released.

476. I am also in agreement with the contention of Mr. Yahya Bakhtiar that the appellation of "principal accused" so profusely used by the High Court in respect of Mr. Bhutto was improper. In the present case Mr. Bhutto had not participated in the actual attack carried out on the car of Mr. Kasuri at Lahore, and consequently in law he was only an 'abettor' and not the "principal accused". In fact the said appellation would be applicable to Arshad Iqbal and Rana Iftikhar Ahmad, who had actually fired on the car of Mr. Kasuri, as also to approver Ghulam Hussain who claimed to have been present supervising the whole operation. In this behalf reference may be made to any standard commentary on Chapter V. of Abetment beginning with section 107, P.P.C., and ending with section 120, P.P.C.

477. Now as to the conclusions, I have not the slightest doubt in my mind that the prosecution has totally failed to prove its case against Mr. Bhutto and Mian Muhammad Abbas. Their appeals are accordingly accepted with the result that the conviction and sentences recorded against them by the High Court are set aside, and it is directed that both of them shall be released forthwith unless required in connection with some other case.

478. As regards appellants Sufi Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad, however, the position is different. Right from the initial stages of the case they have not only admitted the commission of the crime, but the learned counsel appearing for them supported the case of the prosecution throughout. From the evidence on record. which finds corroboration from their own confessional statements, I am satisfied

beyond the shadow of any doubt that all three of them are guilty, and consequently their convictions and sentences recorded by the High Court are proper.

479. It may be mentioned, however, that in respect of the proper legal sentence, which could be awarded to Sub Ghulam Mustafa under section 302, P.P.C., read with sections 301, 109 and 111, P.P.C., I did entertain some anxiety but on deeper reflection am convinced that his sentence thereunder is unexceptionable. It is true that he was not present during the actual attack carried out on car of Mr. Ahmad Raza Kasuri by Arshad Iqbal and Rana Iftikhar Ahmad. But right from the initial stages of the case he has not only admitted his involvement therein but accepted full responsibility in that behalf in his confessional statement as well as in this Court when he was allowed to address the Court by special permission. Furthermore, he had gone with approver Ghulam Hussain, Arshad Iqbal and Rana Iftikhar Ahmad in search of Mr. Ahmad Raza Kasuri on the evening of November 10, 1974, the three of them finally located the car of Mr. Kasuri parked outside the house of Syed Shabbir Hussain Shah in Shadman Colony; the selection of the site, from where attack was to be launched on the car of Mr. Kasuri, took place in his presence and he was also responsible for supplying the weapons. From this it would follow that he had shown his complete agreement with Ghulam Hussain, Arshad Iqbal and Rana Iftikhar Ahmad that the attack on the car of Mr. Kasuri was to be launched from the said selected site, regardless of having taken any precautions to ensure that no one else was sitting in the car with Mr. Kasuri. In other words, all of them agreed to fire at the car of Mr. Kasuri with automatic weapons and this object was indeed achieved as Arshad Iqbal and Rana Iftikhar Ahmad fired at the car from automatic weapons. In this view, his case is distinguishable on facts from the case of Mr. Bhutto in respect of whom, however, I have disbelieved the entire case of the prosecution. In these circumstances, and in view of the finding recorded by me hereinbefore that the act of firing on the car of Mr. Kasuri by appellants Arshad Iqbal and Rana Iftikhar Ahmad was not only a reckless act, but an independent act of their own, the case of Sufi Ghulam Mustafa cannot be treated differently than the case of the said appellants, except that his conviction under section 301, P.P.C., cannot be maintained, and the same is set aside. In this view, the appeal of Sufi Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad is hereby dismissed.

480. Finally, I would like to express my gratitude to the learned counsel appearing for both sides for the hard work put in and the dedication shown by them which has made the writing of this judgment possible comparatively within a short time. My gratitude also is specially due to my Private Secretary, namely, Mr. Budha Khan for the very hard and efficient assistance rendered to me as well as the staff of the Library who answered my frequent calls made on them for the supply of books and references promptly and efficiently.

**MUHAMMAD AKRAM, J.** - I have had the benefit of reading the detailed judgment proposed to be delivered by my Lord the Chief Justice and agree with his conclusions both on questions of law and facts. Accordingly, I am of the view that all the three appeals be dismissed, convictions and sentences recorded by the High Court be upheld and confirmed, as proposed by him.

**DORAB PATEL, J.** - For reasons recorded in my separate judgment, appended herewith, I am of the view that Criminal Appeals Nos. 11 and 12, by appellants Zulfikar Ali Bhutto and Mian Muhammad Abbas respectively, be allowed, their sentences and convictions be set aside, and they be acquitted and set at liberty forthwith, provided they are not required to be detained in any other connection.

However, I agree that Criminal Appeal No. 13 filed by appellants Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad be dismissed and the convictions and sentences recorded against them by the High Court be upheld and confirmed, except that conviction under section 301, P.P.C., recorded against Ghulam Mustafa be set aside.

**MUHAMMAD HALEEM, J.** - For reasons recorded briefly in the note appended herewith I agree with the order proposed to be made by my learned brother G. Safdar Shah, J. to the effect that Criminal Appeals Nos, 11 and 12, by appellants Zulfikar Ali Bhutto and Mian Muhammad Abbas respectively, be allowed their sentences and convictions be set aside, and they be acquitted and set at liberty forthwith, provided they are not required to be detained in any other connection.

However, I agree that Criminal Appeal No. 13 filed by appellants Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad be dismissed and the convictions and sentences recorded against them by the High Court be upheld and confirmed, as modified in respect of Ghulam Mustafa.

**G. SAFDAR SHAH, J.** - For detailed reasons recorded in my separate judgment appended herewith I am of the view that Criminal Appeals Nos. 11 and 12, by appellants Zulfikar Ali Bhutto and Mian Muhammad Abbas respectively, be allowed; their sentences and convictions be set aside, and they be acquitted and set at liberty forthwith, provided they are not required to be detained in any other connection.

However, I agree that Criminal Appeal No. 13 filed by appellants Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad be dismissed and the convictions and sentences recorded against them by the High Court be upheld and confirmed, except that conviction under section 301, P.P.C., recorded against Ghulam Mustafa be set aside.

**KARAM ELAHEE CHAUHAN, J.** - I am in respectful agreement with the conclusions reached by my Lord the Chief Justice in his detailed judgment and would dismiss all the three appeals, and uphold and confirm the convictions and sentences recorded by

the High Court against all the five appellants in these three appeals, as proposed by him.

**NASIM HASSAN SHAH, J.** - I am in respectful agreement with the conclusions reached by my Lord the Chief Justice in his detailed judgment and would dismiss all the three appeals, and uphold and confirm the convictions and sentences recorded by the High Court against all the five appellants in these three appeals, as proposed by him.

## ORDER OF THE COURT

### CRIMINAL APPEAL No. 11 OF 1978

#### *Zulfikar Ali Bhutto v, The State*

According to the opinion of the majority this appeal is dismissed, and the convictions and sentences recorded by the High Court are upheld and confirmed, except that section 301, P.P.C., will not apply.

### CRIMINAL APPEAL No. 13 of 1978

#### *Mian Muhammad Abbas v. The State*

According to the opinion of the majority this appeal is dismissed, and the convictions and sentences recorded by the High Court are upheld and confirmed, except that section 301, P.P.C., will not apply.

### CRIMINAL APPEAL No. 13 of 1978

#### *Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad v. The State*

According to the unanimous opinion of the Court this appeal is dismissed, and the convictions and sentences recorded by the High Court against the three appellants are upheld and confirmed, except that section 301, P.P.C., will not apply to Ghulam Mustafa.

S.A.H

Appeals dismissed.

## ZULFIKAR ALI BHUTTO V. STATE

(Muhammad Akram, J.)

### ORDER

MUHAMMAD AKRAM, J. - This petition seeks a review of the judgment of this Court dated the 6th of February, 1979, whereby Criminal Appeal No. 11 of 1978 filed by the petitioner Zulfikar Ali Bhutto was dismissed, and convictions and sentences recorded against him by the Lahore High Court under sections 120-B/115, 307/109, 307/301, read with sections 109 and 111 of the Pakistan Penal Code were upheld and confirmed, with the modification that section 301 of the Pakistan Penal Code will not apply. This appeal was heard and decided by a Bench of seven Judges, along with two other connected appeals bearing Nos. 12 and 13 of 1978, filed by the remaining four accused in the case. While Appeals Nos. 11 and 12 filed by the petitioner and his co-accused Mian Muhammad Abbas were dismissed according to the opinion of the majority, the third appeal, filed by the confessing accused, namely, Ghulam Mustafa, Rana Iftikhar Ahmad and Arshad Iqbal, was dismissed unanimously by all the seven Judges of the Bench.

2. Although the facts of the case, and the voluminous evidence relating thereto, appear fully in the lengthy judgments delivered by the Court, it is necessary to briefly state the relevant facts for a proper appreciation of the grounds urged for review of the majority judgment.

3. The incident giving rise to these appeals took place at about 0-30 a.m. on the night between the 10th and 11th of November, 1974, near Shadman-Shah Jamal Roundabout in Lahore, when Ahmad Raza Kasuri (P.W. 1) was returning to his house in Model Town after attending the wedding of one Bashir Hussain Shah in Shadman Colony. He was driving his car bearing No. LEJ 9495, and his father Nawab Muhammad Ahmad Khan deceased was sitting next to him, whereas his mother and her sister were occupying the rear seat of the car. As he negotiated the Roundabout in question, less than a 100 yards from the wedding place, his car was fired upon with automatic weapons. The head-lights of the car as well as other parts of its body were hit, and so was his father. The lights of the car went off, but Ahmad Raza Kasuri managed to drive on so as to take his injured father to the United Christian Hospital, where the deceased succumbed to his injuries at 2-55 a.m.

4. In the First Information Report made by Ahmad Raza Kasuri at 3-20 a.m. at the Hospital, he referred to an earlier murderous attack made on him on the 17th of

January, 1972, at Kasur and another attack launched on him on the 24th of August, 1974, at Islamabad, in which automatic weapons were used. After giving the details of the manner in which his car was fired upon near the Roundabout, Ahmad Raza Kasuri asserted that the firing on his car had been carried out for political reasons since he was a member of the Opposition in the National Assembly of Pakistan, and was holding the office of Central Information Secretary of Tehrik-e-Istaqlal Pakistan, which used to criticize the Government in strong terms. He added that in June, 1974, Zulfikar Ali Bhutto had addressed him in a meeting of the National Assembly saying that he was fed up with the complainant, and it was not possible for him to tolerate the complainant any more. Ahmad Raza Kasuri stated that these words formed part of the record of the National Assembly, and had also been published in the newspapers.

5. The autopsy of the dead body of deceased Nawab Muhammad Ahmad Khan revealed that the deceased had received bullet injuries on the top right side and back of the left side of the head, resulting in fracture of the parietal bone as well as the base of the skull. Two thin metallic pieces from the margins of the wounds and one bullet from the right cerebral hemisphere in the middle were recovered, and handed over to the Investigating Officer Abdul Hayee Niazi (P. W. 34) after being sealed in a tube.

6. On inspecting the spot, S.H O. Abdul Hayee Niazi, collected 24 empty cartridges from the ground, and also a lead piece of a bullet from one of the adjacent bungalows. He prepared a site plan (Exh. P. W. 34/2), showing, *inter alia*, four places, two in the Roundabout, and two on the metallised portion of the road, from where he had collected the empty cartridges. Subsequently he had another plan of the spot prepared by the draftsman Inam Ali Shah, which was brought on the record as Exh. P. W. 34/5-D, and shows a somewhat different picture from that appearing in the first site plan as regards distances between the various points.

7. The Investigating Officer first showed the 24 crime empties to Nadir Hussain Abidi (P. W. 36) then Director of the Forensic Science Laboratory, Lahore, so as to ascertain the type of weapon from which they had been fired. Later, on the 23rd of November, 1974, he despatched them to the Inspectorate of Armaments, General Headquarters, Rawalpindi, for an expert opinion as to their caliber etc., and was informed, vide Exh P. W. 32/1, that the crime empties were of 7.62 mm. caliber, of Chinese Make and could be fired from rifle, L.M.G. and S.M.G.

8. In the initial stages the investigation was supervised by Deputy Superintendent of Police, Abdul Ahad, who is said to have died in 1975. As apparently the investigation was not making much headway, the case was then entrusted to Malik Muhammad Waris (P.W. 15) of the Special Branch. The Punjab Government also appointed a special Tribunal, comprising Mr. Justice Shafi-ur-Rehman of the Lahore High Court, to inquire into the incident. The Tribunal submitted its report to the Provincial Government on the 26th of February, 1975, giving certain guidelines for the further investigation of the case.



It appears that the report was not published. In October, 1975, the case was filed as untraced by the D.S.P. Muhammad Waris after obtaining instructions from the Provincial Government through the Inspector-General of Police.

9. However, the case was re-opened after the promulgation of Martial Law on the 5th of July, 1977. The Central Government had directed the Federal Investigation Agency to enquire into the working of the Federal Security Force and its officers, particularly into allegations relating to various political murders and kidnappings, as well as dispersing of political meetings and processions by the F.S.F. while investigating one such incident relating to alleged bomb-blast in the premises of the Lahore Railway Station on the visit of Air Marshal (Rtd.) Asghar Khan in March, 1975, Abdul Khaliq (P.W. 41), Deputy Director of the Federal Investigation Agency, came to suspect that the Federal Security Force might be involved in the murder of Nawab Muhammad Ahmad Khan. Appellants Arshad Iqbal and Rana Iftikhar Ahmad were interrogated in this behalf on the 24th and 25th of July, 1977, and arrested in this case. They confessed their participation in the incident and their statements were recorded on the 26th of July, 1977, under section 164 of the Criminal Procedure Code by Magistrate Zulfikar Ali Toor (P.W. 10). Appellants Ghulam Mustafa and Mian Muhammad Abbas as well as approvers Masood Mahmood and Ghulam Hussain were also later arrested. All of them made confessional statements under section 164 of the Criminal Procedure Code, eventually leading to the arrest of the former Prime Minister.

10. After reviewing the entire evidence at length, the High Court held that the prosecution had succeeded in proving that Zulfikar Ali Bhutto had strained relations with Ahmad Raza Kasuri, thus constituting a motive to get him eliminated; that this appellant had entered into a conspiracy with Masood Mahmood (P.W. 2), in which plan the other accused also joined at different levels to execute the mission along with Ghulam Hussain approver; that the attack on Ahmad Raza Kasuri in Islamabad was a part of the same operation; that the attack launched on Kasuri's car in Lahore, during the course of which his father was killed, was also in furtherance of the same conspiracy and that the initial investigation in the case was not honest, and efforts had been made at various levels to divert its course for the purpose of screening the real offenders. The High Court expressed the view that sufficient evidence, circumstantial and documentary, had been brought on the record to provide corroboration necessary for the purpose of placing reliance on the statements of the two approvers Masood Mahmood and Ghulam Hussain. It also took note of the fact that the appellants Arshad Iqbal, Ghulam Mustafa and Rana Iftikhar Ahmad had stuck to their confession throughout the course of the trial. Finally, the High Court held that there were no extenuating circumstances in favor of the appellants, as Zulfikar Ali Bhutto was the Prime Minister of the country and it was his duty to protect the life and liberty of the citizens of Pakistan, and not to use the Federal Security Force for eliminating his political opponents; that the other appellants were under no obligation to obey the

unlawful commands of their superiors, and such a plea could not afford a valid defence in law.

11. During the course of elaborate and exhaustive arguments, spread over a period of nearly two months, Mr. Yahya Bakhtiar, the learned counsel for appellant Zulfikar Ali Bhutto assailed the judgment of the High Court on three main grounds, namely:-

(a) It is a false, fabricated and politically motivated case, being the result of an international conspiracy aimed at eliminating the appellant both politically and physically.

(b) That the trial stands vitiated for the reason that the presiding Judge of the Bench, namely, Mr. Justice Mushtaq Hussain was biased against the appellant, and the trial was not conducted fairly inasmuch as evidence was not recorded faithfully in accordance with the depositions of the witnesses, objections raised by the defence counsel as to the admissibility of evidence were frequently not recorded, and were often illegally overruled; and that as a result of the cumulative effect of such prejudicial orders the appellant was compelled to boycott the trial from the 10th of January, 1978, onwards as a measure of protest; and

(c) That on merits, the prosecution had failed to prove its case beyond reasonable doubt; that inadmissible evidence had been allowed to be brought on the record and taken into consideration against the appellant in violation of the relevant provisions of law; and that admissible and relevant evidence had been illegally shut out to the prejudice of the appellant; that the prosecution witness, particularly the two approvers Masood Mahmood and Ghulam Hussain were not worthy of credit; and that the necessary corroboration, as required by law, was not available on the record.

12. After Mr. Yahya Bakhtiar concluded his arguments, the petitioner Zulfikar Ali Bhutto was also allowed to address the Court personally for four days on the various aspects of the case.

13. After giving a detailed consideration to the submissions made by Mr. Yahya Bakhtiar, as well as by the petitioner in person, the majority judgment has expressed the view that:

"By and large the trial was held substantially in accordance with the provisions of the Cr. P.C. and that any omissions, errors or irregularities or even illegalities, that have occurred were of such a nature as did not vitiate the trial, and were certainly curable under the provisions of section 537 of the Criminal Procedure Code as it now stands in its amended form since 1972."

This judgment has further found that the allegations of bias against the presiding Judge of the Bench, and criticism of the actions and orders made by the Bench during the course of the trial were not justified; and that in spite of the events, and the background, alluded to by the appellant and his counsel, the High Court Bench of five Judges had done its best to conduct the trial as fairly as possible in the circumstances then prevailing.

14. The judgment has also held that:

"The cumulative effect of all this oral and documentary evidence is to establish conclusively the existence of motive on the part of appellant Zulfikar Ali Bhutto and the existence of a conspiracy between him, approver Masood Mahmood, approver Ghulam Hussain and appellants Mian Muhammad Abas, Ghulam Mustafa, Arshad Iqbal, and Rana Iftikhar Ahmad. It is significant that the task was entrusted to the Director-General of the Federal Security Force who was made personally responsible for its execution, the various subordinate officers were inducted at various levels and at various stages for the execution of the conspiracy through the employment of higher sophisticated and automatic weapons of the Federal Security Force as well as its trained personnel."

15. The majority judgment further goes on to hold that:-

"The death of Ahmad Raza Kasuri's father Nawab Muhammad Ahmad Khan deceased was a probable consequence of the aforesaid conspiracy and was brought about during the course of a murderous assault launched on Ahmad Raza Kasuri in pursuance of this conspiracy .... It is true that the three appellants Zulfikar Ali Bhutto, Mian Muhammad Abbas and Ghulam Mustafa were not specifically charged under section 111 of the Pakistan Penal Code, but in this regard the matter is fully covered by the provisions of section 237 of the Criminal Procedure Code read with section 236 thereof, for the reason that in the ultimate analysis it was a question of law as to whether the facts proved on the record fell within the purview of section 301 read with section 109, or section 302 read with sections 109 and 111 of the Pakistan Panel Code. All the essential facts were fully within the knowledge of the appellants, having been brought out during the course of evidence recorded in their presence and in the presence of their counsel."

16. On the question of sentence, the majority judgment states that as the petitioner had used the apparatus of Government, namely, the agency of the Federal Security Force, for a political vendetta, and later the power of the Prime Minister was used to stifle proper investigation and to pressurize Ahmad Raza Kasuri to rejoin the Pakistan People's Party, there were no extenuating circumstances in favor of the petitioner, and

the High Court was, accordingly, right in imposing the normal penalty sanctioned by law for the offences of murder as well as its abetment. The death sentences awarded to the other four appellants have also been maintained.

17. In the dissenting opinions recorded by three learned Judges of this Court, the evidence of the two approvers as well as of other witnesses, namely, Ahmad Raza Kasuri, Saeed Ahmad Khan and M. R. Welch has not been found to be satisfactory and acceptable, and it has also been held that there was not satisfactory corroboration in support of the testimony of the approvers. They have accordingly taken the view that the prosecution had failed to establish its case beyond reasonable doubt against the petitioner as well as co-accused Mian Muhammad Abbas.

18. However, as to the appeals of the three accused who had pleaded guilty, the view taken is that they had not retracted their confessions and had stood by them even when they appeared before this Court. Dorab Patel, J., has observed that "additionally these confessions are corroborated by the evidence of Muhammad Amir, but it is not necessary to discuss this corroboratory evidence because a conviction can be based on a judicial confession if the Court is satisfied that it was genuine and voluntary, and I am satisfied that the confessions of the three appellants in the instant case were genuine and voluntary."

19. G. Safdar Shah, J., with whom Muhammad Haleem, J., has agreed, while upholding the convictions and sentences of the three confessing accused, has similarly observed that "right from the initial stages of the case they have not only admitted the commission of the crime, but the learned counsel appearing for them supported the case of the prosecution throughout. From the evidence on record, which finds corroboration from their own confessional statements, I am satisfied beyond the shadow of any doubt that all three of them are guilty, and consequently their convictions and sentences recorded by the High Court are proper.

20. Mr. Yahya Bakhtiar, the learned counsel appearing for the petitioner, submits that there are several errors patent on the face of the record in the majority judgment, which have led to a miscarriage of justice by giving rise to erroneous inferences on questions of fact as well as to misapplication of law. He also contends that in several important matters benefit of the doubt has been extended to the prosecution rather than the defence, in violation of the established principles governing the administration of criminal justice.

21. In elaboration of these contentions, the learned counsel has, in particular, urged the following grounds:-

"(i) That in coming to the findings that ammunition belonging to the Federal Security Force of 7.62 mm. bore and bearing the marking 661/71 was used in the

incident, the majority judgment has not given proper effect to its findings that the empties might have been substituted and that the recovery memo, prepared at the spot was not genuine; nor to the fact that Lt. Co. Wazir Ahmad, the author of letter Exh. P. W. 39/2 was not examined at the trial to prove the marking of the ammunition supplied to the Federal Security Force, and that the evidence of Fazal Ali (P. W.24) and the documents produced or proved by him were not free from suspicion, and that, in any case, they did not mention the marking of the ammunition in question;

(ii) That section 510 of the Criminal Procedure Code as amended in 1975, has not been properly interpreted and applied, with the result that the reports Exh. P.W. 32/1 and Exh. P.W. 23/4 signed by Major Fayyaz Haider on behalf of the Chief Inspector of Armaments, as to the caliber and marking of the ammunition used in the incidents at Islamabad and Lahore have been admitted in evidence as properly proved documents, although they were inadmissible for the reason that Major Fayyaz Haider was not examined at a witness at the trial, nor was it shown that he was a fire-arm expert appointed by the Government for the purpose of section 510 of the Criminal Procedure Code, and this deficiency could not be made up by the evidence of Cot. Zawar Hussain, another officer of the same Inspectorate;

(iii) That the majority judgment has failed to give full effect to the non-matching of the crime empties with the guns of the 3rd Battalion of the Federal Security Force, stationed at Walton at the relevant time, from which the weapons used in the incident were allegedly taken by the confessing accused Ghulam Mustafa and supplied to the appellants Arshad Iqbal and Rana Iftikhar Ahmad, that the prosecution had failed to prove substitution of the crime empties, and the majority judgment proceeds on the probability that there might have been substitution of the empties, thus giving the benefit of doubt to the prosecution rather than the defence;

(iv) That there has been a misreading of the site plan Exh. P.W. 34/2 as prepared by the Investigating Officer Abdul Hayee Niazi (P.W. 34), and also a patent error in placing reliance on the site plan prepared by draftsman Inam Ali Shah, Exh. P.W. 34/5-D which was not accepted as correct even by the prosecution, besides the obvious error in thinking that 1 inch was equal to 10 cms. whereas, in fact it was equal to 2.54 cms., with the result that there has been a serious mistake in calculating the distances between the places where the crime empties were found at the spot, and also in concluding that they had been fired from weapons of Chinese origin; and that in this behalf the result of the demonstration of firing seen by the Court could not be used as substantive evidence in support of the prosecution case;

(v) That there is a patent contradiction in the view taken by the majority judgment as to the strict requirements of section 540-A of the Criminal Procedure Code on the one hand, and the effect of its non-compliance by the High Court, with the result that even though the High Court did not record any reasons for proceeding with the examination of as many as 15 prosecution witnesses in the absence of the petitioner, the majority judgment erroneously concludes that the trial was not vitiated on this account;

(vi) That the findings recorded in the majority judgment that the trial of the petitioner was not vitiated on account of the bias of the learned Chief Justice, who presided over trial Bench, is not correct, as the Court has failed to attach due importance to the cumulative effect of the large number instances of bias which were discussed at length during the course of the arguments in the appeal;

(vii) That the finding recorded in the majority judgment regarding the inadmissibility of the Log Book maintained on the jeep driven by Muhammad Amir (P.W. 19) is based on a misreading of the evidence of the witness concerned who had made it clear that the M.T.O. was the proper person, and not the driver of the jeep, to make the relevant entries regarding the journeys performed by the vehicle;

(viii) That while securitizing the evidence of approver Ghulam Hussain (P.W. 31) the Court has fallen in error, and misread the evidence on record, as regards a number of important contradictions and improvements pointed out by the defence, which had a vital bearing on the question of his reliability;

(ix) That important contradictions between the testimony of approver Ghulam Hussain at the trial, and the confessions of appellants Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad, have not been duly considered in assessing the value to be attached to the approver's statement, and it has been erroneously held that the confessions lent support to the approver, al thought, in fact, they contradicted him;

(x) That the evidence of Amir Badshah Khan (P.W. 20) also contradicts approver Ghulam Hussain and driver Muhammad Amir as to the time when the guns were supplied by him to Ghulam Mustafa for being passed on to approver Ghulam Hussain, inasmuch as this witness asserted that the guns were supplied towards the end of September 1974 and not in November 1974 as stated by the approver;

(xi) That similarly the evidence of Fazal Ali (P. W. 24) has been accepted without giving due consideration to the contradictions and improvements pointed out by the defence, which had a direct bearing on the question of the

identity of the ammunition allegedly supplied by him to approver Ghulam Hussain;

(xii) That the majority judgment is in error in placing reliance on the testimony of Saeed Ahmad Khan as corroborating that of Masood Mahmood or Ahmad Raza Kasuri, as, in fact, he should have been found to be an accomplice for the reason that they had suppressed evidence from the Shafi-ur-Rehman Inquiry Tribunal and had consistently tried to screen the real offender, namely, Federal Security Force; and the Court has also ignored the fact that he had clearly stated that the petitioner had become his enemy, and Martial Law inquiries had also been started against him;

(xiii) That the majority judgment has erred in law in placing reliance on the secure reports, which were not proved by their authors, and using their contents against the petitioner in violation of the rule laid down in *Islamic Republic of Pakistan v. Abdul Wali Khan*<sup>626</sup> and approved in this case;

(xiv) That the Court has erred in holding that paragraph 15 of Mr. Justice Shafi-ur-Rehman's report could not be regarded as secondary evidence of the statement apparently made by Ahmad Raza Kasuri before the Tribunal as regards the motive behind the attack launched on his car, which resulted in the death of his father, as the authenticity of the observations contained in this particular paragraph of a judicial document could not be doubted;

(xv) That the Court has gone wrong in thinking that nothing was done in 1974-75 to conduct the investigation according to the guidelines given by the Inquiry Tribunal, as it was clearly stated in the letter of the Deputy Inspector-General to the Inspector-General that the investigation has been completed in accordance with the directions given by the Inquiry Tribunal, and yet the culprits could not be traced;

(xvi) That the oral evidence of M. R. Welch (P. W. 4), as well as the documents proved by him, have been misread in coming to the conclusion that they connect the petitioner with the conspiracy; that in this connection unproved secure reports have also been taken into account, which was not permissible under the law; and that, in any case, Welch was not a reliable witness as shown by his misstatement regarding his religion, and his vulnerability to extraneous pressure, besides the fact that he was not better than an accomplice as he had consciously suppressed information regarding Masood Mahmood's intention to have Ahmad Raza Kasuri eliminated during the latter's visit to Quetta;

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<sup>626</sup> PLD 1976 SC 57

(xvii) That the majority judgment has fallen into serious error in placing reliance on the testimony of approver Masood Mahmood (P.W. 2), and that conclusions have been reached in this matter as a result of misreading the evidence of his driver Manzoor Hussain (P.W. 21), by placing reliance on fabricated documents like tour details contained in Exh. P.W. 5/1 and also by ignoring his evidence regarding his hunch about the Islamabad incident and the lack of corroboration in respect of the circumstances of his appointment as Director-General of the Federal Security Force etc., besides the erroneous assumption that being an official of high status he was expected to speak the truth.

(xviii) That in reaching its conclusions as to the presence of motive on the part of the petitioner to do away with Ahmad Raza Kasuri, the majority judgment has misread the First Information Report as indicating that the motive lay only with the petitioner to the exclusion of other political enemies of the complainant; that it has also erroneously presumed that no other motive was proved on the record and other motives stood excluded; that the effect of Ahmad Raza Kasuri rejoining the Pakistan People's Party after the murder of his father, and his expressing admiration for the petitioner has also been ignored; and it has been overlooked that as Ahmad Raza Kasuri was criticizing and attacking the formation and performance of the Federal Security Force, therefore, Masood Mahmood and the petitioner's co-accused Mian Muhammad Abbas might have had a motive of their own to finish him;

(xix) That the view taken by the majority judgment as to the use of the evidence of an approver for the purpose of satisfying the test of reasonable grounds for believing that there has been a conspiracy involving specified persons, as mentioned in section 10 of the Evidence Act, is erroneous and contrary to the weight of judicial authority that paragraph 118 of the judgment also suffers from an error in as much it seems to permit the use of inadmissible and unreliable evidence for the purpose of forming the belief mentioned in section 10 aforesaid; and that, in any case, the evidence mentioned in support of finding reasonable grounds is such as does not connect the petitioner at all with any conspiracy;

(xx) That the majority judgment also suffers from an error patent in the face of the record as it has used, in support of the petitioner's conviction, facts elicited by the learned counsel for the confessing accused in cross-examination illegally permitted to him by the High Court after the counsel for the petitioner and for the other contesting accused Mian Muhammad Abbas had concluded their cross-examination, with the consequence that certain incriminating facts, damaging to the petitioner, were brought on the record without the petitioner having an opportunity to rebut the same;



(xxi) That the majority judgment suffers from a patent contradiction inasmuch as it has rejected the petitioner's application for summoning additional evidence on the ground that he was not in law permitted to boycott the proceedings of the trial in the High Court, and at the same time it has given legal recognition to the fact of boycott by holding that no prejudice had been caused to him by the failure of the High Court to put certain pieces of evidence to him under section 342 of the Criminal Procedure Code as he has already boycotted the proceedings and refused to answer a large number of questions put to him by the High Court under this section of the Code;

(xxii) That while examining the question of the subsequent conduct of the petitioner, and the evidence of Saeed Ahmad Khan having a bearing thereon, the majority judgment has omitted to examine the effect of the note made by the petitioner on the letter of the Punjab Chief Minister, with which the Report of the Shafi-ur-Rehman Inquiry Tribunal was enclosed, to the effect "What was the point in discussing with you. Please discuss"; that, in fact, these remarks of the petitioner clearly showed that Saeed Ahmad Khan had been meddling with the investigation of the case without the petitioner's authority;

(xxiii) That the majority judgment has erred in coming to the conclusion that there was voluntary agreement on the part of Masood Mahmood to join the alleged conspiracy, as due weight has not been given to the fact that he had been given orders by the petitioner and that he also felt threatened in the sense that the petitioner is alleged to have asked Masood Mahmood whether he wanted to be chased by the Establishment Secretary, Mr. Vaqar Ahmad; and that Masood Mahmood's subsequent conduct in regard to the Islamabad incident and his alleged directions to M. R. Welch at Quetta have also been misconstrued as indicating voluntary acquiescence on his part;

(xxiv) That the majority judgment has not given effect to the submissions made on behalf of the petitioner as the erroneous and illegal view taken by the trial Bench in the matter of contradictions and omissions occurring in the evidence of the prosecution witnesses when they took up the position that they did not remember whether they had stated certain things in their previous statements or not, with the result that the prejudice caused to the petitioner by the refusal of the High Court to allow cross-examination in respect of these matters has not been considered by this Court;

(xxv) That the conclusions reached in the majority judgment as to the effect of non-examination of material witnesses by the prosecution need to be reviewed, as the evidence of the recovery witnesses, Irfan Malhi, Director of the Federal Security Force, Muhammad Yousuf, Head Constable, and Mr. Hanif Ramay, former Chief Minister of Punjab, was material to the unfolding of the prosecution

case, and the Court was under an obligation under the second part of section 540 of the Criminal Procedure Code to summon them as Court witnesses;

(xxvi) That the majority judgment has also erred in refusing to summon, in this Court, defence witnesses like Rao Abdul Rashid, former Inspector-General of Police of the Punjab Province and others as the petitioner did not have adequate opportunity of doing so in the trial Court;

(xxvii) That the majority judgment is in error in holding that section 111 of the Pakistan Penal Code was applicable to the case of the petitioner, as there was no evidence on the record to show that the death of Nawab Muhammad Ahmad Khan deceased was a probable consequence of the alleged conspiracy; that a conviction under this section could not be recorded without there being a separate charge, as the case was not one covered by section 237 of the Cr. P.C. read with section 236 thereof; and that, in any case, there is also an error in the application of section 109 of the Pakistan Penal Code in addition to section 111 thereof, as both the sections are mutually exclusive;

(xxviii) That having reaffirmed the rule laid down in the case of *Faiz Ahmad v. The State*<sup>627</sup> in regard to the effect of the non-supply to the defence of statements of prosecution witnesses recorded under section 161 of the Criminal Procedure Code during the course of investigation, the majority judgment suffers from a patent error in not applying the rule to the facts of this case, and erroneously deciding neither to exclude the evidence of the prosecution witnesses concerned, nor to order a re-trial of the petitioner on that account;

(xxix) That, in any case, even if the conviction of the petitioner is maintained in spite of the errors and defects apparent in the majority judgment, it is a fit case where lesser punishment should be awarded for the offence falling under section 302 of the Pakistan Penal Code read with sections 109 and 111 thereof, for the reasons that the petitioner is guilty only of abetment and was not present at the spot at the time of the murder; that the conspiracy was to kill Ahmad Raza Kasuri and not his father who was hit by accident; that the conviction of the petitioner is based on the evidence of approvers; that there has arisen a difference of opinion between the learned Judges of this Court as to the petitioner's guilt; that with the introduction of the Islamic laws in the country with effect from the 12th of R. Awwal, 1399 H. (*i.e.* the 10th of February, 1979), it would be anomalous to impose death penalty for an unintentional murder, especially when the Shariat Laws do not recognize an approver, and the witnesses have to fulfill strict qualifications as to integrity and character before their testimony can be acted upon; and that the fact the petitioner was compelled

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<sup>627</sup> PLD 1960 SC 8

to boycott the proceedings in the trial has also a bearing on the question of sentence.

22. Before embarking upon an examination of the submissions made by Mr. Yahya Bakhtiar in support of this petition, it would be useful to state clearly as to what is the scope and nature of review proceedings in a criminal case.

23. The power of review has been conferred upon the Supreme Court by Article 188 of the Constitution, which reads as under:-

"The Supreme Court shall have power subject to the provisions of any Act of Parliament and of any rules made by the Supreme Court, to review any judgment pronounced or any order made by it."

24. So far no Act of Parliament has been enacted to regulate this power, but Order xxvi of the Supreme Court Rules, 1956, which have continued to operate under the successive Constitutions of 1962, 1972 and 1973, is directly relevant in this behalf. Rule I of this Order lays down that:

"Subject to the law and the practice of the Court, the Court may review its judgment or order in a civil proceeding on grounds similar to those mentioned in Order XL VII, rule I of the Code, and in a criminal proceeding on the ground of an error apparent on the face of the record."

25. Rule 6 of the said order prescribes that, "as far as practicable the application for review shall be posted before the same Bench that delivered the judgment or order sought to be reviewed."

26. At the commencement of the hearing of this petition on the 24th of February, 1979, it was submitted on behalf of the petitioner (in Cr. Misc, Application bearing No, 16 of 1979) that as originally it had been ordered that the petitioner's appeal shall be heard by the full Court consisting of nine Judges, including Mr. Justice Qaisar Khan and Mr. Justice Waheeduddin Ahmad, these two learned Judges should be recalled to sit on the review Bench. Mr. Justice Qaisar Khan had retired from the Supreme Court on the 31st of July, 1978, on attaining the age of superannuation prescribed by the Constitution, and Mr. Justice Wahedduddin Ahmad was incapacitated by illness to continue on the Appeal Bench from the 22nd of November, 1978 onwards, with the result that the petitioner's appeal, as well as the two connected appeals filed by the co-accused, were ultimately decided by the remaining seven judges of the Bench on the 6th of February, 1979. The petitioner's application for recalling these two learned Judges was dismissed by us on the same date on the ground that the position under the Supreme Court Rules was clear and unambiguous, and in terms of rule 6 of Order XXVI, the review petition had to be heard by the seven Judges of this Court, who had

delivered the judgment under review, and who were all available on the Bench for the disposal of the review petition.

27. At a subsequent stage a question arose as to the position of the three learned Judges of this Court who had recorded dissenting opinions in regard to the disposal of the petitioner's appeal. Again, relying upon the aforesaid rule 6, we took the view that as they were part of the Bench that delivered the judgment sought to be reviewed, their presence on the Bench was necessary, as they were continuing as Judges of the Supreme Court and were available for the disposal of the review petition.

28. It will be seen that according to rule 1 of Order XXVI of the Supreme Court Rules the power of review is to be exercised in a criminal proceeding on the ground of an error apparent on the face of the record, and in a civil proceeding on grounds similar to those mentioned in Order XLVII, rule 1 of the Civil Procedure Code. Now, as rule 1 of Order XLVII of the Code also speaks of a mistake or error apparent on face of the record, this ground for review is common to both the civil and criminal proceedings in this Court. Accordingly, it would appear that the two questions which need examination in this behalf are:-

(a) What is the meaning and content of the phrase "a mistake or error apparent on the face of the record"; and

(b) What is the scope and nature of the proceedings intended for the discovery and correction of such an error.

29. The learned counsel on both sides have taken pains to bring to our notice a considerable number of precedent cases, which have given as valuable assistance on both these points. Mention in this behalf may be made of:

*Chhajju Ram v. Neki and others*<sup>628</sup>

*Tinnevelly Mills Co. Ltd. v. T. A. K. Mohideen Pichai Targanar and others*<sup>629</sup>

*Girdharilal Mansukhbhai Gandhi v. Kapadvanj Municipality*<sup>630</sup>

*Ballrisham and another v. Mt. Bundia and others*<sup>631</sup>

*Thakur Kishan Chand Singh v. Munshi Makundarup*<sup>632</sup>

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<sup>628</sup> AIR 1922 PC 112

<sup>629</sup> AIR 1929 Mad. 209

<sup>630</sup> AIR 1930 Bom. 317

<sup>631</sup> AIR 1933 All. 274

<sup>632</sup> AIR 1938 All. 308

*Ranbir Prasad v. Sheobaran Singh*<sup>633</sup>

*Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai and others and Subhanand Chowdhary and another v. Apurba Krishna Mitra and another*<sup>634</sup>

*Mt. Majid-un-Nisa v. Shaikh Anwarullah*<sup>635</sup>

*Madansingh Ramsingh Malguzar v. Deputy Commissioner, Bilaspur and others*<sup>636</sup>

*Moran Mar Basselios Catholics and another v. Most Rev. Mar Poulouse Athanasius and others*<sup>637</sup>

*Burma Shell Oil Storage Distributing Co. of India Ltd. v. Labour Appellate Tribunal*<sup>638</sup>

*Mirza Akbar Ali v. Mirza Iftikhar Ali and others*<sup>639</sup>

*Muhammad Tufail v. Abdul Ghafoor and others*<sup>640</sup>

*S. P. Awate, v. C. P. Fernandes and another*<sup>641</sup>

*Kashiram v. Bhagwandas Lallu Kurmi and another*<sup>642</sup>

*Anwar Hossain Talukdar and another v. Province of East Pakistan and others*<sup>643</sup>

*Province of East Pakistan v. Mohiuddin Molla and others*<sup>644</sup>

*Lt. Col. Nawabzada Muhammad Amir Khan v. The Controller of Estate Duty, Government of Pakistan, Karachi and Lt. Col. Abdul Ghafoor Khan and others v. The Controller of Estate Duty, Government of Pakistan, Karachi etc.*<sup>645</sup>

*Abdul Ghafoor v. The State*<sup>646</sup>

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<sup>633</sup> AIR 1939 All. 619

<sup>634</sup> AIR 1941 FCI

<sup>635</sup> AIR 1942 Oudh 210

<sup>636</sup> AIR 1944 Nag. 371

<sup>637</sup> AIR 1954 SC 526

<sup>638</sup> AIR 1955 Cal. 92

<sup>639</sup> PLD 1956 FC 50

<sup>640</sup> PLD 1958 S C (Pak)201

<sup>641</sup> AIR 1959 Bom. 466

<sup>642</sup> AIR 1959 Madh. Pra. 75

<sup>643</sup> PLD 1961 Dacca 155

<sup>644</sup> PLD 1961 Dacca 490

<sup>645</sup> PLD 1962 SC 335

<sup>646</sup> 1969 SC MR 13

*Chiragh Din and another v. Chairman Thai Development Authority*<sup>647</sup>

*Abdul Majid v. C.S.C. and others*<sup>648</sup>

*Ata Mohammad and another v. The State*<sup>649</sup>

*Shah Mohammad v. The State*<sup>650</sup>

*Haji Nawab Din v. Qazi Abu Saeed*<sup>651</sup>

*Mohammad Mushtaq v. The State*<sup>652</sup>

*Collector of Customs etc. v. Mohammad Yousuf*<sup>653</sup>

*Muhammad Naseer v. Hakim Dost Muhammad etc.*<sup>654</sup>

*Ch. Manzoor Elahi v. Federation of Pakistan etc. and Province of Baluchistan etc. v. Malik Ghulam Jilani and Government of Pakistan v. Hafiz Umar Gul etc.*<sup>655</sup>

*Syed Mohammad Zaki etc. v. Maqsood Ali Khan etc.*<sup>656</sup>

*Mst. Inayat Bibi etc. v. Umar Din etc.*<sup>657</sup>

*Zamir Ahmad Khan v. Government of Pakistan*<sup>658</sup>

*Rizwan Co-operative Society Ltd. v. Custodiam of Evacuee Property etc.*<sup>659</sup>

*Ghulam Sarwar etc. v. The State.*<sup>660</sup>

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<sup>647</sup> 1970 SC MR 29

<sup>648</sup> 1970 SC MR 34

<sup>649</sup> 1970 SC MR 482

<sup>650</sup> PLD 1973 SC 332

<sup>651</sup> 1973 SC MR 143

<sup>652</sup> 1973 SC MR219

<sup>653</sup> 1974 SC MR 7

<sup>654</sup> 1975 SC MR 87

<sup>655</sup> PLD 1975 SC 66

<sup>656</sup> PLD 1976 SC 309

<sup>657</sup> 1978 SC MR 163

<sup>658</sup> 1978 SC MR 327

<sup>659</sup> 1978 SC MR 449

<sup>660</sup> 1979 SC MR 43

30. A perusal of the judgments cited at the Bar shows that there is a considerable consensus among judicial authorities as to the meaning of the phrase "an error apparent on the face of the record", and also as to the scope and nature of the review proceedings. Accordingly, it is not necessary to dilate at any length on the facts and observations appearing in these cases, and it would suffice, for our purposes, if reference is made to some of the leading judgments delivered in this behalf.

31. In the case of *Tinnevelly Mills Co. Ltd. v. T. A. K. Mohideen Pichai Taraganar and others*, it was observed that an error of law to be apparent on the face of the record must relate to some proposition of law which is well settled and beyond controversy so far as the Court which delivered the judgment is concerned, and on which the judgment rests, and not merely to a question of law which is debatable and may be shown to be erroneous. In *Balkrishan and another v. Mt. Bundia* and others it was held that "an error in law does not come under the words error apparent on the face of the record". Besides a point of law which can only be established after arguments and reference to authorities is certainly not a point which is apparent on the face of the record; nor it is a point so simple as to carry conviction when it is stated. Again in *Ranbir Prasad v. Sheobran Singh*, it was observed that "the fact that a different view on certain question of law is possible is hardly any ground for review. For, an application for review of judgment under Order XLVII, rule I does not lie on the ground of an error of law and in any event the error must be so patent that it could be said to be apparent on the face of the record". On the same subject the observations appearing in *S. P. Awate v. C. P. Fernandes*, are more elaborate to the effect that:

"The error contemplated is an error so manifest, so clear, that no Court would permit such an error to remain on the record. The error is not an error which could be demonstrated by a process of ratiocination, nor would it be correct to say that when two views on a question of law are possible and the Court has taken one view, the fact that the other view is a more acceptable view would render the first view an error apparent on the face of the record."

32 The meaning of the term error apparent on the face of the record was examined at some length by a Division Bench of the Dacca High Court in the case of *Anwar Hussain Talukdar v. Province of East Pakistan*, in relation to the exercise of writ jurisdiction as conferred by Article 170 of the 1956 Constitution, yet the observations made by the learned Judges are highly instructive and relevant in the present context. In the judgment delivered by Hamoodur Rahman, J. (who later became the Chief Justice of Pakistan) it was held that:

"The error of law contemplated is an error so patent, so manifest, that the superior Court will not permit the subordinate Court to come to a decision in the face of a clear ignorance or disregard of a provision of law. If a section of a statute is clearly misconstrued, or if a provision of the law is overlooked, or not

applied, and that appears from the judgment of the lower Court itself, then the superior Court may interfere by a writ of certiorari. It is not, however, always easy to determine what are error of law apparent on the face of the record, what is an error patent on the face of the record cannot be defined with any precision or even exhaustively, and there must always be an element of indefiniteness inherent in its very nature and each case will have to be determined on its own facts."

33. In the case of *Lt. Col. Nawabzada Muhammad Amir Khan v. The Controller of Estate Duty, Government of Pakistan, Karachi and another*<sup>661</sup>, the review petition had been specially admitted to make a thorough examination of the scope and extent of the power of review expressly conferred upon the Court under Article 161 of the 1956 Constitution. Cornelius C. J., expressed the view that "there must be a substantial and a material effect to be produced on the result of the case if, in the interest of "complete justice" the Supreme Court undertakes to exercise its extraordinary jurisdiction of review of its own considered judgment. If there be found material irregularity and yet there be no substantial injury consequent thereon, the exercise of the power of review to alter the judgment would not necessarily be required. The irregularity must be of such a nature as converts the process from being one in aid of justice to a process that brings about injustice Where, however, there is found to be something directed by the judgment of which review is sought which is in conflict with the Constitution or with a law of Pakistan there it would be the duty of the Court unhesitatingly to mend the error. It is the duty of every Judge of the Court to preserve, protect and defend the Constitution and laws of Pakistan. But the violation of a written law must be clear to enable this Court to interfere with its previous judgment or, order in exercise of its review jurisdiction. In that connection Kaikaus, J. observed that the mere incorrectness of a conclusion reached can never be a ground for review. To permit a review on the ground of incorrectness would amount to granting the Court the jurisdiction to hear appeals against its own judgments. It is not because a conclusion is wrong but because something obvious has been overlooked, some important aspect of the matter has not been considered, that a review petition will lie. It is a remedy to be used only in exceptional circumstances. According to Hamoodur Rahman, J. a review is by its very nature not an appeal or a rehearing merely on the ground that one party or another conceives himself to be dissatisfied with the decision of this Court, but the indulgence by way of review may no doubt be granted to prevent irremediable injustice being done by a Court of last resort as where by some inadvertence an important statutory provision has escaped notice which, if it had been noticed, might materially have affected the judgment of the Court but in no case should a rehearing be allowed upon merits."

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<sup>661</sup> PLD 1962 SC 335



34. The views expressed by the Federal Court in the case of *Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai and others* are also instructive. It was observed "the Federal Court will not sit as a Court of appeal from its own decisions, nor will it entertain applications to review on the ground only that one of the parties in the case conceives himself to be aggrieved by the decision ... The Federal Court will exercise its power of review for the purpose of rectifying mistakes which have crept in by mis-precision in embodying the judgments or have been introduced through inadvertence in the details of judgments. It can also supply manifest defects in order to enable the decrees to be enforced, or add explanatory matter, or reconcile inconsistencies. The indulgence by way of review is granted mainly owing to the natural desire to prevent irremediable injustice being done by a Court of last resort as where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard. But in no case, however, can a rehearing be allowed upon the merits or even on the ground that new matter has been discovered, which, if had been produced at the hearing of the appeal, might materially have affected the judgment of the Court."

35. The rule laid down in this case was applied by this Court in the case of *Syed Muhammad Zaki v. Maqsood Ali Khan*<sup>662</sup>, observing that "merely because a decision of this case is erroneous per se is not a ground to justify its review for that would seriously impair the finality attaching to the judgments of this Court, which sits at the apex of the judicial system. Nevertheless, it was observed in that case, if there be found a material irregularity in the decision, which is of the nature which "converts the process from being one in aid of justice to a process which brings about injustice", or if the decision is in conflict with the Constitution or a law of the land, then it would be the duty of the Court to mend the error".

36. In *Ramaswami Fadayachi v. Shanmugha Fadayachi*<sup>663</sup>, it was held that where a judgment is based on two or more grounds, each of which is sufficient to sustain it independently of the others, it is not liable to be reviewed even though one of the said grounds is erroneous and the error may even be apparent on the face of the record. A similar view was taken by this Court in the case of *Muhammad Zafrullah Khan v. Muhammad Khan and others* and it was observed that if the wrong assumption of fact was not the sole ground for the dismissal of the appeal of the petitioner, and the same could be based on the reasoning contained in other portions of the judgment under review, then the review would not be maintainable, as it could not be made a pretext for re-arguing- the whole case. To similar effect are the observations of this Court in three cases recently decided namely, *Mst. Inayat Bibi etc. v. Umar Din etc.*, *Zamir Ahmad Khan v. Government of Pakistan* and *Rizwan Co-operative Society Ltd. v. Custodian of Evacuee*

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<sup>662</sup> PLD 1976 SC 308

<sup>663</sup> (1959) 2 MAD LJ 201

*Property etc.* In the last-mentioned case, the judgment was delivered by our learned brother Muhammad Haleem, J. and it was held that:

"A contention which was not raised either in the High Court or at the hearing of appeal before Supreme Court, cannot be made a ground for review; that even if a provision of law has been erroneously construed, still it cannot be regarded as an error apparent on the face of the record so as to invite interference in review jurisdiction; and that review proceedings did not mean a re-hearing of the appeal, and, therefore, it was not permissible to raise either a new ground or one which had not been argued in the manner in which it was raised in review."

37. There are a number of precedent cases directly dealing with the question of review in regard to the quantum of sentence in criminal matters, In *Muhammad Hussain and another v. The State* (Cr. Review Petition No. 6 of 1974) this Court refused to interfere with the sentence of death awarded to the petitioner in the judgment under review on the ground that the principle, on which reliance was placed, was fully present to the mind of the Court at the time of the judgment. In *Siraj Din v. Nazar Hussain* (Cr. Review Petition No. 8 of 1974) the Court refused to commute death sentence to imprisonment for life on the ground that it was a legal sentence, and, therefore, not liable to interference in review. Similarly in *Muhammad Sarfraz v. The State* (Cr. Review Petition No. 1 of 1974), it was observed that having already awarded the legal sentence of death, this Court cannot reopen this question in review petition and the matter could alone be considered by the Executive authorities in exercise of their Constitutional jurisdiction.

38. In *Agha Khan v. The State* (Criminal Review Petition No. 7 of 1966) review was sought on the plea that while dismissing the special leave petitions, this Court did not consider whether the death penalty was the only appropriate punishment awarded to the petitioner in the case. It was submitted that the petitioner was a youth of 19 years of age and this was a factor which should have been considered in maintaining the death sentence awarded to him. But the Court refused to review its previous decision on this ground of age alone.

39. In *Tariq Javid v. The State* (Criminal Review Petition No. 4-R of 1976) according to the concurrent findings of the two Courts, the petitioner was convicted under sections 323, 354 and 366 of the Pakistan Penal Code, and awarded various terms of imprisonment as well as fine on these counts, including a sentence of five years' rigorous imprisonment for the offence falling under section 366, P. P. C. His petition for special leave against his conviction and sentence was also dismissed. In review it was played that at least this sentence of five years awarded to the petitioner was unduly harsh in the circumstances of the case and might be reduced. But repelling this contention the Court refused to interfere with the legal sentence awarded to him with the observations that:-

"We regret we see no merit in this prayer as well, as the maximum sentence prescribed under section 366 is rigorous imprisonment for ten years. The sentence of five years rigorous imprisonment was, therefore, a legal sentence, and it has been adjudged to be appropriate not only by the trial Court but also by the appellate Court. The Court does not ordinarily interfere with a legal sentence, unless some compelling justification is made out. In the present case, we do not see any such justification."

40. In *Kala Khan and others v. Misri Khan and others* (Criminal Review Petition No. 2-R of 1977) this Court observed that in awarding the capital sentence, the trial Court had held that there was not extenuating circumstance to mitigate the sentence. But the learned counsel for the petitioner was not able to show that this conclusion was amenable to challenge for any substantial reason. In any case, in the opinion of this Court, this objection was not taken in the appeal and therefore, it could not be urged in review.

41. In *Feroze v. The State*<sup>664</sup> the petitioner was convicted by the trial Court under section 302, P. P. C. for the murder of Nooran Shah deceased and sentenced to death. His appeal to the High Court against his conviction failed and his death sentence was confirmed on a reference. He then applied to this Court for special leave against the judgment of the High Court. In that case the murder of Nooran Shah for which the petitioner stood convicted, had a tragic background of murders of four persons committed on three different occasions since 1970 in each of which Nooran Shah deceased was allegedly concerned. In the petition for special leave before this Court, the learned counsel for the petitioner was unable to possibly question his conviction. He however, made an earnest plea that in view of the background which had led the petitioner to avenge the murders of his brother and father and the two prosecution witnesses in cases relating to their murders, the extreme penalty of death was not justifiable and that the ends of the justice would have been fully satisfied with the lesser sentence. In that connection the Court was however, of the opinion that the sentence of death imposed upon the petitioner was perfectly legal, and the mere fact that in the peculiar circumstances of the case, the lesser sentence would have been more appropriate, would not be a sufficient ground for the grant of special leave by this Court. In that connection the Court observed:-

"We cannot possibly say that there is no substance in the above plea. However, the fact remains that the sentence of death imposed upon the petitioner is perfectly legal and the mere fact that in the peculiar circumstances of the case, the lesser sentence would have been more appropriate would not be a sufficient ground for grant of leave by this court for, as pointed out in a number of cases, this court will normally not interfere to reduce the sentence which otherwise is legal. Adhering to that view, we are constrained to refuse leave, in a matter

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<sup>664</sup> 1975 SC MR 232

which was entirely discretionary with the High Court and trial Court. This aspect of the case, now, more appropriately falls to be dealt with by the Executive in the exercise of its prerogative of mercy."

In this connection we cannot help observing that these very considerations are *mutatis mutandis* applicable with even greater force to the proceedings before this Court for a review of its own order.

42. In this connection, however, before concluding we must refer to the unreported case of *Irshad v. The State* (Criminal Review Petition No. 9-R of 1976) brought to our notice by the learned counsel for the petitioner. In that case the petitioner was convicted for offences under sections 366/376, P. P. C. read with M.L.R. 36 and sentenced to five years' R.I. His brother Muhammad Riaz and sister Mst. Salma Akhtar who were also tried with him, were, however, acquitted, the latter by the trial Court and the former by the High Court. His own appeal before the High Court having failed, his petition for special leave to appeal was also dismissed by this Court. But in the proceedings for review of the judgment this Court observed:-

"As the scope of review in criminal matter is confined to an error of law on the face of the record, we cannot enter upon fresh examination of evidence as desired by the learned counsel. However, in the circumstances of the case, we reduce the sentence awarded to Irshad to the period already undergone on both the counts. The State Counsel has no objection to our adopting this course."

It appears that this case was disposed of on its own facts and the order does not even give any reasons for reducing the sentence awarded to the petitioner by way of review to which the State counsel did not object. In the peculiar circumstances of that case it cannot be relied upon as a precedent and is distinguishable.

43. From what has been said in the preceding paragraphs, it follows that in order that an error may be a ground for review, it is necessary that it must be one which is apparent on the face of the record, that is, it must be so manifest, so clear that no Court could permit such an error to remain on the record. It may be an error of fact or of law, but it must be an error which is self-evident and floating on the surface, and does not require any elaborate discussion or process of ratiocination. The contention that the exposition of the law is incorrect or erroneous, or that the Court has gone wrong in the application of the law to the facts of the particular case; or that erroneous inferences have been drawn as a result of appraisal or, appreciation of evidence, does not constitute a valid ground for review. However, an order based on an erroneous assumption of material fact, or without adverting to a provision of law, or a departure from an undisputed construction of the law and the Constitution may amount to an error apparent on the face of the record. At the same time if the judgment under review, or a finding contained therein, although suffering from an erroneous assumption of

facts, is sustainable on other grounds available on the record then although the error may be apparent on the face of the record, it would not justify a review of the judgment or the finding in question. In other words, the error must not only be apparent, but must also have a material bearing on the fate of the case. Errors of inconsequential import do not call for review.

44. It is also to be borne in mind that as finality attaches to the judgments delivered by this Court, which stands at the apex of the judicial hierarchy, a review proceeding is neither in the nature of a rehearing of the whole case, nor it is an appeal against the judgment under review. It is accordingly not permissible to embark upon a reiteration of the same contentions as were advanced at the time of the hearing of the appeal, but were considered and repelled in the judgment under review, in an effort to discover errors said to be apparent on the face of the record.

45. It is further to be noted that it is well settled that in criminal matters the Supreme Court will not interfere in review with the quantum of sentence, if a legal sentence has been imposed, or upheld, after due consideration of all the relevant circumstances.

46. We now proceed to examine, in the light of these principles, the large number of submissions made by Mr. Yahaya Bakhtiar in support of this review petition.

47. Mr. Yahya Bakhtiar has devoted considerable time to showing that there is an error patent on the face of the record inasmuch as while coming to the finding that ammunition of the Federal Security Force of 7.62 mm. bore and bearing the marking of 661/71 was used in the incident, the majority judgment has not given proper effect to its findings that the empties might have been substituted, and that the recovery memo, prepared at the spot was not genuine, nor to the fact that Lt. Co. Wazir Ahmad, the author of letter Exh. P.W. 39/2 was not examined at the trial to prove the marking of the ammunition supplied to the Federal Security Force, and that the evidence of Fazal Ali (P. W. 24) and the documents produced or proved by him were not free from suspicion and that, in any case, they did not mention the marking of the ammunition in question.

48. It will be recalled that the essence of the prosecution case is that in the execution of the conspiracy entered into between the petitioner and approver Masood Mahmood, into which other officials of the Federal Security Force were inducted at various levels, including approver Ghulam Hussain and the three confessing accused, the attack on the car of Ahmad Raza Kasuri, in the early hours of the morning of the 11th of November, 1974, was carried out by the personnel of the Federal Security Force, using arms and ammunition belonging to the Force. Approver Ghulam Hussain gave details of the arrangements made by him in this behalf for the purpose of obtaining ammunition and arms from the F. S. F. Armoury at Rawalpindi and the Third Battalion of the Federal Security Force at Lahore, under the directions of appellant Mian Muhammad Abbas, and with the assistance of appellant Ghulam Mustafa. The details of the marking and

the bore of the ammunition supplied to Ghulam Hussain, and of the empties found at the spot were sought to be proved by the prosecution for the purpose of corroborating the relevant portions of the testimony of this approver. The confessions made by three accused, namely, Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad were also tendered in evidence so as to be taken into consideration not only against these accused persons but also against the other two accused, namely, the petitioner and Mian Muhammad Abbas.

49. Now, all the seven Judges of this Court have found that the confessing accused Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad were involved in the incident, and they were admittedly members of the Federal Security Force. The entire Court has further found that approver Ghulam Hussain master-minded this attack. In coming to the finding that the personnel of the Federal Security Force were involved in the attack, all the Judges have taken into account not only the confessions of the three accused holding them to be voluntary and genuine, but also the other evidence available on the record.

50. As to the identity of the ammunition issued to approver Ghulam Hussain, and subsequently used in the attack, the majority judgment has relied not only on the recovery memos, but also on the other documentary evidence showing the supply of 7.62 mm. ammunition to the units of the Federal Security Force from the Central Ammunition Depot, Havelian, and this evidence has also been accepted by our learned brother Dorab Patel, J., who has gone to the extent of observing that even the incorrect description of the marking of the ammunition in the recovery memo, prepared by Abdul Hayee Niazi (P.W. 34) describing the same as BBI/71 instead of 661/71 was apparently due to his examination of the crime empties in insufficient light. The bore of the ammunition used in the attack also stood established, from the examination of the core of the bullet recovered from the head of the deceased, and sent to the fire-arms expert for examination after having been sealed in a tube by Dr. Sabir Ali (P.W. 7) In the circumstances, there was considerable evidence to establish the fact that the ammunition issued to Ghulam Hussain, and used in the incident, was of the same bore as was admittedly available with the Federal Security Force.

51. In this background, the question is whether the submission made by Mr. Yahya Bakhtiar as to the error appearing in the majority judgment has any bearing on the essential and central fact of the use of the personnel and arms and ammunition of the Federal Security Force in this incident Even if the genuineness of the recovery memo, recorded by sub-Inspector Abdul Hayee Niazi on the 11th of November, 1974, is doubted, there is his oral testimony as to the marking he had found on the crime empties. In this state of the record the lengthy arguments submitted by Mr. Yahya Bakhtiar on the question whether the prosecution had positively succeeded in establishing the marking found on the crime empties, apart from being in the nature of a rehearing of the case, lose most of their relevance. It is well established that it is not

necessary for the prosecution to provide corroboration of each single particular narrated by the approver; what is necessary is that the corroboration must lend assurance to the basic facts narrated by him and also connect the accused with the crime. In the present case there are two distinct aspects of the prosecution evidence; one linking the petitioner with the conspiracy; and the other giving details of the manner in which the execution of the conspiracy was organized and carried out by the subordinate officers of the Federal Security Force. The evidence of approver Ghulam Hussain having been accepted by the majority as to the conspiracy and its execution, and by the minority only as to the mode of the occurrence, the points now urged by Mr. Yahya Bakhtiar have no effect on the fate of the case.

52. Mr. Yahya Bakhtiar's contentions as to the effect of non-production of Lt-Col. Wazir Ahmad to prove the letter Exh. P.W. 39/2, and as to the quality of the evidence given by Fazal Ali (P.W. 24) on the question of supply of F.S.F. ammunition to approver Ghulam Hussain as well as the supporting documents relied upon by him in the shape of his stock register and the relevant road certificates, really seek a re-examination of this mass of evidence on the ground that an erroneous view has been taken regarding its admissibility and reliability, or that erroneous inferences have been drawn therefrom. This exercise is outside the scope of review and it is clear that even if the recovery memo, in question as prepared by the Investigating Officer Abdul Hayee Niazi is kept out of consideration, the finding as to the nature of the ammunition used in attack is sustainable on the basis of the other evidence available on the record, particularly the caliber of the core of the bullet recovered from the head of the deceased. All these matters are discussed at length in the relevant paragraphs of the majority judgment. On this view of the matter the submissions made by Mr. Yahya Bakhtiar as to the identity of the crime empties do not justify a review of the basic conclusions reached in the majority judgment as to the employment of the personnel and ammunition of the Federal Security Force in the attack which resulted in the death of Nawab Muhammad Ahmad Khan deceased. It may be added that in paragraph 721 of the judgment to which special reference was made by Mr. Yahya Bakhtiar in this connection, conclusions as to the identity of the ammunition used in both the Islamabad and Lahore incidents were stated, and the present objections are mainly directed towards the Lahore incident, as the recovery memo, prepared by the Investigating Officer at Islamabad (Exh. P.W. 23/3), whose genuineness and authenticity is not disputed, clearly showed the marking of the empties as 661/71, and the report of the fire-arms expert showed that the empties were of 7.62 caliber and of Chinese origin. The majority judgment takes note of this fact as well for corroborating part of the testimony of approver Ghulam Hussain.

53. Before parting with this aspect of the case, a few words might be said on the submission made by Mr. Yahya Bakhtiar that the contents of his Note No. 28 dated the 17th of December, 1978, have been misconstrued in paragraphs 557 and 710 of the majority judgment to mean that he had given up his objections regarding the

admissibility of letter Exh. P.W. 39/2 dated the 28th of August, 1977, which gave details of the bore and markings of the stock of ammunition supplied to the Federal Security Force from the Central Ammunition Depot in 1973. The learned counsel submitted that the note in question was concerned only with the effect of non-production of Lt-Co. Wazir Ahmad, the author of this letter, as a witness at the trial by the prosecution, but his objection as to the admissibility of the letter, without having been proved by the author, remained intact, and was reiterated in his note of the 17th of December, 1978, while dealing with the question of the use of section 510 of the Cr. P. Code. He contended that it was for the prosecution to prove that ammunition of 7.62 caliber and bearing the marking 661/71 had not been supplied by the Central Ammunition Depot to any other unit of the Civil Armed Forces, but as the learned Prosecutor conceded that he could not prove any such fact, the defence did not press for the examination of Lt. Col. Wazir Ahmad. It appeared to the learned counsel that this was an error apparent on the face of the record which vitiated the conclusions reached in the majority judgment as to the marking of the ammunition available with the Federal Security Force.

54. It will be seen that it is conceded that in Note No. 28 submitted by the defence counsel during the arguments of the appeal, the objection as to the effect of the non-production of Lt. Col. Wazir Ahmad was given up for the reason that the Public Prosecutor had conceded that ammunition bearing the marking 661/71 and 7.62 caliber may have been supplied to other units of the Civil Armed Forces as well. It is clear that in this statement there is an implicit concession that the ammunition of this description had been supplied to the Federal Security Force. In this context the majority judgment could legitimately take the view that the objection as to the admissibility of Lt. Col. Wazir Ahmad's letter giving the description of the ammunition supplied had been given up. However, even if effect is now given to the submission made by Mr. Yahya Bakhtiar that the aforesaid letter was not admissible without having been proved by its author, the fact remains that Fazal Ali's evidence, supported by the stock register, road certificates and vouchers etc., produced by him and accepted by the majority judgment as reliable documents, showed that the Federal Security Force's Armoury At Rawalpindi had several lacs of rounds of ammunition of 7.62 bore received in 1973 and 1974, and that at least 20,000 rounds of this caliber received in 1974 bore the marking 661/71. These facts would suffice to serve as corroboration of the prosecution case that ammunition of the type in use of the Federal Security Force of 7.62 mm caliber was employed in the Lahore incident, a fact which also stood fully proved by the examination of the core of the bullet which killed the deceased, and was recovered from his head. It appears to us, therefore, that nothing turns on the very elaborate submissions now made by Mr. Yahya Bakhtiar on this point, apart from the fact that an error apparent on the face of the record is not one which requires elaborate argument for its discovery.



55. The next submission made by Mr. Yahya Bakhtiar as to the identity of the empties found after the Islamabad and the Lahore incidents was that the majority judgment had not properly interpreted and applied section 510 of the Criminal Procedure Code, with the result that the reports signed by Major Fayyaz Haider on behalf of the Chief Inspector of Armaments as to the caliber and marking of the ammunition used in these incidents have been admitted for the reason that Major Fayyaz Haider was not examined as a witness at the trial, nor was it shown that he was a fire-arms expert appointed by the Government for the purpose of section 510 of the Criminal Procedure Code, and this deficiency could not be made up by the evidence of Col. Zawar Hussain, another officer of the same Inspectorate.

56. We find that these very submissions were made by Mr. Yahya Bakhtiar at the time of the hearing of the appeal, and all these points have been dealt with at length in paragraphs 543 to 555 of the majority judgment ; and from the evidence available on the record we have found that Major Fayyaz Haider was a fire-arms expert appointed by the Government, and as such the reports signed by him were admissible under section 510 of the Cr. P.C. The contention that the law laid down as to the true interpretation of the section is not correct, or that it has not been properly applied to the facts of this case, does not constitute a valid ground for review, as the conclusions in question have been reached after a full consideration of the arguments advanced on behalf of the petitioner. In exercising the power of review the Court has no jurisdiction to hear an appeal against its own judgment so as to reverse an interpretation previously given or an inference previously drawn in the judgment under review. For these reasons it would be inappropriate to examine this matter over again by traversing the same grounds as were urged at the initial hearing of the appeal.

57. A grievance made by Mr. Yahya Bakhtiar that the points mentioned by him in his final note submitted on 14-1-79 in reply to the arguments of the learned Special Public Prosecutor had not been referred to in the majority judgment, is misconceived for the reason that the submissions made in that note were only a reiteration of the earlier arguments which had been presented during the hearing of the appeal. The only point which seems to have been omitted from being dealt with in the majority judgment is that the core of the bullet recovered from the head of the deceased was not sent for examination in the course of proceedings under the Criminal Procedure Code, and, therefore, for that reason as well the relevant report Exh. P.W. 32/2 dated the 7th of January, 1975 was not covered by section 510 of the Code. This argument is untenable, as the core of the bullet recovered from the head of the deceased was in the possession of the Investigating Officer Abdul Hayee Niazi, and his evidence shows that he sent it for examination through Muhammad Sarwar, A.S.I. on 24-12-1974 under the directions of the D.S.P. (see page 631 of the evidence). It appears that this step was probably taken by the Investigating Officer in pursuance of a direction given by Mr. Justice Shafi-ur-Rehman, during the course of the Inquiry held by him, but this direction was clearly to remedy a defect in the investigation of the case, as the core of the bullet should have

been referred for expert examination, in the first instance, along with the crime empties. As a result, the reference to the Inspectorate of Armaments for the examination of the core of the bullet remains a reference under the Criminal Procedure Code, for the purposes of the investigation of this case. Its nature will not change simply because certain information was supplied by the fire-arms expert to the High Court on this point.

58. Mr. Yahya Bakhtiar then contended that the majority judgment has failed to give full effect to the non-matching of the crime empties with the guns of the Third Battalion of the Federal Security Force, stationed at Walton at the relevant time, from which the weapons used in the incident were allegedly taken by the confessing accused Ghulam Mustafa and supplied to the appellants Arshad labal and Rana Iftikhar Ahmad; that the prosecution had failed to prove substitution of the crime empties, and the majority judgment proceeds on the probability that there might have been substitution of the empties, thus giving the benefit of doubt to the prosecution rather than the defence. The learned counsel submitted that this was a serious error having a vital bearing on the fate of the case, as non-matching of the crime empties with the guns in question was destructive of the entire prosecution case.

59. We find that the effect of the negative report of the Ballistics expert on the question of the matching of the guns of the Third Battalion of the Federal Security Force with the crime empties was argued at length during the hearing of the appeal, and had been dealt with in the majority judgment in paragraphs 712 to 720. Precisely the same contentions were raised by Mr. Yahya Bakhtiar, but they were repelled, and the conclusions reached were expressed in paragraph 720 of the judgment as under:

"It seems to me that in the peculiar circumstances of the present case, namely, where the empties were not sealed at the spot, and they were not sent for examination for 12 days, and the alleged weapons of offence were not made available for comparison for at least three years, the prosecution is right in submitting that the non-matching of these empties with any of the guns of the Third Battalion of the Federal Security Force would not have the effect of destroying the prosecution case, especially when there are a number of statements made by the concerned officials that the empties were not sealed at the spot but they were apparently handled by various high officials during the period intervening between their recovery and dispatch to the expert. It is not a question of giving any benefit to the prosecution, but of deciding whether the negative report as to the matching of the guns with the crime empties would necessarily destroy the evidence of Ghulam Hussain approver. In the circumstances explained above I am of the view that this consequence does not follow in this case."

60. All the submissions now made by Mr. Yahya Bakhtiar are in the nature of re-arguing this point on the same lines as was done during the hearing of the appeal. This is clearly beyond the scope of review proceedings. Further, we are of the view that even on merits the conclusions reached are in accordance with the facts of the case, and not in violation of any principle governing the administration of criminal justice.

61. The next point made by Mr. Yahya Bakhtiar concerns the manner of the attack on the car of Ahmad Raza Kasuri, and the kind of weapons from which it was made, as well as the number of assailants who participated therein. He contended that while examining the narration of evidence given by approver Ghulam Hussain in this behalf and the confessional statements made by accused Arshad Iqbal and Rana Iftikhar Ahmad, the majority judgment had misread the site plan Exh. P.W. 34/2 as prepared by the Investigating Officer Abdul Hayee Niazi (P.W. 34) and there is also a patent error in placing reliance on the site plan prepared by draftsman Inaam Ali Shah (Exh. P.W. 34/5-D) which was not accepted as correct even by the prosecution. He further submitted that even in making use of the site plan prepared by the draftsman, the majority judgment had erred in basing in inferences on the erroneous assumption that one inch was equal to 10 Cms. whereas, in fact, it was equal to 2.54 Cms. with the result that there had been a serious mistake in calculating the distances between the places where the crime empties were found at the spot, and also in concluding that they had been fired from weapons of Chinese origin, and that in this behalf the result of the demonstration of firing of Chinese automatic weapons, as seen by the Court could not be used as substantive evidence in support of the prosecution case. Finally, he submitted that the majority judgment had also acted on the conjectures and surmises in reconstructing the incident by observing that the assailants might have run after the moving target as it negotiated the roundabout, as, in fact, the confessing accused or approver Ghulam Hussain had not made any such positive statement, except the fact stated by approver Ghulam Hussain that Rana Iftikhar Ahmad had turned around. The sum and substance of Mr. Yahya Bakhtiar's submission was that on account of these obvious errors, the majority had been misled into thinking that the attack was launched with automatic weapons of Chinese origin by two assailants only, whereas the position of the crime empties showed that they may not have been fired from Chinese weapons.

62. It may be stated at once that the learned counsel for the petitioner is right in pointing out that the correctness of site plan Exh. P. W. 34/5-D, as prepared by draftsman Inaam Ali Shah was questioned by the prosecution and, on a comparison with the visual plan prepared by the Investigating Officer at the spot, namely, Exh. P.W. 34/2, certain differences are, indeed, noticeable; and for that reason it would have been preferable to avoid references to the questioned site plan. It has, however, to be stated that references to it were made by Mr. Yahya Bakhtiar himself for the purpose of contending that the position of crime empties shown in this plan was different from the one shown in the visual site plan prepared by the Investigating Officer.

63. It is also correct that one inch is not equal to 10 Cms. and it is, therefore, possible that this mathematical error may have led to incorrect inferences from the draftsman's sit plan as to the distances between the places where the crime empties have been shown in this plan. In the circumstances, taking into account the facts that the site plan in question was not relied upon by the prosecution, and that in its interpretation a mathematical error crept into the calculations made in the majority judgment, we would discard any inference based on the use of this site plan.

64. The question, however, is whether the findings recorded in the majority judgment on the question of the kind of weapons from which the firing was done on the car of Ahmad Raza Kasuri stand vitiated on this account, and does it necessarily follow that the prosecution case as to the use of the arms and ammunition of the Federal Security Force, as deposed to by approver Ghulam Hussain and supported by the confessional statements stands demolished. A reply to these questions has already been given in the preceding paragraphs when dealing with the lengthy submissions made by Mr. Yahya Bakhtiar as to the identity of the crime empties found at the spot. It will bear repetition to state that the essential question before the Court was whether there was available on the record any corroboration of the account of the incident as given by approver Ghulam Hussain, who had asserted that he had carried out the attack with the help of personnel, arms and ammunition of the Federal Security Force. It has already been stated that all the seven Judges of this Court have unanimously accepted the fact that Ghulam Hussain had master-minded the attack, and that the two confessing accused Arshad Iqbal and Rana Iftikhar Ahmad did actually mount the attack; and, further, that confessing accused Ghulam Mustafa had aided them by helping in the selection of the site at which the attack was to be launched on the car of Ahmad Raza Kasuri. Reference has also been made to the other evidence, both oral and documentary, in coming to the conclusion that ammunition of 7.62 mm. caliber was employed. One of the pieces of evidence in this behalf was the result of the expert examination of the core of the bullet recovered from the head of the deceased. Even if, therefore, the questioned site plan, and the doubtful or incorrect mathematical calculations based thereon, are completely excluded from consideration, the finding that the attack was mounted with Chinese automatic weapons by the persons named by approver Ghulam Hussain remains intact. It is well established that for an error on the face of the record to justify a review of the judgment, it must be shown that the findings recorded therein could not be otherwise sustained. This is not the case here.

65. As to the actual manner of attack, it is true that in the relevant paragraphs of the majority judgment an attempt has been to reconstruct the incident, and in doing so reference has been made to the natural course of events surrounding an attack on a moving target. Here again even if these references are deleted, the manner of attack, as narrated, by approver Ghulam Hussain is not demolished, as suggested by Mr. Yahya Bakhtiar, for the reason that the empties were found at four different places, and the demonstration of firing as seen by the Court had shown that 7.62 mm. caliber

ammunition fired from Chinese automatic weapons did not fall in a perpendicular line, but sometimes also ahead or in front of the firing line. The result of the demonstration was obviously not substantive evidence in the case, but it helped to explain to the Court the kind of result which could be achieved by firing from Chinese automatic weapons, which were in the use with the Federal Security Force at the relevant time. It was as a result of the collective effect of all these circumstances that the whole Court accepted the fact that the actual attack was mounted by the men of the Federal Security Force as master-minded by approver Ghulam Hussain, and with the aid of Ghulam Mustafa. On this view of the matter, the errors pointed out by Mr. Yahya Bakhtiar do not have any effect on the essential findings recorded in the majority judgment. For the same reason it becomes unnecessary and irrelevant to go once again into the question of the possibility of the empties falling in a scattered form, an argument to which considerable attention was paid at the hearing of the appeal.

66. Taking now the contentions advanced by Mr. Yahya Bakhtiar for a review of the conclusions reached in the majority judgment as to the effect of the failure of the High Court to pass a formal order under section 540-A of the Criminal Procedure Code and to record reasons in that behalf, I find that the emphasis of the learned counsel is on the fact that having found that the law envisages strict compliance with the mode of exercise of this discretionary jurisdiction, the majority judgment errs in holding further that it does not mean that any error, omission or failure to strictly comply with the provisions of this section must necessarily in every case result in the vitiating of the trial. In support of this main submission, the Review Petition (on pages 15 to 20) traverses the ground which had been discussed at length during the hearing of the appeal, namely, that the petitioner had fallen ill and that 15 important witnesses should not have been examined in his absence, as he had asked for in adjournment on the ground of his illness, and that there is no authority that the Court can impose an order under this section when the accused is seriously ill and asks for an adjournment. It is further stated that this Court has also fallen in error in observing that in view of the importance of this case there was need for its expeditious disposal.

67. The detailed submissions made by Mr. Yahya Bakhtiar in relation to the application of section 540-A of the Criminal Procedure Code have been dealt with at length in the majority judgment in paragraphs 183 to 252. These paragraphs fully bring out the meaning of the phrase "incapable of remaining before the Court", the effect of the failure of the Court to record reasons for proceeding under this section, and the question whether an order under this section can be made only on the request of the accused who is incapable of remaining before the Court, I am not persuaded by the submissions now made by Mr. Yahya Bakhtiar that there is, indeed, any error apparent on the face of the record in the exposition of the law relating to the scope and application of this section. The submissions now made only amount to an attempt to re-argue the whole matter, an attempt which clearly falls outside the scope of review in a criminal case.

68. It is, however, necessary to reiterate that the question whether in a given case the discretion vesting in the Court under section 540-A has been properly exercised in accordance with judicial principles, is primarily a question of fact to be determined in the light of all the relevant circumstances of the case. Now, in the present case, the majority judgment has found that even though a speaking order, giving reasons, was not recorded, yet the circumstances justified the High Court in proceeding in the absence of the petitioner when he was incapable of remaining before the Court on account of his illness, and that the witnesses in question were cross-examined at length by his counsel, who were in daily touch with him to obtain instructions in this behalf. It has also been found that when the petitioner attended the trial after his illness, he did not ask for recalling any of the witness in question for further cross-examination. I have not been able to discover any error apparent on the face of the record, such as would justify a review of these conclusions.

69. As to the submission that there is a contradiction in the Court observing on the one hand that the provisions of section 540-A, Cr. P.C. should be strictly complied with, and on the other hand also stating that it does not mean that any error, omission or failure in that behalf must necessarily vitiate the trial, it is sufficient to say that this contention overlooks the true import of the provisions contained in section 537 of the Criminal Procedure Code, which have also been elaborately examined in the majority judgment. In paragraph 181 of the judgment it has been observed that:

"It will thus be seen that in determining whether an omission, error or irregularity in the conduct of the trial, using the phrase so as to embrace all aspects thereof, has vitiated the trial in any manner, the Court must look to the substance and to technicalities; and if the accused has had a fair trial, and has not been prejudiced in his defence, then the error, omission or irregularity would stand cured under the provisions of section 537 of the Code. And as the distinction between an illegality and an irregularity is, to borrow the words of Sir John Beaumont of the Privy Council<sup>665</sup>, only one of degree rather than of kind, nothing turns on this distinction for the purposes of the application of this curative section."

70. This being the true position as regards the curing of any errors, omissions or irregularities in complying with the provisions of any part of the Code of Criminal Procedure, it is clear that the same position would obtain in regard to the application of section 540-A of the Code, and there is no question of any contradiction between the two observations pointed out by Mr. Yahya Bakhtiar.

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<sup>665</sup> AIR 1947 PC 67

71. The review petition has devoted considerable space (from pages 23 to 43 and from pages 169 to 183) to the question of bias. I have carefully perused the grounds contained in these pages, and I cannot help remarking that they are in the nature of a repetition of the submissions which had been so elaborately presented by Mr. Yahya Bakhtiar during the hearing of the appeal. If, after a detailed consideration of his submissions, and the legal position obtaining in regard to the allegations of bias against Judges of superior Courts, the majority judgment has not accepted the view canvassed by Mr. Yahya Bakhtiar, that does not furnish a ground for review.

72. In the majority judgment the question of bias has been discussed at length in paragraphs 841 to 915, with the following result:

"In the light of the declared law and the facts discussed above I have reached the conclusion that although some of the orders made by the trial Bench in the day to day conduct of the case may not have been correct on a strict view of the law; and some others may not have been fully called for in the facts and circumstances of the case, yet these were all matters within the discretion of the Court, and mere error therein cannot amount to proof of bias. The appellant was unfortunately misled into thinking from the very start of the case that the learned Acting Chief Justice was biased against him. There was, in fact, no factual basis for such an apprehension. In any case, there was no such apprehension in respect of any of the other four learned Judges constituting the Bench. The trial of the appellant has by and large been conducted substantially in accordance with law, and the conclusions reached by the High Court on the merits of the case have been found to be correct on detailed analysis of the evidence and the law. I would, therefore, repel the contention that the trial was, in any manner, vitiated by reason of bias on the part of the Presiding Judge of the Bench."

73. In the face of this conclusion, it is futile to contend that the majority judgment has not taken into account the cumulative effect of the large number of instances of allegedly narrated and discussed at the Bar during the hearing of the appeal. It is, in fact, regrettable that even minor instances, which were allowed to be discussed during the hearing of the appeal so as to bring out the real grievance of the petitioner, have been paraded once again in this petition, so as to provide justification for a review of the conclusions reproduced above. The submissions made by Mr. Yahya Bakhtiar to justify a review of these findings are entirely misconceived and untenable.

74. It is next contended by Mr. Yahya Bakhtiar that the majority judgment has misread the evidence of driver Muhammad Amir (P.W. 19) in coming to the conclusion that the Log Book of the jeep alleged to have been used by approver Ghulam Hussain and the confessing accused on the day of the incident was not being written up by the official whose duty it was to maintain the same, and, therefore, is inadmissible under section 35 of the Evidence Act. The learned counsel submits that it was not the duty of

the driver of the jeep to write the Log Book, but of the person who travelled in it or of the Motor Transport Officer, and that the evidence of the driver shows that this procedure was fully observed.

75. After examining the scope of section 35 of the Evidence Act, the majority judgment concludes, in paragraph 305, that the essential requirements for the application of section 35 of the Evidence Act are that the entry, that is relied upon, must be one in any public or other official book, register or record; that it must be an entry stating the facts in use or a relevant fact; and that it must be made by a public servant in the discharge of his official duty, or any other person in performance of a duty specially enjoined by the law. Applying these principles to the Log Book in question, it was held that it had to be treated as a book or register maintained by the driver in the discharge of his official duty; and the only question was whether it was being regularly maintained by the official concerned, namely, the driver of the jeep, and that in the state of affairs disclosed by driver Muhammad Amir, the presumption mentioned in illustration (e) to section 114 of the Evidence Act regarding the regularity of judicial and official acts could hardly be invoked in respect of this particular Log Book.

76. The criticism of Mr. Yahya Bakhtiar is that while describing the system of maintaining the Log Book the driver had made it clear that the entries in the Log were to be made by the officer who travelled in the vehicle, and that so long as he remained attached with Ghulam Mustafa, the latter used to make the entries in the Log Book whenever he travelled in the jeep and, therefore, there was no room for holding that the Log Book was not being properly maintained or written up. It is correct that driver Muhammad Amir has made the statement referred to by Mr. Yahya Bakhtiar; but he has made other statements also, which have a direct bearing on the question we are considering. In his examination-in-chief Muhammad Amir stated that "Inspector Sufi Ghulam Mustafa did not use to make entries regularly or correctly. Sometimes, he used to make entries later on". Again, in answer to questions put to him by Mr. D. M. Awan, learned counsel for the petitioner, after making the statements relied upon by Mr. Yahya Bakhtiar, Muhammad Amir went on to state that "Ghulam Hussain, Inspector, did use this jeep sometimes Ghulam Hussain, Inspector, used to drive away this jeep unaccompanied. Although Ghulam Hussain travelled in the jeep a number of times alone, he would not make the entries in the Log Book. They were made by Sufi Ghulam Mustafa". From these statements it would appear that all the entries in this Log Book were not being regularly made by the officer authorized in this behalf, namely, the one who travelled in the jeep. According to the driver, Ghulam Hussain never made any such entries even though he used the jeep; and instead it was Sufi Ghulam Mustafa who wrote the entries even when Ghulam Hussain had used the vehicle.

77. Taking all these statements of Muhammad Amir together, I find that the conclusion reached in the relevant paragraph of the majority judgment is fully in accord with the evidence of the driver, namely, that the Log Book was not being regularly



written up by the person authorized in this behalf There is, accordingly, no room for reviewing this part of the judgment in relation to the Log Book and its admissibility under section 35 of the Evidence Act.

78. It was next argued that while scrutinizing the evidence of approver Ghulam Hussain (P.W. 31) the Court had fallen in error, and misread the evidence on record, as regards, a number of important contradictions and improvements pointed out by the defence, which had a vital bearing on the question of his reliability. In amplification of this submission, Mr. Yahya Bakhtiar has taken pains to refer us to a large number of grounds given in the Review Petition, dealing with different parts of the statement made by Ghulam Hussain approver in Court, and the other evidence or material having a bearing thereon, like his T.A. bill and his previous statements etc. The submission of the learned counsel, in effect is, that the Court should undertake a re-appraisal of Ghulam Hussain's evidence and hold that he was not worthy of credit.

79. We find that the majority judgment has, quite naturally, devoted considerable attention to the detailed appraisal of the evidence of approver Ghulam Hussain. Various aspects of his evidence have been dealt with at length in 53 paragraphs of the judgment, namely, paragraphs 661 to 711, 722 to 723, and 661 to 667 contain a preliminary appraisal of his evidence in order to determine whether he satisfies the first test applicable to an approver, and these paragraphs also incidentally contain references to several pieces of corroborative evidence brought on the record. Paragraphs 668 to 675 deal with the question of further corroboration of his evidence by reference to the details of the Islamabad incident and the present occurrence; followed by paragraphs 676 to 704 dealing with defence criticism of Ghulam Hussain's evidence. The alleged omissions, improvements, contradictions and falsehoods found by the defence in his evidence are then discussed at length in paragraph 705 which contains 19 items, and paragraphs 706, containing 40 items. This detailed discussion is then followed by paragraphs 707 to 711 containing our conclusions and also mentioning some further items of additional corroboration of his evidence, and finally in paragraphs 722 and 723 the majority judgment states that "the cumulative effect of this evidence and circumstances is the statement made by approver Ghulam Hussain as to the circumstances of the crime can be acted upon" and "as a result it stands proved upon the record that Ghulam Hussain was inducted into the conspiracy by appellant Mian Muhammad Abbas, and that, in association with appellant Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad he organized and carried out the attack on Ahmad Raza Kasuri's car during the course of which Kasuri's father was killed."

80. A perusal of the lengthy submissions made by Mr. Yahya Bakhtiar at the Bar, as well as of the relevant grounds mentioned in the Review Petition, leaves us in no doubt that what the learned counsel is striving to achieve is a re-appraisal of the evidence of Ghulam Hussain and of the corroboration relied upon by the Court in support thereof, but, as observed by our learned brother Haleem, J., in the case of Ghulam Sarwar and

another<sup>666</sup> which was also a case of difference of opinion between the Judges comprising the Bench which had decided the case, in the first instance, such an exercise is beyond the realm of Review Jurisdiction as it is not an appeal where resource can be had to the appraisal of evidence and corroboration which is a matter essentially interwoven with it. The majority judgment has already given detailed and elaborated consideration to all the aspects of Ghulam Hussain's evidence, and the corroboration available in that behalf, as were urged on behalf of the petitioner at the hearing of the appeal. The conclusions reached after a due consideration of all the relevant circumstances are not open to interference in review proceedings on the ground that reappraisal might yield a different result. The points now urged against the credibility of Ghulam Hussain, are, with respect to the learned counsel, much too trivial and inconsequential to affect the unanimous conclusion of all the seven Judges of the Bench to the effect that Ghulam Hussain approver was at least master-minding the whole operation.

81. Mr. Yahya Bakhtiar also made a grievance of the fact that in paragraph 680 of the majority judgment his submission that there was a conflict between the statement of Ghulam Hussain approver in Court and the confessional statements of Arshad Iqbal and Rana Iftikhar Ahmad on the question whether Ghulam Hussain had also fired a shot during the course of the incident, had been misconstrued by the Court, inasmuch as the argument attributed to him in the said paragraph is as if in his confessional statement, Ghulam Hussain had accepted the fact that he also opened fire, the learned counsel submits that Ghulam Hussain had not admitted firing any shot in his confessional statement, but on this point he stood contradicted by the confessional statements of Rana Iftikhar Ahmad and Arshad Iqbal.

82. We have verified the factual position, and Mr. Yahya Bakhtiar is right in saying that even in his confessional statement Ghulam Hussain approver had not admitted to having opened fire during the course of the incident. In other words he has consistently denied having opened fire, and it is correct that in this behalf he stands contradicted by the confessions of the other two accused. It was for this reason that Mr. Yahya Bakhtiar submitted that the approver was trying to minimize his part and to exculpate himself, and it showed that he was, in fact, not present in Lahore on that day and was thus not a reliable witness.

83. While dealing with this submission in paragraphs 681 and 682, the majority judgment took note of the fact that there was, indeed, a tendency on the part of approvers to minimize their involvement, but as pointed out by the Indian Supreme Court in A I R 1966 S C 1273, the question always was whether on their statements the approvers would be held guilty or not, and, accordingly, their testimony is not to be rejected because they tried to slur over their own share in the affair. Following this rule,

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<sup>666</sup> 1979 SC MR 43

it was held that Ghulam Hussain's attempt to deny that he had also opened fire during the course of the incident could not lead to the rejection of his testimony as to his presence at the spot.

84. The submission now made by Mr. Yahya, Bahktiar as to the error found by him in paragraph 680 of the judgment does not, in any manner, detract from this conclusion, as the error is of an inconsequential nature, and the essential point regarding the conflict between Ghulam Hussain's testimony in Court and the confessional statements of Rana Iftikhar Ahmad and Arshad Iqbal had been duly considered by the Court before reaching its conclusion in paragraph 682. The contention is; therefore, without merit.

85. Another point made by Mr. Yahya Bakhtiar in this context was that there were several other contradictions also between the testimony of approver Ghulam Hussain and the confessions of accused Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad, but they had either not been considered by the Court, or not given due weight. Apart from the discrepancy on the question whether Ghulam Hussain had opened fire at the spot or not, Mr. Yahya Bakhtiar particularly mentioned the question whether after the incident Ghulam Hussain had telephoned to Mian Muhammad Abbas at Rawalpindi as Mian Muhammad Abbas was not at Rawalpindi on that day, being away to Peshawar on tour. He next mentioned the fact that while Ghulam Hussain stated that he had asked Arshed Iqbal and Rana Iftikhar Ahmad to fire in the air; yet they stated in their confessions that they fired indiscriminately at the car. The effort of the learned counsel was to show that on account of these discrepancies, it should have been held that Ghulam Hussain's evidence could not be relied upon.

86. We regret we do not see any substance in these submissions. The essential and basic question in the case revolved round the fact whether the personnel of the Federal Security Force mounted the attack as asserted by approver Ghulam Hussain, and whether they did so in accordance with the arrangements made by approver Ghulam Hussain under the directions given to him by Mian Muhamad Abbas. The ancillary questions whether after the incident Ghulam Hussain telephoned to Mian Muhammad Abbas at Rawalpindi or not; and whether the firing was carried out exactly in accordance with the direction of Ghulam Hussain do not, in any manner, affect the basic question of the identity of the assailants and the arrangements under which the attack was mounted. Accordingly, nothing turns on the omission or otherwise of the Court to deal with these supposed contradictions, between the testimony of the approver and the confessions of the accused. The confessions lend full support to the approver's statement as to the essential facts of the case.

87. Mr. Yahya Bakhtiar further contended that Amir Badshah Khan, Incharge of the 3rd Battalion, FSF (Walton), Lahore (P. W. 20) has deposed that arms and ammunition

were drawn from him, i.e. his armoury in Walton, by Sufi Ghulam Mustafa accused thrice in the month of September, 1974, as follows:-

S. No.	Time	Quantity	Remarks
1	First week of September,	2 Pistols and 16 cartridges	These were soon returned
2	A week later	1 sten gun + 30 cartridges, 2 pistols + 16 cartridges	Returned after the murder of Nawabzada Muhammad Ahmad Khan, 2 sten guns and 60 cartridges leaving a balance of 2 pistols 16 cartridges
3	After sometimes in September, 1974	1 sten gun + 30 cartridges	

88. He submitted that according to the confessional statement of Sufi Ghulam Mustafa accused ammunition/arms had been drawn by him from Amir Badshah Khan in November, 1974, and that, similar was the strain of the statement of Ghulam Hussain approver (P.W. 31) on pages 608 and 609 of his deposition, where he stated, that he was so told by Sufi Ghulam Mustafa accused. He also referred to the statement of Muhammad Amir, driver (P.W. 19) where he deposed that he took Sufi Ghulam Mustafa accused to the armoury of Amir Badshah Khan in his Jeep wherefrom Sufi Ghulam Mustafa accused brought something which was wrapped and which appeared to be arms, but as that statement does not, with any exactitude, fix the date or time, therefore, the same need not detain us from its further examination here. However, proceeding with the statement of Amir Badshah Khan as reproduced above and the confessional statement of Ghulam Hussain approver (P.W. 31), Mr. Yahya Bakhtiar argued, that as there was inherent conflict between the aforesaid statements with regard to the time and period of withdrawal of the relevant arms/ammunition, it meant, that the prosecution case was false and totally untrustworthy.

89. The plea raised has no merit. No doubt this difference is there, but it does not mean, for example, that Ghulam Hussain approver was not in Lahore during those days; nor does it mean that Sufi Ghulam Mustafa was not involved in the attack, because, on both these matters we have already given reasons which we do not want to recapitulate at this place. However, it may be pointed out, that if the statement of Amir Badshah Khan is analyzed, it will show, that up to the date of the murder of Nawabzada Muhammad Ahmad Khan, the accused Sufi Ghulam Mustafa had drawn from the 3rd Battalion, *inter alia* 2 sten guns and 60 cartridges. The fact that on the day of the attack, arms and ammunition of the 3rd Battalion were thus available with Sufi Ghulam

Mustafa, remains well established on the record. In the circumstances the contradiction pointed out by the learned counsel, and the omission of the Court to take note of it in the majority judgment, have no bearing on the essential point involved.

90. Another point made by the learned counsel for the petitioner was that the evidence of Fazal Ali (P.W. 24) had been accepted without giving due consideration to the contradictions and improvements pointed out by the defence, which had a direct bearing on the question of the identity of the ammunition allegedly supplied by him to approver Ghulam Hussain. The learned counsel submitted that the omissions in his previous statement were so material that they had to be regarded as amounting to contradictions in view of the principle approved in this behalf in paragraph 295 of the majority judgment. Mr. Yahya Bakhtiar further submitted that even the learned Judges in the High Court had accepted the presence of certain omissions or contradictions in the evidence of Fazal Ali, while dealing with the subject in paragraphs 384 and 440 of their judgment. In particular he pointed out the following important instances:-

- (a) Omission of Fazal Ali to mention in his previous statement the direction given to him by Mian Muhammad Abbas for the supply of certain weapons on a chit to approver Ghulam Hussain for use in connection with the Islamabad incident;
- (b) Part played by Mian Muhammad Abbas in regard to the making up of the deficiency of 51 empties; and
- (c) The non-production of the documents proved by him at the trial in regard to the issuance of ammunition to Ghulam Hussain and its return after the incident.

91. There is no merit in these submissions for the reason that in the majority judgment Fazal Ali is relied upon mainly in relation to the documents, namely, the stock register, some vouchers and the road certificates proved by him regarding the ammunition available in the F.S.F. armoury and issued to approver Ghulam Hussain and later returned by him after the incident. The question of issuance of weapons for the Islamabad incident was not directly in issue in the present case, and an assertion had been made at the trial by one of the Investigating Officers (Inspector Muhammad Boota), that Fazal Ali had given these details in another statement made by him under section 161 of the Criminal Procedure Code in relation to the Islamabad case, but we did not think it necessary to go into that question as the details of the Islamabad incident were not the subject-matter of the present trial. Similarly the fact whether Mian Muhammad Abbas played any part in replacing the deficiency of 51 empties was only of peripheral importance as to the guilt of the petitioner. As regards the documents proved by Fazal Ali, it is correct that he had not produced them during the investigation of the case, but he did assert at that stage that he will produce the relevant record at the proper time. This objection has been dealt with in the majority judgment at Item No. 8 on page 317 of the PLD report, where it is stated that:-

"the objections raised herein are fallacious. Fazal Ali in his statement under section 161. Exh. P.W. 39/9-D, page 514 of the documents, had said he would produce all the documents in the Court. The documents have come from proper custody."

It would be seen, therefore, that the submissions now made by Mr. Yahya Bakhtiar do not, in any manner, call for a review of the conclusions reached in the majority judgment as to the documentary evidence furnished or proved by Fazal Ali (P. W. 24).

92. Mr. Yahya Bakhtiar further submits that there is an error apparent on the face of the record in the majority judgment when it proceeds to hold that Saeed Ahmad Khan (P.W. 3) is not an accomplice, after finding that he consciously suppressed certain relevant information from the Shafi-ur-Rehman Inquiry Tribunal, and tried to screen the real offender, namely, the Federal Security Force. Mr. Yahya Bakhtiar also contends that the majority judgment has ignored an assertion made by Saeed Ahmad Khan that the petitioner had become his enemy, and also the fact that the witness was facing several inquiries before the Martial Law authorities, with the result that he could not be relied upon.

93. The question as to who is an accomplice, and the further question whether Saeed Ahmad Khan could be so regarded, has been discussed at length in the judgment under review, and the conclusion reached in this behalf is that Saeed Ahmad Khan could not be treated as an accomplice. In arriving at this conclusion the part played by Saeed Ahmad Khan in meddling with the investigation of this case has been fully taken into account, and it has been held that:-

"he did not have any hand or conscious involvement in the hatching or execution of the conspiracy leading to the present murder, nor has he been shown to be misdirecting the investigation with the knowledge and intention of screening the offender from legal punishment. He was acting all along under the directions of his employer to clear the latter's name. According to the Lahore Police Officers, he was advising them to act with wisdom and caution, and also telling them that the Prime Minister had been falsely accused by Ahmad Raza Kasuri. In these circumstances it cannot be held that he could at all be charged under section 201 of the Pakistan Penal Code, and be tried jointly with appellant Zulfikar Ali Bhutto and the other co-accused."

94. Now, the inferences drawn in this paragraph may or may not be correct, but that is not a ground for review. In the circumstances the submissions now made by Mr. Yahya Bakhtiar amount to rehearing of this part of the case.

95. The submission that Saeed Ahmad Khan's involvement in some inquiries before the Martial Law authorities has not been taken into account is not correct, as this question has been dealt with in paragraph 504 to 506 of the majority judgment and the contention has been rejected. I do not think it necessary to go over the same ground again.

96. As to the last submission in this behalf, namely, that Saeed Ahmad Khan had stated that the petitioner had become his enemy, it is correct that this point has not been specifically dealt with in any paragraph of the majority judgment, but it has obviously no bearing on the credibility of his evidence. Even though he was shifted from the post of Chief Security Officer to the Prime Minister, yet he was retained in service until the end as an O.S.D. attached with the Attorney-General for looking after the Hyderabad case. In the circumstances, nothing turns on the omission in the majority judgment to specifically deal with the statement made by Saeed Ahmad Khan at the trial that the petitioner had become inimical to him. From the absence of any discussion of this question in the majority judgment, it can safely be assumed that the point was not raised as such by Mr. Yahya Bakhtiar during the hearing of the appeal nor was it considered to be of any significance by the Court. Accordingly, no justification has been made out for reviewing conclusion reached in majority judgment as to the weight to be attached to evidence of Saeed Ahmad Khan.

97. The next ground urged by Mr. Yahya Bakhtiar is that the majority judgment has erred in law in placing reliance on the secure reports, which were not proved by their authors, and using their contents against the petitioner in violation of rule laid down in *Islamic Republic of Pakistan v. Abdul Wali Khan*, and approved in this case. He has drawn specific attention to paragraphs 608, 609, 611, 617 and 618 of the majority judgment to contend that conclusions have been drawn from the contents of the unproved secure reports, although the reports have been held to be inadmissible in evidence as they were not proved by their authors. He submits that this use of the secure reports is a patent error, and that even the conclusions drawn from these unproved contents are not correct.

98. The correct legal position as to the use of secure reports has been dealt with in paragraphs 481 and 482 of the majority judgment, and it is, indeed, correct that the rule laid down by this Court in the case mentioned by Mr. Yahya Bakhtiar was reiterated namely, that the intelligence reports cannot be of any assistance in judicial inquiry unless their source is produced to give evidence before the Court. It has further been observed that the secure reports could be used for the limited purpose of showing the petitioner's interest in the activities and movements of Ahmad Raza Kasuri, as what was relevant was the fact that such reports were being sent to him from time to time and were also being perused by him, and the correctness of their contents was neither relevant nor in question.

99. Now, in the paragraphs of the judgment referred to by Mr. Yahya Bakhtiar, the Court has dealt with the large number of documents produced by the prosecution to prove the subsequent conduct of the petitioner in the matter of surveillance of Ahmad Raza Kasuri after the murder of his father. In order to give an intelligible description of the documents, it was clearly necessary to give some idea of their contents, but it is not correct to say that findings have been based on the unproved contents of these reports. A perusal of paragraphs 609 to 617 of the judgment would show that all these secure reports were invariably accompanied by forwarding notes written by either the Chief Security Officer to the Prime Minister, namely, Saeed Ahmad Khan (P.W. 3) or his Assistant the late Abdul Hamid Bajwa, and some of these notes bore the initials or other remarks of the petitioner in token of his having seen them. In the forwarding notes recorded by the officers of the Prime Minister's Secretariat remarks and observations were made for the perusal of the Prime Minister, and it cannot be said that the contents of these notes, which were duly proved, were inadmissible in evidence. The conclusions in paragraph 618 of the judgment are a summing up of the cumulative effect of these notes, some of which were indeed, accompanied by secure reports. It is, therefore, not correct to say that the majority judgment has based its conclusion as to surveillance of Ahmad Raza Kasuri on the unproved contents of secure reports; on the contrary the conclusions are based on the frequent notes submitted to the Prime Minister by the officers named above.

100. The contention that the inferences drawn from these documents are not well-founded is clearly outside the scope of review, as the whole matter is not to be re-argued simply on the ground that the Court has drawn an inference different from the one advocated on behalf of the petitioner.

101. Mr. Yahya Bakhtiar then submits that the Court has erred in holding that paragraph No. 15 of Mr. Justice Shafi-ur-Rehman's Report could not be regarded as secondary evidence of the statement apparently made by Ahmad Raza Kasuri before the Tribunal as regards the motive behind the attack launched on his car which resulted in the death of his father, as the authenticity of the observations contained in this particular paragraph of a judicial document could not be doubted.

102. This submission has been elaborated in the Review Petition at item No. 18 on pages 70 to 72 and it is contended that in coming to the conclusion that Ahmad Raza Kasuri had not made any statement of the kind as is referred to in paragraph 15 of the Shafi-ur-Rehman Report, the majority judgment has acted on the mere conjectures and surmises in holding a judicial document to be incorrect, while even the prosecution has not made any allegation challenging the correctness of the said Report. It is further stated in the Review Petition that the Court has overlooked the fact that the petitioner had requested for summoning Shafi-ur-Rehman, J. during the hearing of the case in the High Court, but this request was turned down, Lastly, it is asserted that the finding



recorded as to paragraph 15 of the Report is contrary to the observations contained in paragraph 487 of the majority judgment.

103. I see no substance in these submissions. It is true that the request to summon Mr. Justice Shafi-ur-Rehman as a witness at the trial was not allowed by the High Court, but the entire record of the Inquiry proceedings, as available with the Punjab Government, was scrutinized by a Deputy Secretary in the presence of Mr. D. M. Awan, the learned counsel for the petitioner, and the only statements found on the record were one oral statement of Ahmad Raza Kasuri recorded by the Tribunal, one written statement, in all of which Ahmad Raza Kasuri had blamed petitioner Zulfikar Ali Bhutto for the attack on his car, and had, in fact, gone to the extent of asserting that he did not expect to get justice as long as Zulfikar Ali Bhutto was in power. It was on the basis of this scrutiny of the record of the Tribunal that the High Court had recorded the conclusion that Ahmad Raza Kasuri had not made the kind of statement referred to in paragraph 15 of the Report of the Tribunal. All these matters are fully described in paragraph 491 of the majority judgment, and it is also stated that:

"In order to satisfy ourselves further the record of the Tribunal was scrutinized, in the presence of the counsel for both sides by our learned brother Muhammad Haleuni, J. and there was no indication at all of the presence of any such statement on the record, nor was there any suspicion that such statement had been removed after the Tribunal had concluded its proceedings. Mr. Batalvi also seems to be right in submitting that a perusal of paragraph 14 of the Report shows that Ahmad Raza Kasuri had made only one oral statement and two written statements as mentioned in the preceding paragraphs. Such being the case, the contents of paragraph 15 of Mr. Justice Shafi-ur-Rehman Report cannot be treated to be secondary evidence of the disputed statement of Ahmad Raza Kasuri, as no such statement appears to have been made at all by him during the Inquiry proceedings."

104. It will be seen that the factual aspect of the matter was fully investigated both in the High Court and in this Court during the hearing of the appeal and it was only thereafter that a finding was recorded that paragraph 15 of the Report could not be used as secondary evidence of a statement that had not been made. In the circumstances there is no justification for reviewing this part of the judgment.

105. As to the alleged contradiction between the observations containing in paragraph 487 of the judgment and paragraph 491, to which reference has just been made, it has only to be stated that this is based on a misconception. Paragraph 487 of the judgment does not deal with paragraph 15 of Shafi-ur-Rehman Report, nor with the statement alleged to have been made by Ahmad Raza Kasuri before the Tribunal; on the contrary it deals with a different matter altogether, namely, the statement attributed to Ahmad Raza Kasuri during the investigation of the Islamabad incident by D.S.P. Agha

Muhammad Safdar, and the question dealt with in paragraph 487 is an officer by the name of Nasir Nawaz. It is, accordingly, a misconception to talk of inconsistency or contradiction between paragraphs 487 and 491 of the majority judgment.

106. Mr. Yahya Bakhtiar has next taken exception to the observations contained in paragraph 607 of the majority judgment to the effect that "once it became known that automatic weapons had been used, and even the Tribunal had indicated that the perpetrators of the crime were well-equipped and well-organized, the investigation ought to have travelled in the direction of the Federal Security Force and other units using this kind of ammunition but no such effort was made". He contends that these observations are not supported by any evidence, and are, in fact, contrary to the contents of the letter Exh. P.W. 35/4 sent by Inspector-General of Police Punjab elated 27-09-1975 to the Home Secretary stating that "the Deputy Inspector-General of Police, Lahore District, has reported that the investigation of the case F.I.R. NO. 402, dated 11-11-1974, under section 302, P.P.C. P.S. Ichhra, on the points raised by the Tribunal has been completed. Despite best efforts, it has not been possible to trace out the culprits and further there is no such hope".

107. He further submits that there was no evidence that the Deputy Inspector-General of Police, who had sent this report to the Inspector General of Police, had been subjected to any pressure in this matter; on the contrary the former D. I. G. Muhammad Abdul Vakil Khan (P.W. 14) had said that he did not give any direction to the Investigating Officer to join the Federal Security Force in the investigation.

108. It is true that in the letter written by the Inspector- General of Police to the Home Secretary to the Punjab Government on the 27th September 1975, it is, indeed, mentioned that the investigation on the points raised by the Tribunal had been completed and yet the culprits could not be traced, but the question is whether this statement was conclusive on the point. It is obvious that such a bold statement, unsupported by the record of the investigation, could not prevail as against the testimony of D.I.G. Muhammad Abdul Vakil Khan, S.S.P. Muhammad Asghar and D.S.P. Muhammad Waris. It is no body's case that any officer of the Federal Security Force, or any other unit using ammunition of the kind found at the spot, was ever interrogated before it was decided to file the case as untraced. It is, therefore, idle to contend that the conclusions expressed in the majority judgment are not supported by evidence. In fact, this subject is also dealt with in paragraph 594 of the majority judgment, in which it has been clearly brought out that the local Investigating Officer were taking instructions directly from Saeed Ahmad Khan and the late Abdul Hamid Bajwa of the Prime Minister's Secretarial and that these two officers had taken various steps with a view to ensuring that the investigation did not connect the Federal Security Force, or the then Prime Minister with this incident, this particular submission of Mr. Yahya Bakhtiar has, accordingly, no merit and is repelled.

109. Mr. Yahya Bakhtiar has also criticized the conclusions reached in the majority Judgment as to the credibility and effect of the evidence of M. R. Welch, Director of the Federal Security Forces at Quetta. He contends that his oral testimony as well as the documents proved by him do not corroborate Masood Mahmood, as the Court has itself observed that from the remarks made by Masood Mahmood to Welch it could not be inferred that Masood Mahmood was acting under the express orders of the Prime Minister. Mr. Yahya Bakhtiar submits that in circumstances the Court should have held that the testimony of Welch did not connect the petitioner with the conspiracy, and, accordingly, there was no corroboration of the approver's statement in this behalf. The learned counsel further submits that the routine reports submitted by Welch regarding the stay of Ahmad Raza Kasur in Quetta have been misconstrued, as the reports did not relate solely to Ahmad Raza Kasuri, but, in fact, covered the activities of the other leaders of the Tehrik-e-Istaqlal as well; that his reports were based on secure report and could not, therefore, be relied upon in the absence of proof of their contents by the source who had rendered the reports; that the Court has also gone wrong in thinking that there were no contradictions and improvements in error in the evidence of M. R. Welch; and similarly the Court has fallen in error not treating M. R. Welch as an accomplice, and also in not giving weight to the fact that he had lied as to his religion while giving evidence at the trial; and that he was giving evidence under the pressure of Martial Law authorities, as he had also been indulging in illegal activities as a Director of the Federal Security Force.

110. After giving my anxious consideration to the submissions made by Mr. Yahya Bakhtiar in regard to the testimony of M. R. Welch, and perusing the detailed grounds mentioned in this behalf in the two volumes of the Review Petition (namely, grounds Nos. 19 and 20 on pages 73-74 and grounds No. 26 to 32 on pages 139 to 146), I am of the view that these submissions are in the nature of an attempt to re-argue the whole matter in regard to the weight to be attached to the testimony of M. R. Welch, and as to the inferences to be drawn from his evidence read along with the relevant documents. In the majority judgment the evidence of Welch, and Mr. Yahya Bakhtiar's criticism in regard thereto, precisely on the lines now advanced before us have been dealt with from paragraphs 513 to 535. All points now urged have been considered in the majority judgment and repelled for reasons given therein. It is correct that it has been observed that from the direction given by Masood Mahmood to M. R. Welch during his stay at Quetta it could not be inferred that Masood Mahmood was doing sb under the orders of the Prime Minister, but these directions did not stand alone. Masood Mahmood had deposed to having an audience with the Prime Minister at Quetta before leaving for Rawalpindi and M. R. Welch had deposed that the directions were given to him immediately before Masood Mahmood's departure from Quetta. From these circumstances taken together, read in the light of document contemporaneously prepared by M. R. Welch during Ahmad Raza Kasuri's visit to Quetta in September 1974, the majority judgment has come to the conclusion that this evidence lent corroboration to the testimony of Masood Mahmood both as to the existence of the

conspiracy, and the connection of the petitioner with it. In review proceedings the correctness of inferences drawn from a consideration of all the evidence to be assailed, as a review is neither in the nature of an appeal nor a rehearing of the case. In the circumstances, Mr. Yahya Bakhtiar's criticism of the majority judgment in regard to the weight and effect of the evidence of M. R. Welch is not such as to justify a review thereof.

111. Mr. Yahya Bakhtiar next contended that the majority judgment had fallen into serious error in placing reliance on the testimony of approver Masood Mahmood (P.W. 2), and that conclusions had been reached in this matter as a result of misreading of the evidence of driver Manzoor Hussain contained in Exh. P.W. 5/1, and also by ignoring his evidence regarding his hunch about the Islamabad incident, and the lack of corroboration in respect of the circumstances of his appointment as Director-General of the Federal Security Force, besides the erroneous assumption that being an official of high status he was expected to speak the truth. The learned counsel further contended that Masood Mahmood's evidence as to his meeting with the Prime Minister and Mian Muhammad Abbas at Rawalpindi on the 11th of November 1974, and his account of his conversation with the Prime Minister and that meeting were also false; and that in any case, he did not tell Mian Muhammad Abbas on that occasion to stop chasing Ahmad Raza Kasuri. Mr. Yahya Bakhtiar further submitted that Masood Mahmood had a motive to give false evidence against Mian Muhammad Abbas as the latter had already implicated him in illegal activities of the Federal Security Force while making a statement before an Inquiry Officer, on 21st of July 1976, and, therefore, the majority judgment was erroneous in thinking that Masood Mahmood had no motive to falsely implicate Mian Muhammad Abbas.

112. I find that the majority judgment has attempted a detailed appraisal of Masood Mahmood's evidence in paragraph Nos. 425 to 456, and the matters now raised have been noticed in one context or the other. However, a few words might be said on the specific points mentioned by Mr. Yaha Bakhtiar as grounds for reviewing the majority conclusions that Masood Mahmood evidence was not such as could be said to be lacking in intrinsic worth by reason of any inherent weakness or infirmity, and that it could be safely acted upon provided the requisite corroboration was available on the record.

113. Taking first the question of Masood Mahmood's appointment as Director-General of the Federal Security Force, the objection of the learned counsel is that the finding, in paragraph No. 438 of the judgment, that the Prime Minister's Chief Security Officer or his Assistant Abdul Hamid Bajwa might have played a role in advising the Prime Minister on Masood Mahmood's suitability is based on speculation as Saeed Ahmad Khan has not said anything on this point. This contention is misconceived for the reason that the question posed in paragraph 438 of the majority judgment was whether Masood Mahmood's account of the circumstances in which he came to be appointed as

Director-General of the Federal Security Force was unnatural and improbable; the question at this stage was not whether it stood corroborated by other evidence on the record or whether Saeed Ahmad Khan and Abdul Hamid Bajwa had, indeed, been deputed by the Prime Minister to pressurize Masood Mahmood into accepting the appointment. It was in that context that statement made by Masood Mahmood was examined so as to ascertain whether he satisfied the first test applicable to an approver's evidence, and the conclusion reached in paragraph 438 was that it was not possible to agree with Mr. Yahya Bakhtiar that the account given by Masood Mahmood in this behalf must be rejected as false and fanciful. It is, therefore, incorrect to say that in not rejecting this part of Masood Mahmood's testimony the Court has given any benefit of doubt to the prosecution. NO such question arises at this stage.

114. The next submission that Masood Mahmood had a motive to falsely implicate Mian Muhammad Abbas on account of the incriminating statement made by the latter before an Inquiry officer, does not find any reflection in paragraph 435 of the Judgment, overlooks the fact that there was no material at all on the record to show that this statement had ever been brought to the knowledge of Masood Mahmood before he made his confessional statement or approver's statement under section 164 of the Criminal Procedure Code. Precisely this argument was raised in the High Court and was repelled in paragraphs 447 and 448 of the judgment of that Court. It was not raised in this manner during the course of the hearing of the appeal, and, accordingly, its omission from paragraph 435 of the judgment is of no consequence whatsoever. The conclusion reached in the majority judgment that Masood Mahmood had no motive to falsely implicate Mian Muhammad Abbas remains unaffected.

115. In this connection, Mr. Yahya Bakhtiar's next submission was that the conclusion reached in paragraph 437 of the majority judgment regarding his contention that the prosecution had assigned to Masood Mahmood a role without a role, was not correct and needed to be reviewed, as the Court had not properly appreciated his submissions with regard to the part assigned by Masood Mahmood to Mian Muhammad Abbas, nor had the Court drawn proper inferences from the evidence of M. R. Welch regarding the directions given to him by Masood Mahmood at Quetta to take care of Ahmad Raza Kasuri. From a perusal of the relevant ground, namely, ground 18 on pages 125 to 127 of the Review Petition, and a consideration of the oral submissions made by Mr. Yahya Bakhtiar in this behalf, I am left in no doubt that he is merely attempting to reargue this point, which is not permitted in review.

116. Mr. Yahya Bakhtiar also submitted that the statement made at the trial by Masood Mahmood regarding his hunch about the Islamabad incident of the 24th of August 1974, was not consistent with the conduct of a conspirator; and that, in any case, he had made an improvement during the course of giving evidence by asserting that after this incident the petitioner had told him that nothing had been accomplished, and that as a result Masood Mahmood gave further directions to Mian Muhammad Abbas.

In this connection the learned counsel also referred to another statement made by Masood Mahmood that after the Lahore incident resulting in the present murder, Mian Muhammad Abbas had told him that the mission could not be accomplished in Islamabad. The object of these submissions was to show that the various omissions, contradictions and improvements of Masood Mahmood had not been given due weight, and it had been incorrectly stated at item 11 of paragraph 455 of the majority judgment that this information had been elicited from Masood Mahmood in cross-examination. Mr. Yahya Bakhtiar submitted that this information was, in fact, volunteered by Masood Mahmood.

117. I find that a large number of alleged omissions, contradictions and improvements attributed to Masood Mahmood have been discussed in paragraph 455 of the judgment, and it is no ground for review that a certain view as to these contentions has been expressed, which the learned counsel thinks is not correct. A reference to the record of Masood Mahmood's evidence shows that the information about the talk with Mian Muhammad Abbas was given by Masood Mahmood during the course of cross-examination, whether voluntarily or otherwise, and he also offered an explanation as to why he had not mentioned the same in his previous statements. The Court has accepted that version, and it is not a ground for review to say that it should not have been so accepted.

118. Mr. Yahya Bakhtiar further contended that the observation appearing in paragraph 568 of the judgment to the effect that Masood Mahmood's driver Manzoor Husain had stated that he did not remember as to where he had taken the Director-General on the morning of the 11th of November, 1974, during his stay in Multan, before taking him to the airport, was not correct, as Manzoor Hussain had made that statement only with regard to the 10th of November 1974, and as regards the 11th of November he had stated that "so far I know D. G. had not visited any place in Multan on the morning of 11th November 1974. I drove the D.G. to the airport from the Canal Rest House on the 11th of November, 1974, and that the keys of the car remained with him". The submission is that on account of this misreading of the evidence of driver Manzoor Hussain an incorrect conclusion has been drawn as regards Masood Mahmood's visit to the petitioner on the morning of the 11th November 1974, at the house of Mr. Sadiq Hussain Qureshi, the then Governor of the Punjab.

119. The submission is untenable as the relevant portion of the evidence of driver Manzoor Hussain is fully and correctly reproduced in paragraph 567 of the judgment, and although an inaccuracy has crept into the paraphrasing of this evidence in the opening sentence of paragraph 568 of the judgment, yet in the body of the paragraph detailed reasons are given for reaching the conclusion that the replies given by Manzoor Hussain driver could not be considered as indicating that Masood Mahmood did not stir out from the Rest House at all before leaving for the airport on that morning. It is further stated in that paragraph "it is significant that Masood Mahmood was not

questioned on this point at all, and for a very good reason, namely, that before departing from Multan it would have been the obvious thing for Masood Mahmood to pay a call on the Prime Minister and specially, as already stated above, when the news of a very important tragic event had reached Multan". In the presence of these detailed reasons, nothing turns on the slight inaccuracy noticed by Mr. Yahya Bakhtiar in the opening sentence of paragraph 568 of the majority judgment.

120. Still another submission made by Mr. Yahya Bakhtiar in regard to the evidence of Masood Mahmood is that the Court has incorrectly disposed of his contention regarding the improbability of a meeting between Mian Muhammad Abbas and Masood Mahmood at Rawalpindi on the 11th of November 1974, as on that date Mian Muhammad Abbas was at Peshawar and returned to Rawalpindi only on the 12th of November 1974. The submission of the learned counsel has been fully dealt with in item 3 of paragraph 455 of the judgment, and nothing is to be gained by covering the same ground again, as the mere contention that an incorrect inference has been drawn is not a valid ground for review.

121. Still another submission against accepting the evidence of Masood Mahmood is that in paragraph 412 of the judgment the Court has accepted the tour details contained in document Exh. P.W. 5/1 as correct, whereas, in fact, this document was a forgery. A reference to the relevant paragraph shows that Mr. Yahya Bakhtiar's contention in this behalf has been fully dealt with and repelled for reasons given therein. A review petition cannot be used as a pretext for re-arguing the point.

122. Yet another point sought to be made by the learned counsel is that the observation of the Court in paragraph 435 is contrary to the dictum of this Court in *Abdul Qadir v. The State*<sup>667</sup>, in which it was observed that standard of corroborative evidence is not to be varied in case of an approver of education and apparent respectability if he is no better than a hired assassin.

123. The contention is entirely misconceived, as paragraph 435 deals with a number of matters having a bearing on the question of the intrinsic worth of Masood Mahmood's evidence and not with the question of corroboration thereof, which question is discussed much later in the judgment. The conclusion expressed in this paragraph does not rest only on the fact that Masood Mahmood was a high ranking official, but on a consideration of all the relevant facts brought out in the evidence, as would be clear from the opening sentence of this paragraph, namely, "considering the fact that Masood Mahmood enjoyed a special position under Zulfikar Ali Bhutto, that he was in close and constant touch with him throughout his tenure as Director-General of the Federal Security force from 1974 to 1977, that he was shown all kind of favors and considerations by being sent abroad for official visits and medical treatment, that he

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<sup>667</sup> PLD 1956 SC 407

was not the only civilian official taken into custody on the proclamation of Martial Law, and that during his long career in the Police service of Pakistan he had held important positions involving assumption of responsibility and exercise of authority, I find it difficult to hold that Masood Mahmood has become an instrument in the hands of the Martial Law Authorities to deliberately and falsely concoct the story he has narrated at such length at the trial".

124. While finding that none of the submissions made by Mr. Yahya Bakhtiar regarding the conclusions reached in the majority judgment as to the acceptability of Masood Mahmood's evidence, provides any justification for review, it will not be out of place to state that as the evidence of Masood Mahmood was an extremely important part of the prosecution case, the fullest consideration was given to all the circumstances having a bearing on the question of his credibility and corroboration. The conclusions were reached on the totality of the evidence available on the record, and they are not open to review on the ground that another view of the matter was also possible.

125. Taking next the finding in the majority Judgment as to the presence of motive on the part of the petitioner, Mr. Yahya Bakhtiar submitted that the majority judgment had misread the First Information Report as indicating that the motive lay only with the petitioner to the exclusion of other political enemies of the complainant; that it had also erroneously presumed that no other motive was proved on the record and other motives stood excluded; that the fact of Ahmad Raza Kasuri rejoining the Pakistan People's Party after murder of his father, and his expressing admiration for the petitioner had also been ignored; and it had been overlooked that as Ahmad Raza Kasuri was criticizing and attacking the formation and performance of the Federal Security Force, therefore, Masood Mahmood and the petitioner's co-accused Mian Muhammad Abbas might have had a motive of their own to finish him.

126. Here again, it is plain that the submissions made by Mr. Yahya Bakhtiar do not fall within the ambit of the scope of review in criminal cases. During the hearing of appeal all the evidence having a bearing on this point was read and analyzed by Mr. Yahya Bakhtiar at length. The previous incidents narrated by Ahmad Raza Kasuri and all other possible motives inviting physical assault on him were also discussed. The various speeches made by Ahmad Raza Kasuri in and outside Parliament were read before the Court, and the relevant extracts have been included in the Judgment. The discussion of motive in the majority Judgment occupies considerable space from paragraphs 458 to 497, and before reaching positive conclusions on the question of motive, the various points now urged by Mr. Yahya Bakhtiar were all duly considered, except the suggestion made for the first time that petitioner's co-accused Mian Muhammad Abbas might have had motive of his own to finish Ahmad Raza Kasuri for the reason that he had criticized in Parliament the formation and functioning of the Federal Security Force. Apart from the fact that this point was not agitated during the hearing of the appeal, I find that there is, in fact, no support for the assertion that Mian



Muhammad Abbas might have had a motive of his own to get Ahmad Raza Kasuri assassinated. As a result I have no hesitation in holding that Mr. Yahya Bakhtiar's submissions as to motive do not justify any review of the majority Judgment.

127. The learned counsel has next argued that this Court in its majority Judgment has grievously erred in the application of section 10 of the Evidence Act to the facts of this case and has thereby relied on inadmissible evidence used against the petitioner, both for the purposes of proving the existence of the alleged conspiracy and that he was also its member along with the other co-accused and the two approvers. In this connection before us at the hearing the learned counsel for the petitioner did not find fault with the interpretation placed on section 10 of the Evidence Act, in paragraphs 83 to 115 of the majority Judgment. His objection was, however, confined against the conclusion recorded in paragraphs 116 to 119 of the Judgment in the application of this section to the facts of the present case.

128. In this connection to be precise the learned counsel submitted that for the purposes of section 10 of the Evidence Act the prosecution had altogether failed to adduce any reliable independent evidence to establish the existence of the alleged conspiracy and that in the majority Judgment reliance has been placed on inadmissible evidence in finding that there was reasonable ground to believe that the petitioner had conspired together with the others to commit the offence. In this behalf it was absolutely necessary for the prosecution to have adduced sufficient independent evidence to enable the court to form a *prima facie* opinion about the existence of conspiracy as condition precedent to the application of this section. In nut-shell, according to the learned counsel, this Court, in its majority judgment, has erred in law in relying on the evidence of Masood Mahmood approver, which was inadmissible for the purpose of Section 10 of the Act for furnishing any ground in forming a reasonable belief as to the existence of the conspiracy between him and the petitioner as a condition precedent, before anything said, done or written by anyone who had thus conspired, in reference to their common intention, after the time when such intention was first entertained by any one of them, could be so conspiring, as well as for the purpose of proving the existence of the conspiracy as for the purpose of showing that such person was a party to it. It was further submitted before us that in this connection we have also erred in relying on the other evidence consisting of the statements of Ahmad Raza Kasuri (P.W. 1), Saeed Ahmad Khan (P.W. 3), M. R. Welch (P.W. 4), Fazal Ali (P. W. 24), Amir Badshah (P.W. 20) and Muhammad Amir (P.W. 19), which did not even remotely go to suggest about the existence of the alleged conspiracy between the petitioner and Masood Mahmood approver.

129. It will be seen that the contentions now raised do not fall within the definition of an error patent on the face of the record. These points were argued at great length by both sides, and the majority Judgment has given a certain interpretation of the law, which is not liable to be interfered with by way of review.

130. Even otherwise, we find that this objection is based on a misconception of the true legal position as to the use of these pieces of evidence to open the door for the application of section 10 of Evidence Act. It goes without saying that under this section, on the principle of agency, each conspirator is liable for anything said, done or written by every other conspirator in reference to the conspiracy. This is a special provision which comes into play and can be invoked only after the Court has found from the evidence *aliunde* on the record that there was reasonable ground to believe about the existence of the alleged antecedent conspiracy. But in this behalf it must be borne in mind that this section does not in any manner exclude the application of any of the other relevant provisions of the Act for the purpose. Therefore, in order to fulfill this initial requirement of the section with a view to enable the Court to form its *prima facie* opinion in that behalf, recourse can be had to the evidence which was otherwise admissible in accordance with any of the other provision of the Act. It cannot be doubted that the approver is a competent witness against the accused in accordance with the provisions contained in section 133 and section 114 (Illustration (b) of the Evidence Act. Therefore, there cannot be any bar in relying on the evidence of the approver as well as on the other relevant evidence admitted on the record in order to enable the Court to form its *prima facie* opinion about the alleged conspiracy with a view to fulfilling the initial requirement before invoking the provisions contained in section 10 of the Act.

131 We find that in the Special Bench case of *Jitendra Nath Gupta and others v. Emperor*<sup>668</sup> a similar objection had been raised and adequately refuted. In that case the appellants, 29 persons were tried by the Special Tribunal constituted by the Government of Bengal under the Bengal Criminal Law Amendment Act on a charge of conspiracy under section 121-A, I.P.C. According to the prosecution accused persons along with Jetendra Nath (an approver examined as a witness for the prosecution) and some other persons were parties to the criminal conspiracy to wage war against the King-Emperor. In that case the Court observed that there cannot be strictly speaking direct evidence of the inception of a conspiracy, if any one of the conspirators themselves do not choose to speak to the same. That a conspiracy, as contemplated by section 121-A, I.P.C. did exist and the persons placed on trial were members of the conspiracy was sought to be established by the evidence falling under different heads; in the first place there was the evidence of the approvers or accomplices, then there was the confessional statements of the accused persons in addition to other evidence adduced on the record. In that connection that Court observed that the evidence of the existence of the conspiracy and of the participation of the accused persons in the same came from the approvers Jitendra Nath and Hrishikesh Gupta; there were then the witnesses coming within the category of accomplices or persons in the position of accomplices; and there were also the confessions-so-called confessional statements by

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<sup>668</sup> AIR 1937 Cal 99

some of the accused persons; of these confessional statements, two stood out prominently, others were of a self-exculpatory nature, and their evidentiary value as statements of accused persons was negligible. In connection with the provision of section 10 of the Evidence Act, the Court observed that:-

"The prosecution examined two persons who turned approvers, and there was evidence coming from independent sources or from accomplices or persons in the position of accomplices as they are sometimes denominated, to prove facts establishing that the accused persons were acting in pursuance of an agreement between two or more persons, leading to the inference that a conspiracy as contemplated by section 121-A existed. The existence of a concerted intention was sought to be established as a matter of inference closely bound up with some overt act or acts, as if only by means of overt acts that the facts of the existence of the conspiracy would be established. The criminality of the conspiracy was, as it was well settled now, independent of the criminality of the overt acts. Direct evidence was given to prove the existence and the planning of a conspiracy as charged, but it was not necessary to establish by direct evidence that the accused persons did enter into an agreement to conspire."

132. In this connection in *Corpus Juris Secundum*, Vol. 22-A, (Page 1137) it is observed that the Courts generally require that there be *prima facie* proof of the existence of a conspiracy before admitting in evidence acts and declarations of an alleged co-conspirator. Ordinarily (page 1133) the Courts permit considerable latitude in the proof of a conspiracy to commit a crime. Usually every transaction between the persons allegedly entering into the conspiracy is admissible to show the existence of the conspiracy or its furtherance, and generally speaking, any evidence which properly tends to show the existence of the conspiracy is admissible. A co-conspirator (page 1134) may testify at the trial as to any fact within his own knowledge which tends to prove any issue of the case, and he may testify to any acts, statements, or circumstances within his knowledge which of themselves constitute or tend to establish a conspiracy, or from which its existence may be inferred, and he may do this the same as any other witness. There is (page 1127) no rule requiring the prosecution to establish a conspiracy in order to permit a witness to testify what one or all of several accused persons did and evidence adduced by co-conspirators as witnesses, which is direct evidence of the facts to which they testify, is not within the rule requiring a conspiracy to be shown as prerequisite to its admissibility. The rule that declarations of an alleged conspirator are admissible against an alleged co-conspirator only if the existence of the conspiracy is established applies only where the declaration by the alleged conspirator is made to a third person, and positive testimony as to a conversation between accused and an accomplice relative to the crime, or the testimony of a third person who overheard such conversation, is not of the class of evidence requiring the establishment of a conspiracy to render it competent. Similarly, according to *Corpus Juris Secundum*, Vol. 15-A, page 902, a conspirator is an accomplice and, although uncorroborated, is

always a competent witness. Independent proof of the conspiracy is not a prerequisite to the admissibility of the testimony of a conspirator implicating defendant. In this connection Roscoe on Criminal Evidence, 16th Edition, page 485 has observed:-

"And this must, generally speaking, be done by evidence of the party's own act, and cannot be collected from the acts of others, independent of his own, as by express evidence of the fact of a previous conspiracy together, or of a concurrent knowledge and approbation of each other's acts. But it may also be done by 'evidence of the acts of the prisoner, and of any other with whom he is attempted to be so connected, concurring together at the same time and to the same purpose or particular object': P.C. 96."

It cannot, therefore, be held that the approver is not a competent witness to directly depose to the existence of the conspiracy of which the petitioner was a member. But it goes without saying that such evidence will be accepted by the Court with caution in accordance with the established principles. The agreement to conspire was also inferred from circumstances discussed in the majority Judgment which gave rise to a strong inference of a concerted plan to carry out the unlawful design. There does not appear to be any error patent on the record in the application of the provisions of section 10 of the Evidence Act to the facts of this case. There is no force in this objection and the majority Judgment is not liable to review on this ground.

133. We may now turn to the contention that the majority judgment also suffers from an error apparent on the face of the record as it has been used, in support of the petitioner's conviction, facts elicited by the learned counsel for the confessing accused in cross-examination illegally permitted to him by the High Court after the counsel for the petitioner and for the other contesting accused Mian Muhammad Abbas had concluded their cross-examination, with the consequence that certain incriminating facts damaging to the petitioner, were brought on the record without the petitioners having an opportunity to rebut them.

134. This point has been noticed in paragraphs 893 and 894 of the judgment of the majority while dealing with the question of the bias as follows:

"893. At times Mr. Irshad Ahmad Qureshi, Advocate, learned counsel for the confessing accused, was illegally permitted to cross-examine the prosecution witnesses for the second time on behalf of Ghulam Mustafa accused, after they had already been cross-examined on behalf of the appellant, at his cost and disadvantage thereby prejudicing his defence."

"894. It appears to me that in the circumstances of this case, the Court had erred in allowing Mr. Irshad Ahmad Qureshi, Advocate to cross-examine the

prosecution witness for the second time on behalf of Ghulam Mustafa as stated above."

The conclusion recorded, however, was as follows:

"But from this it cannot be concluded that the Court was at all prejudiced against the appellant."

135. The plea that Mr. Irshad Ahmad Qureshi should not have been allowed to cross-examine the witnesses after they had been cross-examined by the Court was biased against the petitioner. This plea was overruled by the Court. Now Mr. Yahya Bakhtiar has stressed another aspect of the same plea, namely, that the replies elicited by Mr. Irshad Qureshi by his cross-examination for the second time, were illegally brought on the record, and being damaging to the petitioner, should have been excluded.

136. In this connection the only instance brought to our attention in the course of hearing of the present Review petition was the proceedings which took place before the trial Bench on 15-01-1978 (reproduced at page 650 Vol. of Evidence) during the recording of evidence of Abdul Hayee Niazi (P. W. 34). This is reproduced below:

Note. Mr. Qurban Sadiq Ikram wants permission to put a question to the witness by way of cross-examination because he says that Mr. Irshad Qureshi has, by his cross-examination, damaged the case of Mr. Qurban Sadiq Ikram's client.

Let the question be taken down to enable us to take a decision to this point:

*Question.* Is it a fact that after the Court proceedings yesterday, you were briefed by Mr. A. Khaliq, Deputy Director, F.I.A to make a statement in this Court what you have stated in answer to the question put by Mr. Irshad Qureshi.

*Order.* This question could have, very well, been asked at the time when Mr. Qurban Sadiq Ikram was cross-examining the witness this morning because as the question shows the allegation is that the officer of the F.I.A. briefed the witness yesterday. The question is, therefore, disallowed."

137. The above instance was noticed in the majority Judgment in paragraph 908, and it was observed:-

"The Court rightly did not allow the permission to Mr. Qurban Sadiq Ikram to put further questions to (P.W. 34) Abdul Hayee Niazi after he had already cross-examined him and the objection raised has no force."

138. Apart from this instance, no other example was given of any incriminating facts, damaging to the petitioner, having been brought on the record on account of the opportunity granted to Mr. Irshad Qureshi to cross-examine a witness, once on behalf of two of the confessing accused and, then later, on behalf of the third confessing co-accused, after they had already been cross-examined on behalf of the petitioner.

139. The above instance does not advance the case of the petitioner. It pertains to the tampering of a witness which was allegedly attempted a day earlier to the cross-examination by Mr. Irshad Ahmad Qureshi for the second time and the question put, as rightly observed by the trial Bench, could have been asked earlier by Mr. Qurban Sadiq Ikram Because the witness was still in his hands on the morning following the alleged attempt to tamper with him. Moreover, this objection was raised by Mr. Qurban Sadiq Ikra, Advocate on behalf of Mian Muhammad Abbas who has not filed any Review Petition. We feel, therefore, that Mr. Yahya Bakhtiar is only making a fetish of a procedural mistake which has no bearing on the fundamentals of the case nor has occasioned any prejudice to the petitioner.

140. Another ground urged in support of the Review Petition is that the majority Judgment suffers from a patent contradiction inasmuch as it has rejected the petitioner's application for summoning additional evidence, *inter alia*, on the ground that he was in law not permitted to boycott the proceedings of the trial in the High Court, and at the same time it has given legal recognition to the fact of boycott by holding that no prejudice had been caused to the petitioner by the failure of the High Court to put certain pieces of evidence to him under section 342 of the Criminal Procedure Code, as he had already boycotted the proceedings and refused to answer a large number of questions put to him by the High Court under this section of the Code. The submission appears to be that the view taken in the majority Judgment as to the effect of the failure of the High Court to put certain pieces of evidence to the petitioner under section 342 of the Criminal Procedure Code is not correct and needs to be reviewed.

141. the submission is altogether untenable, as, in fact, in both the matters, namely in rejecting the petitioner's application for summoning additional evidence, and in repelling the contention that he was prejudiced by the failure of the High Court to put certain pieces of evidence to him during his examination under section 342 of Code of Criminal Procedure, the majority Judgment has taken a consistent view to the effect that the petitioner was himself to blame if he decided to boycott the proceedings of the trial in the High Court. He could have summoned defence witnesses during the trial, if he had not y boycotted the proceedings; and he could have legitimately claimed that all incriminating pieces of evidence should have been put to him if he had decided to answer the questions put to him by the High Court and to explain the evidence brought on the record against him by the prosecution. But as he refused to answer question having a bearing on his defence, the majority judgment has held that in these circumstances it could not be said that he had been prejudiced, as nothing would have

been gained even if further questions had been put to him because he would have simply refused to reply.

142. While dealing with the question of the application of section 342 of the Criminal Procedure Code, the majority Judgment has observed in paragraph 163, that "although this section is a mandatory provision, yet its compliance is dependent upon the conduct of the accused himself. In the present case the accused frustrated these provisions by boycotting the proceedings and refusing to answer any question put to him relating to his defence. In fact, in view of the conduct displayed by him, the Court would have been justified not to ask any further question."

143. This paragraph cannot be interpreted to mean that the Court is granting legal recognition to the act of an accused in boycotting the proceedings of the trial. On the contrary, the Court was concerned only with examining the effect of such an attitude on the part of the petitioner. It is, therefore, fallacious to contend that there is any contradiction in the majority Judgment on this point.

144. Still another ground urged by Mr. Yahya Bakhtiar for review of the majority Judgment is that while examining the question of the subsequent conduct of the petitioner, and the evidence of Saeed Ahmad Khan having bearing thereon, the majority Judgment has omitted to examine the effect of the note made by the petitioner on the letter of the Punjab Chief Minister, with which the Report of Shafi-ur-Rehman's Inquiry Tribunal was enclosed to the effect "what was the point in discussing with you. Please discuss" that, in fact, these remarks of the petitioner clearly showed that Saeed Ahmad Khan had been meddling with the investigation of the case without the petitioner's authority. In support of this submission Mr. Yahya Bakhtiar has referred us to paragraph 605 of the majority Judgment in which there is no direct reference to the aforesaid remarks of the petitioner.

145. The submission is clearly misconceived. The handling of the Shafi-ur-Rehman Inquiry Report has been described in paragraphs 586 to 592 of the majority Judgment. These paragraphs reproduce the relevant portions of the oral testimony of Saeed Ahmad Khan (P. W. 3), and also contain copious references to the documents proved by him in support of his oral statement. It is not necessary to recite all those details here, and it would suffice to say that Saeed Ahmad Khan had been dealing with the Shafi-ur-Rehman Report at several stages, and it was for this reason that the Chief Minister's letter to the petitioner, as Prime Minister of Pakistan, was marked by the petitioner to Saeed Ahmad Khan on the 18th of March, 1975, with the remarks quoted by Mr. Yahya Bakhtiar. Paragraph 591 of the majority Judgment states that "Saeed Ahmad Khan says that after receiving these directions, he discussed the matter with the Prime Minister and he was told that the Report shall not be published as it was adverse; and Saeed Ahmad Khan was further told by appellant Zulfikar Ali Bhutto that he should have nothing to do with this case." It is, therefore, incorrect to suggest now that these

particular remarks made by the petitioner on the forwarding letter of the Punjab Chief Minister were not present to the mind of the Court when conclusions were drawn as to the role played by Saeed Ahmad Khan in meddling with the investigation of the case, and the fact that he was doing so under instructions from the petitioner. In paragraph 604 of the majority judgments, it is stated that "from the facts relied upon by Mr. Yahya Bakhtiar, the impression clearly emerges that, if Saeed Ahmad Khan overstepped his authority or interfered with matters not entrusted to him by his employer, then the latter was certainly capable of pulling him up".

146. This paragraph is then followed by paragraph 605 which reads as under:

"However, there is no such material on the record to show that appellant Zulfikar Ali Bhutto, at any stage, pulled up Saeed Ahmaed Khan for interfering with the investigation of this case, or putting up suggestions to him during the progress of the Inquiry before the Shafi-ur-Rehman Tribunal, nor did the Prime Minister object to Saeed Ahmad Khan discussing matters with the Chief Minister and Chief Secretary and other officials of the Punjab Province. The document already referred to in the preceding paragraphs leaves no doubt whatsoever that Saeed Ahmad Khan was keeping the appellant fully in the picture as to the progress of his efforts. There is, therefore, no substance in the contention that all these steps were taken by Saeed Ahmad Khan, or his Assistant Abdul Hamid Bajwa, without the knowledge and authority of the appellant."

147. It will be seen that the conclusions as to the role played by Saeed Ahmad Khan in meddling with the investigation of the case have been drawn by the majority of the Judges after a full consideration of all relevant evidence having a bearing on the point, and it is no ground for review if the conclusion is not in accord with the point of view canvassed by Mr. Yahya Bakhtiar.

148. Mr. Yahya Bakhtiar next contended that the majority judgment had erred in coming to the conclusion that there was agreement on the part of Masood Mahmood within the meaning of the definition of the term conspiracy as contained in section 120-A of the Pakistan Penal Code, and he further submitted that there was a [contradiction] between the observation as contained in paragraph 766 and 744 of the judgment; and that there was also inaccuracy in the statement contained in paragraph 774 that Masood Mahmood had asked Mian Muhammad Abbas to get on with the job after his meeting with the petitioner at which the conspiracy was alleged to have been hatched. He contended that in reaching this conclusion due weight had not been given to the fact that Masood Mahmood had been given order by the petitioner and that he was also threatened in the sense that the petitioner was alleged to have asked Masood Mahmood whether he wanted to be chased again by the Establishment Secretary Mr. Vaqar Ahmad; and that Masood's subsequent conduct in regard to the Islamabad incident and his alleged directions to M. R. Welch at Quetta have also been misconstrued as



indicating voluntary acquiescence on his part. In support of these submissions he referred to certain portions of the dissenting opinions delivered by our learned brothers Dorab Patel, J., and G. Safdar Shah, J., with whom Muhammad Haleem, J, had agreed, to show that there was no agreement on the part of Masood Mahmood.

149. The question whether there was, indeed, any agreement on the part of Masood Mahmood so as to constitute the offence of conspiracy, has been discussed at length in the majority judgment in paragraphs 765 to 777, and the final conclusion reached is based on an appraisal of the oral testimony of Masood Mahmood, and the circumstances showing his subsequent conduct in regard to the execution of the conspiracy. I have perused these paragraphs again, and I find that the submissions made by Mr. Yahya Bakhtiar have been fully considered therein, and accordingly, no question arises of reviewing the inferences drawn from the facts found to have been proved, simply on the ground that three learned judges of this Court have taken a different view on the same facts. It is well established that the contention that inferences drawn from the evidence are incorrect is not a valid ground for review, as it would either amount to a rehearing of the case or an exercise in the nature of an appeal against the original judgment of the Court, matter which are not covered within the ambit of review. There is, accordingly, no merit in this submission.

150. I now turn to the contention that the majority judgment has not given effect to the submissions made on behalf of the petitioner as to the erroneous and illegal view taken by the trial Bench in the matter of contradictions and omissions occurring in the evidence of the prosecution witnesses when they took up the position that they did not remember whether they had stated certain things in their previous statements or not, with the result that the prejudice caused to the petitioner by the refusal of the High Court to allow cross-examination in respect of these matters has not been considered by this Court.

151. This question has been dealt with in the majority judgment in paragraphs 290 to 296 and after discussing the various aspects of the matter the law summed up on page 1523 of Monir's Law of Evidence was accepted as correct, namely, that:-

"A failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact. But it is wrong to suppose that all omissions are contradictions. It must be left to the Court in each particular case to decide whether the omission in question amounts to contradiction or not .... An omission must be material. Thus where a prosecution witness deposes in Court that the accused gave blow on the head or implicates the accused in his deposition before the Court but did not mention such fact before police, the omission would amount to contradiction...."

The correctness of the above summation of the law was not disputed by Mr. Yahya Bakhtiar but his contention is that this principle has not been observed in actual practice.

152. In this connection it may be pointed out that this objection has been raised without specification of instances. Neither in the petition for review nor in the arguments addressed in support thereof any particular instance was brought to our attention except for one, wherein the witness was sought to be confronted with his previous statement but the counsel was not allowed to cross-examine him on the ground that since he had said that he did not remember, therefore, he could not be cross-examined on the point. This instance finds mention in the order of the trial Bench dated 30-11-1977 (page 35 of Volume of Orders) passed during the evidence of Muhammad Waris P.W. 15 and also referred to in the application of Zulfikar Ali Bhutto dated 18-12-1977 at page 185 of the Chart relating to the bias of the trial Court.

The said order is in the following terms:-

"During the cross-examination of P.W. 15, an effort was made to confront the witness with his statements under sections 161 and 164, Cr. P.C., when he said that he did not remember whether he had or had not deposed to a particular point. It was not allowed as we have held already that failure to remember does not amount to "a contradiction."

153. The above instance, however, does not materially advance the case of the petitioner. It does not show as to what answer was given by the witness at the trial and as to what was the previous statement of the witness on the subject. It is not, therefore, possible to say as to whether the answer that "I do not remember" did indeed amount to a contradiction in the light of the principles governing the matter as summed up by Monir and approved by us. It was submitted in this connection that the learned trial Bench did not allow the defence counsel to bring the questions and objections on the record. But as observed in paragraph 894 of the judgment:-

".....However, one thing is certain that in this behalf the defence had all along failed to adhere to the usual practice by reducing the objections into writing in the form of applications filed in the face of Court for its order. This would have been helpful in keeping the record straight."

154. Mr. Yahya Bakhtiar also argued that prejudice was caused to the defence because the effect of lapses of memory has not been examined by the majority judgment. This objection, it appears to us, is more academic than real. It is relevant to mention here that the learned counsel for the petitioner submitted the applications in this Court (Criminal Miscellaneous Nos. 7, 8 and 9 of 1978) for calling additional evidence.. In the first application a prayer was made for resummoning M. R. Welch P.W. 4 so that he could be

questioned in respect of his religion and with regard to some other matters which could not be taken up in cross-examination owing to the petitioner's absence from the Court on the date he was examined. The second application contained a request for resummoning D. S. P. Agha Muhammad Safdar and Col. Wazir Muhammad of the Central Ammunition Depot, Havelian, as Court witness. In the third application a prayer was made for summoning 10 defence witnesses including Gen. Tikka Khan, Mr. Aziz Ahmad, Rao Abdur Rashid and certain officials of the Press Information Department and of the C.M.L.A. Secretariat. However, the prosecution witnesses who gave answers to the effect "I do not remember" were the following:-

P. W. 1 Ahmad Raza Kasuri.

P. W. 11 Abdul Aziz.

P. W. 12 Asghar Khan.

P. W. 14 Muhammad Abdul Vakil Khan.

P. W. 15 Muhammad Waris.

P. W. 18 Abdul Ikram.

P. W. 19 Muhammad Amir.

P. W. 20 Amir Badshah Khan, and

P. W. 31 Ghulam Hussain approver.

(Vide Chart supplied by Mr. Batalvi on the point), but no application was made for resummoning any of the aforementioned 9 witnesses, with a view to confronting them with their previous statements. It is manifest, therefore, that no prejudice was, in point of fact, caused by not allowing these witnesses to be confronted with their previous statements, and the objection raised appears to have been raised only for the sake of an objection. The omission pointed out by the learned counsel is of no consequence.

155. Mr. Yahya Bakhtiar further contended that the conclusions reached in the majority judgment as to the effect of non-examination of certain material witnesses were also not correct, and in support of this submission he reiterated the arguments which he had advanced at the hearing of the main appeal. The learned counsel made particular mention of the two recovery witnesses, of Irfan Malhi, who was a Director of the Federal Security Force at Lahore and was supposed to have been contacted by D.I.G. Muhammad Abdul Vakil Khan; and also of Mr. Hanif Ramay, Head Constable Muhammad Yousaf and Agha Safdar, and submitted that the second part of section 540

of the Criminal Procedure Code had not been properly adverted to in the majority judgment, as this part makes it obligatory on the Court to summon all witnesses whose evidence is material for the unfolding of the case, and that it was not good law to lay down that the *ipsi dixit* of the prosecutor that a witness had been won over should be regarded as sufficient.

156. The subject of the non-production of certain witnesses by the prosecution at the trial of the case has been exhaustively dealt with in the majority judgment in paragraph 309 to 339. Not only the legal position obtaining in this behalf, but also the factual position in respect of each of the witnesses in question has been considered at length. If the conclusions arrived at are contrary to the submissions made by Mr. Yahya Bakhtiar, that does not provide any justification for review. There is no question of the Court not having considered the implication of the second part of section 540 of the Criminal Procedure Code, as the power and duty of the Court to summon witnesses is not in dispute. If the prosecution does not regard certain witnesses as material for the unfolding of the case, and for that reason abandons them, the Court would certainly be in duty bound to call them if it regards their evidence as essential for the just decision of the case. But no such opinion was formed by the High Court, and the majority judgment also has not taken this view. In the circumstances, I am not persuaded that these submissions, in any manner, justify a review of this part of the majority judgment.

157. Another submission made by Mr. Yahya Bakhtiar was that the majority judgment had also erred in disallowing an application made by the petitioner for summoning certain witnesses in his defence for the reason that he did not have an adequate opportunity of doing so in the trial Court, as he had boycotted the proceedings before the conclusion of the prosecution case. Our reasons for dismissing this application (Criminal Miscellaneous No. 9 of 1978), as contained in paragraph 50 of the judgment, have taken due notice of this argument; and the submissions now made by Mr. Yahya Bakhtiar only seek a reopening of this question, which is not permissible in review.

158. We now take up the contentions that the majority judgment is in error in holding that section 111 of the P.P.C. was applicable to the case of the petitioner, as there was no evidence on the record to show that the death of Nawab Muhammad Ahmad Khan, deceased, was a probable consequence of the alleged conspiracy; that a conviction under this section could not be recorded without there being a separate charge as the case was not covered by section 237 of the Criminal Procedure Code read with section 236 thereof; and that, in any case, there is also an error in the application of section 109 of the P.P.C. in addition to section 111 thereof as both the sections are mutually exclusive.

159. Mr. Yahya Bakhtiar further submitted that there was no evidence to show that the petitioner knew that automatic weapons would be used; that moreover the use of

automatic weapons did not automatically lead to the application of section 111, P. P. C.; that in fact, approver Ghulam Hussain had issued instructions regarding the precautions that should be taken while firing on the car of Ahmad Raza Kasuri so that nobody else got hurt, and he had no intention to kill Ahmad Raza Kasuri.

160. Questions regarding the application of section 111 of the Pakistan Penal Code and whether a conviction under this section could be recorded without there being a separate charge there under have been dealt with exhaustively in paragraphs 780 to 840 of the majority Judgment. The contentions now raised have been fully discussed, and before reaching its conclusions, the Court has taken due note of the large number of precedent cases cited by both sides in support of their respective contentions. It seems to us, therefore, that the submissions now made by the learned counsel are only an attempt to reargue the point in the hope that different conclusions might be reached in this behalf. Such an exercise clearly falls outside the scope of review proceedings.

161. It will be pertinent to state that in paragraph 812 of the majority Judgment it has been observed that the actual plan of execution was left to the choice of the concerned assailants and the law recognizes such a situation as squarely falling within the ambit of conspiracy. Earlier, in paragraph 808 of the Judgment it was observed that "a person who sets in motion a plan to murder, and his co-conspirators implement the plan and mount a murderous attack on the victim but miss him and kill a person nearby, he is responsible for the acts of his agents committed in furtherance of the conspiracy, because such a result is the probable consequence of the murderous attack. When a man conspires to murder, and in furtherance of the conspiracy an attack with automatic weapons is mounted on the person intended to be murdered, he cannot plead that he could not visualize that the probable consequence would be that a bullet may miss the target and kill another person nearby. No man can say that he did not authorize an act which he could or ought to have foreseen as the probable consequence of his conspiracy. If he did not, he might and ought to have foreseen and is liable to the same extent as if he had foreseen. The death of Kasuri's father was thus clearly a probable consequence of the murderous attack on Ahmad Raza Kasuri".

162. In paragraphs 812-A and 813 the contention that the act of firing was a reckless act, was repelled. In paragraph 827, after discussing the question of the application of sections 109, 111 and 301, P.P.C., and the questions whether the provisions of sections 236 and 237, Criminal Procedure Code are attracted to the circumstances of this case, and whether there was any doubt as to the application of sections 109, 111 and 301 of the Pakistan Penal Code, the conclusion reached was that:

"In any event, this was a case where it was doubtful which of several offences the facts which can be proved will constitute and hence fell within the purview of section 236, Cr. P.C. Being a case falling within the contemplation of section 236, Cr. P.C., the appellants could be convicted of the offence which was shown to

have been committed although not charged with it under section 237, Cr. P. C. However, the facts have to be set out in the charge with sufficient particularity so that the accused may know what act or acts he is said to have done, so that the question that remains is one of law, namely as to what offence that act or acts constitute."

163. This question was then answered in paragraph 834 of the Judgment as under:

"Thus the accused was given sufficient notice of the facts constituting the offence. The facts were set out in the charge with sufficient particularity so that the accused could know what act or acts he was said to have done, and the only question that remained was one of law, namely, as to what offence the said act or acts constituted. It has been observed that the true test is whether the facts are such as to give the accused notice of the offence for which he is going to be convicted though he was not charged with it, so that he is not prejudiced by the mere absence of a specific charge. Thus the conviction of the appellants under section 111, P.P.C. in the absence of a specific charge in that behalf is not open to any objection."

164. The conclusions reached in the aforementioned paragraphs fully cover all the submissions which were made at the hearing of the appeal by Mr. Yahya Bakhtiar, and which have now been repeated in review proceedings. A word might, however, be said about his contention that approver Ghulam Hussain had issued instructions regarding the precautions to be taken while firing on the car of Ahmad Raza Kasuri so that no one else got hurt, and that even Kasuri might get away. It will be seen that implicit in these instructions was the fact that Ghulam Hussain was conscious that when fire is opened from automatic weapons, then the possibility of other persons getting hurt is very much present. Thus circumstance would appear to confirm the conclusion reached by the Court that the death of the deceased was a probable consequence of the attack mounted on Ahmad Rana Kasuri's car, for the fact remains that approver Ghulam Hussain, and appellants Ghulam Mustafa, Arshad Iqbal and Raza Iftikhar Ahmad selected the particular site at which the attack was launched as well as the manner in which it was carried out. As they were petitioner's agents at the spot, he cannot escape responsibility for their act, especially when the Court has held that he ought to have foreseen the probable consequence of his conspiracy which involved an attack with the automatic weapons of the Federal Security Force.

165. During the present proceedings a new point was urged by Mr. Yahya Bakhtiar that the alleged conspiracy was not necessarily to cause the murder of Ahmad Raza Kasuri by use of automatic weapons, as he could be killed by other methods. It is not only a new plea raised for the first time in review, but is also not borne out by the evidence on the record. In any case, the execution of the plan having been left to the Federal Security Force by the petitioner, and the persons who mounted the attack being

his agents, he must be held responsible for the method actually adopted by them to execute the conspiracy and its probable consequences.

166. We may now take up the contention that there is an error in applying section 109 in addition to section 111, P. P. C., while recording convictions against the petitioner. Section 111, P.P.C. lays down that when an act is abetted and a different act is done, the abettor is liable for the act done, "in the same manner and to the same extent as if he had directly abetted it". This section is, however, subject to the proviso that the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment. It may be seen that even if the act committed is a probable consequence of the abetment, this section by itself does not prescribe any punishment which is determined by reference to section 109, P.P.C. in case there be no other express provision prescribing punishment for the act abetted. This would show that in this case of murder the conviction of the petitioner under section 302 read with sections 109 and 111 of the Code was in order.

167. For the foregoing reasons we are of the view that the submissions made by Mr. Yahya Bakhtiar in relation to the application of section 111 of the Pakistan Penal Code, and other allied matters have no substance, and do not, in any manner, call for a modification of the majority judgment.

168. We may now take up the contention that having reaffirmed the rule laid down in the case of *Faiz Ahmad v. The State*<sup>669</sup> in regard to the effect of the non-supply to the defence of statements of prosecution witnesses recorded under section 161 of the Criminal Procedure Code during the course of investigation, the majority Judgment suffers from a patent error in not applying the rule to the facts of this case, and erroneously deciding neither to exclude the evidence of the prosecution witnesses concerned, nor to order a retrial of the petitioner on that account.

169. A reference to the Judgment of the majority shows that although Faiz Ahmad's case was considered to be a useful precedent which laid down the correct law on the subject, but it was also considered that some observations occurring therein were susceptible of different interpretations and it was necessary to formally lay down the procedure that should be followed in practice in such case, namely:

"(a) copies of the statement under section 161, Cr. P.C. of the witness, which has not been supplied to the accused, should be supplied to him and the said statement considered in juxtaposition with any other previous statement of the witness which had been supplied along with the statements made by him in Court including his cross-examination, to ascertain whether any prejudice has in

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<sup>669</sup> PLD 1960 SC 8

fact been caused to the accused. If after such comparison it appears that no prejudice has been caused the irregularity in not supplying the copies of the statement in question to the accused, as required under the law, would stand cured under section 537, Cr. P.C. and no further action shall be called for.

(b) If on making the comparison, referred to above, it transpires that the non-supply of the copies has resulted in prejudice then any of the following courses may be followed, depending on the facts of each case:-

- (i) the statement of the witness at the trial can be excluded; or
- (ii) the witness recalled and allowed to be cross-examined on the basis of the statement supplied; or
- (iii) a re-trial ordered."

170. It was in the light of the above principles that the situation arising owing to the no-supply of the 161 statements of the two approvers, Masood Mahmood and Ghulam Hussain as well as the 161 statement of Abdul Hayee Niazi/P. W. 34 was examined. The plea, therefore, that *Faiz Ahmad's case* was not applied in practice although the rule laid down therein was adopted in principle, is to overlook the fact that this Court had itself formulated a comprehensive rule to govern such situations, no doubt, by drawing assistance from the rule laid down in *Faiz Ahmad's case*. It is in the light of this clarification that the argument of Mr. Yahya Bakhtiar that in view of the rule laid down in *Faiz Ahmad's case* the statement of three prosecution witnesses recorded under section 161, Cr. P.C. during the course of investigation and not supplied to the defence must either be excluded or retrial ordered, needs to be considered.

171. It is to be noted, that in view of the formulation adopted by this Court on this question the statement could be excluded or retrial ordered only if it was found that the case did not fall under Item (a) of the rule as formulated above. It was held in the judgment of the majority that in view of the exhaustive cross-examination of the three witnesses on all aspects of the matter the non-supply of their statements under section 161, Cr. P.C. had not caused any prejudice to the case of the petitioner and, therefore, neither these witnesses were liable to be recalled for further cross-examination nor was it necessary to exclude their evidence or to order retrial as the matter fell within the scope of Item (a) of the above rule.

172. Mr. Yahya Bakhtiar also argued before us that when the case came up for herring on 21-12-1977 it was observed in open Court that the statements of these witnesses under section 161, Cr. P. C. did provide material for further cross-examination, and the Court had even asked the Special Public Prosecutor as to when the said witnesses would be available for this purpose. It was at this point, according to Mr. Yahya



Bakhtiar, that he felt that in view of the law laid down in *Faiz Ahmad's case*, the stage for recalling the witness for cross-examination had passed as the petitioner had successfully demonstrated that the irritable conclusion of prejudice had been strengthened, and that, therefore, after hearing him the Court decided not to recall the said three witnesses for further cross-examination. The above submission shows that Mr. Yahya Bakhtiar was not himself keen for the cross-examination of the witnesses on the assumption that their evidence was either likely to be excluded or a retrial ordered. However, no such indication was given by the Court. Furthermore, the Court also did not give any indication whether it was considering to recall for further cross-examination all or any one of the three witnesses in question. It had merely observed while addressing the prosecution counsel that in case any prosecution witness was to be recalled prosecution should be ready to do so on short notice in order to avoid delaying the hearing of the case. However, on further consideration all the Judges of the Court were unanimously of the view that it was not necessary to recall any of the witnesses, including Ghulam Hussain P. W. 31 in respect of whose evidence some discrepancies were pointed out (with regard to his statement made under section 161, Cr. P. C. and the statement made in Court), the majority was of this view for the reason that no useful purpose would be served by resummoning him for cross-examination as the discrepancies pointed out had been touched upon in one form or the other in cross-examination, while the other Judges were of the view that as no reliance could be placed on his testimony, therefore, it was not necessary to recall him. Thus a conscious decision was taken, after considering all the relevant facts, not to recall the witness for further cross-examination. In this view of the matter the attempt of the learned counsel for the petitioner to re-open the entire question by way of review is not permissible as this is outside the scope of the review jurisdiction.

173. So far as the other two witnesses, namely, Masood Mahmood and Abdul Hayee Niazi, are concerned, reasons have been given for not summoning them for cross-examination. These were, *inter alia*, that Masood Mahmood had been cross-examined at very great length and that the statement of Ahdul Hayee Niazi even according to Mr. Yahya Bakhtiar, was a concocted one. Accordingly the matter was held to fall within the scope of item (a) of the principles enunciated in regard to this matter by this Court, and we see no reason to review either the principles enunciated or the decision taken in pursuance thereof for which reasons were duly given. In fact this entire matter has been elaborately discussed in the majority Judgment from paragraphs 283 to 289. No error patent on the face of the record has been pointed out so as to induce us to review the findings contained in the aforesaid paragraphs.

174. We may now deal with the last submission made by Mr. Yahya Bakhtiar that, in any case, even if the conviction of the petitioner is maintained, it is a fit case where the lesser penalty should be awarded for the offence falling under section 302 of the Pakistan Penal Code read with sections 109 and 111 thereof, for the reasons that the petitioner is guilty only of abetment and was not present at the spot at the time of the

murder; that the conspiracy was to kill Ahmad Raza Kasuri and not his father who was hit by accident; that the conviction of the petitioner is based on the evidence of approvers; that there has arisen difference of opinion between the learned Judges of this Court as to the petitioner's guilt; that with the introduction of the Islamic laws in the country with effect from the 12th R. Auwal 1399 H. i.e. 10th of February, 1979) it would be anomalous to impose death penalty for unintentional murder specially when Shariat laws do not recognize an approver, and the witnesses have to fulfill strict qualifications as to integrity and character before their testimony can be acted upon; and that the fact that the petitioner was compelled to boycott the proceedings in the trial has also a bearing on the question of sentence.

175. We find that none of these questions was raised by the learned counsel during the hearing of the appeal although all these factors, except the difference of opinion among the members of the Bench as to the guilt of the petitioner were fully present on the record. The learned Judges in the High Court had devoted several paragraphs to the question of sentence and they were made the subject of debate during the hearing of the appeal. Mr. Yahya Bakhtiar had contended that paragraphs 610 to 616/ of the High Court Judgment regarding the personal beliefs of the appellant, and delivering a sermon as to the norms of conduct prescribed by Islam for a Muslim ruler, not only showed the bias of the Court against the appellant but were also completely irrelevant for the disposal of the case before the High Court. While the contention as to proof of bias was repelled, yet the second part of the contention was accepted, and the paragraphs in question were ordered to be expunged from the High Court judgment on the ground mentioned in paragraph 937 of the majority Judgment of this Court to the effect that paragraph 609 of the High Court judgment dealing with the circumstances of the crime and the responsibility of the petitioner, could logically have been followed by paragraph 617 of the Judgment, which consisted of just one line reading "the principal accused is thus liable to deterrent punishment". It will thus be seen that during the hearing of the appeal the question of sentence was very much present before the Court. It was, accordingly, the duty of the learned counsel for the petitioner to press all these points at the proper time. His explanation that at that time he was more concerned with obtaining an acquittal for the petitioner rather than pleading for mitigation of the sentence imposed on him by the High Court, is not worthy of acceptance, for in a criminal case the question of sentence is as important as that of conviction; and if nothing is urged on the point of sentence, it can be presumed that the defence has nothing to say in this behalf in case the conviction is maintained.

176. Now, as would appear from the precedent cases cited in an earlier part of this order while dealing with the question of the scope of review in a criminal case, it is well settled that if a legal sentence has been imposed after due consideration, then there is no error patent on the face of the record requiring correction in review in so far as the quantum of sentence is concerned. On this short ground alone the various submissions now made by Mr. Yahya Bakhtiar on this point are liable to be rejected.

177. Even otherwise, it is obvious that when the stage was reached for the majority of the Judges to consider the question of sentence, it had become abundantly clear that the case against the petitioner was based on the evidence of approvers, supported by corroboratory evidence; that the petitioner was being accused of only abetment by conspiracy, and there was no allegation that he was personally present at the spot at the time of the incident; that the conspiracy was to kill Ahmad Raza Kasuri and not his father who was hit by accident; and it was for both these reasons that the question of the application of sections 109, 111 and 301 of the Pakistan Penal Code was examined at considerable length. All these factors were undoubtedly present before the Court when the question of sentence was ultimately considered and decided in paragraph 933 of the Judgment, which *inter alia* states as under:-

"The facts summarized in the preceding paragraphs establish beyond any doubt that the appellant used the apparatus of Government, namely the agency of the Federal Security Force, for a political vendetta. This was diabolic misuse of the instruments of State power as the head of the administration. Instead of safeguarding the life and liberty of the citizens of Pakistan, he set about to destroy a political opponent by using the power of Federal Security Force, whose Director-General occupied a special position under him. Ahmad Raza Kasuri was pursued relentlessly in Islamabad and Lahore, until finally his father became the victim of the conspiracy, and Ahmad Raza Kasuri miraculously escaped. The power of the Prime Minister was then used to stifle proper investigation, and later to pressurize Ahmad Raza Kasuri into rejoining the Pakistan People's Party. All these facts go to show that there are no extenuating circumstances in favor of the appellant and the High Court was, accordingly, right in imposing the normal penalty sanctioned by law for the offence of murder as well as its abetment."

178. The correct position, therefore, is that the circumstances now urged in support of the lesser penalty by Mr. Yahya Bakhtiar were fully present to the mind of the Court at the time of determining the question of the propriety of the death sentence imposed by the trial Court on the petitioner. It is true that the cases now cited by the learned counsel in support of his submissions in review were not considered and discussed by the Court as they were not mentioned by the learned counsel himself. It would be absolutely outside the scope of review proceedings to embark upon a discussion of the precedent cases on these points, except to say that none of these cases supports the general proposition that in all cases based upon the evidence of approver or where the abettor is personally not present at the spot, or where a person other than the intended victim is killed, the sentence of death should not be imposed. There is no escape from the legal position that, in the ultimate analysis, the question whether the extreme penalty mentioned by law should be exacted or not has to be decided with reference to the peculiar facts of the case in point, and the lesser penalty is to be imposed only if

mitigating circumstances exist in favor of the accused. On this point the majority Judgment has clearly applied its mind and reached the conclusions reproduced above.

179. We are then left with the question whether a difference of opinion between the Judges comprising the appellate Bench, where the majority decides to uphold the conviction and death sentence and the minority records a Judgment of acquittal, provides sufficient justification for review of the sentence. In this behalf the first observation that needs to be made is that such a difference of opinion is not an error on the face of the record of the majority judgment, and for that reason it does not constitute a ground for review of that judgment. In the second place, even on merits, it appears that there is no binding rule of law, or even of prudence, that in the event of the conviction of an accused person being upheld by majority opinion in appeal, the sentence of death should automatically be converted into one of life imprisonment.

180. Mr. Yahya Bakhtiar drew our attention to a number of cases decided under section 378 and 429 of the Criminal Procedure Code where the Judges of the confirmation Bench were equally divided in their opinion either as to the guilt of the accused or as to the question of appropriate sentence, and argued that the rule adopted in such cases has been not to confirm the death sentence. He particularly mentioned *Empress v. Debi Singh*<sup>670</sup>, *Emperor v. Dukari Chandra Karmakar*<sup>671</sup>, *Pandurang v. State of Hyderabad*<sup>672</sup> and in *re: Narsiah and others*<sup>673</sup>.

181. It is correct that in these cases the view has been expressed that when one Judge differs from his brother Judge on the question of the weight of evidence as to the propriety of a conviction, the opinion of the Judge who is in favor of acquittal should prevail; and that in the event of a difference of opinion as to the proper sentence on account of the presence of mitigating circumstances the lesser penalty should be awarded.

182. However, these views were dissented from in a number of other cases, namely, *Empress v. Bunda*<sup>674</sup>, *In Re. Ravipati Sitaramayya*<sup>675</sup>, *In re: Repana alias Nagulu*<sup>676</sup>, *Babu and others v. The State of Utter Pradesh*<sup>677</sup>, *Khurdu and others v. The State*<sup>678</sup> and *Mohammad Bashir v. State*<sup>679</sup>.

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<sup>670</sup> 1886 AWN 275

<sup>671</sup> AIR 1930 CAL 193

<sup>672</sup> AIR 1955 SC 216

<sup>673</sup> AIR 1959 ANDH PRA. 313

<sup>674</sup> 1887 AWN 125

<sup>675</sup> AIR 1953 MAD. 61

<sup>676</sup> AR 1961 ANDH. PRA. 170

<sup>677</sup> AIR 1965 SC 1467

<sup>678</sup> PLD 1963 KAR. 92.

<sup>679</sup> PLD 1971 LAH. 708.

183. It is not necessary to quote at any length from these Judgments, except perhaps to refer to the opinion of Faruqi, J. in the Karachi case of *Khurdu and others*, to the effect that "having regard to the clear provisions of the two sections of the Code (namely, sections 378 and 429), which are identical, when the case is laid before the third Judge on difference of opinion the whole case is before him, and while there is no doubt that he is bound to give due consideration to the fact that another Judge of the same Court had reached the conclusion in favor of the accused, I am not prepared to say that he cannot hold otherwise except upon a finding that that view is perverse".

184. This view was reiterated by learned Judge of the Lahore High Court in the case of *Mohammad Bashir* mentioned above, and it was only upon his own examination of the mitigating circumstances that he arrived at the conclusion that the extreme penalty should not be exacted from the appellant before him.

185. Similarly the observations of the Indian Supreme Court in the case of *Babu and others* are also instructive. In that case a difference of opinion had arisen between the two Judges of the High Court comprising the Bench which was considering the matter of the confirmation of death sentences passed on four persons by the trial Judge. One of the Judges was in favor of upholding the convictions and sentences and dismissing the appeal, whereas the other Judge was in favor of acquitting them. On the matter being referred to the third Judge, the latter decided to uphold the convictions and sentences. The Supreme Court observed that "there seems to be some misapprehension about the manner in which the third Judge is required by law to proceed when there is a difference of opinion between two learned Judges in the High Court in the decision of an appeal. Section 429 contemplates that it is for the third Judge to decide on what points he shall hear arguments, if any, and that postulates that he is completely free in resolving the difference as he thinks fit".

186. On the question of sentence their Lordships expressed themselves thus:-

"It was next contended on the authority of *Pandurang v. State of Hyderabad*<sup>680</sup>, that as the two learned Judges have differed, the extreme penalty of the law should not be imposed. In the cited case the Judges had differed on the question of sentence itself and the third Judge before whom the matter was placed was in favor of the death penalty. Bose, J., in reducing the sentence to imprisonment for life, observed:

"But when appellate Judges, who agree on the question of guilt differ on that of sentence, it is usual not to impose the death penalty unless there are compelling reasons."

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<sup>680</sup> AIR 1955 SC 216

"This cannot be raised to the pedestal of a rule for that would leave the sentence to the determination of one Judge to the exclusion of the other."

187. On the same subject they also observed that "in our judgment each case must be decided on its own facts and a sentence of imprisonment for life can only be substituted if the facts justify that the extreme penalty of the law should not be imposed. We do not consider this to be such a case."

188. It would appear, therefore, that there is no recognized rule of prudence, much less of law, that if the Judges comprising the appellate Bench are equally divided as to the guilt of the accused and the matter is referred to a third Judge, then the latter must acquit the accused; nor there is any rule that if the equal division is in respect of the quantum of sentence, then the death penalty should not be imposed irrespective of the presence or absence of mitigating circumstances. In all such cases the decision must depend upon the independent appraisal of the third Judge as to the guilt of the accused in the first case, and as to the appropriate sentence in the second case. It is also to be noticed that these cases relate to an equal division of opinion on the question of sentence, and not where the conviction as well as sentence are upheld by majority opinion. In such situations the opinion of the majority has to prevail both on the point of guilt as well as of the quantum of sentence, the difference of opinion by itself not constituting an extenuating circumstance, nor would it constitute a ground for review.

189. There are several recent instances of our own Court in which sentences of death were upheld by majority. One may mention *Mehr Ali and others v. The State*<sup>681</sup>, *Misri Khan v. Kala Khan etc.*,<sup>682</sup> *Roshan and others v. The State*<sup>683</sup>, and *Noor Alam v. The State*<sup>684</sup>.

190. It may be stated that in the case of Mehr Ali Khan and others a review petition was filed, but the same was dismissed, and the Judgment is reported as 1968 SC MR 9. It was observed that "on principle it cannot be accepted that wherever there is a dissenting judgment the majority judgment becomes liable to review. Each judgment is based upon its own reasons and it is not necessary that a judgment should anticipate the point of dissent, if any, and deal with the same in advance".

191. Similarly a review petition was also filed in the case of Misri Khan and, as already stated, it was dismissed with the observation, *inter alia*, that the trial Court held that there were no extenuating circumstances in favor of the accused, and the learned counsel was not able to show that this conclusion was amenable to challenge for any substantial reason; and that, in any case, this objection was not taken in the appeal and, therefore, it could not be urged in review.

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<sup>681</sup> 1968 SC MR 161

<sup>682</sup> PLD 1977 SC 162

<sup>683</sup> PLD 1977 SC 557

<sup>684</sup> PLD 1978 SC 137

192. As observed by the learned Judges of the Indian Supreme Court in the case of *Vedivelu Thevar v. The State of Madras*, "if the Court is convinced about the truth of the prosecution story, conviction has to follow. "The question of sentence has to be determined, not with reference to the volume or character of the evidence adduced by the prosecution, but with reference to the fact whether there are any extenuating circumstances which can be said to mitigate the enormity of the crime. If the Court is satisfied that there are such mitigating circumstances, then it would be justified in imposing the lesser of the two sentences provided by law. In other words, the nature of the proof has nothing to do with the character of the punishment."

193. For the foregoing reasons we are of the view that the fact that the convictions and sentences recorded against the petitioner have been upheld by this Court according to the majority opinion, does not constitute a valid ground for review on the question of sentence. It is not an error apparent on the face of the record; nor is there any rule of prudence or of law that in the event of such a difference of opinion the sentence, though legal and imposed after due consideration of the relevant circumstances, should be reviewed for this reason alone.

194. Before parting with this aspect of the matter, it will not be out of place to mention that in regard to accused Ghulam Mustafa, all the seven Judges of the Court, have maintained the sentence of death awarded to him by the High Court, even though he was also not present at the spot at the time of the murder; his conviction was, at least partly, based on the evidence of approver Ghulam Hussain; and section 111 read with section 109, P.P.C. was also applied to his case. All the judgments delivered in the case state reasons for upholding the sentence of death passed against him. In some respects his case was, indeed, similar to that of the petitioner, if not exactly identical with one significant difference namely, that Ghulam Mustafa had no motive of his own even against Ahmad Raza Kasuri.

195. Now, as to the submission made by Mr. Yahya Bakhtiar with reference to the application of certain Shariat laws in Pakistan with effect from the 10th of February, 1979, it needs to be stated that the case of the petitioner was tried under the ordinary law of land obtaining prior to the 10th of February, 1979, that the appeal was also heard under the ordinary law, namely, the Pakistan Penal Code read with the relevant provisions of the Constitution of 1973; and even the judgment under review had been announced before the 10th of February, 1979, and that in the Shariat laws promulgated on 10th of February, 1979 the offence of murder had not been covered. Further, in the Constitution Amendment Order, 1979 (President's Order No. 3 of 1979) Article 203-D clearly stipulates that pending proceedings shall continue, and the point in issue therein shall be decided, in accordance with the law for the time being in force. In the circumstances, it is not permissible for us to embark upon a review of the question of sentence in this case with reference to certain provisions of the Shariat law, as those

provisions were not invoked or applied at any stage of the trial in the High Court or of the appeal proceedings in this Court, and have not been made applicable to pending proceedings.

196. A detailed examination of the lengthy submissions made by Mr. Yahya Bakhtiar in support of this Review Petition has left us in no doubt that this is nothing but an attempt to go over the same ground again as was elaborately discussed and covered during the hearing of the appeal. The errors and omissions pointed out by him, and discussed in the preceding paragraphs have been found by us to be of inconsequential import, having no material bearing upon the fundamental and essential conclusions reached in the majority Judgment as to the guilt, of the petitioner, on the various counts on which his convictions have been upheld, as well on the question of sentence.

197. As a result the review petition fails and is hereby dismissed.

198. Although we have not found it possible in law to review the sentence of death on the grounds urged by Mr. Yahya Bakhtiar, yet these are relevant for consideration by the executive authorities in the exercise of prerogative of mercy.

**ANWANRUL HAQ, C. J.** - I have had the benefit of perusing the well-considered order proposed to be delivered in this case by my learned brother Muhammad Akram, J. I agree that, for the reasons given by him, the review petition be dismissed.

**DORAB PATEL, J.** - Although this review petition has to be dismissed, I would like to make a few observations on the question of sentence.

As submitted by Mr. Yahya Bakhtiar, there are judgments in which capital punishment has been imposed only on the persons who have actually participated in the killing of the victim of the offence, and the lesser sentence has been imposed on the person or persons who have instigated or abetted the murder. Similarly there are judgments in which the lesser sentence has been imposed for murder on account of a cleavage of opinion in the Court which heard the appeal. But confining myself only to the reported judgments of this Court in the last three years to which I was a party, this principle was not followed in *Aminullah v. The State*<sup>685</sup>, in *Roshan and 4 others v. The State*<sup>686</sup>, and in *Noor Alam v. The State*<sup>687</sup>. Perhaps because the trend of authority in this Court in the last eight or ten years has been consistently against the proposition advanced by learned counsel, he placed great stress on the unusual cleavage of opinion in the instant case. Be that as it may, learned counsel's main stress was on the fact that even according to the prosecution it was not Mr. Bhutto who had fired the fatal shots at Mr. Kasuri's car and that in any event the victim of the offence was not the person whose murder Mr. Bhutto

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<sup>685</sup> PLD 1976 SC 629

<sup>686</sup> PLD 1977 SC 557

<sup>687</sup> PLD 1978 SC 137



had planned. But these are circumstances which, according to the settled law, were relevant to a plea for mitigation of sentence, therefore, learned counsel should have referred to them in his arguments before us in the appeal against Mr. Bhutto's conviction, the more so, as the question of sentence is a question in the discretion of the Court. I am also not aware of any case either of this Court or of the High Courts in which counsel for the appellant has, whilst challenging a conviction for murder, not addressed arguments in the alternative on the question of sentence. I, therefore, agree with the view of Akram, J., that the question of sentence cannot be raised in a review petition, and if we were to alter the sentence in this review, we would be unsettling the settled law. But, although we are thus precluded by law from going into the question of sentence, as observed by Akram, J., in the concluding paragraph of his order, the grounds relied upon by Mr. Yahya Bakhtiar for mitigation of sentence are relevant for consideration by the executive authorities in the exercise of their prerogative of clemency.

However, Mr. Yahya Bakhtiar's arguments on the question of sentence were without prejudice to his main submission, which was that the majority judgment suffered from errors apparent on the record which had resulted in the dismissal of Mr. Bhutto's appeal. Now learned counsel had addressed us for nearly two weeks on this question, but as he has failed to persuade the Judges, who pronounced the majority judgment of the Court, to revise the finding of guilt of the petitioner, it follows that the review petition must be dismissed. In these circumstances, consistently with judicial dignity and the practice of this Court, I do not think it would be proper for me to make any observation on learned counsel's submissions; and I would dismiss the petition for the reasons given herein.

**MUHAMMAD HALEEM, J.** - For the reasons given by my learned brother Dorab Patel, J., in his separate note, I agree that this petition be dismissed.

**G. SAFDAR SHAH, J.** - For the reasons given in the order proposed to be delivered by my learned brother, Dorab Patel, J., I agree that this petition be dismissed.

**KARAM ELAHEE CHAUHAN, J.** - Respectfully agreeing with the judgment of and following the reasons given by my learned brother Muhammad Akram, J., I dismiss this review petition.

**NASIM HASSAN SHAH, J.** - I respectfully agree with the judgment proposed to be delivered by my learned brother Muhammad Akram, J. and have nothing further to add.