

APPEAL AGAINST CONVICTION IN NIYOGI MURDER CASE

1. Written Arguments submitted by Mr. K.G. Kannabiran on behalf of the Prosecution, CBI
2. Written Arguments submitted by J.S.M Daud on behalf of Chattisgarh Mukti Morcha
3. Judgment of J. S.K. Dubey and J. Usha Shukla, M.P.High Court in Jabalpur, in Reference case of death Penalty to Paltan Mallah, acquitting the accused. Dt.26.6.1998
4. Judgment of J. S.K. Dubey and J. Usha Shukla, M.P.High Court in Jabalpur, in Appeals by accused, Moolchand Shah, Chandrakant Shah, Gyan Prakash Mishra, Awadhesh Rai and Abhay Kumar Singh against conviction in the Niyogi murder trial. High Court vide order dt. 26.6.1998 acquitted all

**IN THE HIGH COURT OF JUDICATURE, MADHYA PRADESH
AT JABALPUR**

Criminal Reference No. 5 of 1997

with

Criminal Appeal No. 1278 of 1997

and

Criminal Appeal No. 1371 of 1997

and

Criminal Appeal No. 1411 of 1997

and

Criminal Appeal No. 1422 of 1997

Paltan Mallah, A9 and others

Versus

State of Madhya Pradesh through C.B.I.

Criminal Appeal No. 1866 of 1997

filed by State of Madhya Pradesh

ARGUMENTS SUBMITTED ON BEHALF OF THE PROSECUTION

1. The matter before this Hon'ble Court is an unique case in the annals of Indian legal history. In a manner never before known, employers and their hirelings were chargesheeted for having conspired to murder a well known trade union leader, Shankar Guha Niyogi, and were found to have been guilty of the charges framed against them. Shankar

Guha Niyogi was one of those rare leaders who believed in exhibiting workers' might not through demonstration of muscle power, but through democratic methods. The pre-planned and carefully orchestrated murder, and subsequent attempt to evade arrest by the conspirators, had the effect of not only putting back the growth of the trade union movement in a backward, industrialising region, but also eroding the faith of all common citizens in the rule of law and democratic processes.

2. This case is one based solely on circumstantial evidence, and for a conspiracy charge there is seldom direct evidence. The court's perspective in a case of conspiracy is guided by clearcut principles evolved by the Hon'ble Supreme Court in various decisions over the years.

(i) There may be many devices and techniques adopted to achieve the common goal of conspiracy and there may be division of performances; there may also be plurality of means, sometimes even unknown to one another amongst the conspirators. The only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy notwithstanding some misfire or overshooting of some of the conspirators. (Yashpal^{Mittal} Vs. State of Punjab, AIR 1977 SC 2433, pa. 9).

(ii) The prosecution need not necessarily prove that the conspirators expressly agreed to do or cause to be done the illegal act. The agreement may be proved by necessary implication. Nor actual meeting of two persons is necessary. Nor is it necessary to prove the actual words of communication. The evidence as to transmission of thoughts, sharing the unlawful design may be sufficient. If the circumstances establish a tacit understanding that is sufficient. (Kehar Singh Vs. Delhi Administration, AIR 1988 SC 1883, pa. 272).

(iii) It is not open to the accused to take the plea that he should be judged only with regard to the part played by him. The entire agreement must be viewed as a whole and it has to be ascertained as to what in fact the conspirators intended to do and the object they wanted to achieve. (Lenart Schussler VS. Director of Enforcement, AIR 1970 SC 549, at

pa.9, pg.555) Further there is no requirement that each and every conspirator should perform some overt act towards the fulfilment of the object of the conspiracy. (Suresh Chandra Bahri Vs. State of Bihar, AIR 1994 SC 2420, pa. 96/pg.2460-61)

(iv) The conspiracy is a continuing offence and the operation of Sec. 10 of the Indian Evidence Act does not cease so long as the conspiracy continues. (Ajay Aggarwal Vs. Union of India, AIR 1993 SC 1637).

(v) The proper approach of courts to evaluate and appreciate evidence in a case involving circumstantial evidence is to examine whether the circumstances proved by the prosecution cumulatively form so complete a chain that there is no escape from the conclusion that within all human probability the crime was committed by the accused. It is not open to the defence to break the chain of circumstance and to show that there are various missing links in an effort to claim a benefit of doubt. (Laxmi Raj Shetty Vs. State of Tamil Nadu, AIR 1988 SC 1274 at pa. 24, pg. 1289). [See also 'Gokaraju Venkatanarasaraju Vs. State of Andhra Pradesh, 1993 Supp.(4) SCC 191, pa.9,pg.198-99.]

Further, it has been held that in a case involving circumstantial evidence it is not necessary that every link must appear on the surface. (Ram Avatar Vs. Delhi Administration, AIR 1985 SC 1692).

Background to the Conspiracy to Murder Niyogi

3. The incident took place in Bhilai town, the centre of steel production and iron ore mining. Despite the industrial concentration in Bhilai town in terms of the existence of the Bhilai Steel Plant and numerous other industries, the region itself is marked by a great degree of economic and social under-development and is overlaid with feudal practices. It was the prevalence of feudal relations in the industrial context that seems to have beckoned Shankar Guha Niyogi to organise the working class in Dalli Rajhara, to start with, where the iron ore mines are located. The success of the Chattisgarh Mukti Morcha (henceforth referred to as CMM), which he formed, and the resulting success he met with in his fight for

social and economic justice for the workers led to the workers in Bhilai inviting him to form a trade union and represent their interests. In 1989, the workers' agitation in ACC plant in Jamul in Bhilai led to a settlement in favour of the workers. This led to increasing invitations by workers of various establishments in Bhilai area to lead their struggles. The unflinching commitment and dedication to the workers' cause, so rarely to be found in post-independent India, created such a groundswell of demand for his presence that he was compelled to move to Bhilai. It was thus that he came to occupy Quarter No. MIG - 1/55, HUDCO, Bhilai with the office of the Chattisgarh Mukti Morcha at MIG-2/273, HUDCO, Bhilai. Niyogi's wife and children continued to stay at Danitola, near Rajhara.

4. The Simplex Group is the largest industrial group in Bhilai region after the ACC Ltd. Its various units are located in the police jurisdictions of Police Stations Jamul, Urla, Tedesara and Lalbagh. The different units are Simplex Castings in Urla (Raipur District) and Bhilai; Simplex Engineering and Foundry Works with units in Bhilai and Tedesara (Rajnandgaona). Moolchand Shah, A5, and Naveen Shah, A6, are Directors of the above companies. Chandrakant Shah, A1, manages Oswal Iron and Steel Private Limited. The main work of Oswal Industries is dependent on work entrusted by Simplex Castings. PW 26/PB 1472, K.S. Bhatia states in his evidence that most of the material for cutting and processing used to come from Simplex Castings. He also testifies that Naveen Shah, A6, owns Simplex Castings Ltd. Similarly it is the evidence of K.C. Mary, PW 32, who was working as Accounts Assistant in Oswal Iron and Steel Ltd., that job orders of Oswal was entrusted from Simplex company. She spoke to entries in the Job Register of Oswal Industries, Ex-P 122, which clearly reveals that the bulk of the work orders received by Oswal Industries was from Simplex company. It is pertinent to point out in this context that the financial state of Oswal Industries run by Chandrakant Shah, A1, was very much dependent on the work entrusted by Simplex Castings, and thereby when the Simplex company was affected due to industrial unrest, Oswal Industries, in turn also was affected. In this regard, reference may also be made to the evidence of PW 12, R.L. Tiwari, Manager of District

Industries Centre, Durg who speaks about the fact that Moolchand Shah, A5, and Naveen Shah, A6, were directors of Simplex Engineering and Foundry Works and also Simplex Castings Ltd. He also speaks about the details of companies managed by Chandrakant Shah, A1, Moolchand Shah, A5 and Naveen Shah, A6.

5. The noteworthy feature of the present case is the fact that the murder of Shankar Guha Niyogi took place within one year of his entering Bhilai and organising the workers, amongst others, of the Simplex group. It is on record that the first major industrial agitation launched by the CMM and Niyogi was on Vishwakarma Divas on 17.9.90. He was killed on 28.9.1991.

6. It is the consistent testimony of witnesses that the Simplex group have retrenched the maximum number of workmen and their wage levels are also low. That wages was one of the major demands put forward by the CMM is accepted by the Assistant Commissioner of Labour, R.G. Pandey, PW 65. The Sub Inspector, PC Tiwari, PS Lalbagh, PW 3, speaks about a complaint (Ex-P 29) being lodged by General Manager, Simplex Engineering and Foundry Works Ltd., Unit Rajnandgaon that the workers are carrying out an agitation. PW 6, Suresh Sen, SI of Police, PS Jamul, Bhilai, speaks of CMM workers shouting slogans when he was on duty on 1.1.1991 near the Simplex Unit Number 2. He also speaks of Shankar Guha Niyogi, the deceased, addressing the workers at around 1.30 p.m. on that day. The workers were raising slogans against the industrialists.

7. PW 7, S.L. Salaam, Town Inspector, spoke about the procession on 17.9.1990 taken out by the CMM and Chattisgarh Shramik Sangh against Simplex. The strength is described to be around 1,000 to 1,200 workers. The Simplex Company gates were closed and Gyan Prakash, A-2, was standing beside the gate with some workers. The demand made by Shankar Guha Niyogi was reinstatement of dismissed employees and regularisation of workers employed by the factory through contractors. PW 7 speaks about the imposition of prohibitory orders u/s 144 Cr.P.C. even on 14.11.1990 around the gates of Bhilai Engineering Corporation, Simplex Udyog, Simplex Castings and Simplex Engineering. Shankar

Guha Niyogi and his associates were prohibited from entering the area. PW 7 also stated that on 15.11.1990 again prohibitory orders were promulgated u/s 144 Cr.P.C. and a chalk line had been drawn to prohibit the workers from going near the industries. Shankar Guha Niyogi is said to have stated that he would not rest until he compels the Simplex management to concede to the demands of the workers (Ex-P 7). Importantly, PW 7, states that Niyogi had in his speech declared that he had not come to Bhilai to spread terror and that the industrialists are maligning him. He is reported to have further said that if the industrialists do not want the unrest they could come for a discussion. The speech delivered by Niyogi on 15.11.1990 is Ex. P-9 to the effect that his agitation was not against small industrialists but against the owners of Simplex and that he was giving 5 days' time to Naveen Shah, A6, Molchand Shah, A5 to think it over and negotiate with the CMM. It needs to be emphasised that PW 7 had personally witnessed and heard the speech of Niyogi in which he names Naveen Shah, A6, and Moolchand Shah, A5, on which basis he recorded GD entry, Ex-P 9 immediately on reaching the Police Station. In Ex-P 7, PW 7 makes GD entry to the effect that in a meeting at Kailash Nagar on 23.1.1991 Niyogi delivered a speech stating that he would rest only after he made Moolchand Shah, A5, Naveen Shah, A6 and Arvind Shah cow down. It is also stated that on 25.6.1991, and 26.6.1991 processions were taken out and meetings were held in Kailash Nagar and Ghasidas Nagar respectively. Further on 4.7.1991, Niyogi is reported to have made a provocative speech and is marked as Ex-P 10. On 7.8.1991, there was a massive meeting in Ghasidas Nagar protesting against the externment order against Niyogi. Thereafter on 15.8.1991 there was a massive procession and dharna in front of the Simplex Gate where Niyogi is reported to have spoken provocatively. On 26.8.1991 it was decided to observe 28.8.1991 as '*Dhikkar Divas*'. On 28.8.1991, a massive procession was organised against Moolchand Shah (A-5), and Kailashpati Kedia. On 4.9.1991 a public meeting was organised by CMM and Chattisgarh Shramik Sangh in Kailash Nagar Ground. Niyogi criticised the Government, the then Chief Minister for not conceding to the just demands of the workmen and for trying to break the

worker's movement by using knives and swords. The speech is marked as Ex-P20.

8. PW 8, Sub Inspector Parameshwar, of Police Chowki Urla, District Raipur, in which area Simplex Castings is located talks about the agitation led by CMM on 17.4.1991 and 20.4.1991 on the basis of the report (Ex-P 51) given by the General Manager of Simplex Castings, DV Singh, PW 147. According to PW 8, the agitation started in Urla was almost simultaneous with the agitation in Bhilai in 1991. He posted a security guard at the factory on the request of the Simplex Management. PW 9, another Sub-Inspector of Police, Vishram Prasad Banjare, also speaks about the procession in Bhilai against Simplex Engineering and Simplex Castings. In the processions taken out on 13.8.1991 and 20.8.1991 they shouted slogans in front of the gates of Simplex Udyog. They were protesting against the assault on a CMM activist Uma Shankar Rai. An ultimatum was also issued that if the criminals who assaulted Rai were not arrested within a week all the industrial establishments would be closed for three days. This was re-asserted on 22.8.91. On 26.8.91, a worker, Pawan Kumar (Not Examined; henceforth witnesses not examined will be referred to as NE) met the witness and gave a complaint over the fact that CMM workers were preventing other workers from attending I and II shifts in Simplex companies. The report is Ex-P 45.

9. Sudama Prasad, PW 54, is a CMM worker and contract labourer. He met accused Moolchand Shah, A5, with a list of demands of the workers. A5 refused to accept the demand letter. He also said that those workers who do not leave CMM will not be allowed to work in the factory.

10. PW 7, Inspector Salaam has testified to the fact that on 22.2.1990, one Shanti Lal Shrivatsava (NE) had given a written report to him that when he was returning from HUDCO at about 9.00 p.m. some people alighted from car bearing number, CIR 12, and threatened to attack him unless he took back his complaint against Moolchand Shah, A 5. The complaint is Ex-P5.

11. Surya Dev Verma, PW 10, has testified to the fact that on 17.9.1990, on the day

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of Vishwa Karma Pooja, when participating in a CMM procession, he was assaulted by unknown persons near Simplex Engineering. Though he was unable to see the assailants he sustained injuries and reported the same to the police.

9. Bharat Bhushan Pandey, PW 57, filed a complaint against Moolchand Shah, A5, that A5 had given his photograph and Rs.50,000/- to some goondas to attack him and kill prominent persons of the union. The complaint dated 1.9.1991 was lodged in Jamul Police Station and is Ex-P 48.

10. According to Rajendra Sail, PW 70, on 24.8.1991, workers sitting in a dharna outside Simplex Factory, Urla, were assaulted with swords, rods and lathis. PW 70 got them admitted in the hospital and had them treated for their injuries. He also reportedly took photographs and informed higher authorities about the incident. ✓

Strategy Adopted by Moolchand, A5 to Subdue and Contain Niyogi

11. The prosecution with a view to establish the animosity of the management towards the deceased and his union and the unceasing mobilisation of the workers by the deceased in the factory areas of the Simplex Group examined PW 13, and 6 to 9 who are police officers of P.S. Jamul, Lalbagh, Bhilai Bhatti, Urla Chowki Ex P1 to P 20 are entries from Daily Diary Reports of PS Jamul and PW 7 and 9 have spoken to about the contents of these exhibits. PW 7 spoke about a complaint by one Suryadevh a workman of Bhilai Wires who was beaten with lathies by unknown persons while he was in a CMM procession. Ex- P 42, 43 & 44 deal with this incident of 17 Sep.,1990. He speaks about the attack on Umashankar, an important member of CMM and the complaint of Bharat Bhushan Pandey covered by Ex- P 46, 47 & 48. Thus these Exhibits of PS Jamul essay the inexorable progress towards the murder of Niyogi. PW 9 was ASI, Jamul PS at the relevant period and he inter alia, spoke about the GD entries recording the protest against assault on Umashankar and also a complaint against workmen which are Exs-P 55 & 54 respectively. ✓

12. The prosecution produced evidence of civil proceedings to establish circum-

stances leading to the murder of Niyogi. The obstinate refusal to settle what was essentially an industrial dispute by the Shahs drove them to the Civil Court to seek an injunction, which if secured, would legitimate use of force by the police against the workmen. The civil courts in these matters have a no jurisdiction to intervene. This may not be material to the issues which arise in these proceedings, except as a link in the chain of circumstances. Such injunction orders very often provide cover for assaults on workmen.

The Reader, III Addl District Court, Durg, PW 4, produced the Civil Suit Register, the plaint and other records in the two suits, Ex-P 32 (PB pg. No. 499) and Ex-P 35 (PB pg. No. 517). Ex-P 32 and Ex-P 35 are the plaints in the two suits in which the plaintiff is Simplex Engineering and Foundry. Defendant No.18 and 20 in the 2 suits are Shankar Guha Niyogi apart from other important office bearers of the CMM, viz., Bhagwan Singh (Defendant No. 10), Dildar Singh (Defendant No. 11), M.H. Khan (Defendant No. 12) and Sudama Prasad (Defendant No. 15 and PW 54 in the present case), in the same order in both suits respectively. Para 5 of the plaint is the crucial paragraph where it is averred that "due to the illegal activities of the defendants the company is suffering loss of lakhs of rupees and is running at the loss of lakhs of rupees." On the basis of such assertions in the plaint and in the interlocutory application for ad interim injunction the court was persuaded to grant an interim injunction. The plaint averments are verified to be true on the basis of information and/or knowledge. The affidavit is a sworn statement attested by an advocate or other officer competent to attest documents. An averment in a plaint is a positive assertion, a positive statement of facts, which is different from argument or inference. The allegation in an affidavit is also an assertion of the existence of certain set of facts and no suitor can resile from these statements to suit his convenience or interest. It is not open to the accused now to dis-establish motive for murder to persuade the court to accept the argument that their concerns were never running on loss. It needs emphasis that after the injunction referred to above (Ex-P 33 / PB pg. No. 499-504; and Ex-P 36 / PB pg. No. 523) were obtained it was operative even till the date of the judgement of the trial court in the present case. It is not

open to the Accused now, to contend that their concern was not running at a loss.

13. The prosecution has collated certain circumstances which came to light during the course of investigation to establish motive for the crime. Evidence of prior incidents which have been taking place for over a year between the accused as employers, and the deceased as the leader of the workmen employed in the establishments of the accused, are offered as evidence to prove in conjunction with other facts, that these accused are guilty of the murder of Shankar Guha Niyogi.

Motive is a state of mind which induces a person to act in a particular way. Whether the belief which produces a state of mind is true or false, the motive remains the same and the truth or falsity of the belief is not really in question. What is sought to be highlighted by the prosecution is that the accused have unleashed against the Union and the deceased, both civil and criminal proceedings, not with a view to settle the issues according to law. They were launched without any regard to truth or respect for the system of administration of justice. There was an all out attempt to subdue the deceased and his union. The choice of this course of action does not respect law or legality, except in so far as these manage the atrocities unleashed by providing a thin veneer of legality for the chosen course of action ;right to life, freedom of association and right to collective bargaining and industrial peace are of no relevance. Special law for resolution of industrial disputes, which ensure suspension of all lockouts and strikes pending industrial adjudication was looked down upon in utter disdain. **The Contract Labour (Abolition And Regulation) Act** was abused to deprive workmen of their legitimate wages and permanency and security of tenure through the medium of a dummy contractor. In this the Shaha A1, A5 & A6 would have succeeded if Niyogi was a willing accomplice. He was not. What is more his impeccable and unswerving commitment to the cause of the working class and his adherence to non violent and legitimate forms of protest imparted to the officers in charge of these labour matters a certain amount of integrity while dealing with the issues raised by the Simplex Group. This comes out clearly in the evidence PW 65.

14. PW 65, was Assistant Labour Commissioner of Labour between 25 June 1990 and 29 July 1994. He states that trade unions are registered by the Registrar of Trade Unions. He briefly talks about the provisions which have to be complied with under **The Contract Labour (Abolition and Regulation) Act**. According to him Chattisgarh Shramik Sangh, Pragatisheel Engg. Shramik Sangh, and Pragatisheel Cement Shramik Sangh are registered unions. There was a charter of demands raised by Pragatisheel Shramik Sangh on 21-8-90. On 15-10-90 a list of employees who turned out of work were furnished by the Sangh. 32 inspections were carried out by him in Simplex group. Consequently he filed 27 cases. For violation of the provisions of **The Contract Labour (Abolition and Regulation) Act** 9 prosecutions have been initiated against the Simplex group. Against Bhilai Wires, out of five cases inspected three cases resulted in prosecution. He also speaks of violations in other industries. He had with him, when he was deposing, a list of retrenched employees. Regarding the charter of demands submitted by the workmen, joint meetings were called for by PW 65 on 21-10-90, 14-11-90, 27-11-90, and finally on 10-12-90. The Simplex Group Management did not attend any of these meetings. Obviously there has been no statutory response from the government on the failure report. This was due to the clout enjoyed by the accused with the government. That he had informed the government is elicited in cross examination. Once an industrial dispute is referred for adjudication the appropriate government may prohibit continuance of any strike or lock out. The power of the workers to withstand privations during periods of prolonged strike, the resistance to all attempts made by strike breakers, the unswerving faith and confidence in the leadership of Niyogi and the unstinted support given by the second rank leaders despite physical assaults and death threats to some of them left these accused with no other option but to conspire to physically liquidate Niyogi.

15. The prosecution has let in sufficient evidence to show that the maximum number of workers in Bhilai who were either retrenched or dismissed belonged to the Simplex group of industries. It is in the evidence of Sudama Prasad, PW 54, that Moolchand Shah,

A5, refused to take back workers unless they dissociated themselves from CMM. In fact this witness would state that Moolchand Shah refused to accept the demand letter. This stubborn resistance to any resolution of conflict is also evidenced by the testimony of PW 65, the Assistant Commissioner of Labour, R.G. Pande. These facts would bring out clearly the rancour and animosity on the part of A5, Moolchand Shah and A6, Naveen Shah, against Niyogi and his trade union, CMM. That this is not mere rancour or animosity but intended to be acted upon is evident from the recoveries made by R.S.Prasad, PW 192, from A5's house situated in Simplex Colony, Durg, made on 18.11.91 where the documents and other materials recovered under seizure memo, Ex-P 281 establishes the existence of conspiracy of which Moolchand Shah is also a part. Under seizure memo, Ex-P 281, Exs-P 261 to P-266, were seized and were proved by PW 192, the I.O., R.S. Prasad and the independent search witness, H.C. Kapur, PW 154/16. One of the most important document that was seized was Ex-P 261/PB 787, which is a 'Confidential Note on Shankar Guha Niyogi' and is also a psycho-profile of Niyogi's personality, his influence and his resources. It also sets down in a very callous manner methods to eliminate or reduce Niyogi's influence in the area. We would like to draw the attention of the court to a few significant aspects of Ex-P 261 at PB pgs. 787-790.

- 1."His dictatorial working cannot bring any success to him in the areas in which he had direct confrontation with the managements. ... He is more successful in triangular fights with one of the parties viz., the contractor or principal employer like the proverbial monkey and cats story. But in a direct confrontation he loses the battle due to his admancy of approach .. Niyogi believes in the art of bargain and would be content with whatever he may secure in instalments for the workers from the employers so as to keep alive his image as a breadwinner trade unionist (para 2)".
2. The Note stresses that for dealing with Niyogi there should not be any hasty action (para 6(b));
3. Rival trade unions should be given importance (para 6(c));

4.sub-ordinate police officers who give information to Niyogi and sympathise with him should be got transferred (para 6(e));

5.that in collaboration with the police, action must be taken to execute arrest warrants in all cases in which Niyogi is named as accused in cases pending at Balod, Durg, Rajnandgaon and Bilaspur so that "Niyogi shall be required to be present in all cases and in that case he shall have no time to strengthen his position".(para 6(f)

6.if the financial source of Niyogi is sealed, then he would come to a situation of starvation. (Para 6(I) & (j));

7."In order to minimise the image of Niyogi, it is necessary to find out his relation with foreign organisations and it should be published in newspapers" (Para 6(k)).

It is very clear that the Confidential Note seized (Ex-P 261) is in the nature of a Master Strategy Plan to destroy the basis of Niyogi's functioning which is so broad based that it includes plans covering character assassination, financial emasculation of the union, wearing him down by sheer abuse of legal processes, openly exhibited manipulation of state machinery to secure their nefarious ends and manipulating adverse publicity through disinformation campaigns. Another aspect that needs to be highlighted is that the Confidential Note is composed of parallel strands of actions, each strategy complementing or supplementing the other, which together is meant to achieve the end result, of destroying Niyogi and his trade union, the CMM.

It may be stressed here that the different strategies adopted to contain Niyogi and the CMM can be traced to the strategies outlined in the Confidential Note, Ex-P 261. For example the non-response to conciliation can be traced to one of facets outlined in Para 2 which states that Niyogi will not be able to sustain direct confrontation. Similarly the attacks on individual workers can be traced to Para 2 and 6(f). Also the maligning pamphlets can be related to strategy outlined in para 6(d) of the Confidential Note.

There is clear evidence before the court that many strategies discussed in the Confidential Note had been executed by the Accused. Ex-P 262 is a list of 32 cases against

Niyogi and office bearers of CMM and was found in the house of Moolchand Shah, A5. When one compares this with Para 6(f) at PB pg. 689 of the Confidential Note, and further consider the fact that Shankar Guha Niyogi was actually arrested and kept in jail between 4th February, 1991 and 3rd April, 1991 on account of non-appearance in various cases in which he was implicated it is clear that at least one strategy outlined in the Confidential Note had been successfully implemented. The internal consistency in the evidence before the court also leads to another inference, viz., that the Confidential Note must have been prepared prior to the arrest of Niyogi effected in February, 1991. The intrinsic evidence also suggests that the document did not come, and in fact could not have come into existence after the return of Ketan Shah, PW 98, the son of Moolchand Shah, A5, from the US and joining the company in August, 1991.

This reasoning is further fortified by considering Para 5(d) at PB pg. 788 which speaks of the TV coverage of Niyogi "during recent elections on TV network". There were two elections before Niyogi's death. One in the month of May, 1991 which was marked by the assassination of ex-PM Rajiv Gandhi, and the general elections held in end-1989. The recent elections are referable only to the general elections of end-1989. This can be deduced by considering the fact that Para 6(f) talks of getting Niyogi imprisoned in all criminal cases he was implicated in pursuant to which he was arrested in February, 1991. The recovery from Moolchand, A1's house of the list of 32 cases Niyogi was involved in, Ex-P 262/PB 791, reveals the involvement of A5 in the same. All these internal evidences clearly indicate that the "recent elections" referred to in Para 5(d) could only refer to 1989 elections. Thus the document Ex-P 261 must have come into existence prior to the arrest of Niyogi in February, 1991.

17. Much has been made by the Accused about the fact that Ketan Shah, PW 98, who was summoned by the Prosecution, has stated in the witness box that the Confidential Note, Ex-P 261, was prepared by him after getting material from the Time Office. The sheer improbability, and therefore untruthfulness, of this statement, and the fact that this was

made purely for the purpose of shielding the accused in this case, can be gauged by considering the fact that he was a newcomer to the business having stayed abroad in the US from 1989 onwards until 1991. It was only in August, 1991 that he took the position of Manager in the Simplex group. In fact when these documents were seized a detailed statement was recorded in Seizure memo Ex-P 281. It is necessary here to point out that Moolchand, A5, was present with his wife and also signed the seizure memo and received a copy. He did not raise any objection to the search in Ketan Shah, PW 98's room who claimed in the witness stand that the room from which the documents were recovered were within his exclusive possession. It is necessary to note that Moolchand Shah, A5, did not protest at that time that the I.O. should not enter and seize documents from the portion which is now claimed to be under the exclusive possession of Ketan Shah, PW 98. Nor was there any cross-examination when H.C. Kapur, Senior Branch Manager, LIC Bhilai, PW 155 testified as to the seizure in the court. This line of cross-examination was not adopted when the I.O., PW 192, R.S. Prasad was giving evidence, amongst other things, regarding the articles seized from Moolchand Shah, A5's residence. Even in his 313 Cr.P.C. statement he did not come forward with the theory that Ex-P 261 was authored by his son. Nor did he tell the court that he did not have anything to do with the exhibits seized from his house. His statement u/s 313 Cr.P.C. is contrary to the evidence given by his own son, because Moolchand, A5, says in his statement to the court that search and seizures were effected in his house and Ketan Shah's house (PW 98), whereas Ketan Shah, PW 98, in his evidence states that he is the occupant of one room in the first floor of his father's house. In all these documents seized, including Ex-P 261, Moolchand Shah, A5, has signed. It is crucial here to note that at the time of search and seizure on 18.11.1991, Ketan Shah, PW 98, was present and he did not protest against the search and seizure from his room. Further in his cross-examination at para 8 (PB pg. 1777) he has stated that in his presence signatures of his father and mother were obtained on the documents seized from the room in his occupation. The fact that he did not protest when Ex-P 261 was seized from his room alone falsifies his claim in the court,

apart from other circumstances. It is pertinent to point out here that he was summoned as Prosecution Witness to prove his father's handwriting in Ex-P 260 (Letter from A5 to CBI from Bombay when summoned to appear before the latter) and Ex-P 116 (incomplete letter addressed to the Home Minister in the handwriting of A5).

It is a cardinal rule of evidence that all that is stated in the witness box by a witness need not be accepted in toto. Nor does any rule of evidence bar the prosecution to point out discrepancies which are likely to prevent emergence of truth, for in a prosecution the Public Prosecutor does not play an adversarial role. The effort always is to be to place the truth before the court, and therefore to help the court assessing the evidence accordingly. Additionally we have already pointed out how the various aspects mentioned in Ex-P 261 have in fact been carried out, including that aspect of the note which deals with execution of the warrants in all cases against Niyogi and his arrest and incarceration in jail for two months between February-April, 1991. Thus, according to the prosecution, Ex-P 261, must have come into existence much before February, 1991. All this compellingly disproves his claim in cross-examination that Ketan Shah, PW 98, is the author of Ex-P 261, the Confidential Note.

18. Another aspect that needs to be stressed upon is the incomplete letter, Ex-P 116, addressed to the Home Minister in the hand of A5, Moolchand Shah. The contents of the letter itself clearly establishes the intention of A5 to falsely portray Niyogi as a Naxalite, knowing fully well that the State is beset with the problems posed by the naxalite movement and that strong reaction is bound to result. The only inference that can be drawn of the letter being left unfinished is that A5 stopped looking towards the State for help in the fight against Niyogi as by then the plan for liquidating Niyogi had already been hatched.

When examining the evidentiary value of Ex-P 116 we may also look at the visit to Nepal in March, 1991, by A1,2,3, and 4 to procure foreign made weapons with which to finish Niyogi. When these aspects are considered alongwith Ex-P 116, it is clear that the letter was left unfinished, as the plan to finish off Niyogi had been hatched, agreed upon and

action taken to execute it. This unfinished letter is yet another circumstance in this case, in proof of conspiracy.

19. The facts spoken to by witnesses as set out above and the documents exhibited in the course of evidence of these witnesses establish the growing animosity of the 5th Accused, Moolchand Shah, and his associates, Naveen Shah, A6, and Chandrakant Shah, A1 towards the activities of the CMM and the need felt by them to somehow suppress the growing trade union movement by using their henchmen Gyan Prakash, A2, Avadesh Rai, A3 and Abhay Singh, A4. In the beginning, the offensive took the shape of tiring the workers by not yielding to their demands and thereby forcing them to launch agitations during which course, they were attacked, threatened and intimidated from participating in the union struggles. Attempts were also made to implicate them in false criminal cases and to pressurise the administration to declare prohibitory orders u/s 144 Cr.P.C. thereby preventing the workers and the CMM from agitating before the Simplex factories. When such strategies to curb the movement did not succeed, individual terrorism of workers and selected leaders by way of armed assaults and attacks were indulged in. When however even these measures did not prove effective in thwarting the CMM in particular, or the leading role of deceased Shankar Guha Niyogi, the desperate Simplex owners decided that the only effective way to suppress the movement was to do away with the person of Shankar Guha Niyogi himself. Having arrived at the above conclusion, they set about conspiring to physically liquidate the deceased.

Coming to light of Conspiracy to Murder Niyogi

20. Niyogi was in detention in Durg Jail between 4-2-91 and 3-4-91. There in the jail he came to know that a conspiracy was afoot to kill him. Soon after his release he received a letter on 29-4-91 in Dalli-Rajhara Ex-P103 warning him about the conspiracy. Chandrakant-A1 has been entrusted with the task. It mentions about his trip abroad and to Nepal with some persons. It talks about purchase of weapons. The killing according to the letter was planned to take place in Chandrakant's absence. This is an anonymous letter

which brought conspiracy into the open. When this was sent to the police, Ex-P103 became credible information in their hands. (i.e. of the police). (Ex-P 49 and P-50 are the covering letter and photocopy of the letter received). The contents of this letter get corroborated and in turn corroborate evidence unearthed later. While Ex-P 103 bears the character of hearsay evidence, it is not the law that all hearsay evidence should be eschewed from record. If Ex-P 103 is linked to murder of Niyogi it may not qualify as *Res Gestae*. But if it is linked to conspiracy to murder Niyogi then it qualifies to be an exception to hearsay rule. As conspiracy is a distinct offence the statement contained in Ex-P 103 would be admissible as '*Res Gestae*'.

21. The principle of '*Res Gestae*' is roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale of certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not res gestae. It needs to be mentioned that statement refers both to oral and written statement.

The Privy Council while considering the extent upto which the rule of res gestae can be allowed as an exception to the inhibition against hearsay evidence, has observed in '*Teper v Reoinam*' (1952)2 ALLER 447) thus

''The rule that in a criminal trial hearsay evidence is admissible if it forms part of *res gestae* is based on the propositions that human utterance is both a fact and a means of communication and that human action may be so interwoven that the significance of the action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of truth. It is essential that the words that are sought to be proved by hearsay should be, if not

absolutely contemporaneous with the action or event, at least so clearly associated with it that they are part of the thing being done, and so an item or part of the real evidence and not merely a reported statement."

[Reffd. to in '**Gentela Vijayavardhana Rao vs State of AP**'.(AIR 1996 SC 2791 at para 15/pg. 2793)]. This statement of law set out by the Supreme Court fully supports the case of the prosecution on this aspect of the case. Ex-P103 is contemporaneous to the conspiracy , and as conspiracy is a continuing offence its contemporaneity does not get diminished as in other offences.

22. It is unfortunate that Ex-P 103 was not acted upon until it proved itself to be true. What was intended to be a warning later provided a clue for investigation. How this document led to the unfolding of the conspiracy leading to the murder of Niyogi is an interesting study on circumstantial evidence and its unimpeachable quality in the proof of guilt. The informant in Ex-P 103 had to wait till Niyogi was released. The letter, Ex-P 103 is important for revealing three types of information : (I) that there was a conspiracy to kill Niyogi; (ii) that with reference to this Chandrakant Shah, A1, and others had gone to Nepal in March, 1991 to purchase foreign made weapons; and (iii) that after completing arrangements, Chandrakant Shah, A1, was to leave for a foreign trip, the inference being that he should not be around at the time when the assassination takes place.

Nepal Trip : In furtherance of Conspiracy

23. The letter addressed to Niyogi, Ex-P 103, was received on 29.4.91 at the union office and the trip to Nepal took place in the first fortnight of March, 1991. The visit to Nepal is unfolded by the evidence of Ravi Kumar Mendeh PW 91 who is a driver of Surajmull Jain PW 92. At the request of A1 the latter lent the services of PW 91 to A1. A1 along with A3 left in the Tempo Traveller owned by A1 to Nepal in the company of A4. PW 91 gives the route they traversed and the villages and towns they pass through until they reach Khalispur. In Khalispur they halted for the night in A3's house . In the early hours of the

morning they left for Birganj in Nepal where they stayed in Hotel Kailash. There they met Gyan Prakash Mishra, A2. They stayed in Birganj for two days and thereafter left for Kathmandu.

A1 to A4 stayed in Hotel Janak in Kathmandu. Ravikumar Mende, PW 91, A3 and A4 occupied one room, and A1 and A2 occupied another room. PW 91 gave this evidence regarding the journey to Birganj and Kathmandu and stay in hotels in both places, although he turned hostile at the stage of eliciting information regarding purchase of weapons including the statement under Sec 164 Cr.P.C. Thus the fact that A1 to A4 were in Birganj and Kathmandu in the month of March is established by the prosecution. Though PW 91 resiled from that part of his statement dealing with purchase of weapons from Nepal, and was declared hostile, his evidence cannot be rejected in toto. The grant of permission by the court does not amount to an adjudication by the court as to the veracity of the witness. '**Sat Paul vs Delhi Administration**', (AIR 1976 SC 980) The evidence of a hostile witness cannot be treated as washed off the record. It is always open to the court to accept that part of the evidence that inspires confidence and finds support from other evidence. These principles have been repeatedly reiterated in several decisions, vide '**Khujji alias Surendra Tiwari vs State of Madhya Pradesh**'. (AIR 1991 SC 1853) and '**State of U. P Vs Ramesh Prasad Mishra**', (AIR 1996 SC 2766 (1996) 10 SCC360) [the decision the learned trial judge relied on]. The learned Trial Judge proceeded to assess the other evidence on record regarding the purchase of arms in Nepal.

24. The CBI searched the residence of A1 Chandrakant Shah, Annu Villa 21/24 Nehru Nagar Bhilai on 12-11-91 where they recovered, inter alia, a bill, Ex P-393(8) of a provision store Madhuban in Nepal dated 11.3.91 vide Seizure Memo, Ex-P 393. On the reverse of this bill were noted the names and prices of foreign made fire arms. The handwriting on the bill Ex-P 393(8) is proved to be that of A2 Gyan Prakash Mishra as found by handwriting expert Dr. Mittal, PW 160. During the course of the search A1's passport was seized. His visits to Switzerland, Germany and Netherlands is borne out by the entry in the

passport.

Thus Ex-P 103, the evidence of PW 91, Ex-P 393 (8) which contained the names of foreign made fire arms and their prices in the handwriting of A2, prove the visit to Nepal by all the four accused, A1 to A4, for the purchase of foreign weapons in furtherance of the conspiracy to kill Niyogi.

25. The evidence regarding the visit of A1 to A4 to Nepal is strengthened by the evidence of PW 150, Shambu Prasad Choulagai, receptionist of Hotel Janak, near Kathmandu, Nepal. It is his clear testimony that the four accused were booked in the hotel in the name of Chandrakant Bhai and party. The hotel Room Chart, Ex-P 382 reveals that the accused were allotted room numbers G-2 and G-4 and stayed between 9.3.91 and 13.3.91. Ex-P 381 is telephone bill for telephone calls made from the hotel and Ex-P 383 is the hotel Registration Form. All these clearly reveal that the accused were in Nepal between 9.3.91 and 13.3.91. The bill of Madhuban Provision Stores, Ex-P 393(8) is dated 11.3.91, which is during the period the accused stayed in Nepal. Thus the evidence presented by the prosecution clearly establish that the accused were in Nepal in the first fortnight of March, 1991. It also proves that the accused A1 to A4 went to Nepal to purchase foreign made fire arms in pursuance of the conspiracy to murder Shankar Guha Niyogi.

26. The visit to Nepal by A1 to A4 stands unrebutted. None of the accused individually took the position that they did not accompany A1 to Nepal by denying their stay at Hotel Kailash in Birganj or their stay in Hotel Janak in Kathmandu, as deposed by PW 91 and PW 150. A2 did not cross examine PW 91 about his visit to Nepal and his staying in Birganj and Kathmandu with A1 A3 & A4. The bill of Madhuban provision stores, Ex P-393(8), dated 11.3.1991, on the reverse of which the handwriting of A2 is found fixes the presence A2 in Nepal and the seizure of this exhibit from the residence of A1 under seizure memo Ex-P 393 by PW 192, I.O., R.S. Prasad, confirms the role entrusted to A1. This recovery corroborates the evidence regarding Chandrakant, A1's organising the visit to Nepal. The very fact that A1 requisitioned the driver PW 91 though he has drivers working

in his establishments is an adverse circumstance which also has not been explained. A feeble and an obvious explanation was sought to be offered without any basis that the visit to Nepal was a pilgrimage to Lord Pasupathinath at Kathmandu. Visiting Pasupathinath temple while in Kathmandu is entirely different from going on a pilgrimage to Nepal.

What should be noticed here is that Chandrakant Shah, A1, a businessman occupying a higher social status should be found in the company of A2, A3 and A4 who are of considerably lower social standing and who also have a criminal record as revealed by evidence let in by the prosecution. While in Kathmandu for the purpose of purchasing foreign firearms, the visit by the accused to Pasupathinath temple, even if true, cannot be equated with regular pilgrimage as commonly understood.

While the prosecution has placed before the Hon'ble Court all facts leading to the only inference that A1 to A4 visited Nepal for purposes of planning the effective execution of their plan to liquidate Niyogi we also wish to point out the total absence of a credible alternative version to the accusation of the offence of conspiracy. A further aspect that lends substance to the prosecution's story is the admission u/s 313 Cr.P.C. by A4, Abhay Singh, that he had travelled to Nepal in the company of Chandrakant Shah, A1 and Avdesh Rai, A3 and that Gyan Prakash, A2 had already left for Nepal. This aspect has been referred to by the Learned Trial Judge at para 29 of the trial court's judgement. The other accused have also admitted their travel to Nepal.

27. The inference that can be drawn from the visit to Birganj and Kathmandu and the presumption that can be drawn from these facts is that the main object of the trip to Nepal by Chandrakant, A1, Gyan Prakash, A2, Avadesh Rai, A3 and Abhay Singh, A4 was for the purchase of foreign made firearms pursuant to the conspiracy to liquidate Niyogi. The fact that foreign firearms were in fact purchased has been established by the prosecution through the disclosure statement of Paltan Mallah, A9 in Ex-P 285 (as stated by Umesh Chandra Mishra, PW 125, and Dinesh Baloni, PW 104, witness to recovery) leading to the recovery of a .380 American revolver which is marked before the court as W2. It should be pointed

out that the serial number of this revolver had been erased and further that 6 (six) .380 cartridges were found at the same time. The forensic expert Dr. Rup Singh, PW 159, found the revolver to be in working order and the cartridges to be live ones. (Ex-P 397/PB pg. 1187). Similarly the recovery of a foreign firearm based on the disclosure statement of Gyan Prakash, A2, (Ex-P 224 and Ex-P 225) from the house of Devendra Patni on 13.10.91 also proves the prosecution allegation. It is submitted that this aspect of the prosecution case is left unassailed. All that has been done is to hurl accusations against the Investigating agency.

28. Notwithstanding the general burden on the prosecution, the court "may presume under Section 114 of the Evidence Act the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events in their relation to the facts of the particular case. The illustrations are not exhaustive". **'Kaliram Vs State of Himachal Pradesh'**; (AIR 1979 SC 2773). We also refer this Hon'ble court to a recent decision reported in AIR 1997 SC 1830 '**Balram Prasad Agarwal vs State of Bihar**' wherein there is a discussion on hearsay evidence at para 11 and on presumption under Section 114 at paras 12 & 13 of the report. (Note : By oversight these citations were not read before this Hon'ble Court at the time of arguments).

29. We submit that it is impossible to secure direct evidence for proving conspiracy. The very hackneyed way of describing this offence is that it is shrouded in secrecy and the effort has always been to leave no track from start to finish. As the business of law is to track down offenders and in view of the difficulties one encounters in detecting and investigating conspiracy a departure had to be made from the normal rules of evidence for proving conspiracy and section 10 of the Evidence Act embodies the departure. In view of these hurdles the offence can only be proved largely from the inferences drawn from acts or illegal omissions committed by the conspirators in pursuance of their common design. The Supreme Court in '**Yashpal Mittal vs State of Punjab**' (AIR 1977 SC 2433) pointed out:

"It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are coparticipants in the main object of the conspiracy.

There may be so many devices to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in each one of them must be interested. There must be unity of object or purpose but there may be plurality of means, sometimes unknown to one another amongst the conspirators. In achieving the goal several offences may be committed by some conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts done must be purported to be in furtherance of the objects of the conspiracy even though there may be sometimes mis-fire or overshooting by some of the conspirators. Even if some steps are resorted to by one or two of the conspirators without knowledge of the others it will not affect the culpability of those others when they are associated with the conspiracy".

30. We have already referred to Ex-P 393 (8) recovered from the house of A1 on 12-11-91 under seizure memo Ex-P 393. We now set out the entries made by A2 on the reverse of the Bill, of Madhuban Hotel, Kathmandu, Nepal, dated: 11-3-91 as it is found in the original.

30 Mauser gun - 3500/-;

(2)

32 Balthar with silencer - 40000/-

(1) USA;

32 Webley Scot pistol -2500/-;

(1)

9mm U.S.A. pistol - 30000/-.

(1)

Undoubtedly these are reference to foreign firearms and the handwriting is proved to be that of A2. The exhibit-bill Ex-P 393(8) was found in the house of A1. It needs to be stressed here that the intention of the trip to Nepal was to purchase foreign made firearms and the list on the reverse of Madhuban bill, Ex-P 393(8) is evidence of the fact that they were shopping for foreign made firearms and the actual purchase is not limited or confined to the makes listed above.

31. Gyan Prakash, A2, sought to attack the veracity of Ex-P 393(8) by putting forth the contention that the writing on the reverse of Madhuban bill detailing the makes and prices of foreign made firearms was in the handwriting of PW 169, Bhattacharyya. While Bhattacharyya was in the witness stand, an application by the Accused was allowed by the Trial Court to obtain specimen hand writing of PW 169, Ex-D 50 A,B, and C (at PB 3214), for having them sent to the handwriting expert for analysis. However after this assertion they did not follow with sending the specimen hand writing for being examined by an expert vis-a-vis Ex-P 393(8). Interestingly the Accused in his S. 313 Cr.P.C. statement stated that the top two entries were made by him and the latter two entries were in the hand of PW 169. From these facts adverse inference has to be drawn against the accused Gyan Prakash Mishra, A2, and therefore the handwriting in the document stands proved as that of the handwriting of Gyan Prakash Mishra, A2 as confirmed by handwriting expert, Dr. Mittal, PW 160. Thus Ex-P 393(8) proves that the purpose of the Nepal trip by A1, A2, A3 and A4 was for the purchase of foreign made arms and that in fact foreign made firearms were purchased as is evidenced by the subsequent seizures from Devendra Patni at the instance of Gyan Prakash Mishra, A2 (ref.: Ex-P 224 and Ex-P 225 already referred before) and Paltan Mallah (Ref.: Ex-P 285).

Other Recoveries from A1's House : Their Significance

32. Among the other recoveries from A1's residence were a Nepali Khukri and mis-fired .32 cartridge. Significantly a number of documents were recovered which showed the nature of intimacy between A1 and A2, and which also reveals that Gyan Prakash, A2, is a

henchman of Chandrakant Shah, A1 who would do anything for A1 including giving up his life. (Ex-P 393(13)). Important among the documents seized are Ex-P 393(9) to Ex-P 393(13). All these exhibits are letters linking A1 and A2. The last two of these letters vow loyalty to A1. Ex-P 447 to Ex-P 449 establish the concern of A1 in the activities of A2. They are complaints made by Prabhunath Mishra, the brother of A2 against a police officer to the Chief Minister, complaint filed by A2 against a police officer before the magistrate etc.

33. In the search of the premises of Oswal Iron & Steel (P) Ltd, A1's passport evidencing his journey to Switzerland, Netherlands and Germany was found. These entries in the passport confirms the information furnished by Ex-P 103.

34. In the course of the search a slip of paper Ex-P 239 was recovered in which were noted the registration number of the vehicles which were used by Niyogi for his moving about. Fiat car MIR 227 belonged to Dr.Punyavrata Gun, PW60 and the jeep MPT 7971 belonged to the trade union, CMM. It is thus clear that the accused were keeping track of the movements of Niyogi and the vehicles used by him. The only inference that may be drawn, in view of other circumstances already set out, is that the intention of the accused was to plan an attack on Niyogi.

35. Ex-P 239 also contained the names of four important CMM activists M.H. Khan, Dildar Singh, Bhagwan Das and Sudama. Significantly, these are the same 4 persons who are also named as Defendants 10, 11, 12 and 15 in the 2 suits filed by Simplex Engineering in the District Court, Durg, referred to earlier. They are also employees of Simplex. The names are written in the handwriting of A1, Chandrakant Shah, and were found by the handwriting expert, PW 160, Dr. Mittal to have been written by him (A1). This establishes the fact that Chandrakant Shah, A1, was very much part of the Simplex group and played an active role in ensuring that the conspiracy to assassinate Niyogi ended successfully.

In the search conducted in the office of Chandrakant Shah A1, ie "Jain and Shah" at Akash Ganga Complex, PW 192, the Investigating Officer recovered six torn pieces of paper, Ex-P 298, containing handwriting which when pasted together and translated into

English reads as below:

28-9-91

Respected Navin Bhaiji,

Pranam

As you had said the work has been got done. I have taken 20000 rupees from Devendra Patni and have given to him. Rest on meeting.

Your younger brother,

Gyan Mishra.

This was recovered under seizure memo Ex-P 297 by PW 192. Ex-P 455 is the Malkhana Register maintained by CBI during investigation in Bhilai. At serial No.50 six torn pieces are mentioned as having been seized. It must be mentioned here that the Malkhana Register, Ex-P 455, was requisitioned by the Accused much after the trial had proceeded. The very fact that the Malkhana Register, Ex-P 455, clearly revealed that an entry had been made serially in the Register, and could not be an after thought introduced by the prosecution later on, and that it revealed a contemporaneous recording of the seizure must be taken in support of the genuineness of the recovery as also the document itself. This is particularly so when the Accused had called for the Register through an application dated 30.8.96. This aspect has been adverted to by the Learned Trial Judge at para 202 of his judgement.

The above mentioned torn letter is in the handwriting of A2. It is addressed to A6 and it must be presumed that A6 must have passed on to A1 as he was in charge of executing the plan.

Apprehensions of Niyogi : Diary Extracts, Micro-cassette recording and Statements to witnesses

37. Rajendra Sail, PW 70/PB 1626, has stated in court that during the time when Niyogi was in jail he had visited him. At that time Niyogi had communicated to him the

information he had received from within the jail that plans were afoot to get him murdered. This statement is supported by the entry in Niyogi's diary, Ex-P 93 at page 169 and is corroborated by the receipt of letter Ex-P 103 and other circumstances already discussed above. He also expressed his apprehensions to Dr. Gun, PW 16, his wife, Asha, PW 68, and Dr. Saibal Jana, PW 39. In view of the information received by him about the plans to kill him, Niyogi wanted to put grills to his windows as spoken to by PW 44, Anjori Ram.

38. In his diary, Ex- P 93, Niyogi has mentioned the names of Simplex, Chandrakant Shah, A1, Gyan Prakash Mishra, A2, Avadesh Rai, A3, and Abhay Singh, A4 vide entries in page nos. 32, 169, 172 and 174. It is also noted that Gyanu (referring to Gyan Prakash, A2) had collected Rs. 5 lakhs from Simplex for collecting firearms. The entries above were proved to be in the handwriting of Niyogi by G.M. Ansar, PW 55, Kranti Niyogi, PW 67, Sudha Bharadwaj, PW 15, Dr. Gun, PW 16 and the handwriting expert, Dr. Mittal, Pw 160. The diary mentions the names of the accused and the mentioning of the names has to be understood in the context in which the names are mentioned, viz., the attempt by the accused to have him killed. No other manner of reading the diary entries are possible in the circumstances of the case. No other inference can also be derived.

39. Apart from the diary entries, micro-cassette (Article C) containing the recorded speech of Niyogi, transcribed by PW 15, Sudha Bharadwaj as Ex-P 100 also speaks of his apprehensions and also names accused Moolchand Shah, A5, Gyan Prakash Mishra, A2 (as brother of Prabhunath Mishra) and people of Simplex which can only mean A1, A5 and A6. In the context in which the agitation of the CMM was being carried on, the term Simplex, Simplex group and Shah Log can only refer to A5, A6 and A1.

40. It is pertinent to note here that in the afternoon of 27.9.91, deceased Shankar Guha Niyogi had met N.K. Singh, PW 71 at his office in Bhilai and had conveyed his apprehensions of the danger from Shah Log. Later in the evening of the same day, Niyogi again met N.K. Singh, PW 71 and Rajendra Sail, PW 70 at Hotel Piccadilly in Raipur, when he once again mentioned his apprehensions of being killed by Shah Log, which in the con-

text could only refer to A5, A6 and A1.

41. It is submitted that these statements read in the context as stated above, are admissible and relevant u/s 32(1) of the Indian Evidence Act, as dying declarations. They may not qualify to be statements as to the cause of his death. But they do qualify as statements as to "any of the circumstances of the transactions" which resulted in his death. The statements made whether in the diaries, micro cassette or to witnesses later are proximate to his death and therefore constitute relevant evidence to prove, along with other circumstances, conspiracy resulting in murder.

We may refer to two important judgements of the Hon'ble Supreme Court in this context. 'Sharad Birdichand Sharda Vs. State of Maharashtra', AIR 1984 SC 1622, and 'Rattan Singh Vs. State of H.P., 1997(4) SCC 161. In the latter case, the Hon'ble Supreme Court quotes the former case which sets out the principle regarding the proximity test for purposes of dying declarations.

"The test of proximity cannot be too literally construed and practically reduced to a cut and dry formula of universal application so as to be confined in a strait jacket. Distance of time would depend or vary with the circumstances of each case. For instance, *where death is the logical culmination of a continuous drama long in process and is as it were, a finale of the story*, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as a organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death". (Special emphasis ours)

(Ratan Singh Vs State of H.P., h, 1997 (4) SCC 161,
para 15/pg. 167)

Thus in this case Niyogi's apprehensions after he was released from jail, wherever expressed would amount to statements regarding the transactions leading to his death. In a period of one year anything said by Niyogi with reference to threat to his life would be proximate and

therefore would be relevant and therefore admissible as evidence for assessing the evidence and circumstances leading to his death.

Entry of Paltan Mallah, A9, into the Conspiracy

42. Paltan Mallah, A9, is a hireling criminal whose services were requisitioned by A2. The evidence on record shows that Paltan Mallah has been continuously residing in Bhilai area from 1988 onwards. This is clear from Ex-P 155A which reveals that he was arrested and imprisoned in Durg Jail between 22.1.88 and 28.1.88 and between 1.3.1988 to 10.8.1988. During this period in jail he comes to know Gyan Prakash, A2, who was also in the same jail for a period of 1 month and 13 days in two phases, the first period between 29.4.1988 to 9.5.1988 and on the second occasion between 27.6.1988 to 18.8.1988. A3, Avadesh Rai, was also imprisoned in the same prison for nearly 6/1/2 months between 19.12.87 to 2.7.88.

For many years prior to the incident, Paltan had been living in Bhilai and for seven years he had a living in relationship with Reshmibai, PW 51/PB 1540. She has testified to the fact that Paltan used to run a cycle repair shop in Khursipar. She however has stated that she did not know where the shop was located and had never been there.

43. For the purpose of this case there is evidence that Paltan Mallah, A9, was around in Bhilai from January, 1991. Vishambar Das Manikpuri, PW 121, is a photographer in Asian Arts Studio, Bhilai which is in front of the Old Bhilai Police Station. His services as a photographer are also requisitioned by the police. He states that he had taken a photograph of Paltan Mallah in January, 1991, Ex-P 318. He states that the photograph was taken outside the lockup. Paltan, in the accused statement has admitted to this fact. Paltan himself produced the certified copy of criminal case, CC No. 230 of 1991, pending before the Judicial Magistrate Class I, Durg wherein it was shown that he had been arrested for offences u/s 25 of the Arms Act in the Purani Bhilai P.S. on 21.1.1991. It was also disclosed that he obtained bail on 15.3.1991 though he was actually released only in May, 1991 after

executing bail sureties. Thus it is clearly seen from the evidence on record that until May, 1991, Paltan, A9, was in Bhilai.

44. Paltan moved into Camp I, Bhilai sometime before the murder of Niyogi. P.B. Nair, PW 10/PB 1381, stated that Quarter No. 6-F was allotted to Central Industrial Security Force (CISF) and that possession of this quarter was given on 28.1.91. In turn this quarter was allotted to one Rama Reddy who never occupied that quarter. Krishna Kumar, PW 42/PB 1517, has stated that he had seen Paltan Mallah, A9, using a red coloured motorcycle residing in the above quarters about one to two months before the murder (vide Cross-examination, para 9). Based on this, the defense assailed his evidence as not worthy of credence. It may be pointed out that the quarters house workers and employes of Bhilai Steel Plant, and Paltan, not being either a worker or an employee stood out as a stranger and therefore easily recognisable.

PW 42 has also stated that he came to know about the name of Paltan Mallah much later, after reading about it in the newspapers. He also states that he was living since 1987 in Quarter 7-C, opposite Quarter 6 F, and so had occasion to see Paltan at least one-two times when he was living in Quarter No. 6-F. He has also stated that he was a member of INTUC and had nothing to do with CMM. Abhay Singh, A4, is stated by him to be living in the same locality in Block 7 and is known to him. Significantly he stated during cross-examination (para 9) that in 1991, Quarter No. 6-F, did not have lock of BSP but was instead only latched. By inference, it can be seen that there was not much of a problem for Paltan to occupy Quarter No. 6-F in an area not far away from the place where Niyogi stayed which could be conveniently occupied without much resistance.

It is also in evidence of this witness that the quarter was latched but not locked and Paltan obviously occupied it temporarily and unauthorisedly. It is noteworthy that Gyan Prakash, A2, Abhay Singh, A4 and Avadesh Rai, A3 all used to reside in the same area during that period.

45. Reshmibai, PW 51, who turned hostile also made a statement that Paltan, A9, told her two months before the murder of Niyogi that he was leaving for Bombay. From this statement of a hostile witness the defence wanted to urge a plea of alibi, that during the relevant period Paltan, A9, was not living in Bhilai. For this plea of alibi, neither evidence nor proof is available in the record. In fact it is part of the conspiratorial activity to bluff Reshmibai, who is not his wife, and who in any event will not verify the truth or otherwise of the statement made by him excepting to repeat what he might have told her. On this pretext he left her and moved into Camp I, Bhilai. This also is an ingenious way of covering one's track after the murder, in the event of any investigation into his complicity in the crime.

Purchase of Ammunition

46. The prosecution examined two witnesses to prove that on 14.9.1991, accused Paltan, A9, along with one B.K.Singh had gone to the ammunition shop of Mulla Shamsudeen located at Sadar Bazaar, Raipur for the purchase of LG cartridges. PW 66, Nuruddin speaks about the visit of Birendra Kumar Singh along with a boy on that day to his shop. Birendra Kumar wanted to purchase a gun. He wanted to get his friend, Ram Bahadur, PW 59, Police Armourer. So saying he left the boy in the shop. He returned with the armourer who selected a gun for him and departed. Birendra Kumar purchased the gun and some cartridges on his license. Birendra Kumar also purchased on the license of a person named Satyanarayan Singh, 3 L.G. Cartridges and 10 shot cartridges and signed on his behalf in the register. The boy who visited his shop on 14.9.91 alongwith Birendra Kumar Singh was identified in the court by PW 66, Nuruddin, as Paltan Mallah, A9. The defense concentrated their attack on this witness on the ground that no identification parade had been conducted. Further some discrepancies were pointed out between the evidence of Nuruddin, PW 66 and his father, Jakyudeen, PW 61.

The admitted fact is that Birendra Kumar Singh had purchased 3 LG cartridges on 14.9.91 on the license of Satyanarayan Singh, who did not personally come to purchase the cartridges. The presence of a boy alongwith him has not been disproved by the defense nor any doubt created. The only argument is that he could not have identified A9, after such a long lapse of time. One cannot be definite about the memory of a person as pointed out by the learned Trial Judge pointed out. The police had made photo-identification of Paltan much earlier. Apart from that fact, Paltan, A9, was heavily advertised as a fugitive offender for whose apprehension a reward was announced. Under these circumstances the question of identification parade does not assume much importance. That accused Paltan Mallah, A9, was present and was the recipient of 3 LG cartridges is established by the following facts.

On the question of test identification parade our submission was in view of publicity in the print and audio visual media. Mere failure to hold a test identification would not be a material circumstance against the prosecution. Lakshmi Raj Shetty AIR 1988 SC 1274 at 1286 talks judicial notice of the fact that in crimes of this nature resort to publicity and announcement of reward for apprehension of the suspect is not unusual.

The effect of not holding test identification was dealt with by the Supreme Court in Surendra Narain Vs State of U.P. AIR 1998 SC 192 on test identification. Referring with approval the Judgement in 1948 Madras 113 emphasised that portion of the Judgement viz "identification parades are held not for the purpose of giving defence advocates material to work on, but in order to satisfy investigating officers of the bonafides of the prosecution witnesses."

After reviewing the whole law on the subject held.

"On a perusal of the above rulings it is clear that the failure to hold test identification parade even after a demand by the accused is not always fatal and it is only one of the relevant factors to be taken into consideration alongwith the other evidence on record..."

An identification parade is to assure the Investigation Officer that the investigation is proceeding on right line. (AIR 1972 SC 102 (Para 6).

47. The disclosure statement, Ex-P 285, and subsequent recovery discloses recovery of 2 LG cartridges apart from other things. These 2 LG cartridges bear the brand 'ELEY'. About three or four days after the murder of Niyogi on the instructions of B.K. Singh, PW 58/PB 1562, Bankebihari Yadav returns 3 LG cartridges given by B.K. Singh to Satyanarayan Singh, in whose name and on whose license, B.K. Singh had purchased 3 L.G. cartridges on 14.9.91.

Satya Narayan Singh in turn surrenders 3 LG cartridges to Town Inspector, Rajesh Tiwari, PW 173/PB 2503, on 13.10.91. The Seizure Memo is Ex-P 423/PB 1251. The surrendered LG cartridges bear ELEY markings. This feverish replacement of 3 LG cartridges and the ultimate surrender of these 3 LG cartridges to the police station some days after Niyogi's death shows that Paltan was given the 3 LG cartridges purchased on 14.9.91. B.K. Singh could not be examined as he died in an accident. Satyanarayan Singh was also not available for being produced before the court.

48. This story does not end here. On 3.10.91, Jainarayan Tripathi, PW 72/PB 1658, of Bilaspur, and brother-in-law of Gyan Prakash Mishra, A2, goes to Raipur and purchases 3 LG cartridges from Mulla Shamsudeen shop in Raipur. Though there is an ammunition shop in Bilaspur from where he usually makes his purchases, he goes all the way to Raipur to purchase 3 LG cartridges notwithstanding the fact that on 2.10.91 he had made purchases of some 12 bore cartridges from the ammunition shop in Bilaspur. A fair inference would be that Jaynarayan Tripathi, PW 72, purchased these 3 LG cartridges at the bidding of his brother-in-law, Gyan Prakash, A2, which in turn were handed over to B.K. Singh for returning to Satyanarayan Singh in whose name 3 LG cartridges were purchased on 14.9.91.

49. These facts not only fix Paltan in the shop of Mulla Shamsudeen ammunition shop in Raipur on 14.9.91 also fix him as the murderer of Niyogi.

Murder of Shankar Guha Niyogi on 28.9.1991

50. Shankar Guha Niyogi was living in MIG 1/55, HUDCO, Bhilai. On 27.9.1991, late in the night Niyogi returned to Bhilai from Raipur after meeting PW 70, Rajendra Sail, and India Today reporter N.K. Singh, PW 71. By the time he reached his house in Bhilai it was already 1.00 to 1.30 a.m. Niyogi was sleeping in a cot with a mosquito cover. PW 64, Bahal Ram, always stayed with Niyogi in his quarters. A brief description of Niyogi's quarters is not out of place here. The outside gate is about 4 feet high, there are four windows facing the 9 feet wide court yard beyond which is the main gate. The gate, as also the compound wall, is short enough to be climbed over. Ex-P 293, the sketch of the scene of occurrence shows the place in the house where Bahalram, PW 64, was sleeping. The place in the room beside the window where Niyogi was sleeping is also marked. The entire crime has been re-constructed by PW 84, Dr. Maithil, Dr. Nigam, PW 78, and Dr. Roop Singh, PW 159. Dr. Maithil, PW 84, proves that the height of the window from the floor was 3.5' (feet). The diagonal length between the hole in the mosquito curtain and the window (Window No. 1) was 2' 10". Dr. Nigam, PW 78, after examining the various records and photographs, and after using a dummy in the place of the deceased to confirm the findings gave an opinion that the injuries found on Niyogi are gun shot wounds which can be caused by firing cartridge from a 12 bore country made pistol. He also opined that the shots would have been fired diagonally and slightly downwards. This finding tallied with the height of the bed in which Niyogi was sleeping and firing from the window would be diagonal and downwards.

51. Dr. Maithil, PW 84, has also noted that on and near the bed on which Niyogi was sleeping when shot at, pieces of bloodied cardboard wads of the cartridge used were found. Articles W1 and W2 were round overshot paper wads on which LG was printed. These were overshot wads of 12 bore cartridge. Similarly articles W3 and W4 were partially deformed portions of two cardboard cushion wads.

52. In his report, Ex-P 190, Dr. Nigam, PW 78 points out that P1 to P3 are three

partially deformed lead pellets were recovered from Niyogi's body, whose gross weight was 11.661 gms and average weight was that of standard LG pellets. Further he has opined that from the dispersal of the six pellets in the body of deceased Shankar Guha Niyogi, that they could have been fired from a short bared weapon/12 bore country made pistol from a distance of around 2 feet.

53. When the CBI took up investigation on 6.11.1991, Dr. Roop Singh, PW 159, of the Central Forensic Science Laboratory visited the site of the crime in the MIG 1/55, HUDCO and was there from 9th November to 12th November, 1991. He reconstructed the site of the crime on the basis of the site inspection report of the Forensic Lab, Sagar, and photographs and opined that the firing was by a country made pistol from a close range. The report is Ex-P 396.

54. The post-mortem was conducted by a team of doctors headed by Dr. Meshram, PW 75. It was noted that 6 entry wounds were found in the left shoulder of the deceased. These pellets were found in the thoracic cavity of the deceased. There were no exit wounds because no bullet passed through the body of the deceased. During the autopsy only three pellets could be recovered as according to the doctor 3 pellets might have got lodged somewhere in the muscles of the deceased. The doctor opined that the gunshots injuries are sufficient to cause death in the ordinary course of nature. The Post-Mortem report is Ex-P 176 and the time of the death given by PW 75 corroborates the time given by Bahalram, PW 64. The Learned Trial Judge made a perceptive observation that the murderer chose a time of the night between 3 a.m. to 4 a.m. as it is during this period that persons tend to be in deep sleep.

Defense Contention on Ballistics Experts Opinion

55. The report of Dr. Roop Singh, PW 159, has been subjected to attack on three broad grounds.

(1) The report does not contain reasons.

(2) It is not possible to match the pellets recovered from the body with the firearm used as pellets will not carry tell tale marks of a smooth bore firearm.

(3) Dr. Roop Singh has merely examined through microscope which is not a very efficient method of examination of projectiles and that photographs were not taken.

In this context most of the decisions cited by the defense relate to handwriting experts and are therefore not in pari materia with the questions raised with reference to ballistics experts.

56. Taking the last point first, this issue has been dealt with by the Supreme Court in 'Ramanathan Vs. State of Tamil Nadu', AIR 1978 SC 1204. In the discussion at paras 23 to 26/ pgs. 1212-1213, the Supreme Court quoted authors including Hatcher to show that photographic examination of fire arm crimes is inferior to visual examination by comparison microscopes. The objection that photographs have not been taken has been rejected by the Supreme Court on the basis of opinions of Hatcher and others.

57. Regarding the contention that no reasons have been given it may be relevant to note that u/s 293 Cr.P.C. there is no necessity for the expert to come and depose unless the court requires him to. To that extent, the rigour of Sec. 51 of the Evidence Act does not operate to documents covered by Sec. 293. Even u/s 51 Evidence Act grounds can be disclosed in chief examination or cross examination. In the present case, PW 159, has himself been examined and cross-examined in detail. In any case, PW 159 has provided the details of the test conducted and the work sheets on the basis of which the report was prepared. Under these circumstances the argument that reasons have not been given with the report is untenable and cannot in any manner affect the report given by the ballistics expert. Even under Administrative Law where reasons are furnished to the court for passing a non-speaking order the court may not set at nought such order. It is submitted that such hyper-technical arguments cannot be pleaded as the basis for diminishing the value of prosecution evidence in any manner.

58. The last contention that a crime pellet cannot be matched with the firearm is

accepted by Dr. Roop Singh, PW 159. He has conducted tests and has come to the definite conclusion that the crime pellets P1 to P3 recovered from the body of deceased Niyogi do contain tell tale marks of barrel striations from the country made pistol, W1, recovered from Paltan Mallah, A9 on 24.8.93 vide Ex-P 285. Dr. Roop Singh has withstood the cross-examination on this aspect of the case. The counsel for the defense had a passage marked from Dr. B.R. Sharma's book titled, '**Forensic Science in Criminal Investigations and Trials**', 1976 edition as Ex-D 49. In that the learned author has clearly stated that there has been a revolutionary breakthrough and that it is possible to match crime pellets with smooth bore country made firearms used in the commission of the crime. He also states that it is a breakthrough because in India most crimes are committed with such country made firearms.

It is of significance that the same writer, Dr. B.R.Sharma, has in his 1990 edition book stated at page 268 as follows :

"Buck shots and Pellets :

Formerly the identification of buck shots and pellets fired through a smooth bored firearm was considered impossible. Experiments in the author's laboratory have proved otherwise.

It appears that buckshots packed between the wads in a cartridge are pushed through the barrel without any appreciable sideway or turning motion. The buckshots on the periphery scratch against a segment of the inner surface of the barrel. They take up the marks from these segments (corresponding to the land of a rifle barrel) like a bullet. The marks have been found constant to a given segment of a barrel.

Test marks are obtained on a specially prepared slug which fits in tightly in the barrel. When it is pushed through the barrel (without turning motion) or fired it takes up marks from the whole internal surface of the barrel."

The defense relied upon a decision reported in AIR 1957 AP to show that pellets do not contain or carry any tell tale marks from smooth bore fire arm. The decision was rendered about 4 decades back. The last decade of this century has shown an enormous in-

crease in organised crime and if this argument is to be accepted it would amount to legitimating murder by desi kattas by anti-social elements only on the ground that the crime pellets can never be matched with the weapon from which it was discharged. It is precisely this tendency which drove Dr. Sharma, to undertake research into the issue of identification of firearms with marks on pellets. He has succeeded in establishing that it is possible under indigenous conditions. We submit that there is no valid reason to reject the findings after prolonged research on this point and foreign texts regarding smooth bore fire arms cannot be an authority in a country where, even as the defense claims, there is a proliferation of desi katta manufacture as a cottage industry. The decisions cited on this issue are with reference to rifled firearms.

59. It is submitted that in any event the desi katta recovered from Paltan, A9, and the 2 LG cartridges bearing ELEY markings; the opinion of Dr. Nigam, PW 78, that the injuries on deceased Niyogi must have been caused by a shot gun fired from close range; the recovery of wads containing letters 'LG' on them; the report of Dr. Roop Singh, PW 159, that he test fired the LG cartridge from the desi katta from about 2 feet range, and found that the spread of the pellets matched closely with the injuries on the deceased and the purchases of LG cartridges subsequent to the death of Niyogi by Jainarayan Tripathi, PW 72, returned by B.K. Singh to S.N. Singh through Banke Bihari Yadav PW 58; and the deposit of 3 LG cartridges by Satya Narayan Singh with the Police Inspector, Tiwari, PW 173 on 13.10.91, all establish that Paltan Mallah, A9, is the executioner appointed by A5, A6 and A1, and A2 is the person who appointed and paid for him as revealed by Ex-P 298.

60. Another argument advanced by the defense was regarding the difference in weight of the three pellets as recorded by Dr. Roop Singh, PW 159, at the Central Forensic Science Laboratory, Delhi and Dr. Nigam, PW 78, at the State Forensic Science Laboratory, Sagar. At the former place (i.e. Delhi), the pellets were individually weighed and their cumulative weight was recorded to be 11.661 grams. To the contrary the pellets were weighed together in a beam balance and the combined weight was recorded as 11.425 grams at Sagar. The

difference in weight amounting to .0256 grams was assailed as indicative of the fact that the pellets were substituted and the pellets compared were not the pellets recovered from Niyogi's body.

Even at the outset it is submitted that Dr. Roop Singh has testified to the fact that the pellets received by him at Delhi bore the seals of the District Court, Durg and there was no tampering with the seals. The defense attack on the aspect of weight, it is submitted, is inherently untenable as the prosecution loses more by substitution of the pellets recovered from the body of the deceased by another set of pellets. To sustain this argument the cross-examination must have been directed towards eliciting information regarding the types of balance used by both Dr. Roop Singh, PW 159 and Dr. Nigam, PW 78, the period when the instruments were last calibrated, and the conditions in which the balances are maintained and many more such details. Without any of such information, it is submitted, the defense contention would amount to a mere fishing expedition and ought not to be countenanced.

It should further be noted that Dr. Nigam, PW 78, has noted that the pellets recovered and weighed were equivalent to standard weight of about 4.515 gms. In actuality, the cumulative weight of the three pellets were considerably less. Therefore it is submitted there is not much substance over the issue of the difference in the weight of the pellets.

Recovery of the Letter Ex-P 298, Written by A2 after the Murder of Niyogi

61. Ex-P 298, letter dated 28.9.91, has already been referred to as having been recovered from the premises of Jain and Shah Company at Akash Ganga Complex on 15.12.91 vide Seizure Memo, Ex-P 297. This letter was torn to pieces and thrown away, and in that state was recovered by PW 192, R.S. Prasad, under Seizure Memo Ex-P 297 in the presence of M. Toppo, PW 113. The fact of the seizure was also noted in the Malkhana Register, Ex-P 455. The torn letter was pieced together and it was found that the letter was dated 28.9.91, the day of Niyogi's murder and it is addressed to Naveenbhai, A6. It was a handwritten letter

signed by Gyan Prakash, A2. This letter is a complete admission of the crime committed by the accused conveying the fact that the task was completed, meaning thereby that Shankar Guha Niyogi was liquidated. This letter was therefore hotly contested by the defence.

62. Ex-P 298, the letter dated 28.9.91 addressed to Naveen Shah, A6, by Gyan Prakash, A2 after the murder of Niyogi was found by the handwriting expert, Dr. Mittal, PW 160, to have been written by Gyan Prakash, A2. This exhibit was also attacked on the ground that N.K. Pathak, PW 181, in his evidence has stated in his cross-examination that he might have dictated Ex-P 298, to Gyan Prakash Mishra, A2. PW 181 was being cross examined on the documents, including specimen handwriting dictated by him to A2. In the course of such a cross-examination, Ex-P 298 was also introduced and PW 181 mechanically replied that he might have dictated the contents of Ex-P 298. This was not a positive statement and as such it does not carry any weight in disproof of the contentions of the prosecution. It is true that he was questioned about this more than once and was also admonished by the Public Prosecutor more than once, to see the document and answer the question.

63. The English translation of the Hindi Witness statement of PW 181 at para 10 of Page 2093-94 (of Vol. II, Paper Book) reads as follows :

" I cannot say that the paper of Ex-P 298 was written in half and the bottom half portion is torn. On looking at Ex-P 298 I cannot assert that this paper has been torn. I cannot also say that this paper would have come from the paper mill in this shape. I cannot even say that this paper is torn. After seeing the bottom edge from its appearance I cannot say that this paper has been torn. I cannot even say whether this paper was folded and kept. I cannot say whether there are marks of any folding or not. I cannot also say whether the ink of the writing in Ex-P 298 is the same ink used in the specimen writing of Gyan Prakash. "

"Qn. : Are Ex-P 298 and the specimen writing written by a similar ball point pen

having the same line thickness ?

" Ans.: I am not a handwriting expert. And so I cannot say."

" It is correct that I have seen both these documents in court. It is possible that the document in Ex-P 298 might have been written on my dictation. At this juncture the Spl.P.P. told the witness to answer properly as to whether he had dictated this or not. The question was asked thrice to the witness after which he said it might be that he had dictated it".

The answer given earlier, as set out above, clearly reveals that in spite of having the document Ex-P 298 in front of him, the witness exhibited no acquaintance with the document. And this despite the caution administered by the Public Prosecutor. The document appears to be visibly torn on the face of it. The subsequent statement made by him that he might have dictated the contents of Ex-P 298 cannot be given any credence and weight. It should be noted that there is no suggestion that Ex-P 298 was ante-dated. This is yet another circumstance to support the contention that Ex-P 298 is genuine, despite the quixotic answer given by N.K. Pathak, PW 181.

64. The suggestion that PW 181 dictated the entire letter Ex-P 298 is inherently improbable when alongwith the other evidence with respect to this exhibit PW 113, M. Toppo, witness to the search is consistent and is not shaken in the cross-examination as to the fact of the recovery and the condition in which Ex-P 298 was found. It is crucial to note that when Gyan Prakash Mishra, A2, was questioned u/s 313 Cr.P.C. he has not stated specifically that Ex-P 298 was written by him only on the dictation of PW 181, N.K. Pathak. To the contrary, the only claim of the accused is that several specimen writings of A2 were obtained and alongwith that one signature was obtained on a blank paper. It does not require much elaboration that there is a world of difference between affixing a signature and writing the letter as found in Ex-P 298, which admittedly is an incriminating piece of evidence. Then again, the letter in whole was found by the handwriting expert, Dr. Mittal, PW 160, to be in the hand of Gyan Prakash Mishra, A2. Finally it was specifically put to the I.O.,

Prasad, PW 192, that the torn pieces were large in shape and that they themselves threw it in Akash-Ganga complex. The defence did not put any other question to the I.O. throwing any doubt on the document. Finally it needs to be highlighted that the line of questioning of PW 181, Pathak, clearly shows that the defence admits that Ex-P 298 is in the handwriting of Gyan Prakash Mishra, A2.

65. Another question raised by the defence is regarding the fact that Rajesh Shah has not signed on the reverse of the torn pieces of letter, Ex-P 298. However this question is shown to be of no value to the defence when we consider that the search memo, Ex-P 297 itself records the following :

"... Throughout the search both the aforesaid witnesses and Rajesh P. Shah remained present. Only the documents mentioned in the list have been taken into possession. The documents taken have been signed by the witnesses. "

The above recording clearly reveals that Rajesh Shah was not a search witness, and only the search witnesses signed the seized documents. PW 113, Toppo, identifies his signature and that of the other witness, Sosmal, on the reverse of Ex-P 298 letter pieces.

66. Thus all available evidence on record is internally consistent with the prosecution version that the recovery of the torn pieces of letter which make up Ex-P 298 was genuine and stands proved. There is no weight in the defence argument which relies on a vague statement of PW 181, which cannot be characterised as relevant to the question whether Ex-P 298 has any evidentiary value or not.

67. The language in Ex-P 298 is a cryptic style of conveying certain types of information that is incapable of imitation. That this style is peculiar to A2 is illustrated by Ex-P 295, certified copy of the order of the Designated TADA Court, Raipur, dated 11.8.1988. In Ex-P 295, the TADA Court has in its Order reproduced the accusation against Gyan Prakash, A2 and two others. It is mentioned that on the instructions of Chandrakant Shah, Gyan Prakash sent a letter to one of his friends, Satyendar in U.P. and asked him "to come to Bhilai with full preparations". The two of his friends who are the other co-accused in that

case came to Bhilai, and were arrested and a country made revolver, 4 live cartridges and one spring knife were recovered from the other two accused. What is sought to be highlighted is the letter written to his friend asking him to come to Bhilai with "full preparations". In the same language and cryptic style, Ex-P 298 merely says, "The work has been got done". Such a cryptic style could not have been imitated by Pathak, PW 181, or any other investigating officer. The line of cross-examination adopted against PW 181 has not been adopted when Toppo, PW 113, was examined or when R.S. Prasad, PW 192, the I.O. was examined. It is necessary to emphasise that the same line of questening was also not followed when PW 161, Dr. Mittal, the handwriting expert was examined. Use of cryptic code in letters to conceal the message is relevant fact in proof of conspiracy . (Bhagwan Swarup Vs. State, AIR 1965 SC 682, para 20/pg. 692)

68. The nature of attack on the veracity of Ex-P 298 is similar to the attack on another vital document in proof of conspiracy, viz., Ex-P 393(8) which has been deaet with in detail in para 31 above.

69. Thus looked at from whichever angle, from the angle of internal consistency of evidence regarding the genuineness of recovery of Ex-P 298, or when considered alongwith other evidence with reference to the recovery of Ex-P 298, the only conclusion that is possible is that after the murder of Shankar Guha Niyogi was accomplished in the night of 27th and 28th September, 1991, Gyan Prakash Mishra, A2, on the very same day, i.e. 28.9.91, wrote the letter Ex-P 298 to Naveen Shah, A6 that the work had been got done and that consideration of Rs.20,000/- was paid.

70. Thus Ex-P 298 is not only an admission made by Gyan Prakash Mishra, A2, but is also a statement made immediately after the murder and is therefore covered by Sec. 10 of the Indian Evidence Act. In view of this position it would be admissible against Moolchand Shah (A5), Naveen Shah (A6), Chandrakant Shah (A1), Avdesh Rai (A3), Abhay Singh (A4), Paltan Mallah (A9), Chandrabaksh Singh (A7), Baldev Singh Sandhu (A8) and Gyan Prakash Mishra (A2) himself.

Flight of Paltan Mallah, A9

71. After the murder of Niyogi on 28.9.91, Paltan Mallah, A9, leaves Bhilai on a red coloured motor cycle and goes to his native village, Nibahi, in U.P. Two witnesses talk of the fact of seeing Paltan Mallah, A9, riding a red coloured motorcycle in Nibahi and nearby areas in October, 1991, in the period following the assassination of Niyogi. PW 97, Suresh Vishwakarma, is a childhood friend of Paltan. He states that in October, 1991 he met Paltan and accompanied him on the motorcycle to the brick kiln of Ram Parvesh Mal and that Paltan placed orders for the purchase of bricks. Similarly PW 100, Radhe Shyam, a munshi (clerk) in a brick kiln, speaks to the fact that on 4.10.91, 2 persons came to the brick kiln at Ramnagar, Deoria District, UP where he was working and purchased bricks. The witness clearly states that initially the person buying the brick stated his name was Paltan, though he subsequently asked the bill to be made in the name of his father, Nokai. This witness was able to identify A9 in the court by saying that the "face of the person who came to buy bricks resembles him". (Para 4 / PW 100).

72. It is in the evidence of Satya Prakash, PW 105, that Paltan Mallah in October, 1991 (in the period immediately after the murder) visited him at Chainpur village on a red coloured Suzuki motor cycle. Paltan, A9, stayed with him for two days. Towards the end of November, 1991, he was informed by some village children that one of his relatives met with an accident at Saonkhor Cross Roads about 3-4 kms from Chainpur. Satya Prakash, PW 105, went there to find Paltan lying down on the road. Paltan was made to sit on the motorbike and he was taken to meet Dr. Fayaz (NE) at Badalganj for treatment. Paltan was staying with Shri Ram Dubey (NE), a friend of PW 105. Paltan's X-rays were taken by Dr. Salauddin Ansari (NE). As he was complaining of stomach pain Paltan continued to stay in Shri Ram Dubey's house. PW 105 used to visit him in Badalganj occasionally where he stayed for about one month to one month and a week.

73. During one of the visits of PW 105 to Badalganj, Paltan after reading in a tea

stall a newspaper carrying an announcement describing him as a fugitive offender and announcing a reward of Rs. 1 lakh for his apprehension told Satya Prakash in Shri Ram Dubey's house that he, Paltan, in association with Gyan Prakash, A2, killed Bhilai's Guha Niyogi with desi katta when Niyogi was sleeping. He also said that Moolchand A5, Naveen Shah, A6, and Chandra Kant Shah, A1 are behind this murder. As Paltan was obviously mentally disturbed after reading the news about him in the news papers he wanted to move out of Badalganj area. He wanted to go to Azamgad to Satya Prakash's in-laws' house. Paltan went to Azamgad but was not willing to stay there. So both PW 105, and Paltan, A9, left for Azamgad bus stand and it was here that Paltan disclosed that he had seen in the TV an announcement that the CBI had announced a reward of Rs. 1 lakh for his apprehension. Paltan with a view to conceal his crime and evade the law wanted to go away to Nepal. Satya Prakash, PW 105, offered to take Paltan to Dohariya Bazaar, Gorakhpur, where Satya Prakash's sister was staying. His sister is married to one Keshnath Nishad (NE). Paltan spent the night in Keshnath's house. Keshnath Nishad returned from work in the night to his house. In the morning he enquired as to why Paltan had come to his house. Paltan told Keshnath that he, in the company of Gyan Prakash, A2, had committed the murder of Niyogi and that this was done at the instance of A6, A5 and A1 respectively. As Keshnath was not willing to shelter him, once again Paltan left alone to Dohariya Cross roads. When Satya Prakash, PW 105 went behind him Paltan warned Satya Prakash not to reveal to anybody about what he had told him regarding the murder of Shankar Guha Niyogi, "or else the consequences would be bad". Thereafter on the entreaty of Paltan, Keshnath took him (A9) to his brother-in-law, Vishambar Sahani's (PW 124), house in Nepal.

74. Non-examination of Keshnath was seriously contested by the defense. But it is submitted that it is open to the prosecution to decide who to examine and who not. In this case Satya Prakash, PW 105, had already spoken regarding the extra-judicial confession made by Paltan, A9. It was not necessary to duplicate the evidence already brought on record. In this context reference may be made to the judgement of the Hon'ble Supreme

Court in 'Harpal Singh Vs. Devinder Singh, AIR 1997 SC 2914, para 22 and 24.

When Vishambar Sahni, PW 124, enquired as to why Paltan, A9, had come to his house, Keshnath requested that Paltan should be kept in a safe place in Nepal, and on further enquiry by PW 124, Paltan revealed that on instructions from Simplex 'company valon' (people) he had, together with Gyan Prakash Mishra, A2, murdered Shankar Guha Niyogi. Immediately on hearing this PW 124 turned out both Keshnath, and Paltan Mallah away from his house.

PWN 124 Vishambar Sahani mentions that Paltan Mallah came along with Keshnath on the 4 gatte of Nepali month falling in December. It is in evidence that he was in Badalganj for over a month. Taking advantage of this statement the defence tried to argue that Paltan Mallah A-9 could not have been in Nepal. We have produced the Nepali Calender which shows that the first of the Nepali month in December falls on 15th December. This calender being based on Lunar system like our Hindu system. 4 gatte would mean 4th of that month and that would be 19th December. The approximate period mentioned need not be literally taken as one month. Actually he has stayed in Badalganj around 3-4 weeks. So it is possible and, in fact, it is established that A-9 Paltan Mallah was in Nepal on the 19th of December. Thus the prosecution established the fact that A-9 did visit Nepal in the month of December.

not. It is therefore our submission that if communication is not an ingredient of confession as regards the maker, then the confession has to be assessed de hors the delay or otherwise of the communication of the confession. This Hon'ble Court will have to weigh the proba-

tive value of the extra-judicial confession without referring to the fact that it was for the first time referred to the investigating agencies in 1993. Our submission is that if the extra-judicial confession has probative value it cannot be disbelieved or thrown out on the ground that it was not communicated. This approach would amount to prescribing a limitation to the investigation and trial of capital crimes.

On PW 105 and PW 124 being Accomplices

78. In this regard both PW 105 and PW 124 were characterised as accomplices. Sec. 133 of the Evidence Act permits evidence by accomplices. 'S.C. Bahri VS. State of Bihar, AIR 1994 SC 2420 discusses the scope of Sec. 133 r/w Sec. 114 of the Evidence Act.

79. Further the Supreme Court has held that the court should not start with the presumption that extra-judicial confession is a weak piece of evidence as elaborated in 'Narayan Singh Vs. State of MP, AIR 1985 SC 1678 at para 7/pg. 1680'. Further the SC has held that confessions and circumstances have to be read together. 'Ratan Gond Vs. State of Bihar, AIR 1959 SC 18, at paras 10 and 11.'

80. As mentioned earlier, the other two grounds raised by the defense regarding the status of PW 105 and PW 124 as accomplices, and as to why they did not give complaints at an earlier point of time, are directed towards rejection of that part of the testimony which sets down the oral extra-judicial confession made by Paltan Mallah. In addition to the reasoning given by the Learned Trial Court Judge set out in Paras 151 - 168 of the Trial Court Judgement, we would like to place reliance on a judgement of the Supreme Court in 'Satyanarayan Vs. State of Hyderabad', (AIR 1956 SC 309). In this case a dhobi boy was an eye-witness to abduction and killing. His evidence was attacked on the ground that he did not divulge this information which he had with him regarding the crime to anybody . It was pointed out by the Supreme Court that :

"... he took no part whatever in the commission of the offence or in any active or passive preparation for the same. He was not a parti ceps crimines. After securing his re-

lease from his temporary masters he went back with his father to the village. "

"It is true that he did not divulge the secret of the murder to anyone else except to his own father. But who would in view of the atrocities and terrorism that prevailed in the region during the relevant time. It required a very courageous man to have proclaimed the truth needless of consequences to himself and we cannot credit the dhobi boy with so much of fearlessness". (para 6/ pg. 380).

Repelling the contention that he is an accomplice their Lordships quoted a passage from Russell on Crimes which reads : "But a person may be present and if not aiding and abetting, be neither principal nor accessory; as if A happens to be present at a murder and takes no part in it, nor endeavours to prevent it, or to apprehend the murderer, this course of conduct will not of itself render him a principal or accessory ". (Para 6/ pg. 380)

Confessions of Co-Accused

81. Section 30 of the Evidence Act provides that confessions of an accused against a co-accused can be used against the co-accused. The confessing accused must make an inculpatory statement and if this condition is satisfied it can be used against a co-accused, if all other conditions are satisfied. The Supreme Court has in a number of judgements expounded on the scope of Section 30. The entire law on this subject has been summarised in Sarkar on Evidence, 14th edition. We may also usefully refer to 'Baburao Baji Rao Patil Vs. State of Maharashtra, 1971(3) SCC 427', which deals with Sec. 10 and 30 of the Evidence Act. Two other rulings of the Supreme Court in this regard are 'Ram Parkash Vs. State of Punjab, AIR 1959 SC 1' dealing with retracted confessions and 'Nathu Vs. State of UP, AIR 1956 SC 56'.

Interpretation of Sec. 10 Evidence Act in Bhagwan Swarup, AIR 1965 SC 682

82. The Learned Trial Court Judge in para 586 had extended the conspiracy to the flight of Paltan Mallah, A9, and used the statements of extra-judicial confessions against

A2, A1, A5, and A6. This finding is unassailable in our respectful submission. Until 1965, the view of the Supreme Court, including the Privy Council had been that the words "in reference to their common intention" in Sec. 10 of the Evidence Act is synonymous with the English provision "in furtherance of the conspiracy". Justice Subba Rao delivering the judgement of the 3 judge Bench in AIR 1965 SC 682, dealing with this provision held the view that the words "in reference to their common intention" is wider than "in furtheran of conspiracy". Subsequently in Kehar Singh's case (AIR 1988 SC 1883), Justice Oza referred to 1965 SC judgement and agreed with the views expressed by Justice Subba Rao that "in reference to their common intention" in Sec. 10 is wider than "in furtherance of the conspiracy". Justice Jagannatha Shetty dealing with the same question, pointed out that the Privy Council has defined Sec. 10 in Mirza Akbar's case (AIR 1940 PC) that "in reference to their common intention" is synonymous with "in furtherance of conspiracy". Justice G.N. Ray who was the other member of the Bench did not deal with conspiracy but expressed the view that he agreed with both the judges on the question of conspiracy. Thus the views expressed by the SC in Bhagwan Swarup case (AIR 1965 SC 682) would prevail. This being so Paltan Mallah's confession would become a relevant fact against A2, A5, A6, and A1.

83. The reference to Simplex Company 'vaalon' to Vishambar Sahni would be reference to A1, A5 and A6 as Simplex 'vaalon' is a collective noun or expression for A5, A6 and A1. In any case that is Paltan's perception and he used this collective noun as Vishambar Sahni, PW 124, may not know their names.

84. It is important to note that Paltan Mallah, A9, made this confession only after he read in the newspaper that there was a reward announced for his apprehension and that he was wanted for Niyogi's murder. Having realised the magnitude of the offence he had committed he thought that the persons who had engaged him to execute the conspiracy should also be brought in. This would be a natural reaction of anyone who would be in the position

of Paltan Mallah.

Arrest of Paltan Mallah

85. It is necessary to consider the context under which Paltan Mallah, A9, was arrested almost two years after the murder of Niyogi, on 21.8.93, at Gorakhpur.

Paltan Mallah, A9, was arrested on 21.8.93 by Master Warrant Officer Suresh Sharma (NE) for having encroached into prohibited land of Indian Air Force in Gorakhpur. He was arrested as Sanjay Yadav and handed over to Umesh Chandra Mishra, PW 125, who was In-charge Police Station, Cantonment Gorakhpur. After intensive interrogation by Umesh Mishra, PW 125, Paltan revealed his true name. He also disclosed the murder committed by him in Bhilai. On 26.8.93 PW 125 made a remand application before the court at Gorakhpur. Before the remand application, on 24.8.93 PW 125 secured the presence of Dinesh Baloni, PW 104, and witness Ram Bahadur Singh (NE) and then recorded the statement of Paltan Mallah, A9, that he buried a country pistol, a foreign revolver and a cloth belt with 13 cartridges in which there are 12 LG cartridges and 6 other cartridges of 12 bore. He had packed this in a polythene bag and tied the bag with a twine and he had buried the same near his father's house. He also revealed that he kept Suzuki motorcycle in the house of Satya Prakash, PW 105, who is his cousin. He volunteered to take them to the spot for recovery.

86. On 24.8.93, A9 led Umesh Chandra Mishra, PW 125, Dinesh Baloni, PW 104, and Ram Bahadur (NE) to the house of his father in his native village Nibahi. Faruk Mirza Baig, a local villager, was also taken with them. Under cover of Search Memo Ex-P 285, Paltan dug out the hidden weapons from the place pointed out by him in his father's house and took out a bundle wrapped in plastic sheet. On opening the same, there were 12 cartridges wrapped in a cloth belt marked X-1 in the court, a country made pistol, X-2, foreign revolver, X-3, six bullets of .38 bore X-4. Signatures of witnesses and the accused Paltan were obtained in the Search Memo, Ex-P 285. Thereafter A9 took them to Chainpur where the red coloured Suzuki, which bore no Registration number, and whose chasis number

and engine number had been erased, was recovered from the house of Satya Prakash, PW 1105. The motorcycle is marked as X-7. The Seizure Memo is Ex-P 286 in which Satya Prakash, PW 105, Dinesh Baloni, PW 104, Ram Bahadur Singh (NE), and Paltan Mallah affixed their signatures.

Ex.P285 is not couched in third person as argued by the Counsel for A-9. The case in AIR 1979 SC 1949 'Pohalaya Vs State of Maharashtra' is distinguishable. In that case the recovery of only a spear and the statement u/s 27 of the Evidence Act was ambiguous and there were two accused. In this case a careful reading of the statement in Ex.P 285 shows that it is in first person and that he is repeating the several acts he performed before searching the weapons. He talks about keeping the Desikatta the 13 cartridges and a foreign Revolver with six cartridges were first kept in a white polythene bag which again was wrapped up in a white plastic sheet and secured it with a Jute twine (Suthli), have dug the earth and buried it in my fathers house.

The statement in Roman Hindi Reads:

AUR UPROKTA KESIKATT JISS-E-MAINE (SHANKAR GO HO NIYOGI KI HATYA KI THI) EVAM 13 KARTHOOS JO KAPDE KE BELT MAY LAGE THE EK VIDESHI REVOLVER VA 6 KARTHOOS EK SAFED RANG KE POLYTHENE KE LIFAFE ME DALKAR THATA EK DUSRE SAFED PLASTIC KE SHEET ME LAPETKAR SUTHLI SE BANDKAR APND GAON NIBAHI SE LUG BUG EK KILO METER DUR APNE PITHJI KE GHAR ME ZAMIN KHODKAR GAD RAKHE HAIN.

JO MAI WAHAN CHALKAR BARAMAT KARSAKTHA HOON.

The pronoun 'I' used in the beginning links up the various acts mentioned therein. These details cannot be furnished by a person who has not done all these acts himself. It does not leave anybody in doubt that A-9 Paltan Mallah is narrating what he has done.

87. The firearms seized were sent to the Ballistics Expert. Dr. Roop Singh, PW 159 has stated that the LG cartridges can be fired from the country made pistol marked W-1, which was the pistol recovered under Ex-P 285. The American .380 revolver was marked as W-2. PW 159 after detailed laboratory tests confirms that the three lead pellets recovered from Niyogi's body, marked as P-1 to P-3 must have come from firing of 12 bore LG cartridges. He further positively confirmed through scientific ballistics tests that the three lead pellets, P-1 to P-3 have been fired by the 12 bore countrymade pistol marked as W-1.

Dr. Roop Singh, PW 159, also pointed out after test firing W-1 from various distances, that the bullet fired at the deceased would have been from about 2 feet away. This report is marked as Ex-P 398.

All this clearly establishes the fact that the 12 bore country pistol, W-1, seized pursuant to the statement made by Paltan Mallah, A-9, is the same pistol from which he fired a shot at Shankar Guha Niyogi, thereby killing him, and from whose body three pellets P1-P3 were recovered.

As already submitted by us pursuant to the visit to Nepal foreign made fire arms were purchased and the intention to make such purchases was evidenced by the writing of A2 Gyan Prakash Mishra on the reverse of the Madhuban Provision Stores bill dated 11-3-91 (Ex.P 383/8) where a list of four foreign made fire arms and their names along with prices were listed. Ex.P 383/8 does not communicate the decision to purchase the specified firearms but the decision was to buy foreign made fire arms. The seizure of an American Revolver and the Cartridges for the use of that revolver pursuant to the disclosure statement Ex P 285 together with recovery of another foreign made fire arm under P 224 & 225 establishes the prosecution case that Nepal visit was for the purchase of foreign made fire arms in furtherance of the conspiracy.

The recovery of Desi Katta and the American revolver with number erased under Ex.P 285 is a pointer to yet another aspect of the case. It has been the argument of the

Defence that desi katta is available freely and in almost all districts of the state. The non user of the American revolver and the preference to the rather anonymous desi katta is to evade detection of the crime which according to us is also part of the conspiracy. The use of the American Revolver is comparatively easy of detection.

88. The only substantial contention raised by the defense is regarding the fact that Paltan Mallah was arrested for an entirely different offense and the recovery effected therefore is not from the crime presently before this Court. It has been argued that therefore the recovery is suspect and therefore no reliance can be placed on it. A recent judgement of the Hon'ble Supreme Court directly deals with this issue. In 'State of Rajasthan Vs. Bhup Singh', (1997 SCC(CrI) 1032 at para 6, 13-15) the Apex Court considered the legality of seizure of weapons used in a crime when the accused was arrested for an entirely different crime altogether :

"... The High Court side stepped the evidence regarding the recovery of the pistol and the statement of the accused which led to it on the mere ground that the pistol was recovered in connection with another case. PW 12, SHO of Raising Nagar Police Station has deposed in this case that when the Respondent was questioned he told him that the pistol was wrapped in a bag and was buried in his house. When the Respondent was taken to that place, he disinterred Article 4, pistol, and handed it over to the police".

"14. It is clear from the above evidence that PW 12 discovered the fact that Respondent had buried Article 4, the pistol. His statement to the police in the ground near his house therefore gets extricated from the ban contained in Sec. 25 and 26 of the Evidence Act as it became admissible under Sec. 27. The conditions prescribed in Sec. 27 for unwrapping the cover of ban against the admissibility of statement of the accused to the police have been satisfied. ... It is immaterial whether the information was supplied with the same crime or a different crime. Here the fact discovered by the police is not Article 4, the pistol, but that the accused had buried the said pistol

and he knew where the pistol was buried. Of course discovery of the said fact became complete only when the pistol was recovered by the police ". (para 14/pg. 1035-36).

Yet another related contention to this is that PWN 125 had no jurisdiction to effect recoveries in Nibahi because it is beyond the jurisdiction of his police station.

A perusal of section 156 CRPC sets at rest this controversy. No proceedings of a police officer shall be called into question on the ground that he was not empowered to investigate.

blood stains. All this was done, in our respectful submission in furtherance of the conspiracy and obviously with a view to conceal the crime committed by the conspirators.

91. The green coloured tempo van was proved to be that of Chandrakant Shah by Koduram, PW 103, a domestic servant and the Assistant Regional Transport Officer, PW123. He deposed to the fact that the Tempo Trax was registered on 5.3.1991 in the name of Oswal Iron and Steel Private Ltd whose owner is Chandrakant Shah, A1.

92. Before Chandrakant Shah, A1 reached Madras he stayed in Hotel Godavari, Bhadrachalam under the name C.K.Shah who was allotted Room No.205. The Accused signed the Hotel Register Ex-P 247 and the address given is 34, Civic Centre, Bhilai. The signature in the Register, Q47, is found by the handwriting expert Dr.Mittal, PW 160 to be the handwriting of Chandrakant Shah, A1.

Between 3.11.91 to 5.11.91, A1, Chandrakant Shah stayed in the Forest Tourist Lodge, Navegaon Bandh, Maharashtra in the name of C.R. Shah showing his address as 34, Civec Centre, Bhilai, Durg. The entry in the Register Ex-P 417 is proved by the Manager of

the Maharashtra Government Tourist Lodge, PW 166. This witness was also not cross-examined.

Thereafter A1, Chandrakant Shah stayed at Hotel Surya, Nagpur between 5.11.91 and 8.11.91. The Hotel Register, Ex-P 330 shows an entry in the name of Ram Singh of 52, Civec Centre, Jabalpur. Again the handwriting expert Dr. Mittal, PW 160, found the handwriting in the Hotel records at that of Chandrakant Shah, A1.

The relevant entry in the Register of Hotel Continental, Nagpur, Ex-P 356 and the hotel bill Exp-P 357 is made out in the name of the traveller R.K.Singh, 34, Civec Centre, Jabalpur. PW 160 has given his opinion that the handwriting in Ex-P 356 and Ex-P 357 are that of Chandrakant Shah, A1.

A1 stays in Hotel Central Point in Jamshedpur from 23.11.91 to 25.11.91 in the name of H.K.Shah with residence at 34, Civec Centre, Bhilai. The entries in the Guest Register of the Hotel is Ex-P 370 which was proved by Kingchuk Chakravarty, PW 139. The Bill, Ex-P 371 was proved by PW 140. The handwriting in the Guest Register Q 46 (Ex-P 370) was proved to be the handwriting of Chandrakant Shah, A1.

93. It is also in evidence that Shiv Kumar, PW 141, a taxi driver received a phone call from Hotel Surya that he should take a traveller staying in the hotel and so he reached the hotel in his taxi MS 31 2052 at around 3.00 p.m. and took a traveller to Navegaon Bandh Tourist Lodge in Maharashtra which is at a distance of 140 kms from Hotel Surya. The passenger he carried in his taxi got into a Tempo Trax vehicle and proceeded towards Nagpur Road driving the Tempo Trax. Obviously to avoid detection and shake off any possible attempt to trace him, Chandrakant Shah, A1 left the Tempo Trax at the Navegaon Bandh Tourist Lodge between 3.11.91 and 5.11.91 and from there went to Surya Hotel which is in Nagpur.

Chandrakant Shah abandoned the Tempo Trax at village Nagara in M.P. State on the Gondia Balaghat Road. PW 183, B.S. Kanwar, SP, CBI under seizure Memo Ex-P 376 Seized articles Exs-P 237, P243, P244, P246, P377, P326, P433, P410, P411 and P412.

This seizure was corroborated by a local villager Nagra Balkrishna, PW 144.

94. It needs to especially highlighted that in the abandoned Tempo Trax MP 24 B 6622 blood stains were found in a towel, cap, and a rubber mat and these were sent for investigation to the Forensic Laboratory. Sehrologist C.M.Patel, PW 152, deposed before the court that the blood stains found on the articles sent for investigation is human blood and the blood group was 'O'. PW 120, Dr. Dilip Balchandravalkar, told the court that on 7.11.91 a person came to him and wanted 'O +' group blood immediately for his relative. After cautioning that the blood should be transfused only after matching the blood he made an entry in Ex-P 316 which shows the sale of 'O+' blood to one Mr. Singh. It should be recalled that Chandrakant Shah, A1, was staying in Hotel Surya as Ram Singh. A1 did not clarify or offer any explanation of his stay in various hotels under different names nor did he offer any clarification or explanation why the Tempo Trax which is admittedly his and as to under what circumstances the articles found in his Tempo Trax were blood stained.

The important role of Gyan Prakash, A2, in the Conspiracy

95. Ex-P 298, the letter dated 28.9.91 written by A2 that the consideration fixed had also been paid establishes the link between Paltan Mallah, A9, and the other conspirators more particularly A1, A2, A5 and A6. It should be emphasised that the evidence before the court clearly shows that the role of Gyan Prakash, A2, is more than that of a mere conspirator. It is actually in the nature of being an active participant also, in the crime of the murder of Shankar Guha Niyogi. A2, Gyan Prakash, also ought to have been sentenced to the same punishment as Paltan Mallah, A9. If the murder perpetrated by Paltan Mallah, A9, is considered to be the rarest of rare cases, then the role of Gyan Prakash Mishra, A2 should also be considered on the same plan meriting the same sentence awarded to Paltan Mallah, A9.

96. Gyan Prakash Mishra, A2, and Chandrakant Shah, A1, have a business and personal relationship with one another. This is evidenced by Ex-P 393 (12) and (13), which were recoveries made from the house of Chandrakant Shah, A1 on 12.11.1991. These are letters written by Gyan Prakash Mishra to Chandrakant Shah, A1 vowing loyalty to him and

offering to sacrifice his life. Apart from these recoveries, Exs - P 447 to P-449, found in Chandrakant Shah's house are the complaints made on behalf of Gyan Prakash Mishra, A2, by his brother Prabhunath Mishra, to the Chief Minister against City Superintendent of Police, Ram Shankar Singh and an order of the Judicial Magistrate Class I, Durg, registering a crime against police officials on the basis of a complaint against police officials R.S. Singh and R.P. Sharma by Gyan Prakash Mishra. The presence of these documents at A1's house show the degree of intimacy between these two. When A2, Gyan Prakash Mishra, was arrested under TADA charges, Chandrakant Shah, A1 sent an application to IG of Police, (Terrorist Activities) to release him from the TADA charges. This application is dated 3.7.88. A copy of this application was recovered from A2's house when PW 192 searched the house on 11.11.1991 in the presence of PW 113, and is marked as Ex-P 294. Ex-P 295 is the copy of the order of the TADA court dated 11.8.1988 releasing Gyan Prakash Mishra, A2. This establishes the relationship between Gyan Prakash Mishra, A2, and A1, Chandrakant Shah, and reveals that the relationship is a longstanding one and dates back to the year 1988.

97. Gyan Prakash Mishra, A2 and Paltan Mallah, A9, and A3, Avdesh Rai, were in jail together in District Jail, Durg at various times between 1985-1988 as told by PW 63, S.P. Singh, Sub-Jailor, Durg Prison during that period. A2 is also a resident of Camp I, Bhilai. Paltan Mallah, A9 was living in Quarter 6F in Camp I, which is in the neighbourhood of Abhay Singh, A4. It is in evidence that A2 has been organising attacks on workers of Simplex company. According to Sudama Prasad, PW 54 he was introduced to A2 by a worker called Ram Asray (NE) who told him that A2 is a person to beware of, having criminal nature and who regularly frequents Simplex Company and who was very close to the owner of Simplex, A5, Moolchand Shah.

98. Manubhai Boda, PW 11, who is working as Junior Purchase Officer at Simplex Castings has stated that Simplex Castings would purchase steel hulls from Bhilai Steel Plant which would be sent to Oswal Industries of A1 for breaking and returning for further

processing. This witness has testified in court that he had seen A2 coming to Simplex from Oswal with the broken steel pieces. Similarly Atul Chadra Pal, PW 31, an employee of Chandrakant Shah, A1's Oswal Iron and Steel Private Ltd., stated that A1 purchased a brick kiln at Sonepur village, Pattan tahsil, Durg in his name and A2 used to supply coal and other things to the kiln. Ramesh Bhasin, PW 142, has stated that Gyan Prakash, A2, used to frequent the factory of Chandrakant Shah, A1, and whenever A1 by letter requested him to advance moneys to A2, he used to oblige. The financial part of the relationship between Gyan Prakash, A2, and A1, Chandrakant Shah on the one hand, and A2, Gyan Prakash and Avadesh Rai, A3, is clearly discernible from Ex-P 393(9) letter from A1 to Ramesh Bhai to give Rs. 1,000/- to A2, and Ex-P 393(11) letter by A2 to Ramesh Bhaiya of Oswal steels to give Rs.2,000/- to Avadesh Rai.

99. Gyan Prakash Mishra was found in A1, Chandrakant's house two days after Niyogi's death, by PW 92, Surajmal Jain when he had been there to invite A1 to his daughter's birthday party.

100. Naveen Shah, A6, is the brother of Moochand, A5 and the step brother of Chandrakant Shah, A1. As mentioned earlier Ex-P 298, a letter dated 28.9.91 was written by Gyan Prakash Mishra, A2, to Naveen Shah, A6 that he had accomplished the task entrusted to him and that he has paid Rs.20,000 towards the contract for killing deceased Niyogi, and that he borrowed the money from Devendra Patni (Jain as according to the deposition), PW 158. The fact that Devendra Patni turns hostile does not render the rest of the contents of the letter deficient of evidentiary value. The fact of the seizure of Ex-P 298 being made from the Akash-Ganga complex has been proved by the witnesses. Further Gyan prakash, A2, has nowhere controverted the fact that he was the author of the letter.

101. It is also the evidence of PW 70 that workers sitting on a dharna outside Simplex Castings, Urla were assaulted on 24.8.91 and he had got the injured workmen admitted in the hospital. There is also evidence to show that A2 used to accompany trucks from Simplex Casting, Bhilai to Oswal owned by Chandrakant Shah, A1.

102. It is not necessary for a conspirator to commit overt acts. There is enough evidence to show that Naveen Shah is also part of the conspiracy. Once it is found that A6 is part of the conspiracy all acts done and things said by other conspirators will be used against him and he is liable to be punished as a conspirator. Therefore his acquittal has to be set aside.

103. Prior to the event of the murder itself, deceased Niyogi had mentioned Gyan Prakash, A2's name in several places in his diary, Ex-P 93. On page 169 of the diary Niyogi has written that on collecting Rs. 5 lakhs from Simplex, Gyanu, i.e. Gyan Prakash, A2 has collected weapons. Raj Kumar Hasmukh, PW 90, has clarified that Gyan Prakash, A2 is also called Gyanu. Further, Niyogi in his micro-cassette has also said that Prabhunath Mishra's goonda brother, i.e. Gyan Prakash, A2, is also putting his full force to ensure that some untoward incident would happen. Niyogi had also told Rajendra Sail, PW 70 on the last night of his life on 27.9.91 that attacks on workers were being made by Gyan Prakash, A2, and private army of Simplex.

104. After the murder of Niyogi, on 30.9.91, Awadesh Rai, A3, was given a contract to maintain cycle stand in Maurya Talkies on the recommendation of Prabhunath Mishra, elder brother of A2. The earning from the cycle stand were deposited in the Syndicate Bank account of A2, Gyan Prakash. It is pertinent to note that when Avadesh Rai, A3, came under police surveillance on 3.10.91, Gyan Prakash Mishra, A2 in the company of Abhay Singh, A4 absconded overnight on 4.10.91 to Pachmarhi. The defense taken by Abhay Singh, A4 that he did not abscond but that he went to his native place to see his ailing wife is disproved by the fact that instead of rushing to his ailing wife, as claimed by him, he left to Pachmarhi with A2, which is in the opposite direction.

Illegality in Search and Seizure will not vitiate documents seized

105. The defects pointed out in the procedure followed by the prosecution in respect of recoveries made during the course of investigation is attacked on the ground that the procedure contemplated by Sec. 27 of Indian Evidence Act is not scrupulously followed :

(i) as the presence of independent and local witnesses were not secured;

(ii) the panchnama should be in two independent parts viz., (a) on the furnishing of the information by the accused about his willingness to help recover crucial facts and, (b) after discovery as a result of information so furnished. (c) As the two aspects have not been satisfied the recoveries have to be rejected .

106. Illegality in investigation will not vitiate the trial is the position taken by the Supreme Court in H.N. Rishbud case, AIR 1959 SC 196. This has been subsequently followed by the Supreme Court and there are any number of judgements laid down that illegality in searches and seizures do not vitiate the documents recovered in the search and that an illegal search can be resisted by a person whose premises are being searched. In ~~'Om Prakash Vs. State of H.P.'~~ ^{VS. OM PRAKASH} AIR 1972 SC 975, the SC held that recoveries made during the course of investigation need not follow the procedure prescribed for searches u/s 100 or 165 Cr.P.C. The I.O.'s evidence alone is sufficient to prove the recovery. In 'State of Maharashtra Vs. Shiv Pujan Singh' AIR 1980 SC 593, this view was again confirmed. It was pointed out that the US Supreme Court despite the IV Amendment was veering around to the Indian view. In 'State of Punjab Vs. Balbir Singh' AIR 1994 SC 1872, the SC made a complete review of the law regarding searches and seizures under the Criminal Procedure Code and affirmed the settled law that illegality in searches will not vitiate the documents seized pursuant to the search.

107. Dealing with the Miranda principles (of the US Supreme Court of 1966) and the mandatory provisions of Sec. 50 of the NDPS Act, the SC held that the mandatory provisions have to be observed because of the mandatory provision under the Act. Nandini Sathpathy's case, AIR 1978 SC 1025, was referred to in this connection where Miranda principles and their application to Indian situations was discussed and it was pointed out by the court that a person in custody could make voluntary confessions, that provision for the presence of a lawyer during custodial interrogations would be advisable but the court explicitly stated that it did not mandate this. The entire debate in Nandini Sathpathy's case was

within the parameters set by the 11 judge Bench of the SC in 'State of Bombay VS. Kathu Kalu Oghad, AIR 1955 SC 1808'. It is submitted that Miranda principles have no application in the case of Paltan Mallah, A9, who was arrested and produced before the court and a police remand under the Cr.P.C. was obtained. There was no infringement of any procedure prescribed by law. Paltan conclusion though produced on 22.8.93 and 25.8.93 in Gorakhpur, and subsequently on the first date in Durg did not complain of illegal detention or torture.

108. To sum up we submit that the case is proved beyond reasonable doubt. The perspective of the court while examining the evidence should be to examine the case by taking into account the cumulative circumstance forming a chain and not to pluck individual circumstances and fault the prosecution. (Laxmi Raj Shetty, AIR 1988 SC 1274) As stated in 'Ram Avatar Vs. Delhi Administration, AIR 1985 SC 1692, not all the links need to appear on the surface. Further as elaborated in several decisions and reiterated in 'Bhagwan Singh, AIR 1974 SC 898, there can not be better evidence than the acts and statements of co-conspirators. As held in S.C. Bahri case, AIR 1994 SC 2420, as it is not possible to come across direct evidence in conspiracy cases based on circumstantial evidence, the totality of circumstances, and the antecedent and subsequent conduct of the accused have to be taken into account. Further it has been held that no overt acts are necessary from any of the members of the conspiracy. As pointed out in several decisions on conspiracy the agreement u/s 10 Evidence Act need not be proved but can be inferred the nor actual meeting of conspirators is necessary nor actual words spoken is necessary in proof of conspiracy. (Kehar Singh case, AIR 1988 SC 1883).

109. In appreciating evidence hyper technical approach should be avoided as pointed out by the SC in para 10 of 'State of UP Vs. M.K. Anthony', AIR 1985 SC 48. The principles set down in Bhoginbhai Hirjibhai Vs. Gujarat, AIR 1983 SC 753 may guide the court in assessing the evidence before the court. Finally in considering the issue of proof beyond reasonable doubt the principles laid down by the Supreme Court in 'H.P. Administration

Vs. Om Prakash, AIR 1972 SC 975 at para 6, may be taken into account.

110. For the foregoing reasons amongst others advanced during oral arguments before this Hon'ble Court, we submit that the prosecution has proved beyond all reasonable doubt that all the accused charged in this case, including the acquitted accused, Naveen Shah, A6, Chandrabaksh, A7, and Baldev, A8, are guilty of the offence charged with at the trial, viz., 120-B r/w 302 IPC, and in the case of Paltan Mallah, A9, charged with offences w/s 120B- r/w 302 IPC and 302 IPC. While we submit that the convictions against Chandrakant Shah, A1, Gyan Prakash Mishra, A2, Avadesh Rai, A3, Abhay Singh, A4, Moolchand Shah, A5 and Paltan Mallah, A9 be confirmed, the judgement of acquittal by the trial court in favour of Naveen Shah, A6, Chandrabaksh, A7 and Baldev, A8 be set aside and they be sentenced to life imprisonment u/s 120-B r/w 302 IPC.

**THE FOLLOWING SUBMISSIONS ARE MADE IN CLARIFICATION OF ISSUES
RAISED DURING THE COURSE OF THEIR REPLY BY THE LEARNED
COLLEAGUES APPEARING FOR THE DEFENCE.**

On the applicability of section 10 of the Evidence Act to the period when A9 took to flight, moved over to another state and even crossed over to Nepal it plainly is covered by the conspiracy charge and anything said or done by one conspirator would become admissible against the others. He makes an extra judicial confession not as a narrative but as a reason to cross over to Nepal to evade apprehension and would therefore fall within section 10 of the Evidence Act.

We have already submitted while Mirza Akbar AIR 1940 PC 176 held field as it was followed in AIR 1957 SC 747. But when the same case came again to the Supreme Court again Bhagwan Swarup AIR 1965 SC 682 Subba Rao J speaking for the court departed from the view held by the Supreme Court on the interpretation of Section 10 of the Evidence. He after discussing the words used clearly held that "in furtherance of Conspiracy" is not synonymous with the words "in reference to their common intention" used in the Act and the latter is wider. This appears to be obvious because these words transcend the ambit of the definition of conspiracy under Section 120 A and is intended to cover acts both antecedent and subsequent to establish a charge of conspiracy. Otherwise the amplitude of the words used cannot be explained. When the matter came up for consideration in Kehar Singh AIR 1988 SC 1883 Justice Oza agreed with the opinion ex-

pressed in Bhagwan Swarup AIR 1965 SC 682 while Jagannath Shetty J chose to follow the view expressed by the Privy Council in AIR 1940 PC 176.

Even after the restricted definition in AIR 1957 SC 747 the court took into account transactions after the period of Conspiracy, in that case 31 Jan' 1949 as the subsequent transactions are entered into with a view to screen the earlier transactions. They were taken as relevant facts admissible to prove the fact in issue. They characterised the reception of such evidence as preparatory or explanatory and as providing a link in the chain of evidence relating to such matters. The discussion commences from para 35 onwards. While the court did not treat them as admissible under section 10 they were taken as evidence of subsequent conduct providing links in the chain of evidence and as explanatory facts. In our respectful submission what was not let in by the front door was let in by the rear door. Mr. Justice Subbarao in Bhagwan Swarup Vs. State of Maharashtra AIR 1965 SC 682 (please refer to page 688 of the report) while deciding the later case was conscious of the earlier case and chose to interpret section 10 differently departing from the earlier view and interpreted section 10 untrammelled by the Privy Council decision in Mirza Akbar.

The defence know the difficulty in overcoming the submissions on section 10 fell back on the usual contention that the extension of the conspiracy period to the flight of AG Paltan Malla to U.P. and Nepal the accused had no notice. Such a contention, assuming it is tenable cannot vitiate the trial. That

is evident from sub clause (2) of section 464. First the court must be satisfied on failure of justice by this omission to give the extended period and the details in the conspiracy charge framed. A charge of conspiracy has been framed. The evidence regarding the flight is contained in the evidence of PW 125 Umesh Mishra the Police Officer PW 104 Baloni PW 105 Satya Prakash and PW 124 Bishambar Shani.

All these witnesses have been subjected to detailed cross examination by the lawyers appearing for all the accused. All of them filed detailed statements as part of their statements under 313. In the refer trial and appeals against conviction no submissions have been made as to how failure of justice has been occasioned by the omission to indicate the expanded period. This question of failure of justice under the old section 537 been elaborately dealt with by the Supreme Court in William Slaney vs. State of Madhya Pradesh and which still holds the field. We extract the salient passages hereunder :

"We agree that a man must know what offence he is being tried for and that he must be told in clear and unambiguous terms and that it must all be "explained to him" so that he really understands (section 271(1) in sessions trials, section 255(1) in warrant cases) but to say that a technical jargon of words whose significance no man not trained to the law can grasp or follow affords him greater protection or assistance than the informing and the explaining that are the substance of the matter, is to base on fanciful theory wholly divorced from practical reality; and the same applies to the vast bulk of jurors who attend our courts.

They are none the wiser because of a formal charge except in a vague and general way that is of no practical account. The essence of the matter is not a technical formula of words but the reality. Was he told? Was it done in a fair way?

(43) As an illustration, we give a case in which a Sessions Judge in a sessions trial having no charge before him from

the committal court omits to frame one himself but instead, carefully and painstakingly, explains the particulars and the substance of the offence as in section 242 and complies with the spirit and object of section 271 but omits to observe its technical form.

Then, when the witness are examined, the accused shows by his cross-examination that he knows just what he is being tried for. He is examined fully and fairly under section 342 and his answers show that he is under no delusion. He calls witnesses in defence to meet the very point or points the prosecution seek to make out against him. He put in a written statement and is defended by an able lawyer who raises no objection from start to finish.

Will a technical defect in a case like the vitiate the trial? If the Code says Yes, then there is an end of the matter. But, in our opinion, the Code very emphatically says No; but even if that is not the case and even if the very plain and clear words of sections 232 and 535 are susceptible of two meanings, surely they should be construed so as to accord with what will best serve the ends of justice.

We have put a case in which there neither is, nor can be, prejudice. Surely it would be a travesty of justice to brand a conviction in a case like that as illegal. And yet that must be done if these words that are otherwise plain are construed in a - strained and unnatural manner. On the other hand, there is nothing in the view we take to imperil or harass an accused however innocent he may be.

How does the technical formula of a charge afford greater protection than the "explaining" under section 271(1) and the examination under section 342? And yet, on the argument before us, an omission to observe these other rules that are of the substance is curable when there is no prejudice but not the sacred ritual of the framing of the charge; once that is there, the accused cannot be heard to say that he did not understand however much that may be the fact. Surely, this cannot be right.

(44) Now, as we have said, sections 225, 232, 535 and 537 (a) between them, cover every conceivable type of error and irregularity referable to a charge that can possibly arise, ranging from cases in which there is a conviction with no charge at all from start to finish down to cases in which there is a charge but with errors, irregularities and omissions in it. The Code is emphatic that 'whatever' the irregularity it is not to be regarded as fatal unless there is prejudice.

It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be

done if the shadow is mistaken for the substance and the goal is lost in a labyrinth of unsubstantial technicalities. Broad vision is required, a nice balancing of the rights of the State and the protection of society in general against prosecutions from harassment to the individual and the risks of unjust conviction.

(62) It is true that if it cannot be ascertained who struck the fatal blow, then the accused cannot be convicted unless the common intention is proved and in that type of case an acquittal of the co-accused may be fatal to the prosecution. But the converse does not hold good, and if the part that the accused played can be clearly brought home to him and if it is sufficient to convict him of murder simpliciter he cannot escape liability because of the charge unless he can show prejudice.

(63) Put at its highest, all that the appellant can urge is that a charge in the alternative ought to have been framed, which in itself imports that it could have been so framed. As was said by the Privy Council in - 'Begi v. Emperor', AIR 1925 PC 130 at p.131 (L) and also by this Court in - AIR 1952 SC 167 at p.170(I).

"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. That is what happened here ... They were not charged with that formally, but they were tried on evidence which brings the case under section 237".

The variation between murder and concealing evidence after the crime is no more than the variation between killing a man jointly with another, sharing his intention, or allowing the other to do the actual killing with the same common intention.

We submit that the contention that the extended period is not a part of the charge of conspiracy in view of the decision cited has no force and does not warrant interference in the manner set out in either sub clauses (a) or (b) of subsection 2 of section 464 Cr.PC.

The provision to that section on their own showing is not attracted.

Assuming for the sake of argument such interference is warranted all the evidence with reference to the flight of AG Paltan Malla is already available on record and the charge of Conspiracy is only inferential and the accused apart from taking technical pleas could not attack the finding of the learned Trial Judge on this aspect also. Thus the extra judicial confession, not being a narrative but offered as a reason for flight to Nepal would be a statement admissible against A1, A2 and A6 and therefore all the accused including A6 Navin Shah are guilty of the offences with which they are charged and therefore confirm the convictions against A1 to 5 and 9 and reverse the order of acquittal in favour of A6 and A7 and sentence them to life imprisonment u/s 120-B r/w 302 IPC.

We would like to close the case by referring the Hon'ble Judges to the passage from HP Administration Vs. Om Prakash 975 at page 981 para 6 which reads:

(6) "While it is not the function of this Court to determine who other than the person who has been charged with the murder had committed it, the line which the defence adopted was to establish that the witnesses referred to above had an interest in implicating the accused or at any rate to create uncertainty and doubt sufficient to give the benefit to the accused. It is not beyond the ken of experienced able and astute lawyers to raise doubts and uncertainties in respect of the prosecution evidence either during trial by cross-examination or by the marshalling of that evidence in the manner in which the emphasis is placed thereon. But what has to be borne in mind is that the penumbra of uncertainty in the evidence before a Court is generally due to the nature and quality of that evidence. It may be the witnesses are lying or where they are honest and truthful, they are not certain. It is therefore, difficult to expect a scientific or mathematical exactitude while dealing with such evidence or arriving at a true conclusion. Because of these difficulties corroboration is sought wherever possible and the maxim that the accused should be given the benefit of doubt becomes pivotal in the prosecution of offenders which in other words means that the prosecution must prove its case against an

accused beyond reasonable doubt by a sufficiency of credible evidence. The benefit of doubt to which the accused is entitled is reasonable doubt - the conscientiously entertain and not the doubt of timid mind which fights shy - though unwittingly it may be - or is afraid of the logical consequences, if that benefit was not given or as one great Judge said it is "not the doubt of a vacillating mind that has not the moral courage to decide but shelters itself in a vain and idle scepticism". It does not mean that the evidence must be so strong as to exclude even a remote possibility that the accused could not have committed the offence. If that were so the law would fail to protect society as in no case can such a possibility be excluded. It will give room for fanciful conjectures or untenable doubts and will result in deflecting the course of justice if not thwarting it altogether. It is for this reason the phrase has been criticised. Lord Goddard C.J. in Rex. v. Kritz (1950) 1 KB 82 at p.90 said that when in explaining to the juries what the prosecution has to establish a Judge begins to use the words "reasonable doubt" and to try explain what is a reasonable doubt and what is not, he is much more likely to confuse the jury than if he tells them in plain language. "It is the duty of the prosecution to satisfy you of the prisoner's guilt". What in effect this approach amounts to is that the greatest possible care should be taken by the Court in convicting an accused who is presumed to be innocent till the contrary is clearly established which burden is always in the accusatory system, on the prosecution. The mere fact that there is only a remote possibility in favour of the accused is itself sufficient to establish the case beyond reasonable doubt. This then is the approach.

K.G.Kannabiran, Senior Counsel
with Dr.V.Suresh, Advocate
for the C.B.I. alongwith
Y.K.Saxena, Spl.P.P., C.B.I.

SHANKAR GUHA NIYOGI MURDER CASE

STAGES OF CONSPIRACY

Period of Conspiracy : 1990-1991

Murder of Niyogi : 28th September, 1991, around 3:45 a.m.

Stage 1 : Origin of the Conspiracy

II Half of 1990 : Niyogi Moves
to Bhilai from Dalli Rajhara

September 1990 Onwards : Launch of Industrial Agitations

Against Simplex, specifically against
Moolchand, A5, and Naveen Shah, A6,
and other Industries of Bhilai

Police Witnesses

1. TI Salaam, PW 7/PB Pg. No. 1356
2. PW 1, 3, 7, 8, 17, 85, 18

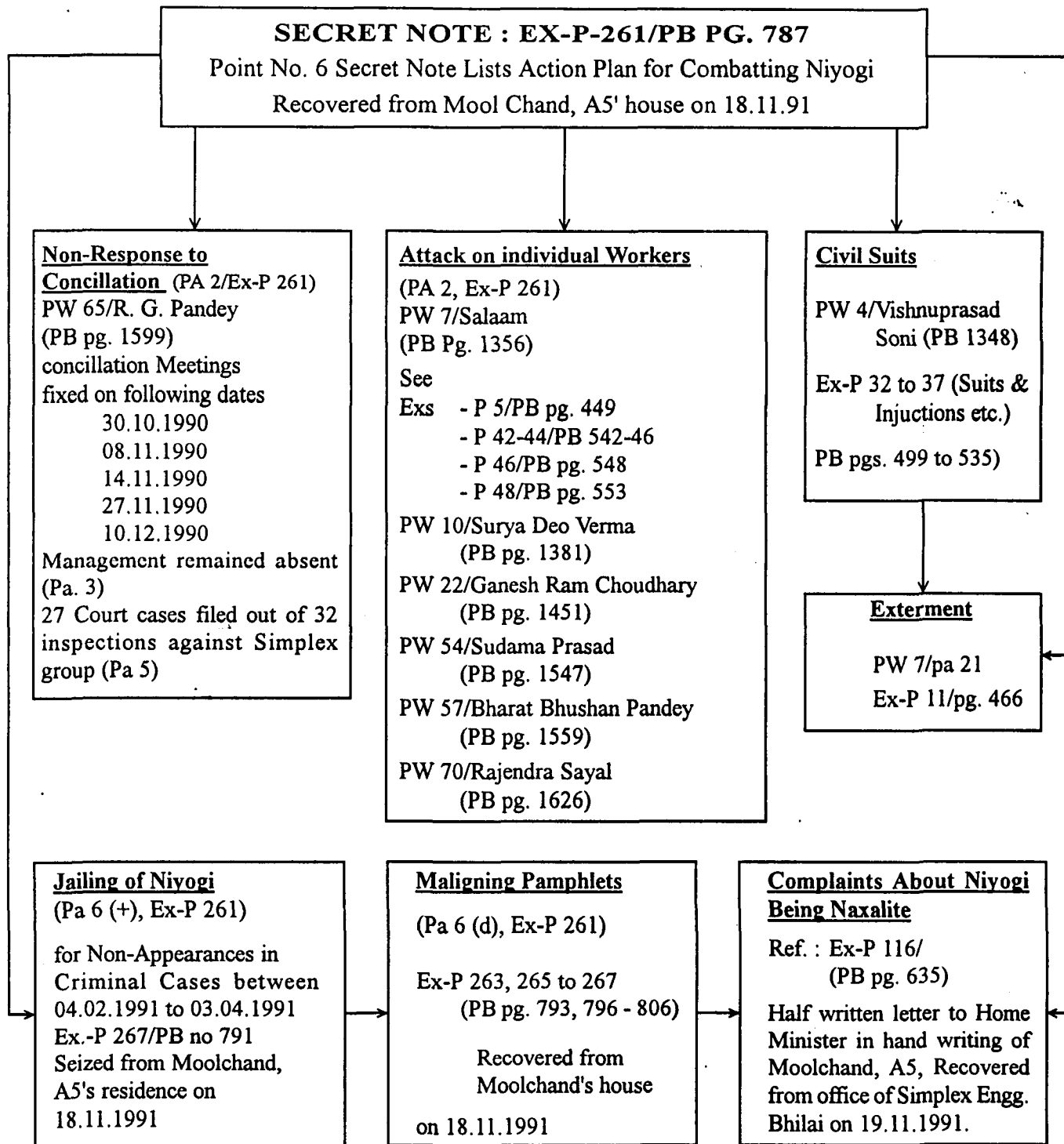
CMM Witnesses

- PW Nos. 64, 67, 68, 70,
71

Dates of Agitation / Meetings launched by CMM, CSS & PESS in 1990-91

<u>Bhilai</u>	<u>Urla</u>
1. 17.09.1990 (Vishwakarma Jayanti)	17.04.1991
2. 14.11.1990	20.04.1991
3. 15.11.1990	13.08.1991
4. 23.01.1991	20.08.1991
5. 25.06.1991	22.08.1991
6. 06.06.1991	
7. 04.07.1991	
8. 07.08.1991	Ref. : PW 8/SI, M.P. Parameshwar
9. 15.08.1991	(PB pg. 1373)
10. 26.08.1991	
11. 28.08.1991 (Dhikkar Divas)	
12. 04.09.1991	

Stage 1 (Cntd.)



When none of the above strategies adopted by A5, A6 and A1, in company of A2 proved adequate to control CMM and Niyogi, the conspiracy was hatched to eliminate Shankar Guha Niyogi. In pursuance of this, to procure arms A1, A3 and A4 left for Nepal by Tempo Trax in March 1991. A2 joined them in Nepal and all of them stayed in hotels together.

The likely date of origin of Secret Note, Ex-P 261 can be ascertained by nothing that para 6 (F) talks of getting Niyogi arrested in case he is involved. Pursuant to this he was arrested on 4.2.1991. The note therefore must have been formulated much prior to that date.

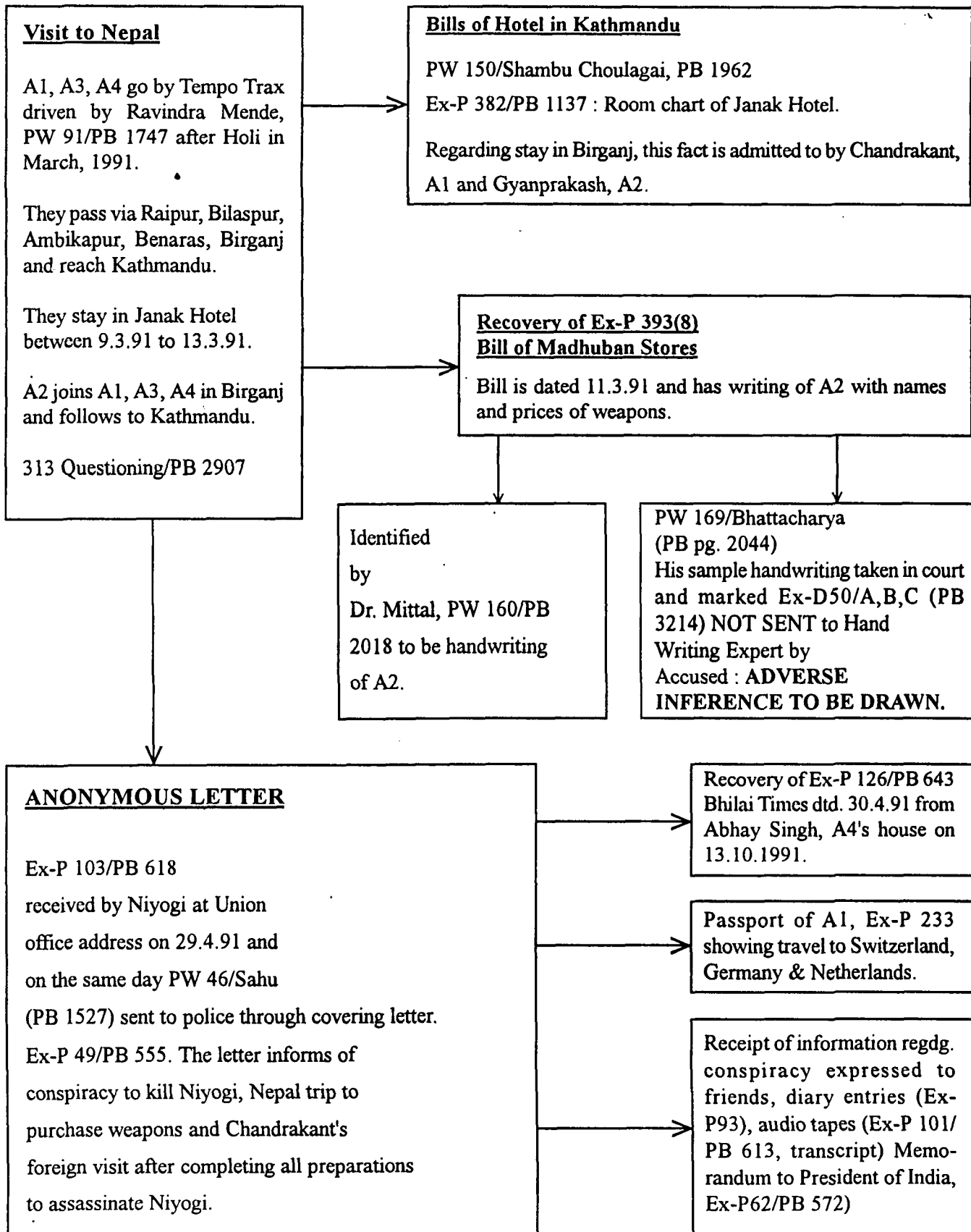
THIS FALSIFIES KETAN SHAH'S, PW 98 (PB 1775) claims on this point.

Shankar Guha Niyogi Murder Case : Stages of Conspiracy

Stage 2 : Conspiracy ; Pre-Execution Phase

(From the end of Stage 1 : In pursuance to the conspiracy hatched by A5, A6 and A1 alongwith A2, A3 and A4 to murder Shankar Guha Niyogi, it was planned to procure weapons. The purchase of weapons were also for self-defence in the event of a backlash.

For this the following action plan was initiated.



Shankar Guha Niyogi Murder Case : Stages of Conspiracy

Stage 3 : Entry of Paltan Mallah, A9 into Conspiracy

Background :

Regarding Paltan being resident in Bhilai for many years.

Reshmi Bai, PW 51/PB 1540

S. P. Singh, PW 63/PB 1582
(Assistant Jailor, Durg)

Ex-P 155A/PB 687,

Jail Register

Vishambar Das Manikpuri

PW 121/PB 1866

(Photographer)

Qn. No. 181/PB 2695

Admission of Paltan

Paltan seen residing in Qr. 6-F

Camp 1, Bhilai, 1-2 months before murder of Niyogi.

Krishna Kumar, PW 42/PB 1517

NOTE : Apart from having seen A9 in above quarter he has testified to fact that the quarters was not locked but latched.

Further, he states that Abhay Singh, A4 also resides close to Qr. 6F.

Also note Gyanprakash, A2, and Awadesh Rai also live in Camp I, in the neighbourhood.

P. B. Nair, PW 19/PB 1441

Purchase of Ammunition and Arms

Purchase on 14.9.91 from Mulla Shamsuddin's shop in Raipur.

Jakudeen, PW 61/PB 1569

Nurudeen, PW 66/PB 1604

Raj Bahadur, PW 59/PB 1564

Purchase of 3 LG cartridges against license of S. N. Singh by B. K. Singh who signed in S. N. Singh's absence. Paltan accompanies B. K. Singh.

Ex-P 148-151/PB 671 - Sale Register

Ex-P 147/PB 670, License of S. N. Singh.

Incriminating Circulation of 3 LG Cartridges immediately after Niyogi's Murder

Purchase by Jainarayan Tripathi, PW 72/PB 1658, of Bilaspur, of 3 LG cartridges on 3.10.91 from Mulla's shop, Raipur.

NOTE : His license shows purchase on 2.10.91 from Bilaspur. Jainarayan is brother-in-law of A2.

Bankebihari Yadav, PW 58/PB 1562

3-4 days after Niyogi's murder, on instruction of B. K. Singh, witness returns 3 LG cartridges to S. N. Singh.

TI Rajesh Tiwari, PW 173/PB 2503 on 13.10.91, S. N. Singh deposits in Police Station Bhilai Nagar, cartridges with ELEY markings.

Seizure Memo, Ex-P 423/PB 1251

NOTE : 2 LG Cartridges recovered from Paltan on 24.8.93 also bear ELEY markings.
Vide : Ex-P 398/PB 1188

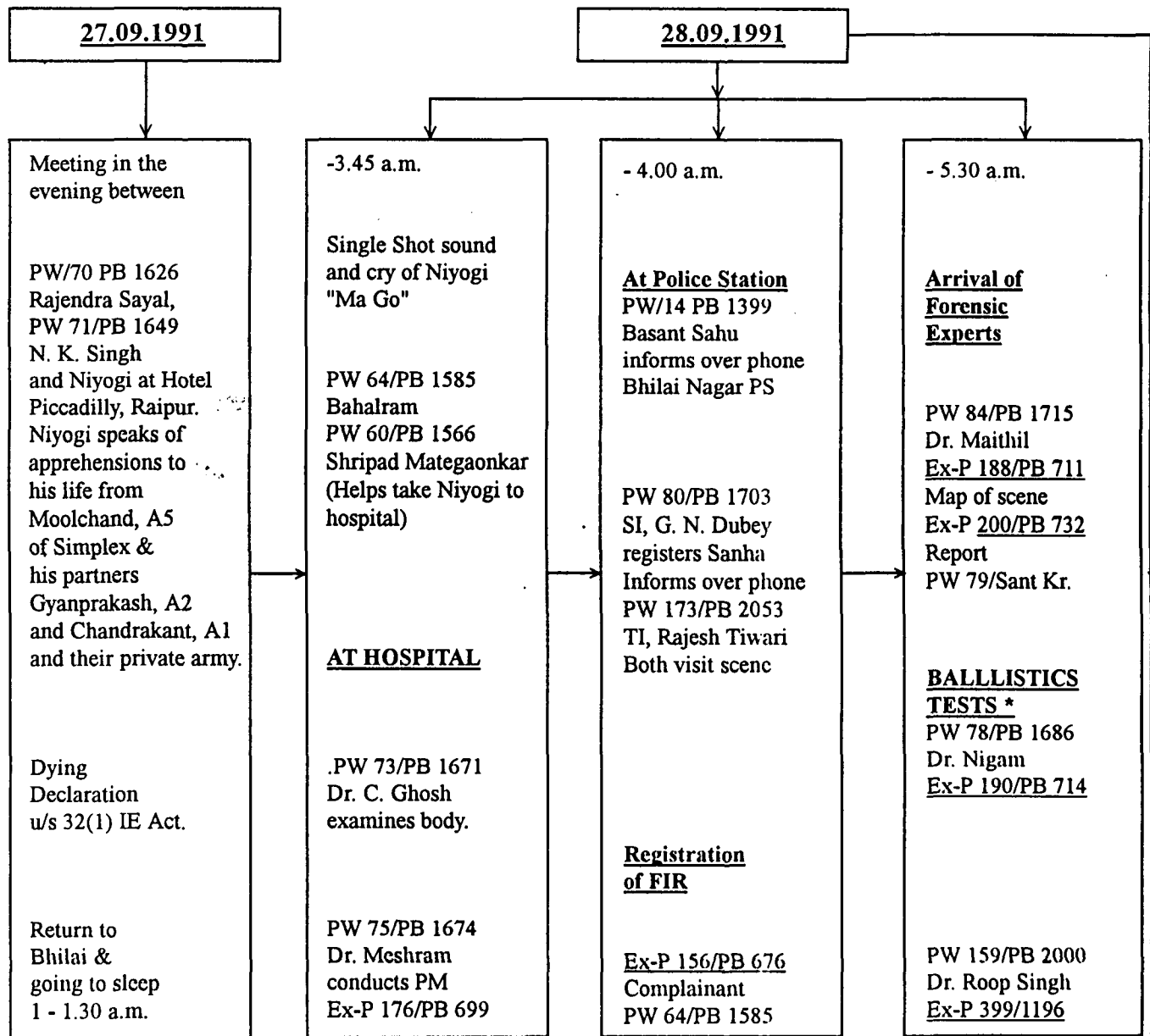
Shankar Guha Niyogi Murder Case : Stages of Conspiracy

Stage 4 : Commission of Murder of Niyogi on 28th September 1991, around 3.45 a.m.

Single Shot by Paltan using "Desi Katta" after entering through courtyard on front side

NOTE : Cobwebs in front of window on courtyard side cleared by his entry.

(Dr. Maithil, PW 84/PB 1715 at Pa 4/PB 1716 and pa 10/PB 1721; Trial Court Judgement Pa 44)

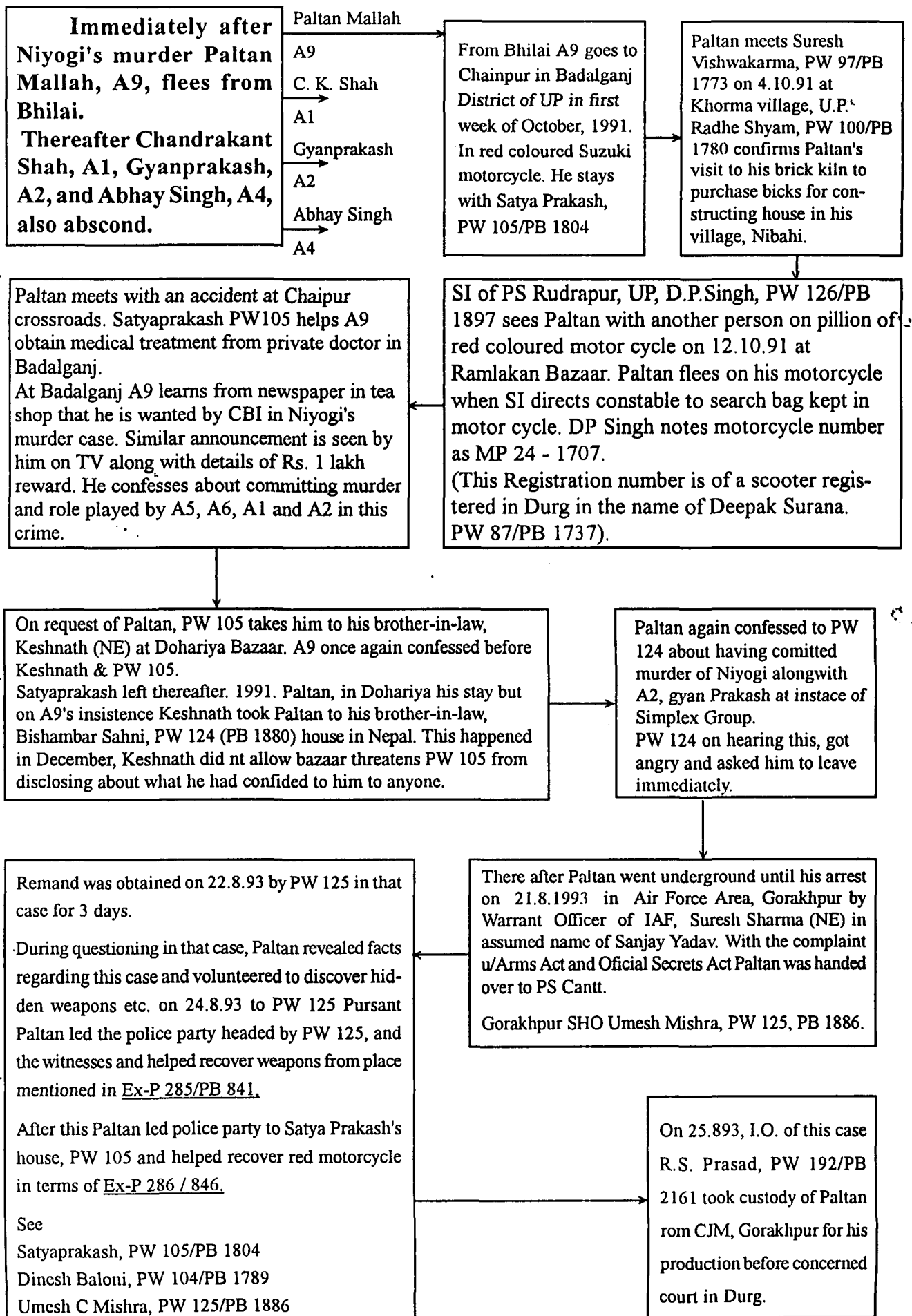


* Note : Ballistics tests were conducted on later dates. They're referred only to complete the facts.

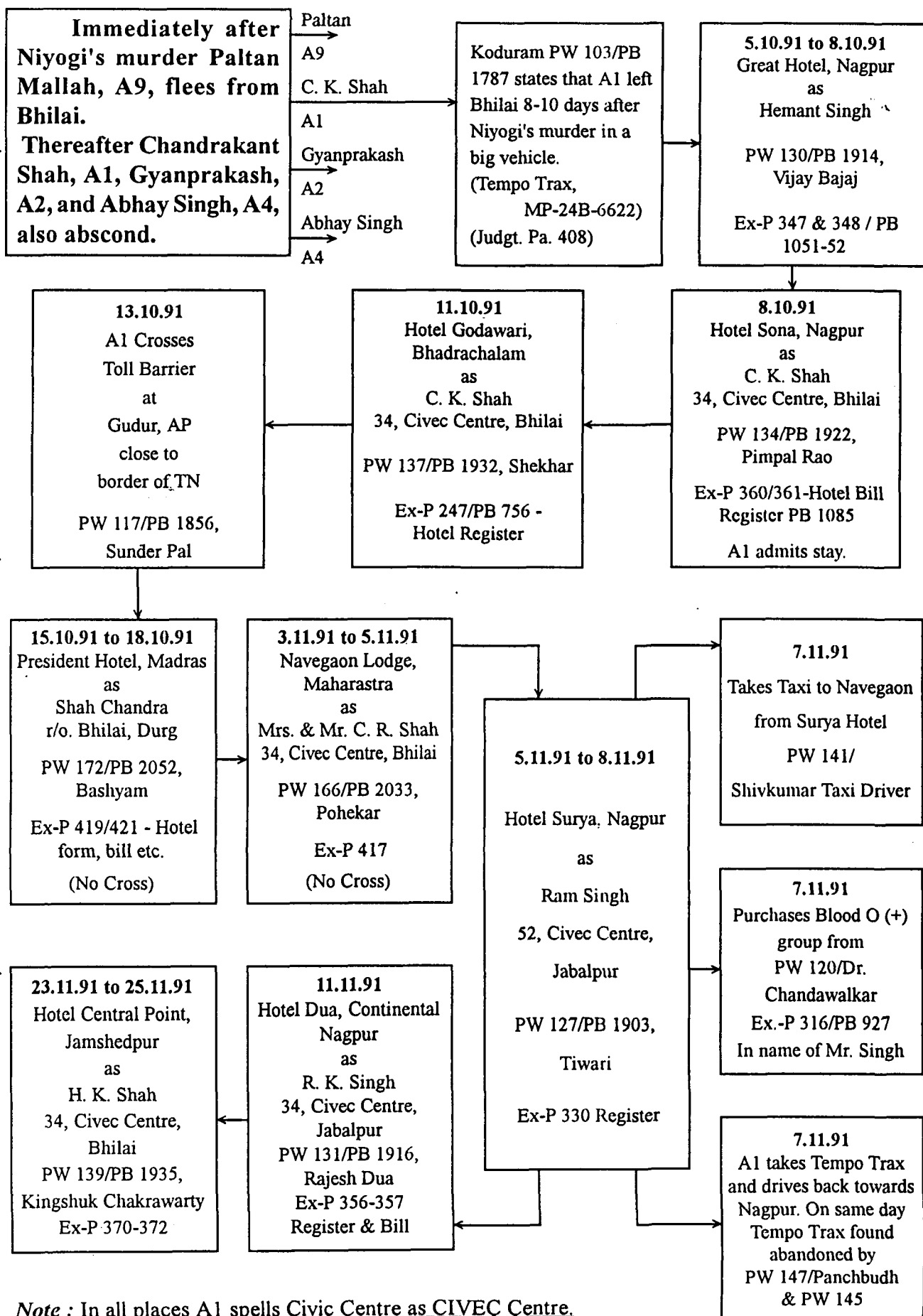
Cryptic Letter
of Gyan Prakash, A2 to Naveen Shah, A6 regarding completion of task and payment to Paltan, A9 (implied)
Ex-P 298/PB 871
Recovered from Akash-Ganga Complex on 15-12-1991 vide Search Memo, Ex-P 297/PB 868

Shankar Guha Niyogi Murder Case : Stages of Conspiracy

Stage 5 : Post - Crime Conduct of Accused

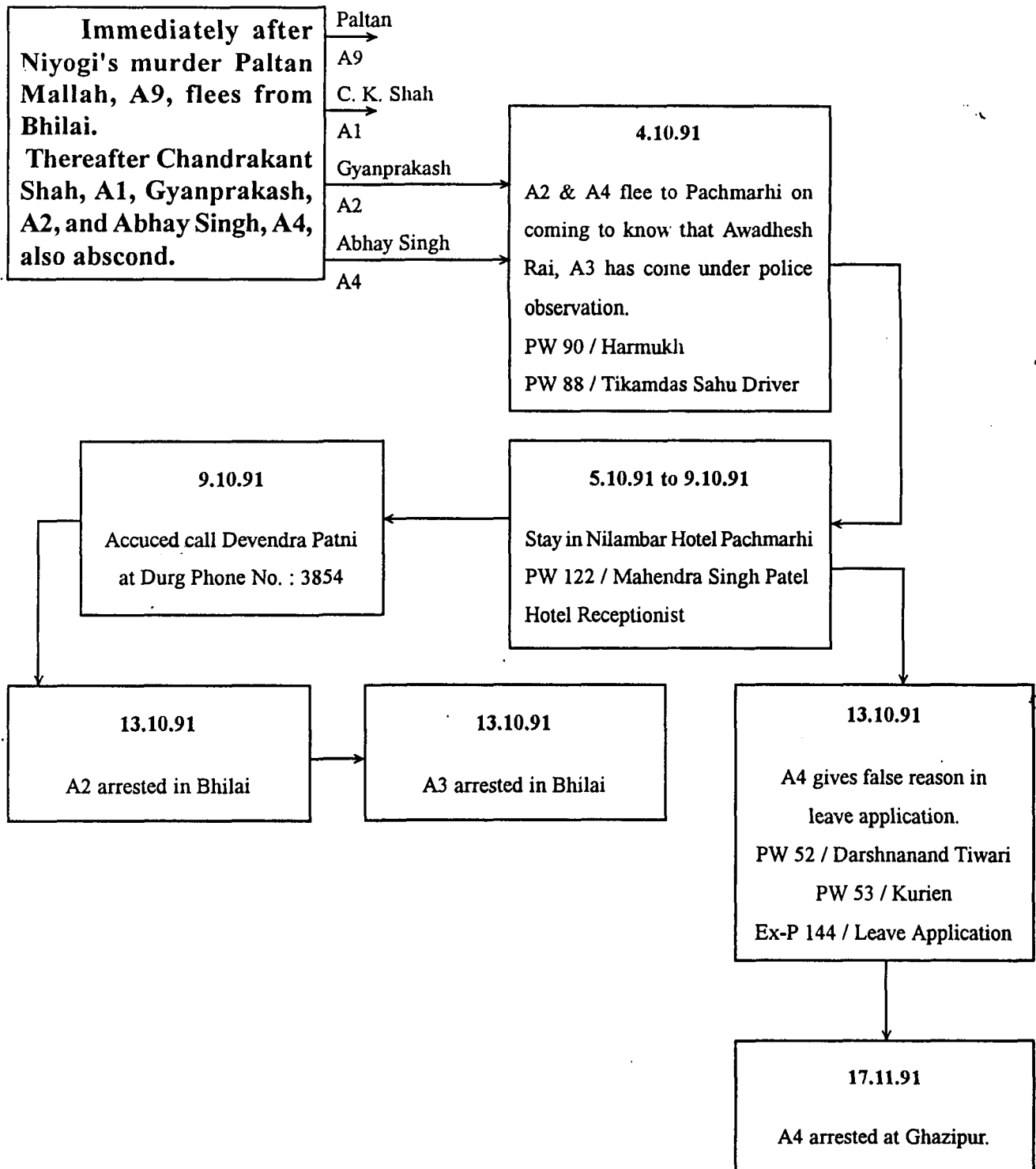


Stage 5 : Post - Crime Conduct of Accused



Note : In all places A1 spells Civic Centre as CIVEC Centre.

Stage 5 : Post - Crime Conduct of Accused



CITATIONS ON DIFFERENT POINTS

CONSPIRACY

1. Bhagwan Swaroop Vs State AIR 1965 SC 682
2. Lernart Schussler Vs Director of Enforcement AIR 1970 SC 549
3. Bhagwan Singh Vs State AIR 1974 SC 898
4. Yashpal Mittal Vs State AIR 1977 SC 2433
5. Kehar Singh Vs Delhi Admn. AIR 1988 SC 1883
6. Ajay Agarwal Vs Union AIR 1993 SC 1637
7. Suresh Chandra Bahri Vs Bihar AIR 1994 SC 2420
8. EK Chandrasen Vs Kerala AIR 1995 SC 1066

CONSPIRACY-STANDARD OF PROOF

- a) Vs P. H. Pandian AIR 1996 SC 1599

CIRCUMSTANTIAL EVIDENCE

PRINCIPLE FOR EXAMINING CASE OF -

1. Laxmi Raj Shetty Vs Tamil Nadu AIR 1988 SC 1274
2. Ram Avtar Vs Delhi Admiration AIR 1985 SC 1692
3. Gokaraju Venkata Naraa Raju Vs AP 1993 supp (4) SCC 191
4. Mulakh Raj Vs Satish Kumar AIR 1992 SC 1175

RES GESTAE U/S 6 IE ACT

1. Gentela Vijayawardhana Rao Vs AP AIR 1996 SC 791

DISCOVERY U/S 27 IE ACT

DISCOVERY IN ONE CRIME WHEN INVESTIGATING ANOTHER CRIME.

1. State of Rajasthan Vs Bhup Singh 1997 (10) SCC/ 675/1997
SCC (crm.) 1032
2. Inre Kamakshi Naidu AIR 1943 Mad 89
3. PP Vs Kandikatla Nagabhushanan AIR 1943 Mad 661
4. R Vs Kelt 1994 (2) All Eng. R 780

RECOVERY IN COURSE OF INVESTIGATION DIFFERENT FROM SEIZURE U/S 103 GPC

5. H.P. Administration Vs Om Prakash AIR 1972 SC 975

OTHER ASPECTS

6. Gridharilal Gupta Vs DN Mehta..... AIR 1971 SC 28
7. State of UP Vs Deoman Upadhyay..... AIR 1960 SC 1125

ABSENCE OF DISCLOSURE STATEMENT & RECOVERY MEMO WILL NOT AFFECT VALIDITY OF EVIDENCE REGARDING RECOVERY.

8. S. C. Bahri Vs Bihar..... AIR 1994 SC 2420

RECOVERY AFTER LAPS OF ONE YEAR

9. Erro-badrappa Vs Karnataka AIR 1983 SC 446

ILLEGALITIES IN INVESTIGATION & SEARCH WILL NOT VITIATE TRIAL

1. H. N. Rishbud Vs Delhi..... AIR 1959 SC 196
2. Radhakrishnan Vs UP AIR 1963 SC 822
3. State of Maharashtra Vs Shivpujan Singh..... AIR 1980 SC 593
4. State of Bombay Vs Kathu Kalu Oghad AIR 1961 SC 1808

(EXAMINATION OF VALIDITY OF S 27 IE ACT IN TERMS OF ART 20 (3) OF CONSTITUTION)

5. State of Punjab Vs Balbir Singh AIR 1994 SC 1872
(for summary of Law on effect illegalities in search)

MIRANDA JUDGEMENT OF U.S. SUPREME COURT

Judgements of Indian SC place limits of applicability of
Miranda Principles in Indian Law.

6. Nandini Sathpathy Vs Dani AIR 1978 SC 1025
- State of Punjab Vs Balbir Singh AIR 1994 SC 1872
7. (Miranda Principles held applicable only vis-a-vis mandatory
provision of S.50 of NDPS Act)
Despite Irregularity & Illegality Trustworthy evidence
can not be Ignored
8. State of Punjab Vs Gurmit Singh..... AIR 1996 SC 1393
- a) State of Rajasthan Vs Kishore AIR 1996 SC 3035

EXTRA JUDICIAL CONFESSION :

CORROBORATION NOT NECESSARY

1. State of UP Vs MK Anthony AIR 1985 SC 48

NON-COMMUNICATION TO OTHERS DOES NOT AFFECT EVIDENTIARY VALUE

2. Sahoo Vs UP AIR 1960 SC 40

COURT SHOULD NOT PRESUME EIC IS WEAK TYPE OF EVIDENCE

3. Narayan Singh Vs MP AIR 1985 SC 1678

CONFESSION & CIRCUMSTANCES TO BE READ TOGETHER

4. Ratan Gond Vs Bihar AIR 1959 SC 18

PUNCH WITNESSES

1. H. P. Administration Vs Om Prakash AIR 1972 SC 975
2. Khujji @ Surendra Tiwari Vs MP AIR 1991 SC 1853

CONFESSIONS OF CO-ACCUSED U/S 30 IE ACT

1. Baburao Bajirao Patil Vs Maharashtra 1971 (3) SCC 427
2. Ram Prakash Vs Punjab AIR 1959 SC 1
3. Nathu Vs UP AIR 1956 SC 56

ACCOMPLICE

- Satyanarayana Vs Hyderabad AIR 1956 SC 379
Relatiew scope of S.133 IE Act
S.C. Bahri Vs Bihar AIR 1994 SC 2420

HOSTILE WITNESS

1. Khujji @ Surender Tiwari Vs HP AIR 1991 SC 1853
Satpal Vs Delhi AIR 1976 SC 980
State of UP Vs Ramesh Prasad Mishra AIR 1996 SC 2766
= 1996 (10) SC 360

PRESUMPTION U/S 114 IE ACT ; ILLUSTRATIONS NOT EXHAUSTIVE

1. Kaliram Vs HP AIR 1979 SC 2773
2. Balram Prasad Agarwal Vs Bihar AIR 1997 SC 1830

DYING DECLARATION V/S 32 (1) IE ACT

1. Sharda Birdichand Sharda Vs Maharashtra AIR 1984 SC 1622
2. Rattan Singh VS HP 1997 (4) SCC 161

ABSCONDENCE

1. Laxmi Raj Shetty AIR 1988 SC 1274
2. S. C. Bahri Vs. Bihar AIR 1994 SC 2420

CHARACTERISTIC MANNER OF SPELLING USE : REF : A 1 WRITING ADDRESS AS CIVIC CENTRE

Laxmi Raj Shetty Vs TN AIR 1988 SC 1274

(Absconding Accused Spelling Bangalore as B'lore held by SC to the incriminatory circumstance against Accused)

NON EXAMINATION OF WITNESS (REF : KESHNATH) = 1997 (6) SC 660

Harpal Singh Vs Dervinder Singh AIR 1997 SC 2914

(Accused could have summoned witness In 114 (a) of Evidence Act only permissible inference and not a necessary inference.)

CRYPTIC COMMUNICATION

Bhagwan Swarup Vs Maharashtra AIR 1965 SC 682

BALLISTICS EXAMINATION : REF : PHOTOGRAPHS

Ramanathan Vs. T. Nadu AIR 1978 SC 1204

BAD CHARACTER VS DISPOSITION

Bhagwan Swarup Vs State of Maharashtra AIR 1965 SC 682

TIME SPENT IN PRISON

Sital Singh Vs Emperor AIR 1920 Cal 200

EVIDENCE GIVEN IN COURT : VALUE (REF : BISHAMBER SAHNI)

Haricharan Kurmi Vs Bihar AIR 1964 SC 1184

APPRECIATION OF EVIDENCE : OMISSIONS & CONTRADICTIONS

1. Tahsildar Singh Vs State AIR 1959 SC

WITNESS PREDILECTION TO BE OVERAWED BY COURT & VIGOROUS CROSS EXAMINATION

2. Bhogibhai Hirjibhai Vs Gujrat AIR 1983 SC 753

3. State of UP Vs M. K. Anthony AIR 1985 SC 48

4. H. P. Administration Vs Om Prakash AIR 1972 SC 975

BENEFIT OF DOUBT : NOT ALWAYS GIVEN TO ACCUSED

1. H. P. Administration Vs Om Prakash AIR 1972 SC 975

2. Khujji @ Surendra Tiwari Vs MP AIR 1991 SC 1853