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ESHER SINGH

v.

STATE OF ANDHRA PRADESH

MARCH 15, 2004

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[DORAISWAMY RAJU AND ARIJIT PASAYAT, JJ.]

Penal Code, 1860—Sections 120A, 120B and 302—Criminal Procedure Code, 1973—Section 2(b)—Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA)—Sections 3(3), 4, 5, 6 and 15—Appellant was involved in giving provocative speeches for formation of Khalistan and inciting violence fanning religious feelings—Appellant and other accused charged for criminal conspiracy and murder of deceased under IPC and TADA—Prosecution relied on confession statement of one of the accused, who died without facing trial, in convicting the appellant—Designated Court convicted only the appellant under section 4 of TADA for making provocative speeches and acquitted the appellant and other accused from the offence of criminal conspiracy and murder—Designated Court disregarded the evidences of some witnesses being relatives of the deceased—Correctness of—Held, use of a confessional statement against the accused under Section 15 of TADA is permissible when both the accused making the confessional statement and the co-accused are facing trial after framing of charges—Designated Court was wrong in disregarding the evidences of witnesses merely on the ground of relationship without giving reasons—Evidences of such witnesses can be acted upon if they are cogent and credible—Ingredients necessary for conviction under section 4 of TADA have been clearly established by prosecution against appellant—On evidence, the conviction for criminal conspiracy and murder not established by prosecution—Evidence Act, 1872 : Section 30—Indian Arms Act, 1959 : Section 27.

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Constitution of India—Article 136—Special Leave Petition by son of the deceased challenging the acquittal of appellant and other accused by Designated Court—Maintainability of—Held, maintainable—Supreme Court has discretionary power to entertain such appeal to prevent serious miscarriage of justice.

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Appellant and other accused intended to take over the institutions established by the deceased and make a base for Khalistan movement. The

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appellant was involved in giving provocative speeches for formation of Khalistan and inciting violence fanning religious feelings. The appellant and other accused were charged for criminal conspiracy and murder of the deceased under sections 120-B and 302 read with 120-B IPC, 3(2) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) and Section 27 of the Indian Arms Act, 1959 read with Section 5 and 6 of TADA.

The Designated Court, on the basis of the evidence tendered by PWs 16 and 32 and corroborated by the confessional statement of one of the accused (A-5), held the appellant guilty of offence punishable under section 4 of TADA and sentenced him to rigorous imprisonment for 5 years and a fine of Rs. 1000 with default stipulation. The Designated Court did not rely on evidences of other witnesses on the ground of relationship with the deceased; however it acquitted the appellant and other accused against other offences since the allegations were not established. Appeals were filed before this Court by the appellant challenging his conviction under section 4 of TADA and by the State challenging the acquittal of the appellant and other accused persons from other offences charged with. An appeal was also filed by the son of the deceased before this Court.

The appellant contended that the evidence of PWs 16 and 32 do not prove the accusations against the appellant; that no specific instance of fanning of religious feelings through provocative speeches for formation of Khalistan and creating communal disharmony by the appellant was proved; that the confessional statement of the accused (A-5), who died before the charges were framed, was not admissible in law; and that the Designated Court acted upon certain statements which were made in the Court for the first time and were not told during investigation. The appellant further contended that the appeal filed by the son of the deceased is not maintainable under Article 136 of the Constitution of India.

The State, in its appeal, contended that accused A-5 had categorically confessed about the involvement of the appellant and other accused in the crime; that the death of the accused A-5, before framing of charges, cannot affect the authenticity of the voluntary confession statement; that the confession of the co-accused is substantive in nature and can be treated as evidence under section 15 of TADA or under section 30 of the Indian Evidence Act, 1872; that the evidences of other witnesses, besides PWs 16 and 32, and other materials on record clearly establish the role played by

A various accused persons, the chain of events and motive for the crime and hence the Designated Court erred in acquitting the appellant and other accused from other charged offences; and that this a fit case under section 3(3) of the Act and offences under the IPC have been clearly established.

The son of the deceased, in his appeal, besides adopting the B contentions of the State, contended that Section 15 of TADA should not be given a too technical interpretation as to disturb the true legislative intent.

Dismissing the appeals, the Court

C HELD: 1. A person becomes an accused for the purpose of trial after the charges are framed. The question of having a trial before charges are framed does not arise. Therefore, the only interpretation that can be given to the expression "charged and tried" in Section 15 of TADA is that the use of a confessional statement against the accused is permissible when D both the accused making the confessional statement and the co-accused are facing trial after framing of charges. [1197-D-E]

Kalpanath Rai v. *State (through CBI),* [1997] 8 SCC 732; *State through Superintendant of Police, CBI/SIT* v. *Nalini and Ors.,* [1999] 5 SCC 253 and *State of Gujarat* v. *Mohammed Atik and Ors.,* [1998] 4 SCC 351, relied on.

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2.1. When the basic features are stated, unless the elaboration is of such nature that it creates a different contour or colour of the evidence, the same cannot be said to have totally changed the complexion of the case. In addition to the evidence of PWs 16 and 32, the evidence of PW-21 provides the necessary links and strengthens the prosecution version. The F evidence of PW-24 was not tainted in any way, and should not have been discarded and disbelieved only on surmises. PW-3, the son of the deceased, has also stated about the provocative statements in his evidence. PW-14 has spoken about the speeches of the appellant highlighting the Khalistan movement. The Designated Court had not given importance to the G evidence of some of the witnesses on the ground that they were relatives of the deceased. The approach is wrong. Mere relationship does not discredit the testimony of a witness. What is required is careful scrutiny of the evidence. If after careful scrutiny, the evidence is found to be credible and cogent, it can be acted upon. [1198-G-H; 1199-A-C]

H 2.2. In the instant case, the trial Court did not indicate any specific

reason to cast doubt on the veracity of evidence of the witnesses, whom it had described to be the relatives of the deceased. PW-24 has categorically stated about the provocative speeches by A-1. The evidence makes the position crystal clear so far as accusations against appellant are concerned. [1199-C] A

3. For the purpose of applying sub-section (2) of Section 4 of TADA, the explanation appended thereto assumes great significance in the present case; more particularly in view of the inclusive definition of "secession". Demand for Khalistan is clearly encompassed by the said definition. The ingredients necessary to bring in application of section 4 of TADA have been clearly established. [1200-F-G] B C

3.1. None of the witnesses examined on behalf of the prosecution stated anything about the descriptive particulars of the assailants. There was also no evidence of the appellant indulging in any manner armed with firearms or explosives. The evidence of witnesses goes only to the extent of showing that the appellant was giving provocative speeches for formation of Khalistan and inciting the Sikhs for violence fanning religious feelings. Merely because the appellant-accused was holding the deceased, as alleged, to be responsible for the killing of six Sikh students that *per se* does not prove conspiracy. [1202-G-H; 1203-A-B] D

3.2. The essence of a criminal conspiracy under the definition in Section 120-A IPC is the unlawful combination and ordinarily the offence is complete when the combination is framed. Unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Law making conspiracy a crime, is designed to curb immoderate power to do mischief which is gained by a combination of the minds. The encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to encompass all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. [1203-F-G] E F G

American Jurisprudence Vol. II p. 559, referred to.

3.3. For an offence punishable under section 120-B IPC, prosecution H

A need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention B only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means. The essence of criminal conspiracy is an agreement to do an illegal act and C such an agreement can be proved either by direct evidence or by circumstantial evidence or by both. The circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused. There is no difference between the mode of proof of the offence of conspiracy and that of any other offence.

[1203-H; 1204-A-B, D; 1205-A]

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Bhagwan Swarup Lal Bishan Lal etc. etc v. *State of Maharashtra,* AIR (1965) SC 682.

Halsbury's *Laws of England* 4th Ed. Vol. 11 P. 58.

E 3.4. As in all other criminal offences, the prosecution has to discharge its onus of proving the case against the accused beyond reasonable doubt. A few bits here and a few bits there on which the prosecution relies cannot be held to be adequate for connecting the accused with the commission of the crime of criminal conspiracy. It has to be shown F that all means adopted and illegal acts done were in furtherance of the object of conspiracy hatched. The circumstances relied for the purposes of drawing an inference should be prior in point of time than the actual commission of the offence in furtherance of the alleged conspiracy.

[1206-A-C]

G *V.C. Shukla* v. *State (Delhi Admn.),* [1980] 2 SCC 665, referred to.

3.5. The provisions of Section 120A and 120B IPC have brought the law of conspiracy in India in line with the English Law by making the overt act unessential when the conspiracy is to commit any punishable offence. [1206-F]

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Regina v. *Murphy,* [1837] 173 ER 502, referred to. A

Russell *on Crime,* 12th Ed. Vol. I. p 202; *Criminal Law* by Glanville Williams, Second Ed. p.382, referred to.

4.1. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event, no overt act is B necessary to be proved by the prosecution because in such a situation, criminal conspiracy is established by proving such an agreement. Where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section 120B read with the proviso to sub-section (2) of Section 120A IPC, then in that event mere proof of an C agreement between the accused for commission of such a crime alone is enough to bring about a conviction under Section 120B and the proof of any overt act by the accused or by any one of them would not be necessary. The provisions, in such a situation, do not require that each and every person who is a party to the conspiracy must do some overt act towards the fulfilment of the object of conspiracy. The essential ingredient being D an agreement between the conspirators to commit the crime and if these requirements and ingredients are established, the act would fall within the trapping of the provisions contained in section 120B IPC.

[1207-F-H; 1208-A]

S.C. Bahri v. *State of Bihar,* AIR (1994) SC 2420 and *E.K.* E *Chandrasenan* v. *State of Kerala,* AIR (1995) SC 1066, referred to.

4.2. The evidence as to the transmission of thoughts sharing the unlawful act is not sufficient. A conspiracy is a continuing offence which continues to subsist till it is executed or rescinded or frustrated by choice F of necessity. During its subsistence whenever any one of the conspirators does an act or series of acts, he would be held guilty under Section 120-B IPC. [1209-C-D]

Kehar Singh and Ors. v. *The State (Delhi Administration),* AIR (1988) SC 1883, referred to. G

4.3. When the evidence is tested, the inevitable conclusion is that the Designated Court was justified in holding that accusations under Section 120-B IPC were not made out so far as the offences under IPC are concerned. So far as the motive for the killing is concerned, the evidence is clear to the extent that the appellant wanted removal of the deceased H

A from the bodies of various trusts and educational institutions and not his removal from this world. In the absence of adequate material to establish commission of offences punishable under Section 302 or 302 read with Section 120B IPC and Section 3(3), 5 and 6 of TADA and Section 27 of the Arms Act, the appeals filed by the State and the complainant are
B without merit. [1211-F-G]

Ajay Agarwal v. *Union of India and Ors.*, JT (1993) 3 SC 203; *Yashpal Mittal* v. *State of Punjab,* [1977] 4 SCC 540 and *State of Maharashtra* v. *Som Nath Thapa,* (1996) 4 SC 615, relied on.

C 5.1. Article 136 of the Constitution neither confers on anyone the right to invoke the jurisdiction of this Court nor inhibits anyone from invoking the Court's jurisdiction. The power is vested in this Court but the right to invoke the Court's jurisdiction is vested in no one. The exercise of the power of this Court is not circumscribed by any limitation as to who may invoke it. Where a judgment of acquittal by the High Court has
D led to a serious miscarriage of justice, this Court cannot refrain from doing its duty and abstain from interfering on the ground that a private party and not the State has invoked the Court's jurisdiction. This Court can entertain appeals against judgments of acquittal by the High Court at the instance of interested private parties also. The circumstance that the Code does not provide for an appeal to the High Court against an order of
E acquittal by a subordinate Court, at the instance of a private party, has no relevance to the question of the power of this Court under Article 136. Appeals under Article 136 of the Constitution of India are entertained by special leave granted by this Court, whether it is the State or a private party that invokes the jurisdiction of this Court, and special leave is not
F granted as a matter of course but only for good and sufficient reasons, well established by the practice of this Court. [1201-A-G]

Durga Shankar Mehta v. *Thakur Raghuraj Singh,* AIR (1954) SC 520; *Mohan Lal* v. *Ajit Singh,* [1978] 3 SCC 279; *Arunachalam* v. *P.S.R. Sadhanantham and Anr.,* [1979] 2 SCC 279 and *P.S.R. Sadhanantham* v.
G *Arunachalam and Anr.,* [1980] 3 SCC 141, referred to.

5.2. In the instant case, both the State and son of the deceased have questioned the correctness of the impugned judgment. Appeal filed by the son of the deceased is first in point of time. On the facts of the case, there is no question of holding the appeal filed by the son of the deceased to be
H not maintainable. [1202-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1363 of 2003. A

From the Judgment and Order dated 17.10.2003 of the IIIrd Additional Metropolitan Sessions Judge, Hyderabad in S.C. No 186 of 1989.

WITH B

(Criminal Appeal Nos. 1523 and 1524 of 2003)

R.K. Jain, Hardev Singh, U.R. Lalit, Mrs. K. Amreshwari, S.S. Nehra, Dr. I.B. Gour, Abhav Prakash Sahay, P.R. Ramasesh and Guntur Prabhakar for the Appearing Parties. C

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. The matrix of these three appeals is a judgment rendered by the III Additional Metropolitan Sessions Judge, Hyderabad acting as the Designated court under the Terrorist and Disruptive Activities D (Prevention) Act, 1987 (in short the 'TADA').

Nine persons were alleged to be responsible for homicidal death of one Joga Singh (hereinafter referred to as the 'deceased'). Five of them faced trial and one of them Nishan Singh (A-3) died during the trial and therefore the case abated so far he is concerned. The accused persons who faced trial were E Esher Singh (A-1), Nanak Singh Nishter (A-2), Nishan Singh (A-3), Dilbagh Singh (A-4) and Rajender Singh Dhingra (A-6). Ram Singh (A-9) absconded. Charge sheet was filed against A-1 to A-9 for offences punishable under Sections 120B and 302 read with Section 120B of the Indian Penal Code, 1860 (in short the 'IPC'). Section 3(3) of TADA and Section 27 of the Indian F Arms Act, 1959 (in short the 'Arms Act'), read with Sections 5 and 6 of TADA.

The Trial Court found that accused Esher Singh, (appellant in Crl.A. No. 1363/2003) was guilty of offence punishable under Section 4 of TADA and while further holding that the other allegations were not established so G far as appellant Esher Singh and other co-accused are concerned. Esher Singh was convicted as afore-noted and sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.1,000 with default stipulation. While Esher Singh questions legality of the conviction and sentence imposed, the State of Andhra Pradesh has questioned acquittal of the accused persons who faced trial, and their non-conviction for the charged offences. H

A The State's appeal is numbered as Criminal Appeal No. 1524/2003. Balbir Singh son of deceased Joga Singh has filed Criminal Appeal No. 1523/2003 with grievances similar as that of the State of Andhra Pradesh.

Accusations which led to the trial of the accused persons are essentially as follows:

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Accused persons conspired to kill deceased Joga Singh, to abet terrorist and disruptive activities. Deceased had established many educational institutions to serve Sikh community like Gurunanak Hospital in 1969, Gurunanak Public School Bidar in 1975, Gurunanak School at Hyderabad in 1978 and could successfully establish Gurunanak Dev Engineering College C at Bidar in August, 1980. Accused persons intended to take over the said institutions and make a base for Khalisthan movement. After "Operation Blue Star" which wounded the religious feelings of Sikhs, the Pro-Khalistan militant Sikh Students Organisation had its watchful eyes on Sikh student population of Bidar to establish its base. Dilbagh Singh (A-4) an activist of D all India Sikh Students Federation (AISSF) who was studying in II year in the Gurunanak Dev Engineering College came in contact with Deepender Singh (A-5) who was student of Regional Engineering College, Balky. Others involved were some wanted activists of AISSF. After proposed move of the Government of India to have a comprehensive legislation for all Gurudwaras, the deceased Joga Singh created a trust in the name of Shree Nanak Jheera E Sahib Trust (Foundation) and transferred all the Educational Institutions to the trust while delinking religious activities of the Gurudwara to Gurudwara Nanak Jheera Sahib and Mai Bhago. Deceased continued to be the head of both the trust and Gurudwara.

Esher Singh (A-1) who was working as Sub-Inspector of Central Reserve F Police Force left the service after "Operation Blue Star" and started moving about in Hyderabad City wearing Bhindranwale type garments and organised processions carrying Bhindranwale pictures and held Bhog ceremony at Gowliguda Gurudwara, Hyderabad. He was making efforts to inject hatred and disaffection among the Sikhs and could successfully take over the G Barambala Gurudwara at Rajendranagar, Attapur in Sikh Chavani and successfully tried to bring some militant youth under his fold and indoctrined Pro-Khalistan ideology by imparting training to them in Shastra Vidya and Karate at Sikh Chavani Attapur and Gowliguda. He also attempted to advocate the said ideology in Bidar among the students. Nanak Singh Nishter (A-2) who was president of Central Gurudwara, Gowliguda and also an Executive H Member of Shree Nanak Jhira Sahib, Bidar, and Gurudwara Mai Bhago at

Janwada was actively assisting the deceased in his religious activities, felt disappointed and aggrieved by his non-inclusion as member of the Trust of Prabhandak Committee, Nanak Jheera Trust in 1987. Nishan Singh (A-3) was residing in Bidar since September 1987 as representative of Baba Charan Singh who was incharge of Karseva of Kurukshetra Gurudwara. Attempts to pursue deceased Joga Singh to transfer the Kar Seva agreement in his name cancelling the earlier agreement of Baba Charan Singh did not yield any result. A-1 to A-3 developed hatred against the deceased, and launched tirade against the deceased with a view to take over the seat of the deceased. Dilbagh Singh (A-4) a native of Amritsar and active member of All India Sikh Student Federation, Punjab, sought his admission in Gurunanak Dev Engineering College, Bidar, and started enlisting students from North India into his Pro-Khalistan activities and became close associate of A-3. Deepender Singh (A-5), resident of Nabha, Patiala, and student of Rural Engineering College, Bhalki which is at a distance of 40 kms. from Bidar came in contact with A-1 and A-3 and was frequently visiting Dhera of Karseva. A-1 and others were rigorously pursing their plan and propagating Pro-Khalistan ideology among Sikh students of Bidar Rajender Singh Dhingra (A-6) of Hind Motor Driving School and Sony Travels and relative of A-2 is staunch supporter of A-1. Mohinder Singh (A-7) a native of Haryana, a proclaimed offender and terrorist of Punjab who was involved in number of terrorist cases was also close associate of A-3. Gurmail Singh (A-8) of Punjab is also a terrorist of Punjab and participated in various crimes alongwith A-5, A-7 and A-9. Ram Singh (A-9) also is a wanted terrorist of Punjab who participated in the present occurrence.

A-1 and A-2 who were entertained for their religious affiliation misused the same by collecting donations from students seeking admissions in Gurunanak Dev Engineering College, Bidar. On coming to know of the same, deceased discarded them. Movement started by deceased to start a Medical College heightened the tensions which was building up with the arrival of some Sikh boys from North India. Several non-Sikh educational institutions joined hands to organise an agitation against granting of permission to start medical college, because they feared that it would be further increasing the number of Sikhs to about 1200, of which 1000 from North India having anti-established stands. There was organised violence and riots in September, 1988, in which six Sikh students were killed, besides many were injured and houses and shops of Sikhs were damaged and burnt, besides religious institutions. A-1 to A-3 who were waiting for an opportunity to make their inroads to contain the growing influence of the deceased Joga Singh and also

A to occupy his position, made number of visits to Bidar, contacted A-3, A-4 and A-5 and other militant Sikhs having Pro-Khalistan ideas for starting tirade against the deceased Joga Singh. They also started an active propaganda that contributions made by the Sikh community to the educational trust were misused with a view to deprive the Sikh community. They also accused the deceased of many improprieties including indifference to the security of Sikhs. B At the instance of A-1 and A-2, a meeting of Sikh community was convened on 22.9.1988 at Sikh Hostel Narayanguda, Hyderabad to pay homage to departed souls of students who were killed in Bidar riots. In the meeting A-1 and A-2 proposed to hold Deewan-E-Aam on 2.10.88 at Bidar Gurudwara with an ulterior motive of defaming and excommunicating the deceased and C trustees and usurp the control of Gurudwara and the trust. A-1, A-2, A-3, A-4, A-6 and others marshalled their associates, and mustered their strength having successfully augmented majority among the students who attended. A-1 and A-2 gave highly inflammatory speeches making wild allegations against the deceased and levelling allegations of mal-administration of religious funds of the community, made the deceased responsible for the misery to D Sikh students and accused him of having failed in his responsibility to protect the Sikhs at Bidar. In that way A-1 to A-3 could successfully make a dent in establishing a base for Pro-Khalistan movement and trying to get support of those who were openly opposing the deceased Joga Singh. A-1 and A-2 made their own henchmen as Punj Pyaras and imposed punishment of E "Thankayya" on the deceased and four others holding them responsible for the death of Sikh students and for their religious impropriety. The deceased and his supporters resisted the said move and the matter was referred to Thakhat Such Khand Shri Hazur Saheb, Nanded, which is considered as Southern region religious head of the Sikh community. Hazura Singh (DW-36) who is one of the Punj Pyaras of Nanded Gurudwara made enquiries F from A-1 and deceased, disapproved the move of A-1 of ex-communication and imposition of punishment on the deceased. A-1 questioned the propriety of decision taken by Hazura Singh (DW-36), but later obeyed the religious order. Accused persons proclaimed that they will retaliate if the culprits are not booked before 23rd November, 1988 (i.e. Guru Nanak Jayanthi) as a part G of terrorist activity to create terror in the minds of moderate Sikhs.

On 28.12.1988, two vehicles bearing Nos. AHS 9424 AHA 1168 which were carrying sixty ceiling fans were burnt by mob of students in Gurudwara premises. In that regard a case i.e. Cr. No. 422/88 U/Ss. 143, 211, 136 r/w 149 IPC was registered at Gandhigunj P.S. of Bidar District against unknown H students in which the complicity of A-4 was strongly suspected. A-1 and A-

2 started printing, publishing and circulating highly inflammatory, defamatory propaganda against the deceased Joga Singh, instigating student community against the deceased with a view to bring them under their fold and propagate Pro-Khalistan among Sikh community and organise an organisation, calling itself as "SIKH COMMANDO FORCE". They threatened the Government with dire consequences under the pretext of championing the cause of Sikh Community.

Deceased was apprehensive of A-1 and his associates and made earnest appeal to the authorities concerned requesting to contain the anti-national activities, for protection and also to take steps to contain the Pro-Khalistan activities. As a security measure, check post was established on the outskirts of Bidar to check the vehicles in which the Sikhs were entering into Bidar and systematically check and numbers noted with a view to prevent inflow of wanted Pro-Khalistan activities and arms and ammunition. Another check post was established at the entrance of Gurdwara, Bidar, besides various other major steps for tightening security at Bidar Gurudwara under charge of M. Srivastava, Superintendent of Police, Bidar. One officer was also posted as Personal Security Officer to the deceased with a service revolver and ammunitions.

A-1 to A-3 intensified their war against the deceased by abusing, threatening, intimidating him. By the end of 1988 A-1 to A-3 could successfully establish contact with the underground dreaded terrorist Mohinder Singh (A-7) in Nanded who was taking his shelter there. Thereafter A-7 shifted to Bidar alongwith his family and took shelter with A-3 in his Dhera as a Kar Sevadar. A-5, A-8 and A-9 used to frequently move in the company of Kar Sevadar alongwith A-3, A-4 and A-7. A-8 approached Dayal Singh (PW-32), Avtar Singh (PW-26) and other residents of Hyderabad and requested them to join hands with them in removing deceased from being a religious head. A-7 shifted to Hyderabad and got accommodation through PW-26 at Hyderabad. A-1 and A-2 held secret meetings in Kishan Bagh Chavani and made efforts to enlist services of Sikh youth to liquidate deceased Joga Singh. A-1, A-2, A-3, A-4, A-5 to A-9 held number of meetings in the house of A-2.

In the month of February 1989, during the examination of B.E. II year at G.N.D.E. College, numbers of students including A-4 were caught while they were indulging in mal-practices. At that time deceased refused to interfere with the enquiry in the matter. At that time, A-3 and A-4 nourished hatred

A against the deceased. A-1 to A-9 entered into criminal conspiracy to do away with deceased. A-1 was mastermind of conspiracy for liquidating the deceased. A-5 and A-7 were entrusted with the job of securing weapons. A-2 and A-3 provided shelter and finance for the operation, A-1 was entrusted to select youth for operation of annihilation, while A-6 was to provide information and conveyance. A-8 and A-9 were entrusted with execution of annihilation B of deceased. In pursuance of said conspiracy, A-5 and A-9 went to Punjab and secured A.K.47 rifles, one .32 revolver and 200 rounds of ammunition. The accused persons surveyed the topography of proposed scene of offence and were noticed late in the night of 29.3.89. On 24.3.89 A-1, A-7, A-8 and A-9 alongwith Professor Darshan Singh Ragi visited Bidar when the latter C attended Keertan arranged by some devotees. At that time, the plan of action proposed to liquidate Joga Singh could not be executed. A-8 through A-6 secured a red colour Maruti Car bearing Registration No. AEY 222 belonging to PW-11 on payment of Rs. 64,000 A-7, A-8 and A-9 visited Bidar on 28.3.1989 in the said Maruti Car and contacted A-3, A-4 and A-5 to track down the movements of deceased Joga Singh. In pursuance of said criminal D conspiracy, A-5, A-7, A-8 and A-9 went to the house of deceased in the red colour Maruti Car while A-5 was waiting in the Car. A-8 armed with a .32 Revolver was guarding at the scene. A-7 and A-9 entered the house armed with AK.47 assault rifle. On 30.3.89 at about 21.05 hours, while PW-1 was serving dinner while other family members of deceased were witnessing the E T.V. in the drawing-cum-dining hall, A-7 and A-9 entered into the drawing cum dinning hall, opened fire with A.K. Assault rifle, pumped bullets on Joga Singh who succumbed to gun shot injuries and on seeing the same Devender Singh (PW-1) and Balwanth Singh (PW-2) raised cries, tried to chase them, but the A-7 and A-9 while retreating fired at them indiscriminatively to scare them away. PW-1 chased them upto main road F and came to know through P. Satyanarayan (PW-8) that 4 to 5 persons fled away in a red Maruti Car towards Darussalam while scaring the public by opening fire in the air. A-5, A-7 and A-9 returned to the house where they were staying and tried to quit the house immediately. Meanwhile Darshan Singh (PW-14) and others surrounded the house in which A-5, A-7 and A-G 9, tried to apprehend them, but they fled away into the dark. A-8 who made attempt to escape on Luna bearing Registration No. AEA 1326 was surrounded by them. He left the Luna and took to heels and he was chased by them and on finding no way to escape, he fired in the air to scare them and finally shot himself dead with his Revolver.

H On receipt of the complaint a case (Cr. No. 63/89) under Section 302

IPC and Sections 25 and 27 of the Arms Act was registered, inquest was conducted over the dead body, and it was sent for post mortem. Blood stained clothes of the deceased, empty cartridges and spent bullets were seized under panchanamas. Residential portion of house of A-7 was searched and a driving license, a receipt, H.P. Gas cylinder, clothes, utensils and other household articles were seized. Naganath (PW-15) identified A-7 to be Mohinder Singh alias Satwender Singh @ Satta involved in number of terrorist cases in Punjab and Haryana. C. Narasingha Rao (PW-47) seized the application form, reservation slip written by A-5 for himself and A-9 for their return journey from Delhi to Hyderabad. Subsequently A-7 was killed in an encounter in the intervening night of 16/17-5-1989. In that regard also one A.K. rifle was seized from his possession which was deposited in the Court of Judicial Magistrate of First Class, Sangrur. A-3, A-6, and A-5 were arrested on 3.4.1989, 7.4.1989 and 20.4.1989 respectively. Confessional statement of A-5 was recorded under TADA and A-2 and A-1 were arrested on 27.4.1989 and 11.5.1989 respectively.

The trial Court on the basis of evidence tendered by PWs 16 and 32 as corroborated by the confessional statement of A-5 held that the accused appellant Esher Singh had committed the offence punishable under Section 4 of TADA. It was concluded that A-1 was giving provocative speeches for formation of Khalistan and was inciting violence fanning the religious feelings. Therefore the accusations clearly established commission of offence punishable under Section 4 of TADA. It further came to hold that the other accusations were not established. It was noted that the two assailants who fired the guns leading to the death of the deceased were not identified. Since some of the statements made in Court were not stated during investigation, the trial Court did not attach any importance thereto.

In support of the appeal filed by accused Esher Singh, Mr. R.K. Jain learned senior counsel submitted that the evidence of PWs 16 and 32 do not prove the accusations. It was not stated during investigation regarding the need for establishing Khalistan or about the claim alleged to have been made that the accused appellant was Deccan Bhindrawala. Merely because he was wearing clothes of a particular colour, that also did not establish commission of any offence. Statements made for the first time in court without having been told during investigation should not have been acted upon by the trial Court. No specific instance of the so called statements that allegedly led communal dis-harmony or fanning of religious feelings, and the nature of provocation alleged to have been made in the speeches for formation of

A Khalistan was stated. The alleged confessional statement could not be relied upon because A-5 who was claimed to have made the confession died on 13.4.1991, even before the charges were framed and therefore was not admissible in law. Even otherwise, the so called confessional statement was recorded when the custody of A-5 was illegal as was observed by the High Court of Andhra Pradesh in Writ Petition No.14403/1989. The High Court B has categorically held that the custody was illegal for the period between 31.3.1989 and 1.10.1989. Reference was made to *Kalpnath Rai* v. *State (Through CBI),* [1997] 8 SCC 732 to contend that the conclusions drawn by the trial Court were erroneous. In essence, it was submitted that the trial Court was not justified in convicting the accused Esher Singh.

C

Learned counsel for the State submitted that A-5 had categorically stated about the involvement of A-1. Not only PWs 16 and 32 but other witnesses i.e. PWs 1, 3, 14, 17, 19, 21 and 24 spoke in detail about the role played by various accused persons. The evidence of PW-21 has not been discarded and the evidence of PW-24 should not have been dis-believed on D mere surmises. The role played by accused Esher Singh was graphically described by the prosecution witnesses and the trial Court has noted them. Therefore, the consideration should not have been restricted only to the evidence of PWs 16 and 32. The pamphlet distributed were published by A-1 and it clearly indicates what was in the mind of accused persons regarding E giving a boost to the Khalistan movement and creating communal disturbances and disharmony. The evidence of certain witnesses has been discarded on the ground of relationship, which is not the correct approach. Merely because A-5 died before charges were framed, that does not affect the confessional statement which has been held to be voluntary. On the peculiar facts of the case, when initially A-5 was not arrayed as an accused subsequently the F doubts regarding certain aspects were set right by this Court and proceedings continued so far as A-5 is concerned, the fact that he died before framing of charge cannot affect the authenticity of his confessional statement. Even if for the sake of argument it is conceded that the same was not to be acted upon in terms of Section 15 of TADA, yet by operation of Section 30 of the Indian Evidence Act, 1872 (in short the 'Evidence Act') it can be considered. G Initially, the trial Court had held that TADA had no application to the facts of this case but this Court held that TADA applies. There is no magical charm in the expression "charged and tried" used in Section 15 of TADA. It can very well mean charged for trial. A person can be treated to be charged when allegations are made and not necessarily when charges are framed. The H confession of a co-accused is in the nature of substantive nature and *Kalpnath*

Rai's case (supra) has been over-ruled in *State Through Superintendent of Police, CBI/SIT* v. *Nalini and Ors.*, [1999] 5 SCC 253. The chain of circumstances were clearly established, the car used for commission of the offence was traced and therefore the circumstances clearly established that the accused respondents along with others named were responsible for the killing of deceased and therefore the acquittal from offence relatable to Section 120B and 302 cannot be maintained. The use of the car standing near the house of the deceased and the purchase and sale of the car are links which have been overlooked. The circumstances like association of an accused with others, and sharing of common/similar animus against the deceased have been established. A-1 and A-2 had strong animosity and motive so far as deceased is concerned. The movement in the close proximity of the house of deceased Joga Singh clearly brings out the patent object and conspiracy has been well established. According to the prosecution version, two persons entered, fired and killed. The search for the accused started immediately when people came running. One person who was traveling on a Luna was chased committed suicide. There is evidence to show that he was A-8. The materials on record show that the deceased A-5 was connected with accused Gurmail and this also provides an additional link to the chain of circumstances. The motive of the crime has been spoken to by various witnesses. The animosity of A-1 so far as deceased is concerned is well brought out by the evidence which shows that because of deceased's refusal to pay money he was killed. Prior to that, he was ex-communicated, was receiving threatening letters and was being made responsible for the killing of six Sikh students through riots. Significance of the statement relating to the Blue Star Operation and the proclamation of A-1 to be Deccan Bhindrawala are circumstances of great significance. The deceased accused was falsely claiming to be one Mohinder Singh, and had got an identity card in that name. But the evidence shows that he was A-8. His presence in the car used for get away and the evidence showing that he knew A-1 closely and that they were meeting and moving together has been established. Ext. P-18 shows that in October 1988 there was a demand of money. These aspects have not been properly considered.

The rigor of Section 15 TADA which is diluted after the amendment has also been noted in *Nalini's* case (supra) and has full application to the facts of the case. A-5 was shown as an accused in the charge sheet. Subsequently there was an order of discharge, which was set aside by this Court so far as proceedings under TADA are concerned.

Learned counsel for Balbir Singh, the son of the deceased Joga Singh adopted the submissions made by learned counsel for the State. Additionally, according to him, the too technical interpretation of the expression "charged and tried" would not be in line with the legislative intent. The Act has been enacted to take care of all terrorist activities. Since direct evidence is hard to find because of fear psychosis created by the accused persons and normally people try to remain behind doors. Special provisions relating to nature of substantive evidence have been provided in TADA. Both learned counsel for the State and Balbir Singh submitted that this is a fit case where Section 3(3) of TADA and offences under the IPC have been clearly found established.

We shall first deal with the question whether confessional statement of A-5 can be acted upon. Section 15 reads as follows:

> **"15. Certain confessions made to police officers to be taken into consideration.** - (1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or soundtracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under this Act or rules made thereunder :
>
> Provided that co-accused, abettor or conspirator is *charged and tried in the same case* together with the accused.
>
> (2) The police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily."
>
> (Underlined for emphasis)

Crucial words in the provision are "charged and tried". The use of the expression "charged and tried" imposes cumulative conditions. Firstly, the two persons who are the accused and the co-accused in the sense used by the Legislature under Section 15, must be charged in the same trial, and secondly, they must be tried together. *Kalpnath Rai's* case (supra) has been overruled

in *Nalini's* case (supra) making the position clear that the confession of a co-accused is substantive evidence. A

Section 2(b) of the Code of Criminal Procedure, 1973 (in short the 'Code') defines "charge" as follows:

> "2(b) 'charge' includes any head of charge when the charge contains more heads than one:" B

The Code does not define what a charge is. It is the precise formulation of the specific accusation made against a person who is entitled to know its nature at the earliest stage. A charge is not an accusation made or information given in abstract, but an accusation made against a person in respect of an act committed or omitted in violation of penal law forbidding or commanding it. In other words, it is an accusation made against a person in respect of an offence alleged to have been committed by him. A charge is formulated after inquiry as distinguished from the popular meaning of the word as implying inculpation of a person for an alleged offence as used in Section 224 of IPC. C D

Chapter XVII of the Code deals with "charge". Section 211 thereof deals with content of charge. Section 273 appearing in Chapter XXIII provides that evidence is to be taken in presence of the accused. The person becomes an accused for the purpose of trial after the charges are framed. The expression used in Section 15 TADA is "charged and tried". The question of having a trial before charges are framed does not arise. Therefore, the only interpretation that can be given to the expression "charged and tried" is that the use of a confessional statement against a co-accused is permissible when both the accused making the confessional statement and the co-accused are facing trial after framing of charges. In *State of Gujarat* v. *Mohammed Atik and Ors.*, [1998] 4 SCC 351 this position was highlighted. Unless a person who charged faces trial along with the co-accused the confessional statement of the maker of the confession cannot be of any assistance and has no evidentiary value as confession when he dies before completion of trial. Merely because at some stage there was some accusation, unless charge has been framed and he has faced trial till its completion, the confessional statement if any is of no assistance to the prosecution so far as the co-accused is concerned. In fact, in para 10 in *Mohammed Atik's* case (supra) it was observed that when it was impossible to try them together the confessional statement has to be kept out of consideration. E F G

So far as application of Section 30 of Evidence Act is concerned, in H

A *Nalini's* case (supra) this question was examined and it was held in paragraphs 90 and 91 as follows:

> "90. But the amendment of 1993 has completely wiped out the said presumption against a co-accused from the statute-book. In other words, after the amendment a Designated Court could not do what it
B could have done before the amendment with the confession of one accused against a co-accused. Parliament has taken away such empowerment. Then what is it that Parliament did by adding the words in Section 15(1) and by inserting the proviso? After the amendment the Designated Court could use the confession of one
C accused against another accused only if two conditions are fulfilled:
>
> (1) The co-accused should have been charged in the same case along with the confessor.
>
> (2) He should have been tried together with the confessor in the same case.
>
D
> Before amendment the Designated Court had no such restriction as the confession of an accused could have been used against a co-accused whether or not the latter was charged or tried together with the confessor.
>
E 91. Thus the amendment in 1993 was a clear climbing down from a draconian legislative fiat which was in the field of operation prior to the amendment insofar as the use of one confession against another accused was concerned. The contention that the amendment in 1993 was intended to make the position more rigorous as for a co-accused is, therefore, untenable."
F

So far as the appeal filed by accused Esher Singh is concerned, the basic question is that even if the confessional statement purported to have been made by A-5 is kept out of consideration, whether residuary material is sufficient to find him guilty. Though it is true as contended by learned counsel
G for the accused-appellant Esher Singh that some statements were made for the first time in Court and not during investigation, it has to be seen as to what extent they diluted the testimony of Balbeer Singh and Dayal Singh (PWs 16 and 32) used to bring home the accusations. A mere elaboration cannot be termed as discrepancy. When the basic features are stated, unless the elaboration is of such nature that it creates a different contour or colour
H of the evidence, the same cannot be said to have totally changed the

complexion of the case. It is to be noted that in addition to the evidence of PWs 16 and 32, the evidence of S. Narayan Singh (PW-21) provides the necessary links and strengthens the prosecution version. We also find substance in the plea taken by learned counsel for the State that evidence of Amar Singh Bungai (PW-24) was not tainted in any way, and should not have been discarded and dis-believed only on surmises. Balbeer Singh (PW-3) the son of the deceased has also stated about the provocative statements in his evidence. Darshan Singh (PW-14) has spoken about the speeches of the accused Esher Singh highlighting the Khalistan movement. We find that the trial Court had not given importance to the evidence of some of the witnesses on the ground that they were relatives of the deceased. The approach is wrong. Mere relationship does not dis-credit the testimony of a witness. What is required is careful scrutiny of the evidence. If after careful scrutiny the evidence is found to be credible and cogent, it can be acted upon. In the instant case, the trial Court did not indicate any specific reason to cast doubt on the veracity of evidence of the witnesses whom it had described to be the relatives of the deceased. PW-24 has categorically stated about the provocative speeches by A-1. No definite cross-examination on provocative nature of speech regarding Khalistan movement was made, so far as this witness is concerned.

Section 4 of TADA reads as under:

"4. Punishment for disruptive activities. - (1) Whoever commits or conspires or attempts to commit or abets, advocates, advises, or knowingly facilitates the commission of, any disruptive activity or any act preparatory to a disruptive activity shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

(2) For the purposes of sub-section (1), "disruptive activity" means any action taken, whether by act or by speech or through any other media or in any other manner whatsoever, -

(i) which questions, disrupts or is intended to disrupt, whether directly or indirectly, the sovereignty and territorial integrity of India; or

(ii) which is intended to bring about or supports any claim, whether directly or indirectly, for the cession of any part of India or the secession of any part of India from the Union.

A Explanation. - For the purposes of this sub-section, -

(a) 'cession' includes the admission of any claim of any foreign country to any part of India, and

(b) 'secession' includes the assertion of any claim to determine whether a part of India will remain within the Union.

B

(3) Without prejudice to the generality of the provisions of sub-section (2), it is hereby declared that any action taken, whether by act or by speech or through any other media or in any other manner whatsoever, which - .

C (a) advocates, advises, suggests or incites; or

(b) predicts, prophesies or pronounces or otherwise expresses, in such manner as to incite, advise, suggest or prompt, .

the killing or the destruction of a person bound by oath under the Constitution to uphold the sovereignty and integrity of India or any D public servant shall be deemed to be a disruptive activity within the meaning of this section.

(4) Whoever harbours or conceals, or attempts to harbour or conceal, any disruptionist shall be punishable with imprisonment for a term E which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine."

The evidence makes the position crystal clear so far as accusations against appellant Esher are concerned.

F Section 4 of TADA covers a wide range of disruptive activities. It not only encompasses commission of disruptive activities, but also conspiracy, attempt, abetment, advocating, advising or facilitation of such activity or an act preparatory to such activity. What is disruptive activity is described in sub-section (2) of Section 4. Sub-section (3) further widens the coverage of generality given by sub-section (2). For the purpose of applying sub-section G (2), the explanation appended thereto assumes great significance for the case at hand; more particularly in view of the inclusive definition of "secession". Demand for Khalistan is clearly encompassed by the said definition.

The ingredients necessary to bring in application of Section 4 of TADA have been clearly established. Therefore, the appeal filed by Esher Singh is H devoid of merit and stands dismissed as the sentence imposed is found to be

commensurate with the gravity of the offence and also needs no interference. A

Coming to the appeal filed by Balbir Singh, we shall first deal with the objection regarding maintainability of the appeal, as learned counsel for the accused Esher Singh has questioned maintainability thereof.

A doubt has been raised in many cases about the competence of a B private party as distinguished from the State, to invoke the jurisdiction of this Court under Article 136 of the Constitution of India, 1950 (in short the 'Constitution') against a judgment of acquittal by the High Court. We do not see any substance in the doubt. Appellate power vested in this Court under Article 136 of the Constitution is not to be confused with ordinary appellate power exercised by appellate courts and appellate tribunals under specific C statutes. It is a plenary power, 'exercisable outside the purview of ordinary law' to meet the pressing demands of justice (See *Durga Shankar Mehta* v. *Thakur Raghuraj Singh,* AIR (1954) SC 520). Article 136 of the Constitution neither confers on anyone the right to invoke the jurisdiction of this Court nor inhibits anyone from invoking the Court's jurisdiction. The power is D vested in this Court but the right to invoke the Court's jurisdiction is vested in no one. The exercise of the power of this Court is not circumscribed by any limitation as to who may invoke it. Where a judgment of acquittal by the High Court has led to a serious miscarriage of justice this Court cannot refrain from doing its duty and abstain from interfering on the ground that a private party and not the State has invoked the Court's jurisdiction. We do E not have slightest doubt that we can entertain appeals against judgments of acquittal by the High Court at the instance of interested private parties also. The circumstance that the Code does not provide for an appeal to the High Court against an order of acquittal by a subordinate Court, at the instance of a private party, has no relevance to the question of the power of this Court F under Article 136. We may mention that in *Mohan Lal* v. *Ajit Singh,* [1978] 3 SCC 279 this Court interfered with a judgment of acquittal by the High Court at the instance of a private party. An apprehension was expressed that if appeals against judgments of acquittal at the instance of private parties are permitted there may be a flood of appeals. We do not share the apprehension. Appeals under Article 136 of the Constitution are entertained by special G leave granted by this Court, whether it is the State or a private party that invokes the jurisdiction of this Court, and special leave is not granted as a matter of course but only for good and sufficient reasons, well established by the practice of this Court.

Above was the view expressed by this Court in *Arunachalam* v. *P.S.R.* H

Sadhanantham and Anr., [1979] 2 SCC 279. The view has again been reiterated by the Constitution Bench in *P.S.R. Sadhanantham* v. *Arunachalam and Anr.*, [1980] 3 SCC 141.

It is to be seen whether the broad spectrum spread out of Article 136 fills the bill from the point of view of "procedure established by law". In express terms, Article 136 does not confer a right of appeal on a party as such but it confers a wide discretionary power on this Court to interfere in suitable cases. The discretionary dimension is considerable but that relates to the power of the Court. Article 136 is a special jurisdiction. It is residuary power; it is extraordinary in its amplitude, its limits, when it chases injustice, is the sky itself. This Court functionally fulfils itself by reaching out to injustice wherever it is and this power is largely derived in the common run of cases from Article 136. Is it merely a power in the court to be exercised in any manner it fancies? Is there no procedural limitation in the manner of exercise and the occasion for exercise? Is there no duty to act fairly while hearing a case under Article 136, either in the matter of grant of leave or, after such grant, in the final disposal of the appeal? There cannot be even a shadow of doubt that there is a procedure necessarily implicit in the power vested in this Court. The founding fathers unarguably intended in the very terms of Article 136 that it shall be exercised by the judges of the highest Court of the land with scrupulous adherence to settled judicial principles, well established by precedents in our jurisprudence.

It is manifest that Article 136 is of composite structure, is power-cum-procedure - power in that it vests jurisdiction in this Court and procedure in that it spells a mode of hearing. It obligates the exercise of judicial discretion and the mode of hearing so characteristic of the court process with the avowed purpose of averting miscarriage of justice. In the instant case, both the State and Balbir Singh (son of the deceased) have questioned correctness of the impugned judgment. Appeal filed by Balbir Singh is first in point of time. We are of the view that on the facts of the case, there is no question of holding the appeal filed by Balbir Singh to be not maintainable.

The aspects highlighted by learned counsel for the State and Balbir Singh do not disturb the positive conclusions of the trial Court about the absence of any positive and cogent evidence so far as the respondents except accused Esher Singh is concerned. None of the witnesses examined on behalf of the prosecution stated anything about the descriptive particulars of the assailants. There was also no evidence of A-1 indulging in any manner armed

with firearms or explosives. The evidence of witnesses goes only to the extent of showing, as noted earlier that A-1 was giving provocative speeches for formation of Khalistan and inciting the Sikhs for violence fanning the religious feelings. The evidence shows that A-1 was inciting the Sikhs to form separate Khalistan State and making Hyderabad as base for Khalistan movement.

Merely because the accused A-1 was holding the deceased, as alleged, to be responsible for the killing of six Sikh students that *per se* does not prove conspiracy. Section 120B of IPC is the provision which provides for punishment for criminal conspiracy. Definition of 'criminal conspiracy' given in Section 120A reads as follows:

> "120A- When two or more persons agree to do, or cause to be done,-
>
> (1) an illegal act, or
>
> (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy;
>
> Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof".

The elements of a criminal conspiracy have been stated to be: (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, (d) in the jurisdiction where the statute required an overt act. The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. From this, it necessarily follows that unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Law making conspiracy a crime, is designed to curb immoderate power to do mischief which is gained by a combination of the minds. The encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed

as to encompass all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. (See: American Jurisprudence Vol.II See 23, p. 559). For an offence punishable under section 120-B, prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means.

No doubt in the case of conspiracy there cannot be any direct evidence. The ingredients of offence are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing illegal means an act which itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused.

In Halsbury's Laws of England (vide 4th Ed. Vol.11, page 44, page 58), the English Law as to conspiracy has been stated thus:

> "Conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. It is an indictable offence at common law, the punishment for which is imprisonment or fine or both in the discretion of the Court.
>
> The essence of the offence of conspiracy is the fact of combination by agreement. The agreement may be express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however, it may be. The *actus rues* in a conspiracy is the agreement to execute the illegal

conduct, not the execution of it. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to affect an unlawful purpose. It is not, however, necessary that each conspirator should have been in communication with every other." A

There is no difference between the mode of proof of the offence of conspiracy and that of any other offence, it can be established by direct or circumstantial evidence. (See: *Bhagwan Swarup Lal Bishan Lal etc. etc* v. *State of Maharashtra,* AIR (1965) SC 682 at p.686) B

It was held that the expression "in reference to their common intention" in Section 10 is very comprehensive and it appears to have been designedly used to give it a wider scope than the words "in furtherance of" in the English law; with the result, anything said, done or written by a co-conspirator, after the conspiracy was formed, will be evidence against the other before he entered the field of conspiracy or after he left it. Anything said, done or written is a relevant fact only. C D

"as against each of the persons believed to be so conspiring, as well as for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it".

"In short, the section can be analysed as follows: (1) There shall be a *prima facie* evidence affording a reasonable ground for a court to believe that two or more persons are members of a conspiracy; (2) if the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other; (3) anything said, done or written by him should have been said, done or written by him after the intention was formed by any one of them; (4) it would also be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the conspiracy or after he left it, and (5) it can only be used against a co-conspirator and not in his favour." E F

We are aware of the fact that direct independent evidence of criminal conspiracy may not ordinarily and is generally not available and its existence invariably is a matter of inference except as rare exceptions. The inferences are normally deduced from acts of parties in pursuance of a purpose in common between the conspirators. This Court in *V.C. Shukla* v. *State (Delhi Admn.),* [1980] 2 SCC 665 held that to prove criminal conspiracy there must G H

A be evidence direct or circumstantial to show that there was an agreement between two or more persons to commit an offence. There must be a meeting of minds resulting in ultimate decision taken by the conspirators regarding the commission of an offence and where the factum of conspiracy is sought to be inferred from circumstances, the prosecution has to show that the circumstances give rise to a conclusive or irresistible inference of an agreement B between two or more persons to commit an offence. As in all other criminal offences, the prosecution has to discharge its onus of proving the case against the accused beyond reasonable doubt. The circumstances in a case, when taken together on their face value, should indicate the meeting of the minds between the conspirators for the intended object of committing an illegal act C or an act which is not illegal, by illegal means. A few bits here and a few bits there on which the prosecution relies cannot be held to be adequate for connecting the accused with the commission of the crime of criminal conspiracy. It has to be shown that all means adopted and illegal acts done were in furtherance of the object of conspiracy hatched. The circumstances relied for the purposes of drawing an inference should be prior in point of D time than the actual commission of the offence in furtherance of the alleged conspiracy.

Privacy and secrecy are more characteristics of a conspiracy, than of a loud discussion in an elevated place open to public view. Direct evidence in proof of a conspiracy is seldom available; offence of conspiracy can be E proved by either direct or circumstantial evidence. It is not always possible to give affirmative evidence about the date of the formation of the criminal conspiracy, about the persons who took part in the formation of the conspiracy, about the object, which the objectors set before themselves as the object of conspiracy, and about the manner in which the object of conspiracy is to be F carried out, all this is necessarily a matter of inference.

The provisions of Section 120A and 120B, IPC have brought the law of conspiracy in India in line with the English Law by making the overt act unessential when the conspiracy is to commit any punishable offence. The English Law on this matter is well settled. Russell on Crime (12 Ed.Vol.I, G p.202) may be usefully noted-

> "The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties, agreement H is essential. Mere knowledge, or even discussion, of the plan is not,

per se, enough." A

Glanville Williams in the "*Criminal Law*" (Second Ed. P. 382) states-

> "The question arose in an lowa case, but it was discussed in terms of conspiracy rather than of accessoryship. D, who had a grievance against P, told E that if he would whip P someone would pay his fine. B E replied that he did not want anyone to pay his fine, that he had a grievance of his own against P and that he would whip him at the first opportunity. E whipped P. D was acquitted of conspiracy because there was no agreement for 'concert of action', no agreement to 'co-operate'. C

Coleridge, J. while summing up the case to *Jury in Regina* v. *Murphy,* [1837] 173 ER 502 at p. 508 states:

> "I am bound to tell you, that although the common design is the root of the charge, it is not necessary to prove that these two parties came together and actually agreed in terms to have this common D design and to pursue it by common means, and so to carry it into execution. This is not necessary, because in many cases of the most clearly established conspiracies there are no means of proving any such thing and neither law nor common sense requires that it should be proved. If you find that these two persons pursued by their acts the E same object, often by the same means, one performing one part of an act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is, had they this common design, and did they pursue it by these common means the design being F unlawful."

As noted above, the essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event no overt act is necessary to be proved by the G prosecution because in such a situation, criminal conspiracy is established by proving such an agreement. Where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section 120B read with the proviso to sub-section (2) of Section 120A, then in that event mere proof of an agreement between the accused for commission of such a H

A crime alone is enough to bring about a conviction under Section 120B and the proof of any overt act by the accused or by any one of them would not be necessary. The provisions, in such a situation, do not require that each and every person who is a party to the conspiracy must do some overt act towards the fulfillment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime and if these B requirements and ingredients are established, the act would fall within the trapping of the provisions contained in section 120B [See: *S.C. Bahri* v. *State of Bihar,* AIR (1994) SC 2420.

The conspiracies are not hatched in open, by their nature, they are C secretly planned, they can be proved even by circumstantial evidence, the lack of direct evidence relating to conspiracy has no consequence. [See: *E.K. Chandrasenan* v. *State of Kerala,* AIR (1995) SC 1066.

In *Kehar Singh and Ors.* v. *The State (Delhi Administration),* AIR (1988) SC 1883 at p. 1954, this Court observed:

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> "Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy E can be undoubtedly proved by such evidence direct or circumstantial. But the court must enquire whether the two persons are independently pursuing the same end or they have come together to the pursuit of the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy required some kind of physical manifestation of agreement. F The express agreement, however, need not be proved. Nor actual meeting of the two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient. Conspiracy can be proved by circumstances and other materials. (See: *State of* G *Bihar* v. *Paramhans,* (1986) Pat LJR 688. To establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself. This apart, the prosecution has not to establish that a particular unlawful use was intended, so long

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as the goods or service in question could not be put to any lawful use. Finally, when the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do so, so long as it is known that the collaborator would put the goods or service to an unlawful use. (See: *State of Maharashtra* v. *Som Nath Thapa,* JT (1996) 4 SC 615.

The most important ingredient of the offence being the agreement between two or more persons to do an illegal act. In a case where criminal conspiracy is alleged, the court must inquire whether the two persons are independently pursuing the same end or they have come together to pursue the unlawful object. The former does not render them conspirators but the latter does. For the offence of conspiracy some kind of physical manifestation of agreement is required to be established. The express agreement need not be proved. The evidence as to the transmission of thoughts sharing the unlawful act is not sufficient. A conspiracy is a continuing offence which continues to subsist till it is executed or rescinded or frustrated by choice of necessity. During its subsistence whenever any one of the conspirators does an act or series of acts, he would be held guilty under Section 120-B IPC.

In *Ajay Agarwal* v. *Union of India and Ors.,* JT (1993) 3 SC 203, it was held as follows:-

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"8.....It is not necessary that each conspirator must know all the details of the scheme nor be a participant at every stage. It is necessary that they should agree for design or object of the conspiracy. Conspiracy is conceived as having three elements: (1) agreement; (2) between two or more persons by whom the agreement is effected; and (3) a criminal object, which may be either the ultimate aim of the agreement, or may constitute the means, or one of the means by which that aim is to be accomplished. It is immaterial whether this is found in the ultimate objects. The common law definition of 'criminal conspiracy' was stated first by Lord Denman in Jones' case that an indictment for conspiracy must "charge a conspiracy to do an unlawful act by unlawful means" and was elaborated by Willies, J. on behalf of the judges while referring the question to the House of Lords in *Mulcahy* v. *Reg* and House of Lords in unanimous decision reiterated in *Quinn* v. *Leathem*:

A 'A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rest in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful; punishable of for a criminal object, or for the use of criminal means.'

This Court in *B.G. Barsay* v. *State of Bombay* held:

"The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. Under Section 43 of the Indian Penal Code, an act would be illegal if it is an offence or if it is prohibited by law."

In *Yash Pal Mittal* v. *State of Punjab,* [1977] 4 SCC 540 the rule was laid as follows: (SCC p. 543 para 9)

"The very agreement, concert or league is the ingredient of the offence. It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-participators in the main object of the conspiracy. There may be so many devices and techniques adopted 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 which each one of them must be interested. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. In achieving the goal several offences may be committed by some of the conspirators even unknown to the others. 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 even though there may be sometimes misfire or overshooting by some of the conspirators.

In *Mohammad Usman Mohammad Hussain Maniyar and Ors.* v. *State of Maharashtra,* [1981] 2 SCC 443, it was held that for an offence under Section 120B IPC, the prosecution need not necessarily

prove that the perpetrators expressly agreed to do or cause to be done the illegal act, the agreement may be proved by necessary implication." A

After referring to some judgments of the United States Supreme Court and of this Court in *Yash Pal Mittal's* case (supra) and *Ajay Aggarwal's* case (supra) the Court in *State of Maharashtra* v. *Som Nath Thapa,* (referred to in *Kehar Singh's* case (supra) summarized the position of law and the requirements to establish the charge of conspiracy, as under: (SCC p. 668, para 24). B

"24. The aforesaid decisions, weighty as they are, lead us to conclude that to establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself. This apart, the prosecution has not to establish that a particular unlawful use was intended, so long as the goods or service in question could not be put to nay lawful use. Finally, when the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do, so long as it is known that the collaborator would put the goods or service to an unlawful use." Also see *State of Kerala* v. *P. Sugathan and Anr.*, [2000] 8 SCC page 203 and *Devender Pal Singh* v. *State of N.C.T. of Delhi and Anr.,* [2002] 5 SCC 234. C D E

Even in the light of the principles highlighted above when the evidence is tested, the inevitable conclusion is that the trial Court was justified in holding that accusations under Section 120B were not made out so far as the offences under IPC are concerned. So far as the motive for the killing is concerned, the evidence is clear to the extent that A-1 wanted removal of the deceased from the bodies of various trusts and educational institutions and not his removal from this world. In the absence of adequate material to establish commission of offences punishable under Section 302 or 302 read with Section 120B and Section 3(3), 5 and 6 of TADA and Section 27 of the Arms Act, as rightly held to have been not established by the trial Court, the appeals filed by the State and Balbir Singh are without merit. In the ultimate, all the three appeals are without merit and are dismissed. F G

B.S. Appeals dismissed. H